

Plenary Session: Ethical Dilemmas in the Round, Including Asset Protection, Social Media and Electronic Discovery

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**Ethical Issues
in Connection with Electronic Discovery**

by

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“While twenty years ago PCs were a novelty and email was virtually nonexistent, today more than ninety percent of all information is created in an electronic format.” THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan M. Redgrave ed., 2d ed. June 2007). Even experienced lawyers may be surprised to hear that their ability to understand and comply with discovery obligations in the electronic age may implicate their ethical duties of competence and diligence (among others) under applicable rules of professional conduct. These materials outline basic principles regarding a lawyer’s ethical responsibilities in connection with electronic discovery.

I. RELEVANT ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. 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.

Comment [8] provides: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”

B. 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).

...

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or

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unauthorized access to, information relating to the representation of a client.

Comment [18] provides: “Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). . . .”

Comment [19] provides: “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. . . .”

C. Rule 3.3 Candor toward the Tribunal:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of**

material fact or law previously made to the tribunal by the lawyer

The Annotation to Rule 3.3 further explains that “[m]isrepresenting the status of discovery or the availability of information sought in discovery violates Rule 3.3(a)(1).” (collecting cases).

D. Rule 3.4 Fairness to Opposing Party and Counsel:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

. . .

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party

Comment [1] provides: “The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”

Comment [2] provides: “Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. . . .”

E. Rule 4.4 *Respect for Rights of Third Persons*:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment [2] provides: “Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, ‘document or electronically stored information’ includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as ‘metadata’), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.”

Comment [3] provides: “Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.”

F. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;**
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and**
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:**
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

Comment [3] provides: “A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an

investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."

Comment [4] provides: "Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules."

II. ABA AND STATE BAR ETHICAL OPINIONS

- A. California State Bar -- Proposed Formal Opinion Interim No. 11-0004, *available at* <http://www.calbar.ca.gov/AboutUs/PublicComment/201501.aspx>.¹

- 1. The time for public comment on a previous version of the opinion closed on June 24, 2014. At its December 5, 2014 meeting, the

¹ California has not adopted the Model Code of Professional Conduct. However, the opinion states that its authors "look[ed] to federal jurisprudence for guidance, as well as applicable Model Rules, and appl[ied] those principals [sic] based upon California's ethical rules and existing discovery law."

State Bar Standing Committee on Professional Responsibility and Conduct revised the opinion in response to the public comments received, which it tentatively approved for an additional 90-day public comment period. The second public comment period will close April 9, 2015.

2. The opinion as currently drafted summarizes its conclusions by stating that an attorney's duty of competence "generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ('ESI') and that "[l]ack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality."²
3. According to the opinion, where an attorney lacks the required competence for the e-discovery in a case, he or she has three options: "(1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation."
4. The opinion provides a list of tasks related to e-discovery that attorneys should be able to perform either themselves or in association with competent co-counsel or expert consultants:
 - "initially assess e-discovery needs and issues, if any;
 - implement/cause to implement appropriate ESI preservation procedures;
 - analyze and understand a client's ESI systems and storage;
 - identify custodians of relevant ESI;
 - perform data searches;
 - collect responsive ESI in a manner that preserves the integrity of that ESI;
 - advise the client on available options for collection and preservation of ESI;
 - engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
 - produce responsive ESI in a recognized and appropriate manner." (footnotes omitted).

² The previous version of the opinion provided that the "[l]ack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence."

B. Ethical Opinions on Issues Surrounding Metadata

1. Metadata is “data about data.” More specifically, it is defined as “information describing the history, tracking, or management of an electronic document.” Wyeth v. Impax Labs., Inc., 248 F.R.D. 169, 171 (D. Del. 2006) (quoting Williams v. Sprint/United Management Co., 230 F.R.D. 640, 646 (D. Kan. 2005)).
2. Metadata poses at least three ethical issues for attorneys: (1) whether an attorney sending electronically stored information (ESI) has a duty to delete or “scrub” metadata before producing it to an adverse party, (2) whether an attorney receiving ESI with metadata may review or “mine” it, and (3) whether an attorney receiving ESI with metadata must notify the sender if metadata is found.
3. ABA Formal Opinions 06-442 and 05-437 do not impose an *explicit* duty with respect to metadata on an attorney sending ESI (however, Rule 1.6 presumably extends to metadata). Certain methods of eliminating metadata (including scrubbing, negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are “concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata.” The Opinions further provide that mining data is not “ethically impermissible.” However, pursuant to Rule 4.4(b), the recipient must notify the sender if metadata is found if the recipient knows or reasonably should know that the transmission of metadata was inadvertent.
4. State Bar ethical opinions regarding metadata are not consistent.

Most impose a duty to exercise “reasonable care” in transmitting ESI to prevent the disclosure of metadata. See, e.g., Alabama State Bar Formal Opinion 2007-02; State Bar of Arizona Ethics Opinion 07-03; Colorado Bar Association Ethics Opinion 119; Florida Bar Ethics Opinion 06-02; Maryland State Bar Association Ethics Docket No. 2007-09; New York State Bar Association Opinions 749 and 782; Association of the Bar of the City of New York Formal Opinion 2003-04.

Some provide that mining metadata is NOT an ethical violation. See, e.g., Maryland State Bar Association Ethics Docket No. 2007-09; State Bar of Wisconsin Ethics Opinion EF-12-01. Others provide that mining metadata IS an ethical violation. See, e.g., Florida Bar Ethics Opinion 06-02; New York State Bar

Association Opinions 749 and 782; Association of the Bar of the City of New York Formal Opinion 2003-04; North Carolina State Bar 2009 Formal Opinion 1. Others take a case-by-case approach. See, e.g., Pennsylvania Bar Association Formal Opinion 2009-100.

Most impose an obligation to notify the sender if metadata is found. See, e.g., Florida Bar Ethics Opinion 06-02; North Carolina State Bar 2009 Formal Opinion 1. But not all. See, e.g., Maryland State Bar Association Ethics Docket No. 2007-09 (because the Maryland Rules of Professional Conduct were not amended to include ABA Model Rule 4.4(b), they “do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged . . . materials”); Oregon Legal Ethics Assistance for OSB Members Formal Opinion No. 2011-187 (because the sender has an obligation to exercise reasonable care to avoid sending confidential information, the receiving lawyer “could reasonably conclude that the metadata was intentionally left in” and therefore there is no duty under Oregon Rule 4.4(b) to notify the sender of the presence of metadata).

5. With respect to ethical issues in connection with electronic discovery in general and metadata in particular, see Hon. Paul W. Grimm & Joel P. Williams, *Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information*, 14 FIDELITY L.J. 57 (Oct. 2008).

III. CASE LAW

- A. Much of the existing case law concerns the propriety of sanctions in connection with a lawyer’s failure to satisfy his or her discovery obligations and is typically not tied to consideration of whether the conduct at issue also constituted an *ethical* violation. However, it certainly could be. Indeed, the Annotation to Model Rule 3.4 states that:

Although Rule 3.4 subjects a lawyer to professional discipline for abusive litigation tactics, it is normally the presiding judge who initially takes the corrective action, such as retrial, exclusion of evidence, disqualification, and payment of monetary sanctions. A court is likely to consider Rule 3.4, as well as other ethics rules, when imposing these litigation sanctions.

Brown v. Tellermate Holdings Ltd., 2014 WL 2987051, at *2, 25-26 (S.D. Ohio July 1, 2014) (precluding defendant from using certain evidence and imposing sanctions against the defendant and counsel, jointly, for failing to satisfy discovery obligations by failing to produce and preserve

electronically stored information; explaining that: “While the preservation, review, and production of ESI often involves procedures and techniques which do not have direct parallels to discovery involving paper documents, the underlying principles governing discovery do not change just because ESI is involved. Counsel still have a duty (perhaps even a heightened duty) to cooperate in the discovery process; to be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and, above all, to exercise sufficient diligence (even when venturing into unfamiliar territory like ESI) to ensure that all representations made to opposing parties and to the Court are truthful and are based upon a reasonable investigation of the facts.”).

Abadia-Peixoto v. U.S. Dep’t of Homeland Sec., 2013 WL 4511925, at *2-3 (N.D. Cal. Aug. 23, 2013) (explaining that “[c]ourts have interpreted the federal rules as imposing ‘a duty of good faith and reasonable inquiry on all attorneys involved in litigation who rely on discovery responses executed by another attorney’” and that counsel “must take ‘responsibility for ensuring that their clients conduct a comprehensive and appropriate document search’”; finding that where “counsel could not articulate how the searches were conducted,” this “suggests that he could not certify [under Rule 11] that a search had been conducted that would fully satisfy Defendants’ discovery obligation” and ordering that defendants disclose their search parameters and to meet and confer regarding the adequacy of such parameters “to ensure that Defendants have met their discovery obligation”).

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 462, 496-97 (S.D.N.Y. 2010) (imposing spoliation instruction and monetary sanctions against plaintiffs whose failure to preserve evidence amounted to gross negligence and monetary sanctions against plaintiffs whose failure to preserve evidence amounted to negligence; noting that “[b]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence.”), abrogated in part by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (rejecting “notion that a failure to institute a ‘litigation hold’ constitutes gross negligence *per se*,” instead finding it is one factor in determining whether to issue discovery sanctions).

William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (“Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the

words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’ It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.”).

Martin v. Northwestern Mut. Life Ins. Co., 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (awarding defendant attorneys fees for plaintiff-attorney’s failure to produce electronically stored information, explaining that “[a]s an attorney, the Plaintiff is familiar with the rules of discovery and should have understood his discovery obligations. . . . His claim that he is so computer illiterate that he could not comply with production is frankly ludicrous.”).

- B. However, a handful of cases do specifically discuss the ethical implications of failing to meet electronic discovery obligations, including the following:

In Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932, at *18 (S.D. Cal. Jan. 7, 2008), the magistrate judge referred six attorneys to the State Bar of California “for an appropriate investigation and possible imposition of sanctions” for assisting their client in “intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that [the client’s] document search was inadequate, and blindly accepting [the client’s] unsupported assurances that its document search was adequate. The Sanctioned Attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury.” The attorneys objected, and the district judge vacated the sanctions order, finding that the attorneys “shall not be prevented from defending their conduct by the attorney-client privilege of Qualcomm . . . because of the application of the self-defense exception to the attorney-client privilege of Qualcomm.” Qualcomm Inc. v. Broadcom Corp., 2008 WL 638108, at *2 (S.D. Cal. Mar. 5, 2008). On remand, the magistrate judge declined to impose sanctions, holding that “the evidence presented during these remand proceedings has established that while significant errors were made by some of the Responding Attorneys, there is insufficient evidence to prove that any of [them] engaged in the requisite ‘bad faith’ or . . . failed to make a reasonable inquiry before certifying Qualcomm’s discovery responses.” Qualcomm Inc. v. Broadcom Corp., 2010 WL 1336937, at *7 (S.D. Cal. Apr. 2, 2010). The magistrate judge found that “[t]he fundamental problem in this case was an incredible breakdown of communication,” noting a “lack of meaningful communication” amongst Qualcomm employees, in-house counsel, and outside counsel and “a lack of agreement amongst the participants regarding responsibility for document collection and production.” Id. at *2-3. She further found that “[t]hese failures were exacerbated by an incredible lack of candor on the part of the principal Qualcomm

employees.” Id. at *4. With respect to the attorney who had signed the discovery responses (and who, therefore, was “responsible for the accuracy and propriety of them”), the court found that he “did take appropriate actions to learn the truth but was misled by Qualcomm employees.” Id. at *6.

State v. Ratliff, 849 N.W.2d 183, 195 (N.D. 2014) (Crothers, J., concurring opinion) (noting that lawyers must understand the contours of electronic discovery, in particular, whether “metadata [is] being admitted along with information on the face of the document,” in order to “provide competent representation to a client” under Rule 1.1, and “maintain client confidences . . .” citing Rules 1.6 and 4.5).

U.S. v. Hernandez, 2014 WL 4510266, at *2, 4 (S.D.N.Y. Sept. 12, 2014) (denying defense counsel’s request to appoint a Coordinating Discovery Attorney, who would receive and index electronic discovery on behalf of all nine defendants in a criminal case, finding that “clear and obvious ethical and legal issues [would be] implicated” and noting that “[t]he point . . . is that counsel-of-record for a particular defendant must at all times, in all ways, remain ultimately responsible for providing effective legal representation to his or her client. This duty does not disappear during the discovery process.”).

Postorivo v. AG Paintball Holdings, Inc., 2008 WL 3876199, at *18-19 (Del. Ch. Aug. 20, 2008) (unpublished) (applying DLRPC Rule 4.4, which provides that a lawyer may not “use methods of obtaining evidence that violate the legal rights of [a third person],” in the context of electronic discovery, and noting: “In modern commercial litigation, it is becoming more common for outside counsel or other agents of a party to litigation to be in possession of privileged information of an adverse party. Many cases involve some form of electronic discovery, for example, and the sheer volume of documents involved often necessitates creative means to handle privileged documents. Consequently, for cost-saving or -shifting reasons, during the early stages of discovery, one side rightfully may come into possession of documents and information storage devices that contain privileged information or communications of an adverse party. It is essential to the integrity of the litigation process in such circumstances that the court and the parties can rely on counsel scrupulously to conform to their ethical obligations . . .”).

Ethical Dilemmas in the Round, Including:
Asset Protection Counseling

The ethical dilemmas faced by attorneys who counsel clients on Asset Protection and Pre-Bankruptcy planning – a discussion.

- A. Lawyers have an ethical duty to diligently and zealously represent their clients. (See, Rule 4-1.3, Rules Regulating the Florida Bar and ABA Model Rules of Professional Conduct.)
 - 1. Lawyers are bound to further the interests and goals of their clients by all lawful means and provide competent advice.
 - 2. A lawyer may counsel a client in an area outside of his area of knowledge and can provide competent representation with adequate study, but lawyer should know his limitations.
- B. A lawyer's advice as basis for illegal activity.
 - 1. ABA Model Rule of Professional Conduct 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
 - 2. Rules Regulating the Florida Bar (same as above):

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

- a. Comments to Rule 4-1.2:

Criminal, fraudulent, and prohibited transactions.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See rule 4-1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See rule 4-1.1.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Subdivision (d) applies whether or not the defrauded party is a party to the transaction. For example, a lawyer must not participate

in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Subdivision (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last sentence of subdivision (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See rule 4-1.4(a)(5).

3. Model Rule of Professional Conduct, Rule 8.4.: *Maintaining the Integrity of the Profession*. Misconduct.

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice

...

C. Lawyer liability for advice, or, “What if my advice on what *not to do* results in a fraudulent transfer?”

1. In the context of Asset Protection and Pre-Bankruptcy Counseling, a common risk is that the client makes a fraudulent transfer based on your advice.
2. A fraudulent transfer is the transfer of an asset for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the asset beyond the creditor’s reach.

3. Factors that point to a transfer falling within the “fraudulent” category:
 - a. There is a lack of consideration or it is inadequate;
 - b. The transfer was to an “insider” who shares a close relationship with the transferor, e.g., family member, close friend, business partner or affiliate;
 - c. Transferor maintains possession, benefit or use of the asset at issue;
 - d. Transferor maintains the same financial condition before and after the transfer of the asset;
 - e. Transfer or transfers took place after some negative change in financial condition (insolvency) prior to litigation or collection efforts by creditors, which show a pattern of movement of assets to thwart efforts of creditors; and
 - f. Time timing of the transfers occur general along with financial hardship and collection efforts by creditors.

See, Florida Uniform Fraudulent Transfer Act, Chapter 726, Florida Statutes. (Modeled after the Uniform Fraudulent Transfer Act.)

CHAPTER 726 – Florida Statutes

FRAUDULENT TRANSFERS

- 726.101 Short title.
- 726.102 Definitions.
- 726.103 Insolvency.
- 726.104 Value.
- 726.105 Transfers fraudulent as to present and future creditors.
- 726.106 Transfers fraudulent as to present creditors.
- 726.107 When transfer made or obligation incurred.
- 726.108 Remedies of creditors.
- 726.109 Defenses, liability, and protection of transferee.
- 726.110 Extinguishment of cause of action.

726.111 Supplementary provisions.

726.112 Uniformity of application and construction.

726.201 Fraudulent loans void.

726.101 Short title.—This act may be cited as the “Uniform Fraudulent Transfer Act.”

History.—s. 1, ch. 87-79.

726.102 Definitions.—As used in ss. 726.101-726.112:

(1) “Affiliate” means:

(a) A person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

1. As a fiduciary or agent without sole discretionary power to vote the securities; or

2. Solely to secure a debt, if the person has not exercised the power to vote.

(b) A corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

1. As a fiduciary or agent without sole power to vote the securities; or

2. Solely to secure a debt, if the person has not in fact exercised the power to vote.

(c) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) A person who operates the debtor’s business under a lease or other agreement or controls substantially all of the debtor’s assets.

(2) “Asset” means property of a debtor, but the term does not include:

(a) Property to the extent it is encumbered by a valid lien;

(b) Property to the extent it is generally exempt under nonbankruptcy law; or

(c) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) “Charitable contribution” means a charitable contribution as that term is defined in s. 170(c) of the Internal Revenue Code of 1986, if that contribution consists of:

(a) A financial instrument as defined in s. 731(c)(2)(C) of the Internal Revenue Code of 1986; or

(b) Cash.

- (4) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (5) "Creditor" means a person who has a claim.
- (6) "Debt" means liability on a claim.
- (7) "Debtor" means a person who is liable on a claim.
- (8) "Insider" includes:
- (a) If the debtor is an individual:
 - 1. A relative of the debtor or of a general partner of the debtor;
 - 2. A partnership in which the debtor is a general partner;
 - 3. A general partner in a partnership described in subparagraph 2.; or
 - 4. A corporation of which the debtor is a director, officer, or person in control;
 - (b) If the debtor is a corporation:
 - 1. A director of the debtor;
 - 2. An officer of the debtor;
 - 3. A person in control of the debtor;
 - 4. A partnership in which the debtor is a general partner;
 - 5. A general partner in a partnership described in subparagraph 4.; or
 - 6. A relative of a general partner, director, officer, or person in control of the debtor.
 - (c) If the debtor is a partnership:
 - 1. A general partner in the debtor;
 - 2. A relative of a general partner in, a general partner of, or a person in control of the debtor;
 - 3. Another partnership in which the debtor is a general partner;
 - 4. A general partner in a partnership described in subparagraph 3.; or
 - 5. A person in control of the debtor.
 - (d) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
 - (e) A managing agent of the debtor.
- (9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(11) "Property" means anything that may be the subject of ownership.

(12) "Qualified religious or charitable entity or organization" means:

(a) An entity described in s. 170(c)(1) of the Internal Revenue Code of 1986; or

(b) An entity or organization described in s. 170(c)(2) of the Internal Revenue Code of 1986.

(13) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(14) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(15) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History.—s. 2, ch. 87-79; s. 1, ch. 2013-189.

726.103 Insolvency.—

(1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under ss. 726.101-726.112.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

History.—s. 3, ch. 87-79; s. 936, ch. 97-102.

726.104 Value.—

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of ss. 726.105(1)(b) and 726.106, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History.—s. 4, ch. 87-79.

726.105 Transfers fraudulent as to present and future creditors.—

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

- 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all the debtor's assets.
- (f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

History.—s. 5, ch. 87-79; s. 937, ch. 97-102.

726.106 Transfers fraudulent as to present creditors.—

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

History.—s. 6, ch. 87-79.

726.107 When transfer made or obligation incurred.—For the purposes of ss. 726.101-726.112:

(1) A transfer is made:

(a) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

(b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under ss. 726.101-726.112 that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not so perfected before the commencement of an action for relief under ss.

726.101-726.112, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) If oral, when it becomes effective between the parties; or

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

History.—s. 7, ch. 87-79; s. 28, ch. 91-110.

726.108 Remedies of creditors.—

(1) In an action for relief against a transfer or obligation under ss. 726.101-726.112, a creditor, subject to the limitations in s. 726.109 may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

3. Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

History.—s. 8, ch. 87-79.

726.109 Defenses, liability, and protection of transferee.—

(1) A transfer or obligation is not voidable under s. 726.105(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 726.108(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under ss. 726.101-726.112, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) A lien on or a right to retain any interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under s. 726.105(1)(b) or s. 726.106 if the transfer results from:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(6) A transfer is not voidable under s. 726.106(2):

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(7)(a) The transfer of a charitable contribution that is received in good faith by a qualified religious or charitable entity or organization is not a fraudulent transfer under s. 726.105(1)(b).

(b) However, a charitable contribution from a natural person is a fraudulent transfer if the transfer was received on, or within 2 years before, the earlier of the date of commencement of an action under this chapter, the filing of a petition under the federal Bankruptcy Code, or the commencement of insolvency proceedings by or against the debtor

under any state or federal law, including the filing of an assignment for the benefit of creditors or the appointment of a receiver, unless:

1. The transfer was consistent with the practices of the debtor in making the charitable contribution; or
2. The transfer was received in good faith and the amount of the charitable contribution did not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the charitable contribution was made.

History.—s. 9, ch. 87-79; s. 2, ch. 2013-189.

726.110 Extinguishment of cause of action.—A cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought:

- (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;
- (2) Under s. 726.105(1)(b) or s. 726.106(1), within 4 years after the transfer was made or the obligation was incurred; or
- (3) Under s. 726.106(2), within 1 year after the transfer was made or the obligation was incurred.

History.—s. 10, ch. 87-79.

726.111 Supplementary provisions.—Unless displaced by the provisions of ss. 726.101-726.112, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement those provisions.

History.—s. 11, ch. 87-79.

726.112 Uniformity of application and construction.—Chapter 87-79, Laws of Florida, shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the law among states enacting it.

History.—s. 12, ch. 87-79.

726.201 Fraudulent loans void.—When any loan of goods and chattels shall be pretended to have been made to any person with whom or those claiming under her or him, possession shall have remained for the space of 2 years without demand and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property by way of condition, reversion, remainder or otherwise in goods and chattels, and the possession thereof shall

have remained in another as aforesaid, the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this chapter, and the absolute property shall be with the possession, unless such loan, reservation or limitation of use or property were declared by will or deed in writing proved and recorded.

History.—s. 4, Jan. 28, 1823; s. 1, ch. 872, 1859; RS 1994; GS 2516; RGS 3871; CGL 5778; s. 938, ch. 97-102.

Note.—Former s. 726.09.

4. Bankruptcy Code considerations:

a. **11 U.S. Code § 544 - Trustee as lien creditor and as successor to certain creditors and purchasers.** This Code provision gives the Trustee the power to avoid fraudulent transfers or obligations of the debtor that would be avoidable by an unsecured creditor under non-bankruptcy law provisions. This is not a “catch-all” provision however.

b. **11 U.S.C. §548 - Fraudulent transfers and obligations.** Trustee’s avoidance powers.

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted;

...

c. **11 U.S. Code § 727 – Discharge.** Another consideration is your client may not get his or her discharge if :

...

with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition

...

D. LAWYER LIABILITY (to Third Parties).

1. An attorney acting pursuant to his or her engagement by a client and at the direction of his or her client and in a lawful manner is not liable for the consequences of his client's actions. (*Pickard v. Marine Holding Corp.*, 161 So. 2d 239 (Fla. 3d DCA 1964). If a lawyer were held liable to third parties (whom he does not represent) for his actions in the lawful furtherance of his client's goals, there would inevitably be conflicts of interest, which would hamper his ability to represent his client. (See, *Brown v. LaChance*, 477 N.W. 2d 296, 301 (Wis. Ct. App. 1991).

2. However, if a lawyer implicitly counsels or assists his client in committing an unlawful act he or she could be liable to third parties. If you transcend your ethical obligations as an officer of the court and you in a malicious and fraudulent way help your client commit fraud, you will be held liable to third parties.

a. Conspiracy. A lawyer who intentionally assists his client in fraud may be held liable for "civil conspiracy"¹. The elements of a civil conspiracy are:

- i. an agreement or plan (conspiracy) between two or more parties;
- ii. to do an unlawful act or to do a lawful act by unlawful means;

¹ Not all jurisdictions will hold a person liable under a civil conspiracy theory under that particular state's version of the UFTA (Uniform Fraudulent Transfer Act). *BankFirst v. UBS Paine Webber, Inc.*, 842 So. 2d 55 (Fla. 5th DCA 2003) (party would have to actually come into possession of the property transferred to be liable under FUFTA). See, Asset Protection Planning—Ethical? Legal? Obligatory? Daniel S. Rubin, 2014.

- iii. the doing of some overt act in pursuance of the conspiracy; and
- iv. damage to [the] plaintiff as a result of the acts performed pursuant to the conspiracy.

(See, *Olson v. Johnson*, 961 So. 2d 356, 359 (Fla. 2d DCA 2007) (quoting *Walters v. Blankenship*, 931 So. 2d 137, 140 (Fla. 5th DCA 2006), review denied by *McNeely v. Walters*, 942 So. 2d 412 (Fla. 2006)).

b. Aiding & Abetting². The inquiry focuses on whether a lawyer or defendant gave substantial assistance to the person who performed the fraudulent acts, even if the lawyer did not agree to join in the fraudulent acts. The elements of aiding and abetting liability are:

- i. the party whom the defendant aids and abets must perform a wrongful act that causes injury or damage;
- ii. the defendant must generally aware of his or her role as part of an overall tortious activity at the time that he or she provides the assistance; and
- iii. the defendant must knowingly and significantly assist the principal violations.

c. Legal Malpractice. While the lawyer may not be held liable to third parties, he or she may be liable to his or her own client.

² The Florida Supreme Court has held that FUFTA was not intended to serve a vehicle of by which a creditor may bring a suit against a non-transferee party for monetary damages arising from the non-transferee party's alleged aiding and abetting of a fraudulent transfer. See, Asset Protection Planning—Ethical? Legal? Obligatory? Daniel S. Rubin, 2014; *Freeman v. First National Bank*, 865 So. 2d 272 (Fla. 2004).

- i. You want to make sure you are very knowledgeable about your jurisdiction's version of the Uniform Fraudulent Transfer Act or similar statutes, and the Bankruptcy Code's look-back provisions on fraudulent transfers.
 - ii. If you hold yourself out as a specialist, you will be held to a higher standard of care.
 - iii. Be careful that your good advice doesn't become bad advice when your client engages in fraudulent transfers and then later claims you counseled him to do it.
 - (a.) Keep notes taken at meetings;
 - (b.) Have a witness present (one that will maintain confidentiality of discussions if the need to waive it never arises); and
 - (c.) Write C.Y.A. letters.
- E. Other ethical considerations. Pre-bankruptcy counseling.
1. Hiding Assets:
 - a. If your client is attempting to hide assets, do not file his petition and withdraw from representation.
 - b. Your client wants to hide assets, you tell him he cannot and then he fires you and doesn't pay you for your services. He then hires a different lawyer who files his petition for him. You are now a creditor in his Bankruptcy and you see that he didn't disclose certain assets. What are your options?
 - i. Can you notify the Trustee?
 - ii. Can you ask him about the assets at the §341 Meeting of Creditors?

iii. Can you schedule a 2004 Exam and ask your former client about the undisclosed assets?

iv. Can you file a dischargeability action?

v. Can you call the FBI?

Not according to the Florida Bar...

2. Hiding Transfers.

3. "Loans" to Insiders.

F. Final Thoughts.

SpecialFeature



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Think Before You Click: Social Media Ethics

Florida lawyers should think twice before clicking “accept” to a friend request on Facebook or diving into any social media site for the first time.

For those unaware, Facebook is a social networking service launched in 2004, currently with over a billion users. The building blocks of Facebook (and most social sites) are user profiles. Users of the site can then link to others’ profiles by propounding what Facebook terms a “friend request” to another user. Once the user accepts the request, certain information is made available between the newly linked users, which all depends on the individual user’s privacy settings. Most Facebook friends probably better fit the moniker of acquaintance, and users commonly have hundreds or thousands of Facebook friends. Facebook social norms make it difficult to refuse a friend request (it is considered fairly rude to reject a friend request from even a casual acquaintance), and thus the title of “Facebook friend” does not fit the average person’s definition of actual friendship. From advertising issues (The Florida Bar’s new advertising rules explicitly apply to Facebook and other social media per rule 4-7.11(a)), to lawyer-judge social media connections, these evolving social media norms and uses are rife with legal and ethical land mines.

For example, in a recent Broward County criminal case, a criminal defendant argued for disqualification of the presiding judge due to the judge’s Facebook friendship with the prosecuting attorney. The defendant argued that his own Facebook “friends” consisted “only of his closest friends and associates, persons whom he could not perceive with anything but favor, loyalty, and partiality” and thus he believed the judge could not be fair and impartial.¹ The judge declined to recuse himself, and the issue wound up in front of the Fourth District Court of Appeal. The Fourth DCA, considering an opinion issued in 2009 by the Florida Supreme Court’s Judicial Ethics Advisory Committee, agreed with the criminal defendant and held that the presiding judge should be disqualified.² In the Judicial Ethics Advisory Committee opinion, the JEAC concluded that the Florida Code of Judicial Conduct does not allow a judge to add lawyers who may appear before the judge as “friend” on a social networking site; nor does it permit such lawyers to add the judge as their “friend.”

The Fourth DCA and the JEAC noted that it is simply the appearance of undue influence evi-

dently created by social media friendships that is the cause of concern, rather than any actual bias. “[A] judge’s listing of a lawyer as a ‘friend’ on the judge’s social networking page – ‘to the extent that such identification is available for any other person to view’ – would violate Florida Code of Judicial Conduct Canon 2B.”³ Canon 2B of the Florida Code of Judicial Conduct provides that “[a] judge shall not . . . convey or permit others to convey the impression that they are in a special position to influence the judge.”⁴

The JEAC’s conclusion (relied upon by the Fourth DCA) is that when a judge lists a lawyer who appears before him as his “friend” on a social networking page, it conveys the impression that such a lawyer “friend” is in a special position to influence the judge.⁵ According to the JEAC, whether the lawyer “friend” actually has the ability to influence the judge is irrelevant; it is the mere appearance of impropriety that creates the problematic issue. This standard is somewhat unusual, as presumably one could potentially avoid the prohibition by making one’s “friend” list completely private – thereby making it so the identification of the online friendship was not publicly available – and thus avoiding the appearance of impropriety or undue influence discussed by the Fourth DCA and the JEAC.

There also appears to be a disconnect between the underlying JEAC rationale and the actual, everyday use of social media. While Facebook friendship might mean more to some than to others, the belief that a lawyer’s status as a Facebook friend of a judge would create an impression that the lawyer has some sort of special influence is not an objectively reasonable one in light of how Facebook is actually used. The Florida Supreme Court voted 5-2 against hearing an appeal of the Fourth DCA’s decision, but the *Domville* case remains a cautionary tale for judges and lawyers using social media sites like Facebook. Social media issues do not end with lawyer-judge online connections. There are a wide variety of socially awkward (and legally awkward) situations that social media-savvy lawyers deal with daily. For example, if you are Facebook friends with a lawyer, should you de-friend that lawyer if he or she takes the bench? Per Florida’s rule, this is the safest route, yet the act of de-friending is essentially a social snub.

Additionally, Facebook has a feed that constantly updates friends as to what other friends are doing – i.e., Adam is at the beach, Jessica is in court –

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and if you are Facebook friends with a judge, you may accidentally be engaged in unauthorized *ex parte* communications when you have done nothing intentional to communicate with your judicial social media connection.

Florida's new advertising rules also create issues. For example, on LinkedIn, a popular business-oriented social media site, a user's default listing on the LinkedIn page contains a category called "Specialties[.]" which then lists areas in which the individual does business.

According to LinkedIn's current site, "[t]o help streamline how your profile is displayed, we've combined specialties with [your] summary section." Thus, without the user's knowledge, LinkedIn may have populated many users' profiles with a listing of "Specialties[.]" such as "commercial litigation" or "eDiscovery[.]"

The problem? You generally can't list legal "specialties" online per new Rules 4-7.11(a) and 4-7.14(a)(4).

Rule 4-7.14(a)(4) states that potentially misleading advertisements include statements that a lawyer is "board certified, a specialist, an expert, or other variations of those terms" unless any of the following are true:

- (1) the lawyer has been certified under the Florida Certification Plan;
- (2) the lawyer has been certified by an organization whose specialty certification program has been accredited by the ABA or The Florida Bar – such advertisements for lawyers whose specialty is certified by the ABA but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification – or
- (3) the lawyer has been certified by another state bar, if the bar program grants certification on the basis of

standards "reasonably comparable" to the standards used by The Florida Bar's certification program.

Additionally, the rule requires all advertisements of "specialties" to include the area of certification and the name of the certifying organization. There are undoubtedly many Florida lawyers on LinkedIn who are currently out of compliance with Florida's advertising rules and who have no idea that they have an automatically populated list of "specialties" on their LinkedIn page. You might want to take a look at yours, if you have one, and correct your profile accordingly.

Finally, though the rules are a good source of guidance, it's best to make sure you use common sense in all of your online interactions. A Miami-Dade county public defender recently caused a mistrial and was subsequently fired, all because of a Facebook posting. This particular public defender was representing a man accused of murdering his girlfriend. The defendant's family brought him a bag of clean clothes to wear during trial, and as officers were holding up the various pieces for routine inspection, the public defender took a picture of the defendant's leopard-print underwear with her cell phone. Then, while on break, she posted the picture on her own Facebook page, along with a caption belittling her client's family for thinking the briefs were "proper attire for trial."

The public defender's Facebook page was private and could only be viewed by her friends, so she likely thought she was safe; however, someone who saw the post alerted the judge, who eventually declared a mistrial. After the offending attorney was fired, the Miami-Dade public defender stated that "when a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and gives the appearance that he is not receiving a fair trial."⁶ Again, much

like in the context of lawyer-judge online "friendships," it is the appearance of impropriety that seems to be at issue here.

So, how to handle social media? Lawyers: De-friend members of the judiciary, and decline friend requests if you are a litigator. However, there is nothing wrong with letting the judge know it is nothing personal and that you are just being cautious and complying with Florida's ethics rules. Keep an eye on your social media profiles and connections, and read Florida's new advertising rules so you can ensure you don't run afoul of them. Be careful of what you post, even if you think your page is private. Judges: The most prudent path given Florida's highly restrictive rule is to be wary of dipping your toe in social media, and if you do, it is best to stay away from online friendships with lawyers who may appear before you.

Adam C. Losey, Esq., and **Jessica E. Joseph, Esq.,** are attorneys with Foley & Lardner LLP. They have been members of the OCBA since 2009 and 2013, respectively.

¹*Domville v. State*, 103 So. 3d 184, 185 (Fla. 4th DCA 2012).

²*Id.*; see also Fla. JEAC Op. 2009-20 (Nov. 17, 2009).

³*Domville*, 103 So. 3d at 185.

⁴*Id.*

⁵*Id.* at 186. (citing Fla. JEAC Op. 2009-20).

⁶David Ovalle, "Lawyers Facebook Photo Causes Mistrial in Miami-Dade Murder Case," *The Miami Herald*, Sep. 13, 2012, available at: <http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html>.

ANNOUNCEMENT

The Courthouse Resource Room will be closed now through November 1, 2013,

while it is being used as an additional hearing room for foreclosure matters. The CRC will reopen to the general public upon the completion of the 14th floor build-out.

If you have any questions, please contact Julio Semino at

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FLORIDA SUPREME COURT

Judicial Ethics Advisory Committee

Opinion Number: 2009-20

Date of Issue: November 17, 2009

ISSUES

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may post material on the committee's page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member's "friends". The member of the social network must approve a person who requests to be identified as the member's "friend".

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's "friends", to certain visitors to the member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member's "friends" could see the names of the member's other "friends".

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In the social network, a "friend" may post comments and links to other websites on the member's home site, known as the member's "wall." The member may reply to these postings or delete them, but they will remain on the member's site until deleted. The "friend's" comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about "friends" and privacy concerns:

- Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
- We built Facebook to make it easy to share information with your friends and people around you.
- We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.
- Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.

(<http://www.facebook.com/policy.php?ref-pf>)

Political campaigns may also establish pages on social networking sites which allow users to list themselves as "fans" or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a "fan" in order for their name to appear on the campaign's Facebook page. Anyone desiring to be listed as a "fan" may do so unilaterally, without the campaign's knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes. Fla. JEAC Op. **99-26**. See also Fla. JEAC Opns. **00-22** and **08-11** related to campaign activities and internet websites.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as "friends" on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a "friend" on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the

<http://jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>

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private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.¹

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

"Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

A judge's participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:

"A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. undermine the judge's independence, integrity, or impartiality;
3. demean the judicial office;
4. interfere with the proper performance of judicial duties;
5. lead to frequent disqualification of the judge; or
6. appear to a reasonable person to be coercive."

The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence

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the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends". This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers, or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge's questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remains whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a "friend" or contact on the member's site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge's "friend" is thereafter displayed to the public or the judge's or lawyer's other "friends" on the judge's or the lawyer's

page.

REFERENCES

Florida Code of Judicial Conduct: Canon 2B; Commentary to Canon 2A.

Florida Judicial Ethics Advisory Committee Opinions: **99-26**, **00-22**, and **08-11**.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the Committee. See *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See *Id.*

The opinions of this Committee express no view on whether any proposed conduct of an inquiring judge is consistent with the substantive law which governs any proceeding over which the inquiring judge may preside. This Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with the issue of whether the proposed conduct violates a provision of that Code.

For further information, contact: Judge T. Michael Jones, Chair, Judicial Ethics Advisory Committee, 190 Governmental Center, M.C. Blanchard Judicial Building, Pensacola, Florida 32502.

Participating Members:

Judge Roberto Arias, Judge Robert T. Benton, Dean Bunch, Esquire, Judge Lisa Davidson, Judge Kerry I. Evander, Judge Jonathan D. Gerber, Judge T. Michael Jones, Patricia E. Lowry, Esquire, Judge Jose Rodriguez, Judge C. McFerrin Smith III, Judge Richard R. Townsend, Judge Dorothy Vaccaro.

Copies furnished to:

Justice Peggy Quince
Thomas D. Hall, Clerk of Supreme Court
All Committee Members
Executive Director of the J.Q.C.
Office of the State Courts Administrator
Inquiring Judge (Name of inquiring judge deleted from this copy)

¹ By way of contrast, many other websites do not have these characteristics and a judge's use of them does not conflict with Canon 2B. For example, there are many subject matter websites which people with similar interests use to communicate with one another. Parents of students in a particular club or organization in a high school, for example, may register as a part of a parent group, with the names of all of the members of the group being visible to all of the other members. Similarly, persons with an interest in studying a particular subject, or members of a club,

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might be a part of a group on a website, with the names of the members visible to one another, or to the public at large. However, even if a judge is listed on one of these sites, and even if a lawyer who appears before the judge is also listed, Canon 2B is not implicated because the judge did not select the lawyer as a part of the group, nor have the right to approve or reject the lawyer's being listed in the group. The only message conveyed to a person viewing the website would be that both the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. Because the judge played no role in the selection of the lawyer whose name appears on the website, no impression is afforded to those who view the website that the lawyer is in a special position to influence the judge.

PUBLIC COMMENT
PLEASE NOTE: Publication for public comment is not, and shall not be, construed as a recommendation or approval by the Board of Trustees of the materials published.
SUBJECT:
Proposed Formal Opinion Interim No. 11-0004 (ESI and Discovery Requests)
BACKGROUND:
The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with Tab 19, Article 2, Section 6(g) (as modified by Tab 12, Title 1, Division 2, Rule 1.10) of the State Bar Board Book, the Committee shall publish proposed formal opinions for public comment.
DISCUSSION/PROPOSAL:
Proposed Formal Opinion Interim No. 11-0004 considers: What are an attorney's ethical duties in the handling of discovery of electronically stored information?
The opinion interprets rules 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code section 6068(e).
The opinion digest states: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.
At its Feb. 28, 2014 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 11-0004 for a 90-day public comment distribution. Subsequently, at its Dec. 5, 2014 meeting, COPRAC revised the opinion in response to the public comments received and, in further accordance with its Rules of Procedure, tentatively approved Proposed Formal Opinion Interim No. 11-0004 for an additional 90-day public comment distribution.
ANY KNOWN FISCAL/PERSONNEL IMPACT:
None
ATTACHMENT:
Proposed Formal Opinion Interim No. 11-0004
SOURCE:
State Bar Standing Committee on Professional Responsibility and Conduct
DEADLINE:
5 p.m., April 9, 2015
DIRECT COMMENTS TO:
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THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 11-0004

ISSUE: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

DIGEST: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

AUTHORITIES

INTERPRETED: Rules 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code section 6068(e).

STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor in a judicial district that mandates consideration of e-discovery^{2/} issues in its formal case management. Opposing Counsel demands e-discovery; Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys they have had ample prior notice that e-discovery would be addressed at the conference and tells them to return in two hours with a joint proposal.

In the ensuing meeting between the two lawyers, Opposing Counsel suggests a joint search of Client's network, using Opposing Counsel's chosen vendor, based upon a jointly agreed search term list. She offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that is protected by the attorney-client privilege and/or the work product doctrine ("Privileged ESI").

Attorney believes the clawback agreement will allow him to pull back anything he "inadvertently" produces. Attorney concludes that Opposing Counsel's proposal is acceptable and, after advising Client about the terms and obtaining Client's authority, agrees to Opposing Counsel's proposal. The Judge thereafter approves the attorneys'

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

^{2/} Electronically Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (e.g. Code Civ. Proc., § 2016.020, sub. (d) – (e)). Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

joint agreement and incorporates it into a Case Management Order, including the provision for the clawback of Privileged ESI. The Court sets a deadline three months later for the network search to occur.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case, and provides them to Opposing Counsel as Client's agreed upon search terms. Attorney reviews Opposing Counsel's additional proposed search terms, which on their face appear to be neutral and not advantageous to one party or the other, and agrees that they may be included.

Attorney has represented Client before, and knows Client is a large company with an information technology ("IT") department. Client's CEO tells Attorney there is no electronic information it has not already provided to Attorney in hard copy form. Attorney also assumes that the IT department understands network searches better than he does and, relying on that assumption and the information provided by CEO, concludes it is unnecessary to do anything further beyond instructing Client to provide Vendor direct access to its network on the agreed upon search date. Attorney takes no further action to review the available data or to instruct Client or its IT staff about the search or discovery. As directed by Attorney, Client gives vendor unsupervised direct access to its network to run the search using the search terms.

Subsequently, Attorney receives an electronic copy of the data retrieved by Vendor's search and, busy with other matters, saves it in an electronic file without review. He believes that the data will match the hard copy documents provided by Client that he already has reviewed, based on Client's CEO's representation that all information has already been provided to Attorney.

A few weeks later, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence and/or spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. After Attorney receives this letter, he unsuccessfully attempts to open his electronic copy of the data retrieved by Vendor's search. Attorney finally hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney potentially responsive ESI has been routinely deleted from the Client's computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that, due to the breadth of Vendor's execution of the jointly agreed search terms, both privileged information, as well as irrelevant but highly proprietary information about Client's upcoming revolutionary product, was provided to Plaintiff in the data retrieval. Expert advises Attorney that an experienced IT professional likely would have recognized the overbreadth and prevented the retrieval of the proprietary information. What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

DISCUSSION

I. Duty of Competence

A. Did Attorney Violate The Duty of Competence Arising From His Own Acts/Omissions?

While e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" in legal services shall apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service. Read together, a mere failure to act competently does not trigger discipline under rule 3-110. Rather, it is the failure to do so in a manner that is intentional, reckless or repeated that would result in a disciplinable rule 3-110 violation. (See, *In the Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149 ("We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation."); see also, *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416 (reckless and repeated acts); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41 (reckless and repeated acts).

Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes "keeping abreast of changes in the law and its practice, including the benefits and risks associated with technology, . . ." ABA Model Rule 1.1, Comment [8].^{3/} Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. When e-discovery is at issue, association or consultation may be with a non-lawyer technical expert, if appropriate in the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case involves e-discovery. Yet, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute. The law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make provisions for electronic discovery. See, e.g. Code of Civil Procedure section 2031.010, paragraph (a) (expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action.")^{4/} However, there is little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to the federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principals based upon California's ethical rules and existing discovery law.^{5/}

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with expertise to assist. Rule 3-110(C). Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;^{6/}

^{3/} In the absence of on-point California authority and conflicting state public policy, the ABA Model Rules may provide guidance. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

^{4/} In 2006, revisions were made to the Federal Rules of Civil Procedure, rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly-parallel provisions in those 2006 federal rules amendments. See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5*, March 3, 2009. (http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_cfa_20090302_114942_asm_comm.html).

^{5/} Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532]; *Vasquez v. Cal. School of Culinary Arts Inc.* (2014) 230 Cal.App.4th 35 [178 Cal.Rptr.3d 10]; see also footnote 4, *supra*.

^{6/} This opinion does not directly address ethical obligations relating to litigation holds. A litigation hold is a directive issued by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such documents, pending further direction. See generally Redgrave, *Sedona Conference® Commentary on Legal Holds: The Trigger and The Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260 – 270, 277 – 279. Prompt issuance of a litigation hold may prevent spoliation of evidence, and the duty to do so falls on both the party and outside counsel working on the matter. See

- analyze and understand a client's ESI systems and storage;
- identify custodians of relevant ESI;
- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI;
- advise the client on available options for collection and preservation of ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
- produce responsive ESI in a recognized and appropriate manner.⁷¹

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462 – 465 (defining gross negligence in the preservation of ESI), (abrogated on other grounds in *Chin v. Port Authority* (2nd Cir. 2012) 685 F.3d 135 (failure to institute litigation hold did not constitute gross negligence per se)).

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early, prior to the initial case management conference. That it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management highlighted Attorney's obligation to conduct an early initial e-discovery evaluation.

Notwithstanding this obligation, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation by not consulting with an e-discovery expert prior to agreeing to an e-discovery plan at the initial case management conference. He then allowed that proposal to become a court order, again with no expert consultation, although he lacked sufficient expertise. Attorney participated in preparing joint e-discovery search terms without experience or expert consultation, and he did not recognize the danger of overbreadth in the agreed upon search terms.

Even after Attorney stipulated to a court order directing a search of Client's network, Attorney took no action other than to instruct Client to allow Vendor to have access to Client's network. Attorney did not instruct or supervise Client regarding the direct network search or discovery, nor did he try to pre-test the agreed upon search terms or otherwise review the data before the network search, relying on his assumption that Client's IT department would know what to do, and on the parties' clawback agreement.

After the search, busy with other matters and under the impression the data matched the hard copy documents he had already seen, Attorney took no action to review the gathered data until after Opposing Counsel asserted spoliation and threatened sanctions. Attorney then unsuccessfully attempted to review the search results. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage already had been done.

At the least, Attorney risked breaching his duty of competence when he failed at the outset of the case to perform a timely e-discovery evaluation. Once Opposing Counsel insisted on the exchange of e-discovery, it became certain that e-discovery would be implicated, and the risk of a breach of the duty of competence grew considerably; this should have prompted Attorney to take additional steps to obtain competence, as contemplated under rule 3-110(C), such as consulting an e-discovery expert.

[Footnote continued...]

Zubulake v. UBS Warburg, LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 218 and *Zubulake v. UBS Warburg, LLC* (S.D.N.Y. 2004) 229 F.R.D. 422, 432. Spoliation of evidence can result in significant sanctions, including monetary and/or evidentiary sanctions, which may impact a client's case significantly.

⁷¹ This opinion focuses on an attorney's ethical obligations relating to his own client's ESI, and therefore, this list focuses on those issues. This opinion does not address the scope of an attorney's duty of competence relating to an opposing party's ESI.

Had the e-discovery expert been consulted at the beginning, or at the latest once Attorney realized e-discovery would be required, the expert could have taken various steps to protect Client's interest, including possibly helping to structure the search differently, or drafting search terms less likely to turn over privileged and/or irrelevant but highly proprietary material. An expert also could have assisted Attorney in his duty to counsel Client of the significant dangers in allowing unsupervised direct access to Client's system due to the high risks, including the high potential for violation of trade secrets, and how to mitigate those risks. An expert also could have supervised the data collection by Vendor.^{8/}

Whether Attorney's acts/omissions in this single case amount to a disciplinable offense under the "intentionally, recklessly, or repeatedly" standard of rule 3-110 is beyond this opinion, yet such a finding could be implicated by these facts.^{9/} (See, e.g., *In the Matter of Respondent G.* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179 (respondent did not perform competently where he was reminded on repeated occasions of inheritance taxes owed and repeatedly failed to advise his clients of them); *In re Matter of Copren* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 861, 864 (respondent did not perform competently when he failed to take several acts in single bankruptcy matter); *In re Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377-378 (respondent did not perform competently where he "recklessly" exceeded time to administer estate, failed to diligently sell/distribute real property, untimely settled supplemental accounting and did not notify beneficiaries of intentions not to sell/lease property).

B. Did Attorney Violate The Duty of Competence By Failing To Supervise?

The duty of competence in rule 3-110 includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents. See Discussion to rule 3-110. This duty to supervise can extend to outside vendors or contractors, and even to the client itself. See California State Bar Formal Opinion No. 2004-165 (duty to supervise outside contract lawyers); San Diego County Bar Association Formal Opn. No. 2012-1 (duty to supervise clients relating to ESI, citing *Cardenas v. Dorel Juvenile Group, Inc.* (D. Kan. 2006) 2006 WL 1537394).

Rule 3-110(C) permits an attorney to meet the duty of competence through association or consultation with an expert, including a non-lawyer technical expert. See Cal. State Bar Formal Opn. No. 2010-179. Such expert may be an outside vendor, a subordinate attorney, or even the client, if they possess the necessary expertise. This consultation or association, however, does not absolve an attorney's obligation to supervise the work of the expert under rule 3-110, which is a non-delegable duty belonging to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court. An attorney must maintain overall responsibility for the work of the expert he or she chooses, even if that expert is the client or someone employed by the client. The attorney must do so by remaining regularly engaged in the expert's work, by educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by the law or by the court, and of any relevant risks associated with the e-discovery tasks at hand. The attorney should issue appropriate instructions and guidance and, ultimately, conduct appropriate tests until satisfied that the attorney is meeting his ethical obligations prior to releasing ESI.

Here, relying on his familiarity with Client's IT department, Attorney assumed the department understood network searches better than he did. He gave them no further instructions other than to allow Vendor access on the date of

^{8/} See Advisory Committee Notes to the 2006 Amendments to the Federal Rules of Civil Procedure, rule 34 ("Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) . . . is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."). See also The Sedona Principles Addressing Electronic Document Production (2nd Ed. 2007), Comment 10(b) ("Special issues may arise with any request to secure direct access to electronically stored information or to computer devices or systems on which it resides. Protective orders should be in place to guard against any release of proprietary, confidential, or personal electronically stored information accessible to the adversary or its expert.").

^{9/} This opinion does not intend to set or to define a standard of care of attorneys for liability purposes, as standards of care can be highly dependent on the factual scenario and other factors not applicable to our analysis herein.

the network search. He provided them with no information regarding how discovery works in litigation, differences between a party affiliated vendor and a neutral vendor, what could constitute waiver under the law, what case-specific issues were involved, or the applicable search terms. Client allowed Vendor direct access to its entire network, without the presence of any Client representative to observe or monitor Vendor's actions. Vendor retrieved proprietary trade secret and privileged information, a result Expert advised Attorney could have been prevented had a trained IT individual been involved from the outset. In addition, Attorney failed to warn Client of the potential significant legal effect of not suspending its routine document deletion protocol under its document retention program.

Here, as with Attorney's own actions/inactions, whether Attorney's reliance on Client was reasonable and sufficient to satisfy the duty to supervise in this setting is a question for a trier of fact. Again, however, a potential finding of a competence violation is implicated by the fact pattern. See, e.g., *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (evidence demonstrated lawyer's pervasive carelessness in failing to give the office manager any supervision, or failing to instruct on trust account requirements and procedures).

II. Duty of Confidentiality

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068 (e)(1).) "Secrets" includes "information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." (Cal. State Bar Formal Opinion No. 1988-196.) "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1), without the informed consent of the client, or as provided in paragraph (B) of this rule." Rule 3-100(A).

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client. (Evid. Code, §§ 952, 954, 955.) In civil discovery, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege. *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law.^{10/} A lack of reasonable care to protect against disclosing privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Tech. Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at 2 – 3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable).

In our hypothetical, because of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed. Due to Attorney's actions, Chief Competitor can argue that such disclosures were not "inadvertent" and that any privileges were waived. Further, non-privileged, but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Chief Competitor. Even absent any indication that Opposing Counsel did anything to engineer the overbroad disclosure, it remains true that the disclosure occurred because Attorney participated in creating overbroad search terms. All of this happened unbeknownst to Attorney, and only came to light after Plaintiff accused Client of evidence spoliation. Absent Plaintiff's accusation, it is not clear when any of this would have come to Attorney's attention, if ever.

The clawback agreement heavily relied upon by Attorney may not work to retrieve the information from the other side. By its terms, the clawback agreement was limited to inadvertently produced Privileged ESI. Both privileged information, and non-privileged, but confidential and proprietary information, have been released to Plaintiff.

^{10/} See Federal Rules of Evidence, rule 502(b): "Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure, rule 26 (b)(5)(B)."

Under these facts, Client may have to litigate whether Client (through Attorney) acted diligently enough to protect its attorney-client privileged communications. Attorney took no action to review Client's network prior to allowing the network search, did not instruct or supervise Client prior to or during Vendor's search, participated in drafting of the overbroad search terms, and waited until after Client was accused of evidence spoliation before reviewing the data – all of which could permit Opposing Counsel to viably argue Client failed to exercise due care to protect the privilege, and the disclosure was not inadvertent.^{11/}

Client may have to litigate further its right to the return of non-privileged but confidential proprietary information, which was not addressed in the clawback agreement.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of its non-privileged/confidential proprietary information, again are legal questions beyond this opinion. Attorney did not reasonably try to minimize the risks. Even if Client can retrieve the information, Client may never “un-ring the bell.”

The State Bar Court Review Department has stated, “Section 6068, subdivision (e) is the most strongly worded duty binding on a California attorney. It requires the attorney to maintain ‘inviolable’ the confidence and ‘at every peril to himself or herself’ to reserve the client’s secrets.” (*Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179). While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it requires the exercise of some level of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took only minimal steps to protect Client's ESI, or to instruct/supervise Client in the gathering and production of that ESI, and instead released everything without prior review, inappropriately relying on a clawback agreement. Client's secrets are now in Plaintiff's hands, and further, Plaintiff may claim that Client has waived the attorney-client privilege. Client has been exposed to that potential dispute as the direct result of Attorney's actions. Attorney may have breached his duty of confidentiality to Client.

CONCLUSION

Electronic document creation and/or storage, and electronic communications, have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It also may result in violations of the duty of confidentiality, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

^{11/} Although statute, rules, and/or case law provide some limited authority for the legal claw back of certain inadvertently produced materials, even in the absence of an express agreement, those provisions may not work to mitigate the damage caused by the production in this hypothetical. These “default” claw back provisions typically only apply to privilege and work product information, and require both that the disclosure at issue has been truly inadvertent, and that the holder of the privilege has taken reasonable steps to prevent disclosure in the first instance. See Federal Rules of Evidence, rule 502; see also generally *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817 – 818 [68 Cal.Rptr.3d 758]. As noted above, whether the disclosures at issue in our hypothetical truly were “inadvertent” under either the parties' agreement or the relevant law is an open question. Indeed, Attorney will find even less assistance from California's discovery clawback statute than he will from the federal equivalent, as the California statute merely addresses the procedure for litigating a dispute on a claim of inadvertent production, and not with the legal issue of waiver at all. (Code Civ. Proc., § 2031.285).