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THE ETHICS OF E-MAIL

By: Thomas E. Spahn*

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INTRODUCTION

[1] In many ways, communicating by e-mail and other forms of electronic transmission reflects a fundamentally different way of human interaction. Historians eventually will put this in perspective, but one could easily conclude that e-mails are essentially a “third way” for people to communicate.

[2] From the dawn of time, people have communicated either orally or in some permanent form. The former started with grunts among cavemen, and now includes telephone calls. This oral tradition involves fleeting communications, never meant to last. Oral communications convey messages as much through body language or tone of voice as they do through the actual words. The primeval human belief that these communications should not be permanently recorded reflects itself in state laws prohibiting one participant in a telephone call from tape recording that call without the other’s consent.

[3] The permanent form of communication started with clay tablets, and now includes faxes. Folks using this written tradition expect the writing to last, and therefore usually (but not always) use care in choosing what they write. The words themselves convey the meaning, perhaps slightly supplemented by exclamation points, question marks, etc.

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[4] E-mails combine these two forms of communication in a unique way. They combine the informality and sometimes careless substance of oral communications with the permanence of written communications. E-mails have changed the way we communicate in three fundamental ways. First, e-mails change the substance of our communications. Unfortunately, for some litigants, e-mails can be easily misinterpreted. What seemed like humor in an e-mail can later haunt the author. Discovery now focuses on e-mail because that form of communication captures litigants' and witnesses' unguarded thoughts in a way that provides insight into their thinking.¹

[5] Second, e-mails represent a fundamental change in the way we communicate because they can be sent so easily. In many ways, this ease of transmission represents a good development for most e-mail users. E-mails allow users to stay in touch with family, friends, and business associates more easily. E-mails make service industries (such as the legal profession) more responsive to their clients. This ease of transmission, however, carries downside risks for the sloppy and inattentive. In some situations, the sender intends to transmit e-mails using this easy method. It can be as easy to send an e-mail to one hundred recipients as it is to one recipient. This has enormous ramifications for the attorney-client privilege, which rests its protection on clients and lawyers communicating only among themselves,² or a very select group of others with a "need to know." Some recent decisions (which are outside the subject of this article about ethics) have jeopardized every American corporation's attorney-client privilege, by finding that widespread intra-corporate circulation of e-mails essentially demonstrates that the e-mails relate to a business rather than a legal purpose.³

[6] Everyone has also sent e-mails to unintended recipients, often because of the software that fills in the names of recipients after senders type in

¹ See M. James Thomas, *At the Intersection of Privilege and E-Discovery*, 44 TENN. B.J. 14, 16 (2008) ("The amendments to the Federal Rules of Civil Procedure on discovery now apply to ESI, including individual e-mails, e-mail strings or strands, and soft copy attachments.").

² See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2000).

³ *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 39467, at *96 (M.D. Fla. May 7, 2008); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 809-10 (E.D. La. 2007).

just a few letters of an e-mail address. The law has always had to deal with the inadvertent transmission of privileged or otherwise confidential communications, but e-mails clearly exacerbate that problem.⁴

[7] Third, e-mails involve the astounding increase in volume of such communications. The advent of copy machines might have created a flood of communications, but e-mails have generated a tsunami. In addition to all of the technological challenges that this huge increase in volume generates, the law of discovery has had to keep up. The new Rule 502 of the Federal Rules of Evidence represents the latest attempt to update discovery rules in light of the increasing amount of material that litigants must review and produce.⁵

[8] As indicated above, the enormous changes triggered by e-mail communication play out in many legal contexts—including the attorney-client privilege, discovery rules, and elsewhere.⁶ This brief article analyzes how the changes affect the ethics rules that guide the legal profession's conduct. It makes sense to focus on the audience with which lawyers communicate by e-mail. First, and perhaps most importantly, the ethics rules have had to deal with lawyers' communications with their clients' adversaries. Second, ethics rules must deal with lawyers' communications with third parties other than their adversaries. Third, the ethics rules have had to adapt to a number of issues arising in litigation.

I. COMMUNICATING WITH ADVERSARIES

A. UNSOLICITED E-MAILS FROM PROSPECTIVE CLIENTS

[9] There may be no better example of the ethical impact of e-mails than state bars' efforts to analyze how they affect the very creation of an attorney-client relationship. All lawyers know that they must preserve

⁴ See generally Thomas E. Spahn, *Litigation Ethics in the Modern Age*, 33 *The Brief* 2 (2004), available at http://www.mcguirewoods.com/news-resources/publications/commercial_litigation/LitigationEthics.Brief.33.2.Winter2004.pdf (discussing the frequent inadvertent e-mail communications and the associated unethical conduct).

⁵ See FED. R. EVID. 502.

⁶ See, e.g., PAUL R. RICE, *Att'y-Client Privilege in the U.S.* § 5:20 (West Group 1999).

their clients' confidences.⁷ Bars, however, have to deal with how lawyers should handle confidential information they learn from prospective clients, even if an attorney-client relationship never develops.⁸ Lawyers have always faced this issue, but the advent of e-mails has allowed prospective clients to easily transmit confidential communications to many lawyers. Sometimes clients are legitimately seeking lawyers to represent them, while others are cynically trying to disqualify lawyers who might represent their adversaries.

[10] This scenario also implicates conflicts of interest rules, which supply a fairly easy but seemingly harsh answer. Nationwide, bars have repeatedly held that a lawyer who learns confidential information while interviewing a prospective client cannot (absent consent) later be adverse to the prospective client, even if no attorney-client relationship ever arises.⁹

[11] This well-recognized principle requires lawyers who meet with or otherwise receive information from prospective clients to walk a "tightrope"—obtaining enough general information from the prospective client to run a conflicts search, while not acquiring so much information that the prospective client will be considered an actual client for conflicts purposes.¹⁰ A number of law firms have learned to their regret that one of their partners or associates crossed the line and created a disabling conflict by acquiring too much information from a prospective client.

[12] A rule requiring a lawyer to maintain the confidentiality of information received from a prospective client, however, makes much less sense if the prospective client sends unsolicited information to the lawyer. A strict application of the confidentiality and conflicts rules in such a setting might tempt clever litigants to purposely taint their adversary's potential lawyers by sending unsolicited confidential information to them. Still, the confidentiality rules do seem fairly strong even with prospective clients who never become actual clients.

⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

⁸ *Id.* R. 1.18(b).

⁹ *See id.* R. 1.18(c).

¹⁰ *See id.* R. 1.18(c)-(d).

[13] This issue becomes more complicated if the information obtained from the prospective client is of interest to an existing client. In that situation, the possible duty to keep the prospective client's information secret runs directly contrary to what would otherwise be a clear fiduciary duty to *reveal* the material information to the existing client.¹¹ If a lawyer received information "on the street" that a plaintiff was about to file a lawsuit against the lawyer's client, fiduciary duties probably would require the lawyer to immediately advise the client. Do these fiduciary duties apply with equal force to an unsolicited e-mail from a prospective client? The answer is unclear.

[14] Since the advent of e-mails, bars across America have dealt with this issue—with mixed results. In 2001, the New York City Bar essentially adopted the approach of Rule 1.18 of the ABA Model Rules of Professional Conduct (discussed below).¹² The New York City Bar took a very lawyer-friendly approach.

Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client.¹³

In discussing law firms' websites, the New York City Bar indicated that

¹¹ *See id.* R. 1.7(a).

¹² The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2001-1 (2001).

¹³ *Id.*

The fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm's web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm's general availability to accept clients, which has been traditionally done through legal directories, such as Martindale Hubbell, and now is also routinely done through television, the print media and web sites on the internet.¹⁴

The New York City Bar assured lawyers that a law firm website disclaimer that

[P]rominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check . . . would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.¹⁵

[15] Several years later, the Nevada Bar took essentially the same approach.¹⁶ In 2005, the Nevada Bar indicated that prospective clients generally could not create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney."¹⁷ The Nevada Bar explained that a lawyer's website disclaimer should effectively eliminate any

¹⁴ *Id.*

¹⁵ *Id.* (footnotes omitted).

¹⁶ *See generally* State Bar of Nev. Comm. On Ethics and Prof'l Responsibility, Formal Op. 32 (2005) (discussing the formation of the attorney-client relationship in the context of the Internet and electronic communication).

¹⁷ *Id.*

reasonable expectation of confidentiality by someone sending an unsolicited e-mail to the lawyer.¹⁸

[16] In 2006, the San Diego Bar also took this approach, but in a different factual context. In San Diego LEO 2006-1, the San Diego Bar addressed a hypothetical situation in which a lawyer received an unsolicited e-mail.¹⁹ The Bar began its analysis by assuming that the lawyer did not have a website and did not advertise, although the state Bar publicized her e-mail address.²⁰ The majority indicated that the prospective client's

[U]nsolicited e-mail is not confidential. Private information received from a non-client via an unsolicited e-mail is not required to be held as confidential by a lawyer, if the lawyer has not had an opportunity to warn or stop the flow of non-client information at or before the communication is delivered.²¹

The San Diego Bar stated that the lawyer may continue to represent the other injured accident victim and use the information against the e-mail's author.²² The San Diego Bar indicated that it would be a "closer question" if the lawyer had included her e-mail address at the bottom of an advertisement without any disclaimers.²³ In that situation, there would be an "inference that private information divulged to the attorney would be confidential."²⁴ A dissenting opinion argued: "I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice."²⁵

¹⁸ *Id.*

¹⁹ *See generally* San Diego Cal. Bar Ass'n on Ethics, Formal Op. 2006-1 (2006) (discussing the duty of confidentiality with unsolicited communications by e-mail).

²⁰ *See id.*

²¹ *Id.*

²² *See id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

[17] In 2007, the Massachusetts Bar took a dramatically different approach.²⁶ In direct contrast to the New York City analysis, the Massachusetts Bar indicated that a lawyer *could* control the flow of information by using a click-through disclaimer.²⁷

[W]hen an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and 'click' his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter.²⁸

The Massachusetts Bar explained that depending on the kind of information conveyed in the unsolicited e-mail, a law firm's receipt of confidential information from a law firm client's adversary might "materially limit" the law firm's ability to represent its client, thus resulting in the law firm's disqualification.²⁹ The Massachusetts Bar concluded that "a law firm can avoid disqualification by requiring prospective clients to affirmatively indicate their consent to appropriate terms of use before using an e-mail link provided on the firm's website."³⁰

[18] Most recently, the Virginia Bar adopted a majority approach, indicating that lawyers receiving confidential information in unsolicited e-mails or voicemails from prospective clients do not have a duty to keep that information confidential.³¹

²⁶ See generally Mass. Bar Ass'n on Ethics, Formal Op. 2007-1 (2007) (discussing the duty owed to former clients).

²⁷ See *id.*

²⁸ *Id.*

²⁹ See *id.*

³⁰ *Id.* cmt. 1.

³¹ See Va. Bar Ass'n on Ethics, Formal Op. 1842 (2008).

[19] In trying to deal with all of these issues, the ABA added Rule 1.18 of the ABA Model Rules of Professional Conduct.³² That rule (“Duties to Prospective Client”) starts with the bedrock principle that a person will be considered a “prospective client” if the person discusses with a lawyer “the possibility of forming a client-lawyer relationship.”³³ The lawyer must treat such a person as a former client for conflicts purposes.³⁴ A lawyer in such a situation may not represent the adversary in the same or substantially related matter—if “the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.”³⁵ This would allow the lawyer more flexibility than the standard rule, which would have prevented the lawyer’s representation of the adversary if the lawyer had received *any* pertinent confidential information from the prospective client and not just information that “could be significantly harmful” to the prospective client.³⁶

[20] Finally, any individual lawyer’s disqualification even under that standard is *not* imputed to the entire law firm if the lawyer had taken “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” and if the individually disqualified lawyer is screened from the matter (including financially screened) and provides written notice to the prospective client.³⁷

[21] The second comment of Rule 1.18 of the ABA Model Rules of Professional Conduct provides some guidance that could apply to unsolicited e-mails.

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer

³² MODEL RULES OF PROF’L CONDUCT R. 1.18 (2000).

³³ *Id.* R. 1.18(a).

³⁴ *Id.* R. 1.18(b); *see id.* R. 1.9 (2000).

³⁵ *Id.* R. 1.18(c).

³⁶ *Id.*

³⁷ *Id.* R. 1.18(d)(2).

relationship, is not a “prospective client” within the meaning of paragraph (a).³⁸

As with all ABA Model Rule changes, it will take time to see if states ultimately follow the same approach.

[22] Ironically, e-mail communications can also make it difficult to analyze the other end of an attorney-client relationship. Under Rule 1.7 of the ABA Model Rules of Professional Conduct, lawyers cannot take on any matter adverse to a current client without that client’s consent.³⁹ In contrast, Rule 1.9 of the ABA Model Rules of Professional Conduct permits lawyers to take on matters adverse to former clients, unless the client formerly represented a client in the same or substantially related matter, or otherwise acquired confidences from the client that the lawyer could now use against him.⁴⁰ Thus, it can be critically important to know whether there is a current attorney-client relationship when analyzing conflicts. Many law firms send various complimentary e-mail “alerts” to both current clients and former clients. To the extent that lawyers continue to treat a former client as if he were currently a client (by sending e-mail alerts or otherwise), those lawyers might find themselves facing the much more stringent conflicts rules governing adversity to current clients.

B. EX PARTE CONTACTS WITH ADVERSARIES

[23] The ease of e-mail transmissions sometimes implicate Rule 4.2 of the ABA Model Rules of Professional Conduct, another basic ethics rule dealing with lawyers’ communications with represented adversaries.⁴¹ As with the issue of communications from prospective clients, the spread of e-mail communications has not created a brand-new issue, but made an existing issue more difficult to tackle.

[24] The ABA Model Rules of Professional Conduct contain a fairly simple prohibition that generates a nearly endless series of issues:

³⁸ *Id.* R. 1.18(a) cmt. 2.

³⁹ *Id.* R. 1.7.

⁴⁰ *Id.* R. 1.9.

⁴¹ *See id.* R. 4.2.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.⁴²

This prohibition rests on several basic principles:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.⁴³

As one analyzes application of the basic prohibition, it becomes apparent that the more important principle underlying the rule is the need to avoid interference between a client's and lawyer's relationship. For instance, the prohibition extends to many types of communications that could not possibly involve a lawyer's "overreaching."⁴⁴

[25] The *Restatement (Third) of the Law Governing Lawyers* follows essentially the same approach, although with a few more variations:

- (1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:
 - (a) the communication is with a public officer or agency to the extent stated in § 101;
 - (b) the lawyer is a party and represents no other client in the matter;

⁴² *Id.*

⁴³ *Id.* R. 4.2 cmt. 1.

⁴⁴ *See id.*

- (c) the communication is authorized by law;
- (d) the communication reasonably responds to an emergency; or
- (e) the other lawyer consents.⁴⁵

The Restatement recognizes the two same basic principles underlying the prohibition: “The rules stated in §§ 99-103, protect against overreaching and deception of nonclients. The rule of [Section 99] also protects the relationship between the represented nonclient and that person’s lawyer and assures the confidentiality of the nonclient’s communications with the lawyer.”⁴⁶

[26] The language of Rule 4.2 of the ABA Model Rules of Professional Conduct and the Restatement involves several important issues. First, courts and bars might have to determine whether there is a matter sufficient to trigger the Rule 4.2 prohibition. For instance, in Alaska Ethics Opinion 2006-1, on January 27, 2006, the Alaska Bar dealt with situations in which a lawyer has a consumer complaint about a local company, disagrees with a local newspaper’s editorial policy, or has concerns as a homeowner with a municipal government’s decision on a building permit.⁴⁷ Among other things, the Alaska Bar discussed whether any of the scenarios involved a matter in which the store, newspaper, or government is represented:

In the three examples set forth above, the key question posed in each instance is whether there is a “matter” that is “the subject of the representation.” An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a “matter” that is

⁴⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1) (2000).

⁴⁶ *Id.* § 99 cmt. b (citations omitted).

⁴⁷ See Alaska Bar Ass’n on Ethics, Formal Op. 2006-1 (2006).

“the subject of representation.” The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.⁴⁸

The Alaska Bar concluded that:

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a “matter that is the subject of representation” depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party.⁴⁹

[27] Second, courts and bars might have to determine whether a lawyer engaging in such an ex parte contact is doing so in “representing a client.”⁵⁰ In some situations involving ex parte contacts, lawyers are not acting as client representatives. For instance, Maryland Ethics Opinion 2006-7 states that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer.⁵¹ The Maryland Bar contrasted the role of a guardian with that of a lawyer:

“A guardian is not an agent of a ward, because guardians are not subject to the ward’s control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See MODEL RULES OF PROF’L CONDUCT R. 4.2 (2000).

⁵¹ See Md. Bar Ass’n on Ethics, Formal Op. 2006-7 (2006).

sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian.”

In contrast, an attorney-client relationship is “an agent-principal relationship.” “A client’s right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one.” From this explication, it does not appear that the member appointed by the court as Guardian “represents” the Resident . . . no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility.⁵²

[28] The restriction on ex parte communications to situations in which a lawyer is “representing a client” also allows clients to seek “second opinions” from other lawyers—because those other lawyers are not “representing a client” in that matter.⁵³

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer’s representation.⁵⁴

[29] Third, similar to other situations involving conflicts of interests, courts and bars might have to determine whether the other person is

⁵² *Id.* (citations omitted).

⁵³ See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (2000) (“Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”); see also *id.* R. 4.2 cmt. 8 (“The prohibition on communication with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.”).

⁵⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. c (2000).

“*represented by another lawyer.*”⁵⁵ In class action situations, this issue normally involves a debate about whether the attorney-client relationship has *begun*. The Restatement explains the majority position on this issue:

A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.⁵⁶

An ABA legal ethics opinion has also taken the following approach. In the class action context, “a client-lawyer relationship with a potential member of the class does not begin until the class has been certified and

⁵⁵ MODEL RULES OF PROF’L CONDUCT R. 4.2 (emphasis added).

⁵⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. 1 (2000); see Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 355-56 (2002) (“The majority view, embraced by most courts, the Restatement, and the leading class action treatise, holds that before class certification, putative class members are not ‘represented’ by class counsel.”); Phila. Bar Ass’n on Ethics, Formal Op. 2006-6 (2006) (stating that a defense lawyer may engage in ex parte communications with purported class members before a class certification). The Philadelphia Bar Association also states, “[t]he majority rule in most jurisdictions is that, after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of the putative class is permitted,” citing to the Restatement that the ex parte contact would be with sophisticated corporations rather than unsophisticated individuals and that the lawyer must make the recipients of the communications aware of the pending class action. See *Blanchard v. Edgemark Fin. Corp.*, No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *19 (N.D. Ill. Sept. 11, 1998) (recognizing that class members are represented “once a class has been certified”) (quoting MANUAL FOR COMPLEX LITIGATION § 30.2, at 234 (3d ed. 1995)).

the time for opting out by a potential member of the class has expired.”⁵⁷ Therefore, Rules 4.2 and 7.3 of the ABA Model Rules of Professional Conduct “do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class.”⁵⁸ The opinion further determines both lawyers must comply with Rule 4.3 of the ABA Model Rules of Professional Conduct if they communicate with potential class members, and that plaintiffs’ lawyer must comply with Rule 7.3 if they are soliciting membership in the class, but those restrictions “do not apply to contacting potential class members as witnesses.”⁵⁹ The opinion states “[b]oth plaintiffs’ counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified”⁶⁰ and that

Restricting defense communication with potential plaintiffs could inhibit the defendant from taking remedial measures to alleviate a harmful or dangerous condition that has led to the lawsuit. A defendant in a class action lawsuit also would be prevented from attempting to reach conciliation agreements with members of the potential class without going through a lawyer whom the potential class member may have no interest in retaining.⁶¹

Of course, however, “the court may assume control over communications by counsel with class members.”⁶²

[30] In other situations, the debate focuses on whether the attorney-client relationship has *ended*. For example, in *K-Mart Corp. v. Helton*,⁶³ the Kentucky Supreme Court found that

⁵⁷ See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-445 (2007).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 894 S.W.2d 630 (Ky. 1995).

The Court of Appeals correctly observed that the continued representation of an individual after the conclusion of a proceeding is not necessarily presumed and that the passage of time may be a reasonable ground to believe that a person is no longer represented by a particular lawyer. Rule 4.2 is not intended to prohibit all direct contact in such circumstances. Here counsel for plaintiffs had reasonable grounds to believe that the petitioners were not represented by counsel when he took the Pittman statement. In considering the fact that no contact was made by an attorney on behalf of K-Mart until more than one year after the incident which gave rise to this action and almost one year after plaintiffs' counsel took the statement, we believe that the communication with the K-Mart employee was not with a party the attorney knew was represented by another attorney in the matter.⁶⁴

[31] Fourth, courts and bars might have to determine if the lawyer making ex parte contacts “*knows*” that the other person is represented by another lawyer in the matter. Rule 1.0(f) of the ABA Model Rules of Professional Conduct defines “*knows*” as denoting “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”⁶⁵ Comment 8 to Rule 4.2 of the ABA Model Rules of Professional Conduct explains that:

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, *the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.*⁶⁶

⁶⁴ *Id.* at 631.

⁶⁵ MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2000).

⁶⁶ *Id.* R. 4.2 cmt. 8 (emphasis added).

The ABA has also explained that:

[I]n the Committee's view, Rule 4.2 does not, like Rule 4.3 [governing a lawyer's communications with an *unrepresented* person], imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" . . . actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication with a represented person simply by closing her eyes to the obvious.⁶⁷

[32] Fifth, courts and bars might have to determine if an *ex parte* contact constitutes a "communication" for purposes of Rule 4.2 of the ABA Model Rules of Professional Conduct. For instance, in *Hill v. Shell Oil Co.*,⁶⁸ plaintiffs filed a class action suit against Shell gas stations, claiming that they discriminated against African-American customers.⁶⁹ The previous six years, plaintiffs arranged for assistants posing as consumers to interact with Shell gas station employees, videotaping what they alleged to be racial discrimination.⁷⁰ When Shell discovered this type of investigation, it moved for a protective order to prohibit any further such contacts.⁷¹ The United States District Court for the Northern District of Illinois denied the protective order, finding that while the gas station managers were in the Rule 4.2 "off-limits" category, the contacts between the investigators and the gas station employees did not constitute "communications" sufficient to trigger the Rule 4.2 prohibition.⁷² The court stated,

Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that

⁶⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (emphasis added).

⁶⁸ 209 F. Supp. 2d 876 (N.D. Ill. 2002).

⁶⁹ *Id.* at 877.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.* at 879-80.

occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera. These interactions do not rise to the level of communication protected by Rule 4.2. To the extent that employees and plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial.⁷³

[33] Courts take Rule 4.2 of the ABA Model Rules of Professional Conduct very seriously. For instance, in *In re Allan K. Knappenberger*,⁷⁴ two law firm employees filed an employment-related lawsuit against a lawyer.⁷⁵ After the lawyer received service of the Summons and Complaint late on a Friday afternoon, he confronted one of the employees and “ask[ed], in an angry tone, what it was and whose idea it had been.”⁷⁶ It was apparently undisputed that “[t]he entire conversation lasted between 30 seconds and one minute.”⁷⁷ The lawyer spoke the next day to the other plaintiff who had sued him—in a conversation that lasted between 5 and 20 minutes.⁷⁸ Both of the plaintiffs reported these contacts to their lawyers, who amended the complaint, to add a retaliation claim.⁷⁹ The Oregon Supreme Court found that the lawyer had violated the ex parte contact prohibition, and suspended him for 120 days.⁸⁰ The court noted in passing, but ultimately found irrelevant, the fact that the lawyer ultimately won the lawsuit brought by his employees.⁸¹

[34] The general rule applies even to lawyers sending copies of pleadings to represented adversaries:

⁷³ *Id.* at 880.

⁷⁴ 108 P.3d 1161 (Or. 2005).

⁷⁵ *Id.* at 1163.

⁷⁶ *Id.*

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1172.

⁸¹ *See id.* at 1163 (emphasis added).

Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer's client, such as a settlement offer.⁸²

[35] Rule 4.2 of the ABA Model Rules of Professional Conduct and every state's variation require the consent of the other person's lawyer.⁸³ The other person's consent does not suffice.⁸⁴ Comment 3 to Rule 4.2 states, "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."⁸⁵

[36] The Restatement takes the same approach. Comment B in Section 99 of the *Restatement (Third) of the Law Governing Lawyers* states that the "general exception to the rule . . . requires consent of the opposing lawyer; consent of the client alone does not suffice."⁸⁶ Another comment states that the "anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication."⁸⁷ Another example is a New York City Bar Association legal ethics opinion which applied the ex parte prohibition even to communications initiated by a "sophisticated non-lawyer insurance adjuster."⁸⁸

[37] Ignoring this rule can cause real damage. In *Inorganic Coatings, Inc. v. Falberg*,⁸⁹ for example, a lawyer for Inorganic Coatings sent a letter to

⁸²See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. f (2000) (citations omitted).

⁸³MODEL RULES OF PROF'L CONDUCT R. 4.2 (2000).

⁸⁴*Id.* R. 4.2 cmt. 3.

⁸⁵*Id.*

⁸⁶RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000).

⁸⁷*Id.* § 99 cmt. f.

⁸⁸See The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-04 (2005).

⁸⁹926 F. Supp. 517 (E.D. Pa. 1995).

an International Zinc official (Falberg) threatening to sue his company for certain conduct.⁹⁰ Inorganic's lawyer later spoke with International Zinc's lawyer about a possible settlement, but the conversation was unsuccessful.⁹¹ Later the same day, the lawyer received a telephone call from Falberg.⁹² Inorganic's lawyer advised Falberg that "it would be best" if the communication took place between the lawyers, but did not terminate the conversation.⁹³ The lawyer spoke with Falberg for about ninety minutes and took twenty-four pages of notes.⁹⁴ Among other things, he used the information to revise his draft complaint.⁹⁵ The court found that Inorganic's lawyer had violated the state ethics code prohibition on such ex parte contacts, and disqualified the lawyer and his firm from representing Inorganic even though they had been engaged for over one year in investigating and preparing the lawsuit.⁹⁶

[38] It may seem counter-intuitive, but a lawyer takes an enormous risk by accepting at face value even a highly sophisticated person's assurance that the person's lawyer has consented to an ex parte communication.⁹⁷ Courts and bars have wrestled with a lawyer's obligations if the person indicates that she has *fired* her lawyer. The ABA has stated that a lawyer may proceed with an ex parte communication with a person only if the lawyer has "reasonable assurance" that the representation has ended.⁹⁸ On the other hand, the Texas Supreme Court has held,

Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. Confirmation may be necessary in some

⁹⁰ *See id.* at 518.

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 521.

⁹⁷ *See* The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-04 (2005) ("A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.").

⁹⁸ *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

circumstances before an attorney can determine whether a person is no longer represented, but it is not required by Rule 4.02 in every situation, and for good reason. The attorney may not be able to provide confirmation if, as in this case, he and his client have not communicated. And while a client should certainly be expected to communicate with his attorney about discontinuing representation, the client in some circumstances may have reasons for not doing so immediately.⁹⁹

E-mail communications implicate all of these traditional ethics issues.

C. INADVERTENT TRANSMISSION OF COMMUNICATIONS

[39] As indicated above, the ease of communicating by e-mail has affected many legal issues in the context of intentionally transmitted e-mails. Most importantly, clients' and lawyers' intentional widespread transmission of e-mails implicates attorney-client privilege issues. The ethics rules primarily deal with the other kind of transmission—the unintentional (usually called “inadvertent”) transmission of e-mails. This issue has vexed the ABA, state bars, and state courts for many years.

[40] In the early 1990s, the ABA tended to favor requiring the return of such documents, but recently, however, the ABA shifted its course. It will be interesting to see if the ABA's retreat from its earlier position generates a similar approach by bars and courts. In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.¹⁰⁰ The ABA indicated that:

[A]s a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the [privileged] materials once the inadvertence is discovered, (b) should notify the sending

⁹⁹ *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 334-35 (Tex. 1999).

¹⁰⁰ See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.¹⁰¹

As explained below, many bars and courts took the ABA's lead in imposing some duty on lawyers receiving obviously privileged or confidential documents to return them forthwith.

[41] The ABA, however, recently retreated from this position. As a result of the Ethics 2000 Task Force Recommendations, Rule 4.4(b) of the ABA Model Rules of Professional Conduct now indicates that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent *shall promptly notify the sender.*"¹⁰²

[42] Comment 2 to Rule 4.4(b) of the ABA Model Rules of Professional Conduct reveals that, in its current form, the ABA's approach is both broader and narrower than the ABA had earlier announced in its Legal Ethics Opinions.¹⁰³ Rule 4.4(b) is *broader* because it applies to documents "that were mistakenly sent or *produced* by opposing parties or their lawyers," thus clearly covering document productions.¹⁰⁴ The rule is *narrower* than the earlier legal ethics opinion because

If a lawyer knows or reasonably should know that such a document 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 the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a

¹⁰¹ *Id.*

¹⁰² MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2000) (emphasis added); see THOMAS E. SPAHN, MORTGAGE BANKERS ASS'N OF AM., LITIG. ETHICS: PART II (DISCOVERY) HYPOTHETICALS & ANALYSIS 85 (2007), <http://www.mortgagebankers.org/files/Conferences/2007/2007LIRC/LitigationEthicsPartIIH&A.pdf>.

¹⁰³ See MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2.

¹⁰⁴ *Id.* (emphasis added).

document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.¹⁰⁵

[43] In its new form, the ABA approach defers to case law on the issue of whether a lawyer must return such documents, but provides a professional “safe harbor” for those who do:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.¹⁰⁶

Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts. As a result of these changes in the ABA Model Rules of Professional Conduct, the ABA took the very unusual step of withdrawing the earlier ABA LEO that created the “return unread” doctrine.¹⁰⁷

[44] The Restatement would allow use of inadvertently transmitted privileged information under certain circumstances:

If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer’s own client and may be required to do so if that

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* R. 4.4 cmt. 3.

¹⁰⁷ See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 05-437 (2005) (discussing inadvertent disclosure of confidential materials). ABA Model Rule 4.4(b) now governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party. MODEL RULES OF PROF’L CONDUCT R. 4.4(b). Formal Opinion 437 stated that Rule 4.4 “only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.” ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 05-437 (2005).

would advance the client's lawful objectives. That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony. The same legal result may follow when divulgence occurs inadvertently outside of court. The receiving lawyer may be required to consult with that lawyer's client about whether to take advantage of the lapse.

If the person whose information was disclosed is entitled to have it suppressed or excluded, the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege.

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim.

Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage. A tribunal may also order suppression or exclusion of such information.¹⁰⁸

[45] State bars have provided varying ethics guidance to lawyers who receive inadvertently sent privileged documents outside the document production context. State bars have directed that lawyers: should return the documents if the lawyer received them "under circumstances in which it is clear that they were not intended for the receiving lawyer," but should

¹⁰⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. m (2000) (citations omitted).

not be disciplined for attempting to use the documents under a good faith argument that the protections had been waived.¹⁰⁹ State bars have stated that lawyers should return the documents before reviewing them if the lawyer receives notice of their inadvertent transmission, but feel free to use the inadvertently sent documents if the lawyer reviews them without notice of the inadvertent transmission by the sending lawyer.¹¹⁰ State bars have also affirmed that lawyers should feel free to retain the inadvertently sent documents, but notify the sending lawyer (and send a copy of the documents back to the sending lawyer “to ensure that there is no misunderstanding about the document in issue.”)¹¹¹

[46] Court decisions have also reached differing conclusions. Some courts have allowed lawyers to take advantage of their adversary’s mistake in transmitting privileged or confidential documents.¹¹² The courts normally do not even mention the ethics issues, but instead focus on the waiver issues.¹¹³ Other decisions indicate that lawyers who fail to notify the adversary or return inadvertently transmitted privileged documents risk

¹⁰⁹ Ky. Bar Ass’n on Ethics, Formal Op. KBA E-374 (1995),

http://www.kybar.org/documents/ethics_opinions/kba_e-374.pdf.

¹¹⁰ See Ill. State Bar Ass’n Advisory Op. on Prof’l Conduct, Advisory Op. 98-04 (1999); see also Va. Bar Ass’n on Ethics, Formal Op. 1702 (1997) (discussing confidentiality duties when a lawyer inadvertently receives confidential information without notice). The Illinois State Bar Association opinion adopts the reasoning of ABA Formal Op. 368 (1992) in concluding that a lawyer receiving “inadvertently transmitted confidential documents from opposing counsel or opposing counsel’s client” should return the documents although prohibiting a lawyer from reading an inadvertently transmitted document based on “boilerplate” notices on fax cover pages would “violate reality.” Ill. State Bar Ass’n Advisory Op. on Prof’l Conduct, Adv. Op. 98-04 (1999). Once the lawyer recognizes a document as confidential, the lawyer “has an ethical duty to notify opposing counsel, to honor opposing counsel’s instructions about disposition of the document, and not to use the document in contravention of opposing counsel’s instructions.” *Id.*

¹¹¹ See Me. Bd. of Overseers of the Bar Comm. on the Prof’l Ethics, Formal Op. 146 (1994), *withdrawn and rev’d* Advisory Op. 172 (2000).

¹¹² See, e.g., *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992) (“[A]lthough Plaintiff produced the memorandum inadvertently, it waived its privilege in the document when opposing counsel reviewed it.”); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (“The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.”).

¹¹³ See *FDIC*, 140 F.R.D. at 253 (“The purpose of the privilege is to protect the confidences of clients . . . [h]owever, when a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party . . .”).

disqualification or sanctions.¹¹⁴ The California Supreme Court recently disqualified a lawyer for reading and relying upon a privileged document that the lawyer claims to have inadvertently received from a court reporter (although the facts of the case seem to indicate that the lawyer surreptitiously purloined the document from the opposing lawyer's briefcase).¹¹⁵

[47] One might have expected the ethics rules to take a more forgiving approach to the increasingly common unintentional transmission of communications occurring in the era of e-mail. The ABA, in taking the opposite approach, highlights its emphasis on lawyers' roles as client

¹¹⁴ See generally *Am. Express v. Accu-Weather, Inc.*, No. 91 CIV. 6485 (RWS), 92 CIV. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call from opposing counsel informing them of the inadvertent production); *Conley, Lott, Nichols Mach. Co. v. Brooks*, 948 S.W.2d 345, 349 (Tex. App. 1997) (stating that although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered" and disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow."), *rev'd sub nom. In re Meador*, 968 S.W.2d 346 (Tex. 1998) (holding that it is difficult to assign a bright line standard for disqualification where an attorney, through no wrongdoing, receives an opponent's privileged material).

¹¹⁵ See *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1094 (Cal. 2007). In *Rico*, the plaintiff's lawyer came into possession of the defendant's counsel's personal notes of a previous session with defendant's expert. *Id.* at 1095. Plaintiff's counsel made copies for other counsel and for plaintiff's experts to study. *Id.* at 1100. The notes were then used by the plaintiff's counsel to impeach the defendant's expert during a deposition. *Id.* at 1095. The Supreme Court of California upheld the trial court's determination that the notes were "absolutely privileged by the work product rule." *Id.* at 1096, because they amounted to "an attorney's written notes about a witness's statements." *Id.* at 1096-97. The court explained that, "[w]hen a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes." *Id.* at 1097. The court adopted the rule that an attorney should refrain from unnecessary examination and notify the sender "where it is reasonably apparent that the materials were provided or made available through inadvertence." *Id.* at 1099. The California court rejected the defendant's argument that use was justified because the plaintiff's expert was lying. *Id.* at 1100. The court explained that "once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing." *Id.* at 1100-01.

advocates, and—perhaps more importantly—the recognition that the effect of such inadvertent transmissions should play out in the court-supervised world of privilege rather than in the disciplinary world of ethics.

D. METADATA

[48] Perhaps the most fascinating new ethics issue (of any variety) involves the bars' attitude toward "metadata"—the invisible "data about data" that often accompanies an electronic document transmission sent via e-mail.¹¹⁶ Such metadata can include valuable information about a document's authors, dates of creation, earlier drafts, changes, etc.¹¹⁷ Transactional lawyers would love to know of an adversary's evolving thoughts about price, purchase terms, etc. that might be reflected in earlier versions of the adversary's deal documents. A litigator could gain a significant advantage by learning their adversary's now-discarded arguments in briefs, initial factual statements contained in earlier versions of interrogatory answers, etc.

[49] This inherently interesting issue has played out in an equally fascinating display of various states' differing approaches to receiving lawyers' ethical responsibilities. Anyone looking for the best current paradigm of ethics rules should focus on metadata. If ethics rules represented some timeless moral principles, one would expect state bars to take essentially the same approach. After all, every state bar's ethics committee consists of experienced, intelligent, professional, and ethically aware bar leaders.¹¹⁸ Yet the evolution of state bars' approach to metadata shows the true nature of ethics rules—which simply try to balance lawyers' duties to their clients and lawyers' possible duties to others in the legal system.

[50] As so frequently occurs, New York State was the first state bar to deal with metadata. In 2001, the New York State Bar held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "get[ting] behind" electronic documents sent by adversaries who failed to

¹¹⁶ See W. Lawrence Wescott, *The Increasing Importance of Metadata in Electronic Discovery*, 14 RICH. J.L. & TECH. 10, ¶ 1 (2008).

¹¹⁷ See *id.* ¶ 3.

¹¹⁸ See, e.g., Virginia Legal Foundation: Committee on Continuing Legal Education, <http://www.vacle.org/clecomm.htm>.

disable the “tracking” software.¹¹⁹ Interestingly, the New York State Bar issued legal ethics opinion 782 three years later, indicating that lawyers have an ethical duty to “use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets.”¹²⁰

[51] The Florida Bar followed the New York approach—warning lawyers to be careful when they send metadata, but prohibiting the receiving lawyer from examining the metadata.¹²¹ Lawyers must take “reasonable steps” to protect the confidentiality of any information they transmit, including metadata.¹²²

It is the recipient lawyer’s concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender’s client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit.¹²³

[52] These positions, however, are not reconcilable with Florida Rule 4-4.4(b), which requires the receiving lawyer to “promptly notify the sender” if the receiving lawyer “inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient [lawyer]” but does *not* prevent the recipient from reading or relying upon the inadvertently transmitted communication.¹²⁴ The Florida opinion explicitly avoids addressing metadata “in the context of documents that are subject to discovery under applicable rules of court or law.”¹²⁵

¹¹⁹ N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 749 (2001).

¹²⁰ N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 782 (2004).

¹²¹ Prof’l Ethics of the Fla. Bar, Formal Op. 06-2 (2006).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See RULES REGULATING THE FLA. BAR R. 4-4.4(b) (2006).

¹²⁵ Prof’l Ethics of the Fla. Bar, Formal Op. 06-2 (2006).

[53] In 2006, the ABA took exactly the opposite position—holding that the receiving lawyer may freely examine metadata.¹²⁶ As long as the receiving lawyer did not obtain an electronic document in an improper manner, the lawyer may ethically examine the document’s metadata, including even using “more thorough or extraordinary investigative measures” that “might permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted.”¹²⁷ The opinion does not analyze whether the transmission of such metadata is “inadvertent,” but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata’s receipt.¹²⁸ Lawyers “sending or producing” electronic documents can take steps to avoid transmitting metadata through new means such as scrubbing software, or more traditional means such as faxing the document.¹²⁹ Lawyers can also negotiate confidentiality agreements or protective orders allowing the “client to ‘pull back,’ or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself.”¹³⁰

[54] Maryland then followed this ABA approach.¹³¹ Absent some agreement with the receiving lawyer, the sending lawyer “has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery,” although not every inadvertent disclosure constitutes an ethics violation.¹³² There is no ethical violation if a lawyer or the lawyer’s assistant “reviews or makes use of the metadata [received from another person] without first ascertaining whether the sender intended to include such metadata.”¹³³ The opinion points to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted

¹²⁶ ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-442 (2006).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ Md. State Bar Comm. on Ethics, Formal Op. 2007-09 (2007).

¹³² *Id.*

¹³³ *Id.*

privileged material to notify the sender.¹³⁴ A receiving lawyer “can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate.”¹³⁵ The opinion notes that the 2006 Amendments to the Federal Rules of Civil Procedure will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) of the ABA Model Rules of Professional Conduct as being “prejudicial to the administration of justice.”¹³⁶

[55] In early 2007, the Alabama Bar lined up with the bars prohibiting the mining of metadata.¹³⁷ In Ethics Opinion 2007-02, the Alabama Bar first indicated that “an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client’s secrets and confidences.”¹³⁸ The Alabama Bar then dealt with the ethical duties of a lawyer receiving an electronic document from another person; the Bar only cited New York Ethics Opinion 749, and did not discuss ABA Ethics Opinion 06-442.¹³⁹ Citing Alabama Rule 8.4 (which is the same as Rule 8.4 of the ABA Model Rules of Professional Conduct), the Alabama Bar concluded that “[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.”¹⁴⁰

[56] The Alabama Bar did not address Alabama’s approach to inadvertently transmitted communications (Alabama does not have a corollary to Rule 4.4(b) of the ABA Model Rules of Professional Conduct).¹⁴¹ The Alabama Bar acknowledged that “one possible exception” to the prohibition on mining metadata involves electronic

¹³⁴ *See id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ Ala. State Bar Gen. Counsel, Formal Op. 2007-02 (2007).

¹³⁸ *Id.*

¹³⁹ *See id.*; ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-442 (2006); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 749 (2001).

¹⁴⁰ Ala. Bar Gen. Counsel, Formal Op. 2007-02 (2007); *see* MODEL CODE OF PROF’L CONDUCT R. 8.4 (2000).

¹⁴¹ *See* Ala. Bar Gen. Counsel, Formal Op. 2007-02.

discovery, because “metadata evidence may be relevant and material to the issues at hand” in litigation.¹⁴²

[57] The D.C. Bar dealt with the metadata issue in late 2007.¹⁴³ The D.C. Bar generally agreed with the New York and Alabama approach, but noted that as of February 1, 2007, D.C. Rule 4.4(b) is “more expansive than the ABA version,” because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer “knows, before examining the writing, that it has been inadvertently sent.”¹⁴⁴ The D.C. Bar held that

A receiving lawyer is prohibited from reviewing metadata sent by an adversary *only* where he has *actual knowledge* that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer’s client.¹⁴⁵

[58] After having explicitly selected the “actual knowledge” standard, the D.C. Bar then proceeded to abandon it. First, the D.C. Bar indicated that lawyers could not use “a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender.”¹⁴⁶ The Bar warned that “a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks ‘actual knowledge’ in an individual case.”¹⁴⁷

[59] Second, in discussing the “actual knowledge” requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the inadvertence “before the receiving lawyer reviews the document.”¹⁴⁸ The D.C. Bar, however, then gave another example that appears much closer to a negligence standard:

¹⁴² *Id.*

¹⁴³ Legal Ethics Comm. of the D.C. Bar, Formal Op. 341 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ *Id.* at n.3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Such actual knowledge may also exist where a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included. These situations will be fact-dependent, but can arise, for example, where the metadata includes a candid exchange between an adverse party and his lawyer such that it is “readily apparent on its face,” that it was not intended to be disclosed.¹⁴⁹

The D.C. Bar indicated that “a prudent receiving lawyer” should contact the sending lawyer in such a circumstance¹⁵⁰—although the effect of the D.C. Ethics Opinion 341 is to allow ethics sanctions against an imprudent lawyer.¹⁵¹

[60] Third, the D.C. Bar also abandoned the “actual knowledge” requirement by using a “patently clear” standard.¹⁵² The D.C. Bar analogized inadvertently transmitted metadata to a situation in which a lawyer “inadvertently leaves his briefcase in opposing counsel’s office following a meeting or a deposition.”¹⁵³

The one lawyer’s negligence in leaving the briefcase does not relieve the other lawyer from the duty to refrain from going through that briefcase, at least when it is patently clear from the circumstances that the lawyer was not invited to do so.¹⁵⁴

[61] After describing situations in which the receiving lawyer cannot review metadata, the Bar emphasized that even a lawyer who is free to examine the metadata is not obligated to do so:

Whether as a matter of courtesy, reciprocity, or efficiency, “a lawyer may decline to retain or use documents that the

¹⁴⁹ *Id.* (citations omitted).

¹⁵⁰ *Id.*

¹⁵¹ *See generally id.* (discussing the parameters of a lawyer’s duty).

¹⁵² *Id.* at nn.3-4.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary.”¹⁵⁵

[62] Unlike some of the other bars which have dealt with metadata, the D.C. Bar also explicitly addressed metadata included in responsive documents being produced in litigation.¹⁵⁶ Interestingly, the D.C. Bar noted that other rules might prohibit the removal of metadata during the production of electronic documents during discovery.¹⁵⁷ Thus,

In view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally.¹⁵⁸

Even in the discovery context, however, a receiving lawyer must comply with D.C. Rule 4.4(b) if she has “actual knowledge” that metadata containing protected information has been inadvertently included in the production.¹⁵⁹

[63] In Ethics Opinion 07-03, the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take “reasonable precautions” to prevent the disclosure of confidential information.¹⁶⁰ The Arizona Bar nevertheless agreed with those states prohibiting the *receiving* lawyer from mining metadata—noting that Arizona’s Ethical Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to “promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.”¹⁶¹ The Arizona Bar acknowledged that the sending lawyer might not have inadvertently sent the document, but explained that the

¹⁵⁵ *Id.* n.9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Ariz. Bar Comm. on the Rules of Prof’l Conduct, Formal Op. 07-03 (2007).

¹⁶¹ *Id.*

lawyer did not intend to transmit metadata—thus triggering Rule 4.4(b).¹⁶² The Arizona Bar specifically rejected the ABA approach, because sending lawyers worried about receiving lawyers reading their metadata “might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely.”¹⁶³

[64] In Ethics Opinion 2007-500, the Pennsylvania Bar promised that its opinion “provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials,”¹⁶⁴ but then offers a completely useless standard:

[I]t is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, “resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules” and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation.¹⁶⁵

The Pennsylvania Bar’s conclusion is equally useless.

Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy.¹⁶⁶

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 2007-500 (2007).

¹⁶⁵ *Id.* (alteration in original).

¹⁶⁶ *Id.*

[65] The next legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics.¹⁶⁷ In Ethics Opinion 738 (2008), the Committee specifically rejected the ABA approach, and found that mining an adversary's electronic documents for metadata amounts to unethical conduct that "is deceitful and prejudicial to the administration of justice."¹⁶⁸

[66] Relying on a unique Colorado rule, the Colorado Bar then explained that a receiving lawyer may freely examine any metadata unless the lawyer received an actual notice from the sending lawyer that the metadata was inadvertently included in the transmitted document.¹⁶⁹ In addition, the Colorado Bar explicitly rejected the conclusion reached by jurisdictions prohibiting receiving lawyers from examining metadata.¹⁷⁰ For instance, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata."¹⁷¹ The Colorado Bar also concluded that "an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."¹⁷²

[67] The most recent state to have voted on metadata is Maine. In Ethics Opinion 196 (2008), the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that

[A]n attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated.¹⁷³

The Maine Bar explained that

¹⁶⁷ N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Op. 738 (2008).

¹⁶⁸ *Id.*

¹⁶⁹ Ethics Comm. of the Colo. Bar Ass'n, Formal Op. 119 (2008).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Me. Prof'l Ethics Comm. of the Bd. of Overseers of the Bar, Op. 196 (2008).

Not only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice.¹⁷⁴

Not surprisingly, the Maine Bar also stated that

[T]he sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.¹⁷⁵

[68] So the box score on metadata represents a nearly even split. Some states allow receiving lawyers to check for metadata that their adversaries might have included along with an electronic document, while an almost even number of states find such conduct flatly unethical. It will be interesting to see whether any consensus ever develops.

II. COMMUNICATIONS WITH NON-CLIENTS

[69] Although perhaps not as interesting as the ethics issues implicated when lawyers communicate by e-mail with adversaries, the ethics rules have also had to address lawyers' electronic communications with non-adversarial third parties. These issues arise in a number of settings.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

A. WORKING WITH SERVICE PROVIDERS

[70] To comply with their broad duty of confidentiality, lawyers must take all reasonable steps to assure that anyone with whom they are working also protects client confidences.¹⁷⁶ For instance, the ABA has indicated that a lawyer who allows a computer maintenance company access to the law firm's files must "ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality" of the information in the files.¹⁷⁷ The ABA also indicated that the lawyer would be "well-advised to secure" the computer maintenance company's written "assurance of confidentiality."¹⁷⁸

[71] In its recent decision generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers—such as "investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures."¹⁷⁹

[72] Lawyers must be very careful even when dealing with service providers such as copy services. In *Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*,¹⁸⁰ the defendant, Ride & Show Engineering (RSE), had filed motions seeking the return of documents that it asserted had been inadvertently produced during discovery.¹⁸¹ The United States District Court for the Middle District of Florida highlighted RSE's lawyer's "most serious failure to protect the privilege [which arose from the litigant's] knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement."¹⁸² Taking these observations in combination

¹⁷⁶ ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).

¹⁸⁰ 230 F.R.D. 688 (M.D. Fla. 2005).

¹⁸¹ *See id.* at 698.

¹⁸² *Id.* The court continued by observing that "[h]aving taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service." *Id.* The court further

with the rest of its analysis, the court refused to order the adversary to return the inadvertently produced documents.¹⁸³

B. DONATING ELECTRONIC FILES TO INSTITUTIONS

[73] In a context that interests historians as much as practicing lawyers, bars have also had to deal with a lawyer's ability to share client confidences with institutions which might make them available to later historians. This issue has always existed, but as in so many other areas, historical trends have exacerbated the dilemma. Not only have lawyers played an increasing role in making history (thus, attracting historians' interest in their communications), but those lawyers increasingly communicate by e-mail.

[74] The ethical duty of confidentiality and the attorney-client privilege last forever.¹⁸⁴ A number of state legal ethics opinions have explained that lawyers may not—without consent following full disclosure of *every* client affected—donate their files to research libraries or other third parties.¹⁸⁵ Unfortunately, there is no exception for papers even of historical significance.

C. DISCARDING ELECTRONIC FILES

[75] The increasing use of electronic communications has highlighted another ethics issue that has always existed—the care with which lawyers must discard obsolete and unwanted communications with their clients. Lawyers throwing out their trash have always had to deal with this issue,

opined that “RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service.” *Id.*

¹⁸³ *Id.*

¹⁸⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 18 (2000) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”); see also *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that the attorney-client privilege survived the client's suicide).

¹⁸⁵ See, e.g., Va. State Bar Comm. on Legal Ethics, Op. 1664 (1995) (stating that a lawyer may not provide a former client's historically significant files to a university without either obtaining the client's consent or determining that the files contain no confidences or secrets); Va. State Bar Comm. on Legal Ethics, Op. 928 (1987) (stating that the ethical duty of confidentiality continues after a client's death, and the lawyer may not turn over the client's files to an institution).

but now must remember the surprising permanence of the electronic impulses that comprise electronic communications. The sloppy handling of client confidences can violate a lawyer's duty of confidentiality, and also result in waiver of the attorney-client privilege.¹⁸⁶ In its recent decisions generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers—such as “investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures.”¹⁸⁷

[76] The most frightening form of inadvertent express waiver is exemplified by *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*¹⁸⁸ In *Suburban*, the plaintiff sifted through the defendant's trash dumpster for two years.¹⁸⁹ This unpleasant task yielded hundreds of discarded documents, several privileged.¹⁹⁰ The United States District Court for the Northern District of Illinois held that the defendants had not taken reasonable steps to ensure complete obliteration of the documents (such as shredding) and, therefore, had expressly waived the privilege.¹⁹¹ Under this approach, the negligent discarding of documents, not just the negligent handling of documents or the negligent production of documents to an opponent, can amount to a waiver.¹⁹²

[77] Other courts take a more forgiving approach, and find that clients do not waive the attorney-client privilege if they take reasonable steps when discarding their privileged documents.¹⁹³ Lawyers attempting to discard

¹⁸⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2000); *id.* R. 1.16(a).

¹⁸⁷ ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).

¹⁸⁸ 91 F.R.D. 254 (N.D. Ill. 1981).

¹⁸⁹ *Id.* at 255-56.

¹⁹⁰ *Id.* at 256.

¹⁹¹ See *id.* at 260-61.

¹⁹² See *id.* at 257-58, 260-61.

¹⁹³ See *Sparshott v. Feld Entm't, Inc.*, No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired); *McCafferty's, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 169-70 (D. Md. 1998) (finding that client had not waived the attorney-client privilege by discarding a privileged document by tearing it into smaller pieces and throwing it in the trash).

repositories of electronic communications (such as computer hard drives) must remember both their ethical duty of confidentiality and the risks to the attorney-client privilege.

III. LITIGATION ISSUES

A. OUTSOURCING OF DISCOVERY WORK

[78] The advent of e-mails and other forms of electronic communications have affected how and from where lawyers and their assistants can perform legal services. This new form of providing legal services implicates everything from multi-jurisdictional practice (because lawyers in one state can virtually “practice law” in another state using electronic communications) to the hotly discussed method of outsourcing legal work overseas.¹⁹⁴ Lawyers analyzing these issues must protect their clients from real risks,¹⁹⁵ while avoiding the sort of “guild mentality” that will prevent the lawyer from exploring all of the options that might save the client money.¹⁹⁶

[79] The ABA and state bars are still wrestling with the ethics implications of foreign outsourcing.¹⁹⁷ The ABA has explicitly explained that lawyers may hire “contract” lawyers to assist in projects—although the ABA focused on billing questions.¹⁹⁸ State bars have also dealt with

¹⁹⁴ See, e.g., Cassie B. Hanson, *Time for a Virtual Revolution*, MINNESOTA LAWYER, Nov. 3, 2008, available at <http://www.mncourts.gov/lprb/fc08/fc110308.html>.

¹⁹⁵ See, e.g., Posting of Avoiding the Unauthorized Practice of Law in Other Jurisdictions When Practicing Law Online to <http://kimbrolaw.blogspot.com/2008/06/avoiding-unauthorized-practice-of-law.html> (June 9, 2008, 22:50:00 EST).

¹⁹⁶ See, e.g., <https://www.kimbrolaw.com/about.phtml>.

¹⁹⁷ See Lisa R. Bliss, *ABA Ethics Opinion Guides Lawyers in Outsourcing*, LITIGATION NEWS, Nov. 5, 2008, available at http://www.abanet.org/litigation/litigationnews/top_stories/article_ethics.html.

¹⁹⁸ ABA Standing Comm. on Prof'l Responsibility, Formal Op. 420 (2000). A law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a “reasonable expectation” that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client, although some state bars and courts require disclosure of both the hiring and the surcharge, or (2) costs, in which case the law firm can only bill the actual cost incurred “plus those costs that are associated directly with the provision of services.” *Id.* The ABA states that temporary lawyers must comply with all ethics rules arising from a lawyer’s representation of a client, but depending on the facts, such as whether the

ethics issues implicated by lawyers employing “temps” and “independent contractor” lawyers.¹⁹⁹ Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing.²⁰⁰

[80] These opinions previewed the more recent issue involving law firms relying on distant assistance in serving their clients. In recent years, the New York City Bar,²⁰¹ the San Diego Bar,²⁰² the Florida Bar²⁰³ and the

temporary lawyer “has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working” may not be considered “associated” with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations). ABA Standing Comm. on Prof’l Responsibility, Formal Op. 88-356 (1988). Further, lawyers hiring temporary lawyers to perform “independent work for a client without the close supervision of a lawyer associated with the law firm” must obtain the client’s consent after full disclosure. *Id.* Additionally, lawyers need not obtain the client’s consent to having temporary lawyers working on the client matters if the temporary lawyers are “working under the direct supervision of a lawyer associated with the firm.” *Id.* Lawyers need not advise clients of the compensation arrangement for temporary lawyers “assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement.” *Id.*

¹⁹⁹ Va. State Bar Comm. on Legal Ethics, Formal Op. 1712 (1998).

²⁰⁰ *See, e.g.*, D.C. Comm. on Unauthorized Practice of Law, Op. 16-05 (2005) (noting that contract lawyers who are performing the work of lawyers rather than paralegals or law clerks must join the D.C. Bar if they work in D.C. or “regularly” take “short-term assignments” in D.C.).

²⁰¹ The Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006). The New York City bar assessed the ethics ramifications of New York lawyers outsourcing legal support services overseas. *Id.* It distinguished between the outsourcing of “substantive legal support services” and “administrative legal support services” such as transcriptions, accounting services, clerical support, data entry, etc. *Id.* It held that New York lawyers may ethically outsource such substantive services if they: (1) *avoid aiding non-lawyers in the unauthorized practice of law*, which requires that the lawyer “must at every step shoulder complete responsibility for the non-lawyer’s work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer’s work and then vet the non-lawyer’s work and ensure its quality;” (2) *adequately supervise the overseas workers*, which requires that the

New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the

professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations;

(3) *preserve the client's confidences*, suggesting "[m]easures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality;" (4) *avoid conflicts of interest*, advising that

As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients;

(5) *bill appropriately*, noting that

By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service;

(6) *obtain the client's consent when necessary*, as

[T]here is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer,

North Carolina Bar²⁰⁴ have all approved foreign outsourcing of legal services. The ABA joined this chorus in July 2008.²⁰⁵

[81] Although there are some variations among these bars' analyses regarding the outsourcing of discovery work, all of them take the same basic approach. To begin, lawyers must avoid aiding non-lawyers in the unauthorized practice of law.²⁰⁶ Doing so requires lawyers to take responsibility for all of the outsourced work, ultimately adopting the outsourced work as their own.²⁰⁷ Additionally, lawyers must provide

in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.

Id. (citations omitted).

²⁰² See generally San Diego County Bar Ass'n Legal Ethics Comm., Op. 2007-1 (2007) (assessing a situation in which a lawyer in a two-lawyer firm was retained to defend a "complex intellectual property dispute" although he was not experienced in intellectual property litigation in which the attorney outsourced to an Indian firm).

²⁰³ See generally Prof'l Ethics of the Fla. Bar, Op. 07-2 (2008):

[L]awyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties . . . [t]he committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. . . In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services . . . [t]he law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.

Id.

²⁰⁴ See generally N.C. State Bar Comm. on Ethics and Prof'l Responsibility, Formal Op. 2007-12 (2008) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant.").

²⁰⁵ See generally ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) (approving the use of outsourcing of legal services).

²⁰⁶ See MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2000).

²⁰⁷ See *id.* R. 5.3.

some degree of supervision, however, the exact nature and degree of the supervision is far from clear.²⁰⁸ They should consider such steps while researching the entity that will conduct the outsourced work, conducting reference checks, interviewing the individuals who will handle the outsourced work, describing the specific work that the lawyers will require, and reviewing final product before adopting it as their own.

[82] At the same time, lawyers must assure that the organization they hire adequately protects the client's confidences. This duty might involve confirming that the foreign lawyers' ethics are compatible with ours, and may also require some analysis of the confidentiality precautions and technologies that the foreign organization uses. Meanwhile, lawyers arranging outsourcing should avoid conflicts of interest.²⁰⁹ At the very least the lawyers should assure that the organization handling the outsourced work is not working for the adversary as well.²¹⁰ Some of the bars warn lawyers to take this step to avoid the inadvertent disclosure of confidential communications rather than to avoid conflicts.²¹¹

[83] With the aforementioned steps in mind, lawyers must bill appropriately.²¹² As explained earlier, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In such a situation, a lawyer may generally add overhead expenses to the bill.²¹³ The ABA notes, however, that there will be very few overhead expenses in pursuing a foreign outsourcing operation.

[84] Lastly, lawyers usually must advise their clients that they are involving another organization in their work.²¹⁴ As various legal ethics opinions explain, such disclosure may not be required if the contract or

²⁰⁸ *See id.*

²⁰⁹ *See id.* R. 1.7(a).

²¹⁰ *Id.*

²¹¹ *See, e.g.,* The Ass'n of the Bar of the City of N.Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 2001-1 (2001).

²¹² *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2000).

²¹³ ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).

²¹⁴ *See id.*

temporary lawyers act under the direct supervision of the law firm.²¹⁵ Nevertheless, disclosure is always best, and almost surely would be required in a situation involving a foreign law organization.²¹⁶ For instance, the ABA indicated that the lawyer's lack of immediate supervision and control over foreign service providers means that they must obtain the client's consent to send work overseas.²¹⁷ The North Carolina Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.²¹⁸ Unlike the issue of metadata and the inadvertent transmission of electronic communications, state bars have reached a general consensus on the ethical permissibility of foreign outsourcing. It will be interesting to see if the market drives law firms and their clients to keep expanding that practice.

B. DUTY TO RETAIN E-MAIL COMMUNICATIONS

[85] The obligation of any litigant, or possible litigant, to preserve potentially responsive evidence obviously does not present a new issue. Conversely, the enormous volume of electronic communications clearly makes the analysis more difficult, and exacerbates the possible burden. It should go without saying that litigants must preserve potentially responsive documents, including electronic ones.²¹⁹ The duty obviously arises before a discovery request arrives and can also arise before litigation begins.²²⁰

[86] The most widely quoted standard comes from the Southern District of New York.²²¹ In *Zubulake v. UBS Warburg (Zubulake I)*,²²² the United States District for the Southern District of New York court held that "the obligation to preserve evidence arises . . . when a party should have known that the evidence may be relevant to future litigation."²²³ Furthermore, the

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ *Id.*

²¹⁸ N.C. State Bar, Formal Ethics Op. 2007-12 (2008).

²¹⁹ *See* FED. R. CIV. P. 26(a)(1)(A)(ii).

²²⁰ *Id.*

²²¹ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

²²² 220 F.R.D. 212 (S.D.N.Y. 2003).

²²³ *Id.* at 216.

court found that officials at UBS Warburg were on notice that the plaintiff might sue the company for gender discrimination, thus triggering the preservation duty.²²⁴

[87] In discussing the *scope* of a company's duty to preserve, the *Zubulake I* court rejects a blanket duty:

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no." Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.²²⁵

Instead, the court explained that a company that anticipates being sued "must not destroy unique, relevant evidence that might be useful to an adversary."²²⁶ The court held that the preservation duty extends to all "key players" in the anticipated litigation.²²⁷

[88] Later, in *Zubulake II*,²²⁸ the United States District Court for the Southern District of New York reaffirmed that UBS should have preserved electronic documents that were ultimately destroyed.²²⁹ It again ordered UBS Warburg to pay the cost of the plaintiff's motion, directed the company to reimburse plaintiff for the costs of any depositions or re-depositions necessitated by the document destruction, and approved a jury instruction containing an adverse inference about the destroyed back-up tapes.²³⁰

²²⁴ *See id.* at 216-17.

²²⁵ *Id.* at 217.

²²⁶ *Id.*

²²⁷ *Id.* at 218.

²²⁸ 229 F.R.D 422 (S.D.N.Y. 2004).

²²⁹ *Id.* at 439.

²³⁰ *See id.*

[89] Other courts have essentially adopted the same standard, although sometimes using different language.²³¹ Large companies have found themselves severely punished for destroying electronic documents under this standard. For instance, a court ordered Philip Morris to pay \$2.75 million as a sanction for not preserving relevant e-mails, and also prohibited Philip Morris from relying on the testimony of any of its executives who had not saved their e-mails.²³² Morgan Stanley also lost a highly publicized Florida state court case involving allegations of document spoliation.²³³ The verdict against Morgan Stanley was approximately \$1.5 billion.²³⁴ In perhaps the most frightening new development, a court pointed to a litigant's work product claim, reflected on its privilege log, as triggering a duty to have preserved pertinent documents— starting on the day that the company created the purportedly work-product protected document.²³⁵

²³¹ See, e.g., *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005) (explaining that a litigant asserting a spoliation claim must show bad faith if its adversary destroyed documents before the appropriate “trigger date”, when a party knows or should have known that the evidence is relevant to the future or current litigation,” but they need not show bad faith if documents are destroyed after that date.); *Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005) (holding that a company had engaged in spoliation and that when Broccoli made numerous complaints regarding an employee's inappropriate behavior throughout 2001, which was communicated verbally and via email, the company should have started saving documents as of that time).

²³² *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004).

²³³ Landon Thomas, *Jury Tallies Morgan's Total at \$1.45 Billion*, N.Y. TIMES, May 5, 2005, at C1; see also Michael Christie, *Morgan Stanley Case Highlights Email Perils*, REUTERS, May 20, 2005.

²³⁴ Thomas, *supra* note 240.

²³⁵ *Anderson v. Sotheby's Inc. Severance Plan*, No. 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517, at *11 (S.D.N.Y. Oct. 11, 2005):

A duty to preserve evidence arises when the party in possession of the evidence is notified of its relevance. A party is on notice once it receives a discovery request or the complaint alerts the party that certain information will likely be sought in discovery. However, “the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.”

Id. See generally *Anderson v. Sotheby's Inc. Severance Plan*, No. 04 Civ. 8180 (SAS) (DFE), 2005 U.S. Dist. LEXIS 9033, at 23 (S.D.N.Y. May 13, 2005) (stating that the withheld documents “appear” to be documents that the defendants created in the

[90] Another court addressed a situation in which a defendant accused of spoliation argued that it had not anticipated litigation until 2002, which was after it had destroyed the pertinent documents.²³⁶ When the defendant claimed work product protection for documents created before 2002, the plaintiff argued against such protection.²³⁷ The court rejected plaintiff's argument, noting that "the court made no finding with regard to alleged spoliation or anticipation of litigation that would serve to penalize [defendant] Great Lakes from making any claim of work-product privilege for documents created prior to filing suit."²³⁸ Although it was not stated as bluntly as it could, this decision essentially declined to equate the mental states: (1) required to assert work product protection, and (2) triggering the duty to save responsive documents.²³⁹

[91] The law concerning the duty to retain email communications is evolving. Unfortunately, the law in this area has not yet reached a point where companies can make rational decisions about exactly when to begin preserving e-mails, and the scope of the preservation. No court seems to have required companies to preserve *all* of their e-mails simply because they might at some point be sued. On the other hand, a company's duty to preserve electronic communication begins *before* a company files a lawsuit, or is sued by a plaintiff.²⁴⁰

[92] It appears that courts might use the same "trigger" date for the duty to preserve electronic communication as they use when assessing a work product claim. Companies should keep this in mind before picking an aggressively early date to begin a work product protection claim. Recent changes to Rules 16 and 26 of the Federal Rules of Civil Procedure will presumably focus companies' attention on this matter, which might reduce the likelihood that companies will find themselves in this position.

"ordinary course of assessing an employee's beneficiary's claim for a large severance benefit).

²³⁶ See *Albemarle Corp. v. Great Lakes Chemical Corp.*, Civ. A. No. 02-506-A-M3, 2008 U.S. Dist. LEXIS 4710, at *3-5 (M.D. La. Jan. 22, 2008).

²³⁷ *Id.* at *6.

²³⁸ *Id.*

²³⁹ See *id.*

²⁴⁰ See *Zubulake v. UBS Warburg, LLC (Zubulake I)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

CONCLUSION

[93] Because today's lawyers are trying to deal with the changes triggered by the expanding use of e-mails, it might be difficult for all of them to see what a dramatic change they represent. It will be interesting to see how the ethics rules continue to adapt as new forms of electronic communications supplement, or even replace e-mails. With texting, instant messaging, and new forms of instant communication expanding, we may soon look back at the era of e-mails as the "good old days" when ethics rules could adequately address modern technology.