Legal Ethics for Free Software

Karen Sandler[1]
Seminar on GPL Enforcement and Legal Ethics
Suffolk University Law School
March 24, 2014

1 Karen Sandler is the Executive Director of the GNOME Foundation. A lawyer admitted to practice in the State of New York, Karen was General Counsel of the Software Freedom Law Center prior to joining the GNOME Foundation. Karen continues in a pro bono legal capacity with the Free Software Foundation, SFLC, the Software Freedom Conservancy, and QuestionCopyright.Org, of which she is also General Counsel.

There are ethical issues that repeatedly arise in the practice of law related to free software. This document summarizes some of these issues and discusses how the issues play out through the lens of a lawyer's legal responsibility. Conflict of interest, confidentiality, organization as a client and duties to prospective clients all can arise and lawyers practicing in this field should be aware of their ethical obligations.

Overview to Ethics Rules

The practice of law can be fraught with head scratching dilemmas where lawyers try to balance their own career and the social good with the needs of their clients. The legal profession imposes on itself a strict code for professional responsibility. While this varies state to state, almost all states have adopted some form of the American Bar Association's Model Rules of Professional Conduct[2], which have a set of rules along with explanatory comments for their interpretation. As of the date hereof, California remains the only state not to have adopted the ABA's Model Rules in some part. New York has adopted the rules but without the comments. Massachusetts and Virginia have adopted the comments only as a guide while the rules are authoritative.[3] Many states have revised the rules as they adopted them[4]. We will primarily discuss the New York version of the rules in this session, as they apply to free and open source software, though much of the analysis is comparable in many other states.

Practice of Law in Free Software

As is consistent with the increasing number of technology savvy people, there is an increasing number of technically savvy lawyers and an increased awareness of the sharing licenses that are used in both free software and free culture. At the same time there is an increasing need for lawyers to be active in the field. Software is becoming more and more integral to our society and the ethical issues that arise from our technology choices are fundamental ones. The practice of law for free software has unique challenges as it touches on copyright, trademark, patent and corporate law and intersects with the ideological core of the movement. The legal ethics issues that arise for free software reflect this complex environment.

---

2 The ABA's Model Rules of Professional Conduct can be found online at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

3 http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf

4 A comparison of the New York rules (but not the comments) and the ABA's model ones is available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/newyork.authcheckdam.pdf, a comparison of the Virginia rules and the ABA's model ones is available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/virginia.authcheckdam.pdf.

A great need for *pro bono* attorneys

Many free software projects are represented by nonprofit organizations that provide key infrastructure and support to their communities. These organizations often lack the resources for full legal representation. As free software is predicated on legal concepts like licensing, these organizations nonetheless have a great need for counsel. *Pro bono* attorneys are incredibly important to these nonprofit organizations and free software communities. In addition, pro bono representation is a good experience for lawyers to fulfill their desire to work in the public interest and also to gain experience in the field. The need for volunteer lawyers is great and the work that can be done is very important, provided that lawyers are aware of their ethical obligations and keep their professional responsibilities in mind.

Corporate Representation

Because so many companies are active in free software and have a commercial interest in it, in house and private practice lawyers are a key component of the legal landscape in free software. There are also many situations where these lawyers may find themselves in confusing territory

Affiliations of Contributors to Free Software

Blurry Lines in Free Software Allegiance (Organization as a Client)

Free software has both commercial and ideological motivations. Free software enthusiasts often use their coding skills in a principled way and release their software under freely available licenses to ensure that their software is available for everyone to use, no matter where users are, what their background is or how much money they have. At the same time much of the software has valuable commercial utility and many companies that use free software hire core developers as employees. While it is a problem in many fields that individuals confuse corporate counsel for their own, free software has an additional layer of complexity in free software projects that exist as their own often ideologically driven groups, sometimes even represented by an independent nonprofit organization.

Rule 1.13 of the New York Rules of Professional Conduct is helpful in navigating appropriate behavior when situations arise.

Rule 1.13(a) states:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

The possible layers of affiliation present in free software are generally:

- Developer/contributor as individual volunteer
- Developer/contributor as a consultant
- Developer/contributor as employee of a company
- Company with interest in the free software project

- Nonprofit free software project as unincorporated association
- Nonprofit free software project as charitable 501(c)(3) organization
- Nonprofit association of companies interested in a free software project as 501(c)(6)

All permutations of these affiliations result in possible confusion for lawyers. Moreover, it is common in many free software communities for individuals to conflate their responsibilities to the different groups they are affiliated with. Developers often feel passionately about the free software projects they contribute to and sometimes forget that they are also acting in their capacity as the employee of a company. Those same individuals might further forget that the project is embodied in an incorporated nonprofit organization with its own interests.

Laypeople often don't understand confidentiality and, despite the fact that the average free software developer has well above average intelligence, they don't always understand lawyer's duties to their clients or how that plays out when there are different parties involved. To those not familiar with privilege other than as it plays out in television sometimes think that a lawyer is obligated not to share anything told to him or her.

“Well, I can tell you, you're my lawyer after all!”

Sometimes this results in a discussion about other parties not within the scope of representation by the lawyer. For example:

- Sharing inside information about company politics to a lawyer engaged by a charitable organization who is in negotiations with the company or seeking donations from them.
- Asking an in-house lawyer about legal advice about what would be best for a free software project where the project and company's interest are not aligned.
- Seeking guidance from trade association counsel, assuming that the organization is a charitable one representing the interests of the public rather than a common business interest.

Rule 1.13 is quite clear in this instance that the lawyer must explain who has engaged the representation and where the lawyer's loyalties of representation lie.

> In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter...(iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege...belongs to the organization... Care must be taken to ensure that the constituent understands that... the lawyer for the organization cannot provide legal representation for that constituent, and that discussions... may not be privileged.

Because these situations can be awkward and because the disclosing individual might regret sharing the information if he or she understood the nature of the lawyer's representation even where there aren't legal implications, best practices demand aggressive application of this rule. Lawyers should make this notification as soon as there is a hint of confusion regarding who their client is. Because free software affiliations are overlapping and potentially confusing,as discussed above, reminders about representation are very helpful at various times.

The New York rule's language about explaining that the lawyer is the lawyer for the organization and

not for any of the constituents is additional language to the ABA's model rules which are briefer on this point.

Comments to Rule 1.13 also clarify that the rule pertains equally to unincorporated associations, which are common free software.

The rule also provides guidance on how to treat instruction from individuals at an organization in the scope of representation.

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6...This does not mean, however, that constituents of an organizational client are the clients of the lawyer.

While it's clear in the rule that a lawyer representing an organization is not representing constituents in their individual capacity (and that lawyers have an obligation to so inform those individuals where appropriate), the lawyer must treat communication by the individuals as that from which confidentiality obligations can flow.

It cannot be stressed enough that free software contributors are particularly susceptible to confusion in this area. The blurring of lines between developer's personal and professional interests are characteristic of the community. While there have been advantages to this mentality for free software, it also leads to a host of problems some of which can be ameliorated in part by a clear discussion of affiliations by lawyers active in the space.

Communication with represented persons

Due to many of the issues discussed in the Organization as a Client section, communicating with represented person is another area for possible pitfalls for the unwary free software lawyer.

Rule 4.2(a) states:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

Part of the reason why this could be unclear is that there are often multiple ways in which lawyers may be involved in a free software legal issue. A lawyer may be retained by an individual contributor, one of a number of companies active in the project or by a nonprofit formed around the project. This can be very tricky for lawyers in house at involved companies who need to protect their client's interests while dealing with individual contributors who as employees are filling two roles.

The comments clarify that the rule does not prevent communication concerning matters outside the representation and that a lawyer having independent justification for communicating with a represented person can do so. The prohibition only arises when the lawyer knows that the person is actually represented in the matter to be discussed. But as the comments state, "the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious."

Comment 12 to the rule is worth noting, as there are many documented cases of free software contributors being abusive and rude:

> A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct.

Individual free software contributors and free software projects often do not have access to legal counsel. Rule 4.3 weighs in on communications with unrepresented persons:

> In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding...

The comments specify:

> In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person

They continue:

> This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Confidentiality

Keeping a client's confidential information confidential is one of a lawyer's key responsibilities. Many of the lawyers who become involved in the practice of law in free software do so because they are drawn to the public nature of the discourse and the collaborative environment fostered by the free software communities. Unlike other law practices where almost all of the legal work is done privately and preferably never publicly discussed, much of the practice in this field is done out in the open. This can be very confusing for lawyers to keep track of.

Scope of privilege

Rule 1.6(a) prescribes:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent... (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted by paragraph (b).

Under the New York Rules of Professional Responsibility (as an addition by New York to the ABA's Model Rules), Rule 1.6, "confidential information" is:

> ...information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential

The last two provisions of the rule impose a much lower standard for the information to be considered confidential. The information need only be likely to be detrimental or even embarrassing to the client to be included. And clients need only ask that the information be treated as confidential to have it included in the rule's definition.

According to the rule, a lawyer's legal knowledge and legal research is not ordinarily included in confidential information nor is information that is generally known in the field or community.

For any non-attorneys reading this article, attorney-client privilege applies in communication between a lawyer and a client, provided the information was exchanged in confidence. It is not considered attorney-client privilege if the lawyer and client are not acting in their respective capacities. If there are third parties involved in the communication then it is unlikely that privilege would apply. There is quite a bit of misunderstanding about attorney-client privilege in the free software world, where many contributors believe that there is a much broader application.

Within free software, where so much is done in public there is quite a lot that is generally known. Some free software projects even have legal discussion lists that are open to the public. Some projects however do have private legal discussion lists, and there are some of those which include multiple lawyers (and sometimes pro bono and paid lawyers on the list). The legal status of those lists regarding privilege and confidentiality could be a bit murky as discussion varies widely in different contexts.

Section (b) of Rule 1.6 specifies when a lawyer can disclose confidential information to the extent he or she believes it is necessary:

> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime;
> (3) to withdraw a written or oral opinion or representation... where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
> (4) to secure legal advice about compliance with these Rules or other law by the lawyer...;
> (5) (i) to defend the lawyer... against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
> (6) when permitted or required under these Rules or to comply with other law or court order. [5]

As is evident from this list, the rules allow disclosure only in extreme or narrow situations.

The rule continues in section (c):

---

5 Note that Virginia's rules include provisions to deal with a lawyer's death, incapacity or incompetence; to deal with law firm management; and to inform an outside agency for bookkeeping, accounting, data processing, etc management purposes, provided the lawyer reasonably believes that the information will be kept confidential. Massachusetts' rules add qualifiers on two of the provisions of "to the extent the lawyer reasonably believes necessary".

> A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client...

In the informal situations that members of the bar find themselves at free software events (see the section on this topic below) its essential to make sure that one's colleagues are aware of their confidentiality obligations.

Volunteer capacity

All of the issues discussed in the Organization as a Client section above also come to play when evaluating questions regarding confidentiality and duties of attorneys to clients. Individuals acting on behalf of free software organizations are often not employees and are acting in a volunteer capacity. Employees at companies working on the free software project can be confused as to their affiliation when participating in key discussions with lawyers.

In nonprofit

It may be difficult for a lawyer to determine whether someone has the appropriate authority or is truly acting on behalf of the organization with respect to confidentiality. Some courts use a "control group" test that allows only those people who represent the organization and have the power to respond to the legal advice. Other courts, including the Supreme Court[6] have adopted a "subject matter" test where the court analyzes factors on a case by case basis. The communication is protected if it was made specifically in the context of legal advice, if it relates to the legal advice, if the employee is acting within the scope of his or her corporate duties and if it is is treated internally as confidential information. Under the "subject matter" test it's not really about who is involved so much as the nature of the discussion. There are compromises between the two approaches and some states have enacted legislature, narrowing the test in their evidence rules[7]. Under federal and New York law, only current directors can waive their attorney-client privilege; former employees cannot act for the corporation, and, therefore, cannot waive privilege.[8].

Duties to former clients

Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The comments to Rule 1.9 clarify:

---

6 Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981).

7 Multiple states have adopted: "A person upon whom these rules confer a privilege against disclosure waives that privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged."

8 See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985), 2nd Circuit – U.S. v. International Brotherhood of Teamsters, et. al., 119 F.3d 210 (2nd Cir. 1997), Dooley v. Boyle, 531 N.Y.S.2d 161 (N.Y.Sup.Ct. 1988). See also Chronicle Pub Co. v. Hantzis, 732 F.Supp. 270 (D.Mass. 1990) and In re Grand Jury Supbpoenas, 89-3 and 89-4, John Doe 89- 129, 902 F.2d 244 (4th Cir. 1990), for the first and fourth districts, respectively.

> After termination of a client lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules.

Section (c) of the rule prevents disclosure of confidential information of former clients, with some exceptions, such as in the case where the information has become generally known.

"Substantially related"

Fundamental to the very idea of software freedom is the ability to take an existing code base and modify it to become something new, or "forking" it[9], such that the project is a competing project to its originating one. In addition, the software freedom community is very adamant about having choice in their software projects and has a long history of creating new projects for all kinds of reasons. This leads to many competing free licensed software projects, with varying degrees of friendliness between them.[10] Lawyers practicing in free software are often approached by projects with overlapping target audiences and it may sometimes seem like a conflict of interest to represent such projects, even where the legal matters are not technically adverse.

The New York Bar Association promulgated an Ethics Opinion 989 that lends guidance to this scenario. The case they considered is somewhat analogous to the free software fork. A law school legal clinic was representing a nonprofit organization that had an internal dispute and some of the members left to form a new organization. The question was whether the clinic was able to represent the new organization in its application for recognition of 501(c)(3) status.

The opinion focused on the use of the term "substantially related" as explained in Comment 3 to Rule 1.9:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

While the Bar Association acknowledged that there could be situations where the representation of both clients would be a conflict of interest, in this situation that was not the case. The Opinion explains:

> While the Former Client may be concerned with competition from a new organization with similar goals, this kind of general enterprise competition is not enough to create a conflict of interest.

The opinion also referred to Comment 6 to the rule, which states that economic adversity does not necessarily constitute a conflict of interest.

The opinion concluded:

---

9 This is the historical use of the term "fork" but the term has recently been used in other ways. The term "social fork" is now sometimes used to convey this historical meaning.

10 The author would be remiss if she didn't point out the example of GNOME and KDE, both free desktop environments for GNU/Linux. While GNOME was sparked by the fact that KDE had a problem with its licensing that made it non-free, that licensing problem was subsequently fixed and a mostly friendly rivalry has existed for about a decade.

> Under Rule 1.9, the Clinic's representation of the Proposed Client would not be in a matter substantially related to its representation of the Former Client; it would not involve use of the Former Client's confidential information; and the relevant interests of the Former Client and Proposed Client are not materially adverse. The Clinic may thus undertake the New Representation, representing the Proposed Client in applying for not-for-profit status, without obtaining the Former Client's consent.

Duties to Prospective Clients

Rule 1.18 deals with obligations to prospective clients, which are not often anticipated by lawyers. New York adopted Rule 1.18 with significant modification from the ABA's model rules. Massachusetts and Virginia did not adopt this provision at all.

The New York Rule 1.18 states:

> (a) A person who discusses with a lawyer the possibility of forming a client- lawyer relationship with respect to a matter is a "prospective client."
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter

There are real implications to discussing legal issues with anyone who might be seeking legal advice. Under section (d) of Rule 1.18, when the lawyer has received disqualifying information under (c), representation is permitted with the appropriate informed consents, notifications, screening procedures for law firms, care with fees and taking "reasonable measures" to avoid more disqualifying information than needed. There's the additional test that a reasonable lawyer would think that competent and diligent representation in the matter was possible.

There are two specific carve outs in section (e) of New York's Rule 1.18 where no obligations attach to prospective clients. One is where there is unilateral communication to the lawyer without any reasonable expectation that any legal relationship might be formed. The other is where the communication is specifically for the purpose of disqualifying the lawyer from some adverse representation "on the same or a substantially related matter."

Comment 3 to the rule says, "The duty exists regardless of how brief the initial conference may be." A quick sidebar at a conference between talks could be enough to trigger the obligations under this rule.

Free Software Events

There are a tremendous number of conferences, hackfests, meetups and other events in free software to bring people face-to-face. The number of social and professional gatherings is extremely high for the number of people in the field. These events are spread throughout the world and vary from ideological or academic events to corporate trade shows. There is no shortage of opportunity to network and meet people in person.

Fortunately and unfortunately, these events are packed with people who are deeply interested in the legal issues surrounding free software. Being a lawyer at a free software event can make you a popular attendee, but the environment is very conducive to the missteps anticipated in Rule 1.18. Most of these events have a significant drinking component[11], and many of the attendees by nature will aggressively attempt to engage lawyers to discuss the projects they are involved in. As mentioned in earlier sections of this article, contributors are used to working and thinking out in the open and may not see the need to curb any disclosure. It's easy to get drawn into these discussions only to find yourself on the receiving end of very specific detailed information about a specific legal situation for which the conversation partner is hoping to get some (hopefully gratis) legal advice. It's probably impossible to avoid this situation completely but it's imperative to remain aware that this is a likely outcome of any engrossing legal discussion in this context. And on the flip side, these types of situations can also be fertile ground for new clients (*pro bono* or otherwise), which makes lawyers walk a fine line.

Recommendations

- Affiliations are so confused in free software communities that formal policies and procedures for good disclosure should be considered.
- Big legal-discuss lists should not be preferred communication for lawyers for any possibly sensitive discussions regarding legal advice.
- Lawyers should advise their volunteer directors to use non-employer email addresses when acting in their capacity as a director on behalf of the organization.
- It's often cumbersome, but lawyers should take care to explain their affiliations, obligations duties and attorney-client privilege and how it works where ever it could be relevant.
- While not always necessary, seek a waiver from competing clients if practicable.
- Free software organization should consider explicitly requesting their attorneys to keep information confidential that they expect to be so kept (and their lawyers should as a best practice ask for clarification on this point).
- Advise clients against abusive, harassing, or unfair conduct.
- At events, take care to limit disclosures from those who may be seeking legal advice.

11 Many free and open source software organizations have adopted codes of conduct for their formal events that help prevent against harassment and other unacceptable behavior, a long history of which has been associated with such events. The need for codes of conduct, photography policies and safe spaces could be the topic of its own legal education session.