

COMPLIANCE & LEGAL SECTIONS ANNUAL MEETING 2019

JULY 15-17

FORT LAUDERDALE MARRIOTT HARBOR BEACH RESORT & SPA

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Ethical Challenges for In-House Lawyers: Constant Vigilance in an Ever-Evolving World

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Prepared for: ACLI LEGAL & COMPLIANCE SECTION

July 2019

Decisions.... Choices....

We face decisions and make choices – every day. Some are mundane; some, momentous.

What shoes to wear; what to have for breakfast; whether to look at the dessert menu.

And often, we don't realize in the moment whether the decision is really mundane – or whether it is momentous.

Different Roles



True story.

Rules of the Day

- Everyone is a Participant
- Play Your Assigned Role
 - You Can 'Hire':
 - Subordinates
 - Third Party 'Experts'
- Be Creative, But Realistic
- Your Opinion Does Matter

Before We get Started: Measuring the Mood of the Room – Polling #1

Which of these songs stands the “test of time” the best?

- A. Billy Joel – “Piano Man”
- B. Beatles – “I Want to Hold Your Hand”
- C. Bruce Springsteen – “Born to Run”
- D. None.

Your Face or Mine – The Selfie

You are an in-house transactional attorney for *BigInsureCo*. As part of due diligence during the negotiation of a possible acquisition or joint venture with *Your Face or Mine*, a facial recognition technology company, you take selfie in the lobby of *Your Face or Mine*.

The selfie depicts you and your facial recognition profile along with the *Your Face or Mine* lobby logo in the background.

You post the photo on your Facebook account.

Your Face or Mine – Polling #2

Have you breached your duty of confidentiality?

- A. Yes.
- B. No.
- C. It depends.
- D. I'm not sure.

“The Selfie” Discussion

Face Plant

You are the Deputy General Counsel-Intellectual Property at *BigInsureCo*.

Prior to your new position at *BigInsureCo*, you were an intellectual property attorney at *High Life Insurance Company*.

During your tenure at *High Life*, you managed *High Life's* portfolio of patents and trademarks. As part of this work, you were involved in the intellectual property protections and uses of **Face Plant** (including possible intellectual property challenges against **Face Plant**), *High Life's* proposed facial recognition underwriting system.

During your work on this project, you became aware of a patent application for **Head Games**, a very similar product developed by *Your Face or Mine*, a budding technology company.

Face Plant, Continued

Following your job change, you join the *BigInsureCo.*'s new facial recognition underwriting project, a project created to compete with *High Life's* offering.

As part of your role, you inform your organization about **Head Games** and mention that if *BigInsureCo.* could acquire the **Head Games** patent or *Your Face or Mine*, it might be able to sustain an infringement action against *High Life* and **Face Plant**.

Subsequently, *BigInsureCo.* acquires **Head Games** and sues *High Life* for infringement and attempts to enjoin its use of **Face Plant**.

Face Plant – Polling #3

Have you violated your duty of confidentiality to your prior client?

- A. Yes.
- B. No.
- C. I'm not sure.

Face Plant – Polling #4

What is the impact on the rest of the Department?

- A. Entire department is disqualified.
- B. No impact.
- C. I'm not sure.

“Face Plant” Discussion

BigRevenue

BigInsureCo's new acquisition, HeadGames, can utilize its facial recognition software to predict longevity in a manner that can be used in underwriting. *BigInsureCo* intends to: use the technology for its business purposes; and sell the services to other companies.

You are the general counsel of *BigInsureCo* and your first responsibility is to set up a new company, *BigRevenue*, that will sell underwriting services back to *BigInsureCo* and to third parties.

Your boss, the CEO of *BigInsureCo* has asked you to set up *BigRevenue* with the Senior Leadership Team, including you, owing a minority share of *BigRevenue*.

BigRevenue – Polling #5

Can you own shares of BigRevenue?

- A. No.
- B. Only if it is part of reasonable compensation.
- C. Only if held in trust.
- D. Only if held in the names of your children.
- E. Yes.

BigRevenue

BigRevenue has been established and you have been appointed as its General Counsel, reporting to the General Counsel of *BigInsureCo*. You also are considered part of the business leadership team.

The algorithm used to predict longevity is incredibly complicated and the knowledge about the algorithm is a closely held secret held by the sister company, **Head Games**. At its core, it has been explained to you, it measures the distance between eyebrows to predict a person's longevity.

You understand little more than that.

BigInsureCo is domiciled in the Commonwealth of Chaos. You have been asked to lead a team to meet with Chaos' Insurance Commissioner to explain the use of the technology.

BigRevenue – Polling #6

Can you represent BigRevenue with this level of knowledge about the subject matter?

- A. No.
- B. Yes.
- C. I'm not sure.
- D. Only if you know more than the Commissioner.

BigRevenue – Polling #7

Do you have to identify to the Insurance Commissioner that you are acting as a lawyer for BigRevenue?

- A. No.
- B. Only if the Commissioner does not know you.
- C. It depends on the questions the Commissioner asks.
- D. Yes.
- E. You cannot attend the meeting.

BigRevenue

The Insurance Commissioner of Chaos is intrigued by the technology and is inclined to let your company begin to pilot the program. But the Commissioner raises concerns: Does the technology reliably predict longevity? How does the technology have a disparate impact? You are Deputy General Counsel to BigRevenue and have been tasked by the general counsel with leading the team to answer the Commissioner's questions. As you begin to examine these issues, you develop two understandings about the program:

1. The technology relies on a number of "simplifying assumptions" to make the predictions work; and
2. In some of the testing, the faces of people of color run through the program generally tend to have shorted longevity predicted as compared to other demographics.

BigRevenue

When you share these observations with your peers and co-workers, you are told that the data set is new – but growing. Any assumptions that are made and any inaccuracies will get better over time.

You are not satisfied and share your concerns with the General Counsel and the CEO.

You are instructed to “let it go” and report back to the Insurance Commissioner showing only the reports of accuracy and the test results showing no disparate impact.

“BigRevenue” Discussion

Questions or Further Discussion?

Thank you!

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Selected Model Rules

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Selected Model Rules

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

[. . .]

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Selected Model Rules

Rule 1.8 Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

[. . .]

Selected Model Rules

Rule 1.13: Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Selected Model Rules

Rule 1.13: Organization as Client (Continued)

- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Selected Model Rules

Rule 1.13: Organization as Client (Continued)

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.