A Day In The Life Of A Well Run Law Practice

All You Need To Know About Law Practice Management But Were Afraid To Ask

Amy J. Cocco | Bethann R. Lloyd
WHC 429 Fourth Avenue, Suite 602 Pittsburgh, PA 15219

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- Signing Up Clients
  - Marketing
  - Client Selection
  - Engagement agreements
- Bringing in the Money
  - Fees
  - Collecting
  - Bank Accounts/Record Keeping
- Office Procedures
  - HR
  - Succession Planning
  - Technology
  - File Management
- Closing the Matter

2

Attorney Advertising and Marketing

- Social Media
- Internet Marketing
- Pa.R.P.C. Rules 7.1 et. seq.
- Specialization
- Reviews and Endorsements
- Referrals

3

Client Selection

Accepting or Rejecting a New Client or a New Matter?

- Pick your clients
- Identify your client, and those who aren't your client
- Don't Dabble
- Joint / Multiple Clients
- Pa.R.P.C. Rule 1.16

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Signing Up The Client

- When lawyers apply for malpractice insurance, the majority claim to routinely use engagement letters in their practices.
- When a malpractice claim is asserted, the lawyer's file rarely contains an engagement letter.
- You must save your engagement letter for 5 years

5

Signing Up The Client

Include, at a minimum, the following information:

- Scope of undertaking
- Identity of client
- Fee arrangement
- File retention and destruction procedure

AND

- Signed by the client.

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Fees

- Retainers
- Contingency
- Hourly
- Flat fee
- Reasonableness
- Billing on a regular basis
- Detail, detail, detail
- Withdrawal if not paid

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Collecting your fees

- Charging Liens / Retaining Liens
- Suing for fees
- ADR opportunities
- Fee concessions (Hair cut)
- Successor Attorney liability
- LPL Policy provisions

8

Record Keeping 101

Rule 1.15 - Record Keeping Rules

Lawyer must maintain for 5 years following the last distribution of funds or the termination of the attorney client relationship whichever is later:

- Individual Client ledger sheet for each trust client
- -Fee Agreement (Rule 1.5 writing)
- -Distribution Statements
- -Transaction Records
- -Check Register
- **-Monthly Reconciliation Forms**

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Succession Planning

GOAL: ORDERLY TRANSITION

- Not (yet) mandatory in PA
- A smooth transition
- Content and reassured clients
- The longevity of the future of the firm
- Proper representation of all clients
- All ethical rules obeyed

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Managing the file

- Keep client informed
- Document, document, document
- Emails/Texts
  - cc/bcc
- Advise if you don't meet LPL requirements
- Prepare clients for bad results
- Don't guarantee success

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Staff and Hiring

- Training Employees
- Vetting Vendors
- Office Policies

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Technology

- Rule 1.1 "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...."

- Rule 1.6(d) "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

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Technology

- Confidentiality – Rule 1.6
- Cyber – Claims and Causes
- Public Access Policy
- Emailing
- Texting
- Remote Destruction
- Social Media

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Files

- Who owns the client file
- What's included in the client file
- How long do I have to keep it
- Who can I give it to

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After the Matter is Done

Suggested Closing File Checklist

- ✓Disengagement letter sent
- ✓Return original materials to clients
- ✓Lawyers should review closed files prior to storage/destruction
- ✓Original client documents should not be destroyed without making an effort to return them to the client
- ✓Destruction records must be retained "for a reasonable period of time"
- ✓Maintain confidentiality destroying files

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Reference Materials

Maleski v. Corporate Life Insurance Company, 641 A.2d 1 (1994)

Recht v. Clairton Urban Redevelopment Authority, 168 A.2d 134 (Pa. 1961)

PBA Formal Ethics Opinion 2007-100 Client Files

PBA Formal Ethics Opinion 2011-200 Ethical Obligations For Attorneys Using Cloud Computer

PBA Formal Ethics Opinion 2014-300 Social Media

ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, 5/22/2017

Engagement Agreement article

Understanding Record Keeping rules article

Dos and Don'ts Article

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Parrish v. Wilson, Pa.Super., May 12, 2014

402 Pa. 599
Supreme Court of Pennsylvania.

Herman H. **RECHT**, Appellant,
v.
URBAN REDEVELOPMENT
AUTHORITY OF the CITY OF CLAIRTON.

Jan. 17, 1961.
|
Rehearing Denied March 10, 1961.

Synopsis
Condemnation proceeding, wherein the attorney who had represented the condemnee before the viewers petitioned for a rule on the condemnee and the condemnor to show cause why his fee for services in the viewers' proceeding should not be paid from the judgment obtained by the condemnee in the trial de novo on appeal from the viewers' report. The Court of Common Pleas of Allegheny County, No. 816 January Term, 1955, Samuel A. Weiss, J., entered judgment adverse to the condemnee, and he appealed. The Superior Court, No. 114 April Term, 1959, 191 Pa.Super. 404, 156 A.2d 877, affirmed judgment, and the condemnee appealed. The Supreme Court, No. 178 March Term, 1960, Benjamin R. Jones, J., held that the attorney, who took no part in the preparation for the appeal or the trial de novo on appeal, could not assert a charging lien against jury verdict recovered on the trial de novo.

Judgment reversed.

West Headnotes (5)

[1] Eminent Domain
Costs, Fees, and Expenses

Trial court had no jurisdiction, in proceeding on attorney's petition for rule on former client-condemnee and condemnor to show cause why attorney's fee for services in viewers' proceeding should not be paid from judgment obtained in trial de novo on appeal from viewers' report, to adjudicate attorney's claim for fees.

9 Cases that cite this headnote

[2] Attorney and Client
Judgment or Proceeds Thereof

Attorney, who represented condemnee in proceeding before viewers, but who took no party in preparation of appeal or trial de novo on appeal from viewers' report, could not assert a charging lien against jury verdict recovered on the trial de novo. 53 P.S. § 37842.

21 Cases that cite this headnote

[3] Attorney and Client
Right to Lien

Attorney has right to an equitable charging lien if there is fund for distribution on equitable principles, if attorney's services operated substantially or primarily to secure such fund, if attorney and client agreed that attorney was to look to fund, rather than client, for his compensation, if lien claimed is limited to costs, fees, or other disbursements incurred in litigation by which fund was raised, and if equitable considerations necessitating recognition and application of charging lien exist.

61 Cases that cite this headnote

[4] Eminent Domain
Trial or Review

Appeal under Third Class City Code from reports of viewers for jury trial in court of common pleas is a de novo proceeding. 53 P.S. § 37842.

1 Cases that cite this headnote

[5] Eminent Domain

Proceedings for Transfer of Cause and Effect of Appeal

Taking of an appeal, under Third Class City Code, from reports of viewers to court of common pleas for jury trial extinguishes determination and award rendered in viewers' proceeding, and viewers' proceeding becomes merely part of history of case without weight or bearing on merits of case before jury. 53 P.S. § 37842.

Cases that cite this headnote

Attorneys and Law Firms

***601** ****135** Joseph I. Lewis, Pittsburgh, for appellant.

William M. Acker, John B. Nicklas, Jr., McCrady & Nicklas, Pittsburgh, for appellee.

***600** Before CHARLES ALVIN JONES, C.J., and BELL, MUSMANNO, BENJAMIN R. JONES, COHEN, BOK and EAGEN, JJ.

Opinion

BENJAMIN R. JONES, Justice.

This is an appeal from a decision of the Superior Court (191 Pa.Super. 404, 156 A.2d 877) which affirmed a judgment entered by the Court of Common Pleas of Allegheny County in the amount of $750 with interest and costs in favor of J. B. Nicklas, Jr., an attorney, and against Herman **Recht**, a judgment which the court directed be a 'charging lien' against a jury verdict recovered by **Recht** against the Urban Redevelopment Authority of the City of Clairton [Authority].

The issue herein presented is: may an attorney assert a 'charging lien' against a judgment recovered as a jury verdict in an appeal from a viewers' award in a condemnation proceeding if the attorney took no part in the preparation or trial of the appeal proceeding?

Recht owned an undividen one-sixth interest in certain real estate in the city of Clairton. This realty was condemned by the Authority of that city in eminent domain proceedings in the Court of Common Pleas of Allegheny County, No. 312 April Term, 1954.[1] A board ***602** of viewers was appointed and proceedings were held before the viewers which resulted in an award of $22,500, of which $3,750 represented **Recht's** share. Attorney Nicklas took part in *that proceeding*, filed and argued exceptions to the viewers' award and he further prepared and filed a petition for appeal to the Court of Common Pleas of Allegheny County on behalf of all the tenants in common [No. 1057 January Term, 1955]. However, all of the parties, with the exception of **Recht**, ****136** finally accepted the viewers' award rather than proceed with a jury trial.

Attorney Nicklas then submitted a bill of $750 to **Recht** for his services rendered in the viewers' proceeding [No. 321 April Term]. **Recht** denied that Attorney Nicklas represented his interests in that proceeding or that he was ever retained to do so, and, accordingly, refused to pay the bill.

Subsequently, a separate appeal to the Court of Common Pleas of Allegheny County was filed on behalf of **Recht** [No. 816 January Term, 1955] by Louis Rosenfield, Esq.[2] After a trial, **Recht** recovered a verdict of $6,360 against the Authority upon which a judgment was duly entered. Attorney Nicklas did not participate in that proceeding.

Thereafter, Attorney Nicklas presented a petition praying for a charging lien against the verdict and judgment thereon awarded to **Recht**. The court, acting in the capacity of a chancellor, granted a rule on **Recht** and the Authority to show cause why the sum of $750 [fee for services] should not be paid out of the $6,360 judgment. The Authority answered, alleging ***603** that it was a stakeholder of the fund and that it was ready or prepared to pay as the court ordered. By order of court, the Authority was permitted to the pay the amount of the judgment to **Recht** upon the filing of a bond to insure and protect the claim of Attorney Nicklas. Herman **Recht** presented a motion to dismiss the rule, which was argued before the court en banc. The court refused the motion and ordered **Recht** to answer the rule. **Recht** then answered the rule denying that the relationship of attorney and client ever existed between the parties in the viewers' proceeding

and denying the right of Attorney Nicklas to any lien. Recht later submitted a petition for leave to amend his answer for the purpose of requesting a jury trial; a rule to show cause was granted, and, after oral argument and briefs, the court en banc dismissed the petition.[3] A hearing was held before the court and on the pleadings and the testimony taken, the court found as a fact that Recht had retained Attorney Nicklas as counsel to represent him in the viewers' proceeding and that the sum of $750 was fair and reasonable. The court entered a judgment in favor of Attorney Nicklas and against Recht and directed that such judgment be a charging lien against the fund of $6,360.

[1] **[2]** Upon Attorney Nicklas' petition for a rule, the court below first adjudicated Nicklas' claim for fees against Recht and then proceeded to make the judgment thus obtained a charging lien on the fund realized in the condemnation proceeding. In both instances, the court below erred. The court below had no jurisdiction in this form of proceeding to pass upon and adjudicate Nicklas' claim for fees and the court could not in the capacity of a chancellor assume such jurisdiction. Furthermore, assuming, *arguendo*, the court had jurisdiction ***604** to pass upon the validity of Nicklas' claim for fees, under the instant circumstances, it could not make the judgment a charging lien on this fund.

The right of an attorney to secure an *equitable charging lien* upon a fund has been frequently recognized by the appellate courts of the Commonwealth. McKelvy's and Sterrett's Appeals, 108 Pa. 615, is a landmark decision on the subject. In that case, a controversy had arisen out of an award made to Sterrett and others by a master's court. Sterrett's attorney, Neill, moved to have his fee paid out of the share of his client, Sterrett. An auditor was appointed and he found that Neill was entitled to his fee. This Court, affirming the decree entered below, stated that counsel had no lien upon the fund but, since its existence ****137** was due to counsel's efforts and since it had been agreed that compensation was to be from the fund recovered, counsel was and would be treated as the 'equitable owner' to the extent of his fees. It further appeared that Sterrett, the client, was insolvent.

In Appeal of Atkinson, 8 Sadler 292, 11 A. 239 an attorney had secured a judgment for his corporate client and the money realized by execution on the judgment was paid into court and an auditor appointed to distribute the proceeds. Upon the request of the attorney for allowance of his fees from the fund, we affirmed, per curiam, the decree of the court below which held that where a fund is brought into court through the efforts of an attorney, the court may award him reasonable compensation out of the fund, especially where the client is insolvent.

In Aber's Petition, 1901, 18 Pa.Super. 110, Aber obtained a judgment against Schnuth for $188.42. Shortly thereafter, Schnuth obtained a judgment against Aber for $327.28. The day before entry of the latter judgment, Schnuth assigned it to his attorneys for services rendered in that and other proceedings. ***605** Aber was granted a rule upon Schnuth and his attorneys to show cause why he should not be allowed to set off his judgment. Schnuth was insolvent at the time. The attorneys claiming a lien upon the judgment, the court discharged the rule. While this Court reversed on other grounds, it was stated that, even assuming that a lien was available upon the fund, such lien was limited to claims for services rendered in the proceeding which created the fund and did not extend to services rendered in other litigation.

In Seybert v. Salem Township, 22 Pa.Super. 459, counsel was retained by the plaintiff and he prepared a case for trial. Other counsel however prosecuted the case to judgment and received the payment therefor. The first counsel then petitioned for a rule to show cause why he should not be paid out of the funds in the hands of the attorneys. The court found that there was no fund created by the services of the attorney nor was there any agreement between counsel and his former client for the payment of services, and, therefore, no basis for the imposition of a lien upon such funds. The Court stated that the relationship of the parties under these circumstances was that of creditor and debtor and that counsel was required to pursue his remedy in the ordinary fashion for collecting debts, namely, in an assumpsit action.

In Quakertown & Eastern Railroad Co. v. Guarantors' Liability Indemnity Co., 206 Pa. 350, 55 A. 1033, an attorney was retained to secure certain bonds wrongfully

detained by the defendants. The attorney filed suit in equity and this suit was finally settled. Not being satisfied with the amount of compensation offered him, the attorney refused to mark the case settled of record. The defendants petitioned for leave to deposit the bonds with the prothonotary and asked for an order on the attorney to interplead. The court held that there was no fund created by counsel nor any ***606** agreement to look to that fund for compensation and, therefore, no reason for the court to interfere in any extraordinary manner for counsel's protection.

In the leading case, Harris' Appeal, 323 Pa. 124, 186 A. 92, Mrs. Harris retained counsel, a Mr. Jacoby, to represent her in certain condemnation proceedings instituted by the city. It was agreed in writing that counsel fees were to be 10% of the amount, if any, collected from the city. A bank held a mortgage on the condemned property as security for a debt due them by Mrs. Harris. Jacoby represented Mrs. Harris in the viewers' proceedings and an award was made which was less than the amount of the mortgage. After the award became final but before payment by the city, the mortgagee intervened and filed a petition to have the whole award paid to it as lien creditor. Jacoby claimed a charging lien on the fund. The Court found that the fund was created by Jacoby's efforts, ****138** that it had been agreed that Jacoby would look to the fund for compensation, that the client was now insolvent, and further that the bank although on notice of the proceedings did not participate therein but was now attempting to take advantage of Jacoby's efforts. The Court concluded that Jacoby had an equitable charging lien upon the fund to the extent of his claim.

In Turtle Creek Bank & Trust Co. v. Murdock, 150 Pa.Super. 277, 28 A.2d 320, an attorney successfully established his client's claim to certain real estate in an equitable proceeding. A bank had a judgment against the client and revived its judgment so that it became a lien upon the property recovered. The bank issued execution and the proceeds of the sale were less than the amount due on the judgment lien. The sheriff's return showed the amount of the sale was applied to the bank's judgment. The attorney filed exceptions to the return and claimed a lien to the extent of his fee. The Court held that there was a fund created ***607** by the services of the attorney, and it had been agreed that he was to look to the fund for his compensation and, therefore the fund was subject to the claim of the attorney.

In Jones et al. v. City of Pittsburgh, 157 Pa.Super. 528, 43 A.2d 554, an attorney for the plaintiff sought to impose a charging lien upon a fund created in a trespass action against the city for dumping refuse upon the plaintiff's property. The city refused to pay the judgment and proposed to apply the same [set-off] to delinquent taxes due against the property, which taxes amounted to more than the judgment recovered in the thespass action. It was held, that under the circumstances, since the fund was created by the attorney and he was to look to the fund for compensation [contingent fee], the fund should be applied equitably to payment of his claim.

In Purman Estate, 358 Pa. 187, 56 A.2d 86, 175 A.L.R. 1129, a decedent devised his entire estate to his daughter and son to the exclusion of his widow. The widow elected to take against the will, and, as a result, friction developed between the widow and daughter. The daughter retained two attorneys, one orally and the other by written agreement. Subsequently, the mother and daughter adjusted their differences and an administration account was filed. Both attorneys presented claims against the share of the distributee-daughter. This Court held, that, under the circumstances and facts of the case, while the attorneys represented the interests of the daughter, those services created no fund, and there was, therefore, no basis to establish a charging lien.

In Silverstein v. Hornick, 376 Pa. 536, 103 A.2d 734, plaintiffs retained certain attorneys on a contingent fee basis. The attorneys after considerable negotiation effected a settlement which resulted in the execution of a deed of trust securing plaintiffs' rights. ***608** Plaintiffs demanded that the trustee pay distributions under the trust to them directly rather than to the attorneys who claimed a charging lien to the extent of their fee. We held that justice and equity dictated that, where the services of an attorney contributed to the creation of a fund and there is an agreement that the fee is to be paid from the fund, the fund should be subject to a charging lien of the attorneys to the extent of their fee.

In Syme v. Bankers National Life Ins. Co., 400 Pa. 74, 161 A.2d 29, counsel secured an award in an action of assumpsit on an insurance policy. It was agreed that counsel was to be paid out of the proceeds, if any, recovered. Counsel filed a petition to establish a charging lien upon the proceeds of the policy. This Court in affirming the denial of the petition, held, inter alia, that the case was devoid of the factors necessitating recognition of an attorney's charging lien on equitable principles.

[3] A review of these authorities illustrates that before a charging lien will be recognized and applied, it must appear (1) ****139** that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien. Applying these principles to the instant case, we find neither reason nor authority to support the action of the court below.

Attorney Nicklas took part in the viewers' proceeding [No. 312 April Term], but he did not participate in the trial on appeal before the Common Pleas Court ***609** and jury [No. 816 January Term]. The lower court treated and considered the viewers' proceeding and the trial on appeal as one proceeding and concluded that since the viewers' proceeding was a procedural requirement (statutory) to the right to appeal, the services of Attorney Nicklas played an essential and necessary part in the ultimate disposition of the case, and that his services, even though rendered only in the viewers' proceeding, operated to create the fund secured in the jury trial. In considering and treating the viewers' proceeding and the trial on appeal as one proceeding, the court below fell into error.

[4] **[5]** The Third Class City Code (Act of June 23, 1931, P.L. 932, Art. XXVIII, Sec. 2842, as amended, 53 P.S. § 37842) permits either party to appeal to the court of common pleas and demand a jury trial, if such appeal is filed within thirty days after the report of viewers is filed. This appeal is a *de novo* proceeding. In such proceeding the case is heard and decided as if it were being tried for the first time. As a result of such an appeal, the determination and award rendered in the viewers' proceeding is extinguished. That proceeding becomes, therefore, merely a part of the history of the case and has neither weight nor bearing upon the merits of the case before the jury. While these proceedings may be related procedurally, they are in all other respects separate and distinct proceedings and are to be so considered and treated.

The only fund available in this case is that fund which was created as a result of the trial [No. 816 January Term]. Attorney Nicklas participated in the action at No. 312 April Term but he did not participate in action No. 816 January Term. While his services were valuable to **Recht's** cause it follows from what we have said that his services did not operate, substantially or primarily, to create the fund upon which he now claims the right to a charging lien. His services were ***610** rendered in No. 312 and not in No. 816, and, therefore, not in the litigation which gave rise to the fund. He has no right to a charging lien as against that fund.

A further examination of the record fails to disclose any indication, averment, or conclusion that there was any agreement between Attorney Nicklas and **Recht** that counsel would look to the fund for his compensation. The only statement in the record in that regard is the finding and conclusion of the court below that the fee claimed by Attorney Nicklas for his services was just and reasonable. An agreement to look to the fund for compensation is essential to the recognition of a charging lien and this requirement is not satisfied by a finding of the court that the fee or amount claimed is just and reasonable. The record indicates that no such agreement ever existed and this conclusion is buttressed by the fact that Attorney Nicklas submitted a bill to and demanded payment ****140** of **Recht** *prior* to the creation of the fund secured in the jury trial.

Nor are we able to discover in the record any equitable reasons necessitating or justifying the imposition of the charging lien in the present case. It does not appear that Herman **Recht** is attempting to defraud counsel nor that he is insolvent. There is no adverse or third-party attempting to appropriate the fund. Indeed, it does not

appear that the right of Attorney Nicklas to collect his fee has been in any wise jeopardized.

Judgment reversed.

All Citations

402 Pa. 599, 168 A.2d 134

Footnotes

1 The legality of this condemnation proceeding was decided by this Court in Oliver v. City of Clairton, 374 Pa. 333, 98 A.2d 47. Attorney Nicklas was retained there by **Recht** to contest the validity of the condemnation proceedings and he intervened in the above-captioned case and argued the same before this Court. Attorney Nicklas was paid in full for his services rendered in that case and makes no claim therefor in this proceeding.

2 This appeal was tried by Joseph I. Lewis, Esq., present counsel for **Recht** on this appeal.

3 The adjudication of the court below discloses that the petition to amend was not timely and for that reason was refused.

163 Pa.Cmwlth. 36
Commonwealth Court of Pennsylvania.

Cynthia M. **MALESKI**, Insurance Commissioner of the Commonwealth of Pennsylvania, By Her Deputy, Ronald E. CHRONISTER, Plaintiff,
v.
CORPORATE LIFE INSURANCE COMPANY, Defendant.

Argued Feb. 23, 1994.
|
Decided March 9, 1994.
|
Publication Ordered April 11, 1994.

Synopsis

Former counsel to life insurance company moved for reconsideration of order entitling special counsel to Insurance Commissioner to boxes of documents from files relating to representation of company prior to liquidation. The Commonwealth Court, No. 175 M.D. 1993, Pellegrini, J., held that: (**1**) Commissioner could waive any attorney-client privilege held by company; (2) former directors and officers of company may have attorney-client privilege separate from corporation; and (3) former counsel had no proprietary interest in the documents.

Motion denied.

Reconsideration denied, 163 Pa.Cmwlth. 49, **641** **A.2d** 7.

West Headnotes (9)

[] **Privileged Communications and Confidentiality**
Waiver of privilege

Insurance Commissioner as statutory liquidator of insurance company may waive any attorney-client privilege held by company with respect to confidential preliquidation communications; Commissioner's management successor to former directors and officers of company. Rules of Prof.Conduct, Rule **1**.6, 42 Pa.C.S.A.; 42 Pa.C.S.A. §§ 5916, 5928; 40 P.S. §§ 221.21, 221.23.

7 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Attorney-client privilege attaches to communications made by corporate as well as individual clients. Rules of Prof.Conduct, Rule **1**.6, 42 Pa.C.S.A.; 42 Pa.C.S.A. §§ 5916, 5928.

8 Cases that cite this headnote

[3] **Corporations and Business Organizations**
Corporation acts through officers or agents

As inanimate entity, corporation can only act with respect to attorney-client privileges through those authorized to act on its behalf. Rules of Prof.Conduct, Rule **1**.6, 42 Pa.C.S.A.; 42 Pa.C.S.A. §§ 5916, 5928.

1 Cases that cite this headnote

[4] **Corporations and Business Organizations**
Directors, officers, or agents in general

Displaced managers may not assert corporate attorney-client privilege over wishes of current managers even as to statements that former managers might have made to counsel concerning matters within scope of their corporate duties. Rules of Prof.Conduct, Rule **1**.6, 42 Pa.C.S.A.; 42 Pa.C.S.A. §§ 5916, 5928.

1 Cases that cite this headnote

[5] Privileged Communications and Confidentiality

Corporations, partnerships, associations, and other entities

Liquidated corporation's former directors and officers held attorney-client privilege separate and distinct from corporation's privilege, and, thus, communications were unavailable to Insurance Commissioner as statutory liquidator, if former directors and officers approached counsel for purpose of seeking legal advice and clarified that they were seeking advice in their individual capacities, if counsel saw fit to communicate with them in individual capacities, if conversations with counsel were confidential, and, if substance of communications with counsel did not contain matters within company or general affairs of company. Rules of Prof.Conduct, Rule 1.6, 42 Pa.C.S.A.; 42 Pa.C.S.A. §§ 5916, 5928.

14 Cases that cite this headnote

[6] Pretrial Procedure

Work-product privilege

Work-product doctrine has not been incorporated into liquidation proceedings. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

3 Cases that cite this headnote

[7] Pretrial Procedure

Work-product privilege

There is no common law work-product doctrine.

2 Cases that cite this headnote

[8] Attorney and Client

The relation in general

Insurance commissioner as statutory liquidator, rather than insurance company's former law firm, held proprietary interest in documents that law firm prepared for company. Rules of Prof.Conduct, Rule 1.15, 42 Pa.C.S.A.; Code of Prof.Resp. DR 9–102(B).

2 Cases that cite this headnote

[9] Attorney and Client

The relation in general

Once client pays for creation of legal document and it is placed in client's file, it is client, rather than attorney, who holds proprietary interest in the document. Rules of Prof.Conduct, Rule 1.15, 42 Pa.C.S.A.; Code of Prof.Resp. DR 9–102(B).

5 Cases that cite this headnote

Attorneys and Law Firms

****2** ***38** Jerome J. Shestack, Zachary L. Grayson and Linda J. Wells, for plaintiff.

Peter J. Tucci, Michael L. Browne, Denise Pallante and Richard A. Sprague, for defendant.

James D. Golkow, Patrick J. O'Connor, Gerianne Hannibal and Douglas B. Lang, for intervenor, Berry & Martin.

Opinion

PELLEGRINI, Judge.

Frederic S. Richardson, Theodore D. Nering and the law firm of Berry & Martin (collectively, Petitioners), former counsel to Corporate Life Insurance Company (Corporate Life) move for reconsideration of this Court's order of February 18, 1994, directing Berry & Martin to turn over to Wolf, Block, Schorr and Solis–Cohen (Wolf, Block), special counsel to the Insurance Commissioner (Statutory Liquidator), nineteen sealed boxes of documents from files relating to its representation of Corporate Life, claimed to be either privileged or protected as attorney work-product.

641 A.2d 1

On February 18, 1994, following a determination that the corporation was insolvent within the meaning found in the Insurance Department Act (Act), [1] this Court ordered that Corporate Life, a Pennsylvania stock life insurance company, ***39** be dissolved and liquidated. In addition to the Order of Liquidation, this Court also directed that all files pertaining to Corporate Life be turned over to Wolf, Block, acting on behalf of the Statutory Liquidator. After Wolf, Block determined that Berry & Martin had served as legal counsel to Corporate Life, representatives of Wolf, Block demanded that all Berry & Martin files pertaining to the Corporation be turned over. In compliance with this Court's order, Berry & Martin turned over all Corporate Life files in its possession, but sealing nineteen boxes of documents, asserting immunity under the attorney-client privilege on behalf of both Corporate Life and its former directors and officers, as well as the work-product doctrine on its own behalf. Petitioners then filed these motions for reconsideration of the February 18, 1994, order, essentially seeking a protective order regarding the contents of the nineteen sealed boxes.

Petitioners contend that the nineteen sealed boxes contain three types of documents immune from disclosure:

1) Documents in which Corporate Life can claim attorney-client privilege.

2) Documents in which former directors and officers of Corporate Life can claim a privilege separate from that of the corporation.

3) Documents constituting the work-product of Berry & Martin which should not be disclosed because of the proprietary interest the firm holds in them.

The Statutory Liquidator contends that because it now stands as the management of Corporate Life, it may waive any attorney-client privilege which the corporation might hold. It also contends that the former directors and officers of Corporate Life cannot assert the attorney-client privilege with regard to communications made in their role as corporate officers. Finally, it contends that the Pennsylvania law does not recognize the work-product doctrine outside pre-trial discovery or grand jury proceedings.

***40** I.

[1] [2] [3] [4] The initial issue presented is whether the Statutory Liquidator of Corporate Life has the power to waive any attorney-client privilege Corporate Life may have as to pre-liquidation communications. In statute, common law, and the Rules of Professional Conduct governing attorneys, Pennsylvania has recognized that confidential communications from a client to an attorney are immune from disclosure. See, e.g., 42 Pa.C.S. §§ 5916, 5928; Pennsylvania Rules of Professional Conduct Rule 1.6; and ****3** *Estate of Kofsky,* 487 Pa. 473, 409 A.2d 1358 (1979). This privilege attaches to communications made by corporate as well as individual clients. *Upjohn v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). A corporation, as an inanimate entity, can only act with respect to the privilege through those authorized to act on its behalf. *Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). Under the Pennsylvania Corporation Law, the authority to act on behalf of a corporation is vested in the directors and officers. [2] This authority passes with the succession of management. Displaced managers may not assert corporate privilege over the wishes of current managers, even as to statements former managers might have made to counsel concerning matters within the scope of their corporate duties. *Id.* at 349, 105 S.Ct. at 1991. In *Weintraub,* the United States Supreme Court addressed the issue of whether the bankruptcy trustee held the power to waive a corporation's attorney-client privilege to the same extent as successive management.

Weintraub involved a corporation which had filed a petition for liquidation under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 761–766. The trustee appointed to liquidate the corporation sought to waive the attorney-client privilege with respect to confidential pre-bankruptcy communications. In addressing whether the power to waive the privilege passed to the trustee as it would have to successive management had the corporation remained solvent, the Court examined the role of the trustee in liquidating the corporation. ***41** *Weintraub, supra* at 351–352, 105 S.Ct. at 1992. The Court

determined that, even though their ultimate goals differed, the powers and duties of the trustee in maximizing the estate of the corporation were analogous to those held by a solvent corporate management, even to the extent of conducting business operation if necessary. *Id.* at 352, 105 S.Ct. at 1993. In addition, based upon the trustee's duty to seek recovery on behalf of the corporation from former directors and officers, the Court concluded that the power to waive the attorney-client privilege with respect to pre-bankruptcy communications properly rested with the trustee as the management successor to the pre-bankruptcy directors and officers. *Id.* at 353, 105 S.Ct. at 353.

Petitioners correctly point out that *Weintraub* was decided on the basis of the powers of a liquidating trustee in bankruptcy, and argue that the dissolution of the corporation here distinguishes that case. *Weintraub* established a functional test to determine what successors were entitled to waive the privilege; when a successor manages the affairs of a corporation, even if merely winding up its affairs, the right to assert the privilege devolves to the successor. Consistent with that holding, the right to waive the privilege has not been limited to matters arising under the Bankruptcy Code and has even been applied to corporations that have been dissolved by orders of liquidation where there is broad-based power of the liquidator to continue to engage in management-type activity. See, *Federal Deposit Insurance Corporation v. Cherry, Bekaert & Holland,* 129 F.R.D. 188 (M.D.Fla.1989); *Federal Deposit Insurance Corporation v. Berry,* Civ. No. 1–85–62 (E.D.Tenn., June 10, 1985) and *Federal Deposit Insurance Corporation v. Ellis,* Civ. No. CD–84–PT–2560–M (M.D.Ala., Dec. 23, 1985); but see, *Federal Deposit Insurance Corporation v. McAtee,* 124 F.R.D. 662 (D.Kan.1988) (holding *Weintraub* rational inapplicable to liquidations because corporation ceases to exist after liquidation order); and *Federal Deposit Insurance Corporation v. Amundson,* 682 F.Supp. 981 (D.Minn.1988) (holding *Weintraub* not controlling once a corporation is dissolved). In *Cherry, Berry* and *Ellis,* where the FDIC acted in a liquidation role after the dissolution of the ***42** corporation, the courts held *Weintraub* to be controlling based upon the "winding up" function of the liquidator where the affairs of the dissolved entity continued to be managed for liquidation purposes despite the dissolution. Conversely, *Amundson* and *McAtee* dealt with situations where the FDIC acted in its corporate capacity, solely as the purchaser of a defunct corporation's assets, in which there was no authority for the FDIC to engage in ****4** management type functions. See *Texas American Bankshares, Inc. v. Clarke,* 954 F.2d 329 (5th Cir.1992) (liquidation involves a continuation of the management of corporate affairs for the purposes of estate maximization while corporate purchasing does not).

Under the Act, the Statutory Liquidator, performs functions similar to the trustee in liquidations under the Bankruptcy Code. In effecting a liquidation, the Statutory Liquidator has the power:

- To collect debts and monies due the insurer and to do such other acts as are necessary or expedient to collect, conserve or protect the assets or property of the insurer.
- To sell the property of the insurer and use the assets of the estate to transfer policy obligations to other insurers.
- To acquire, encumber, lease, improve, sell, or otherwise deal with any property of the insurer and otherwise engage in any transaction in connection with the liquidation.
- To borrow money and enter into contracts on behalf of the insurer, as well as to make bank deposits and invest monies.
- To initiate and defend lawsuits, including instituting suits against former officers and directors of the insurer.

See, 40 P.S. § 221.21. In addition, the Statutory Liquidator has the right to do "such other acts, ... as may be necessary or expedient for the accomplishment of or in aid of the purpose of liquidation." 40 P.S. § 221.23(23).

As was the case with the bankruptcy trustee in *Weintraub,* and the FDIC in *Cherry, Berry* and *Ellis,* the Statutory Liquidator performs a function most analogous to that of the management of a corporation, continuing to wind up the affairs of Corporate Life after the dissolution of its corporate ***43** existence. We feel that *Weintraub*

functional analysis is properly employed here and its standards met by the Statutory Liquidator despite the dissolution of the corporation. Accordingly, as the management successor to the former directors and officers of Corporate Life, the Statutory Liquidator may waive any attorney-client privilege held by Corporate Life with respect to confidential pre-liquidation communications.

II.

[5] Petitioners next contend that the former directors and officers of Corporate Life hold a privilege separate and distinct from the corporation's privilege for communications made to corporate counsel seeking individual representation. While our state courts have not yet addressed this issue, both parties correctly point out that the federal courts have. The parties direct our attention to *In re: Beville, Bressler & Shulman Asset Management,* 805 F.2d 120 (3d Cir.1986). In *Beville,* the United States Court of Appeals for the Third Circuit held that while former officers and directors of a corporation may not claim privilege for communications made by them in their corporate capacities, they nonetheless may hold a privilege as to communications made by them in their individual capacities. *Id.* at 124–125. The court recognized that if an officer or director approached outside corporate counsel as an individual, seeking individual representation, the attorney-client privilege attaches to those communications and may be asserted by the officer or director. *Id.* The court held that in order to assert this privilege, the burden rests with the officers or directors to establish that the representation sought was in fact individual and approved a five-factor test to make this determination. Relying on the language used in *In re: Grand Jury Investigation, No. 83–30557,* 575 F.Supp. 777 (N.D.Ga.1983), the court held that the officer or director must show:

- That they approached counsel for the purpose of seeking legal advice.
- ***44** . That when they approached counsel, they made it clear that they were seeking legal advice in their individual rather than corporate capacities.
- That counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise.
- That the conversations with counsel were confidential.
- That the substance of their communications with counsel did not contain matters ****5** within the company or the general affairs of the company.

Beville at 123 (citing *In re: Grand Jury Investigation* at 780).

This test recognizes the distinction between the corporation's privilege, and that of the officer or director seeking individual representation separate and apart from corporate matters. Further, we believe that this test insures protection of communications in which the officer or director holds a privilege, while fostering the estate maximization goal of liquidation under the Act. Accordingly, if the former officers and directors of Corporate Life can establish these five required showings as to communications in which they claim a privilege, such communications shall not be available to the Statutory Liquidator unless the former officers and directors choose to waive their privilege. The determination of whether the former officers and directors of Corporate Life hold an individual privilege in documents currently in the possession of the Department shall be made by this Court in accordance with the following order.

III.

[6] Finally, Petitioners contend that certain materials contained in the files confiscated by the Statutory Liquidator are work-product in which Berry & Martin has a proprietary interest and which are immune from disclosure under the work-product doctrine. The Statutory Liquidator contends that the only work-product doctrine recognized in Pennsylvania is that embodied in Pennsylvania Rules of Civil Procedure 4003.3 applicable only to discovery matters.

***45** The work product doctrine was first set out by the United States Supreme Court in *Hickman v. Taylor,*

329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), protecting the mental impressions, conclusions, notes, memoranda, theories, and research, from disclosure during discovery in actions governed by the Federal Rules of Civil Procedure. The federal courts have subsequently extended the scope of the doctrine to grand jury investigations, *In re: Grand Jury Proceedings,* 604 F.2d 798 (3d Cir.1979), as well as requests for information from federal agencies under the Freedom of Information Act.[3] *Federal Trade Commission v. Grolier,* 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983). However, the federal courts have held that the work-product doctrine does not apply to the situation in which a client seeks access to documents created by an attorney in the course of representation. *Spivey v. Zant,* 683 F.2d 881 (5th Cir.1982).

[7] Pa.R.C.P. 4003.3 specifically adopts the doctrine as set out in *Hickman* for pretrial discovery matters in civil actions under the Rules. Our Supreme Court has likewise extended the applicability of the doctrine to pretrial criminal discovery, search warrants, and grand jury proceedings, *In re: Gartley,* 341 Pa.Superior Ct. 350, 491 A.2d 851 (1985), *affirmed sub nom., In re: Search Warrant B–21778,* 513 Pa. 429, 521 A.2d 422 (1987) (pursuant to Pa.R.Crim.P. 305G), and most recently, this Court has applied it to actions brought under the Right-to-Know Act.[4] *Nittany Printing and Publishing Co., Inc. v. Centre County Board of Commissioners,* 156 Pa.Commonwealth Ct. 404, 627 A.2d 301 (1993) (identifying privileged work-product as outside the scope of the statutory definition of public record). In each of these cases, the courts have relied upon the embodiment of the *Hickman* doctrine in a specific rule or statute governing the proceeding and no Pennsylvania court has ever recognized the doctrine in either common or statutory law outside these three areas. Since nothing in the Act incorporates the work-product doctrine into liquidation proceedings, and the Pennsylvania courts do not ***46** recognize a common law work-product doctrine, none of the documents are immune from disclosure on that basis.

[8] Nevertheless, Petitioners contend that Berry & Martin holds a proprietary interest in its work-product which should give it the right to refuse to disclose it to the Statutory Liquidator because the documents do not belong to Corporate Life. The same ****6** argument was made in a similar situation in *Resolution Trust Corporation v. H——, P.C.,* 128 F.R.D. 647 (N.D.Tex.1989). In *Resolution Trust,* the Resolution Trust Corporation (RTC), upon being named conservator of a defunct S & L, requested that the law firm that had previously represented the S & L turn over all its files relating to that representation. While the law firm did turn over part of the files, it refused to turn over attorney's notes and memoranda on the basis that such documents were "the personal property of the individual attorneys who drafted and prepared [the] documents." *Id.* at 648. The RTC sued to recover the entire contents of the files. In ordering the law firm to turn over the entire contents of the files, the court relied upon the language of DR 9–102(B)(4) which provides that a lawyer must "promptly ... deliver to the client as requested by a client ... properties in the possession of the lawyer which the client is entitled to receive." It reasoned that since the S & L in conservatorship paid for the creation of the contents of the files, the attorney's work-product contained in them was now the property of the RTC. *Id.* at 649, quoting *In re: Kaleidoscope, Inc.,* 15 B.R. 232 (Bankr.N.D.Ga.1981), *rev'd on other grounds,* 25 B.R. 729 (N.D.Ga.1982) ("an attorney ... has no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client documents which he determines the client is not entitled to see. The client is either entitled to all of the file or none of it").

[9] We find this reasoning persuasive. Pennsylvania has substantially readopted former DR 9–102(B)(4) in Rule 1.15(b) of the Pennsylvania Rules of Professional Conduct. See Comment to Rule 1.15(b). Notes and memoranda are part of the ***47** package of goods and services which a client purchases when they retain legal counsel. The client is entitled to the full benefit of that for which they pay. We therefore believe that once a client pays for the creation of a legal document, and it is placed in the client's file, it is the client, rather than the attorney who holds a proprietary interest in that document. When a client requests that its property held by an attorney be turned over, under Rule 1.15(b) the attorney must comply. Accordingly, Berry & Martin does not have the right to

withhold any documents belonging to Corporate Life (and now the Department) on the basis of work-product.

An appropriate order will be entered.

ORDER

AND NOW, this 9th day of March, 1994, it is ORDERED that:

1. Petitioners' Motion to Reconsider our order of February 18, 1994, that all Corporate Life legal files be turned over to the Insurance Commissioner as Statutory Liquidator, on the basis of any attorney-client or work-product privilege is denied.

2. Petitioners' Motion to Reconsider our order of February 18, 1994, directing them to turn over files in which former Corporate Life officers may claim a personal attorney-client privilege is granted.

3. To determine which documents in which a personal attorney-client privilege may exist, the parties are to:

a. By March 31, 1994, conduct an inventory of the documents. The inventory shall be conducted as follows: documents in possession of the Insurance Department will be inventoried by Petitioners' representatives at the office of Wolf, Block. Documents in the possession of Reed, Smith shall be inventoried at their offices. A representative of the Insurance Department is entitled to be present during the inventory. After each box is inventoried, it will be resealed until further order of the court.

***48** b. By April 11, 1994, those asserting an attorney-client privilege will file with the court a petition identifying those documents it contends are privileged, documents it contends support their claim, and witnesses that they may call to support their claim.

c. The Statutory Liquidator will have until May 6, 1994, to take depositions of witnesses Petitioners' intend to call. Depositions are to be *limited* to the facts giving rise to the privilege. If the Statutory Liquidator desires to depose parties not named by Petitioners, it may ****7** request permission to do so from the court. The Statutory Liquidator will coordinate in advance the scheduling of the depositions with Petitioners. Petitioners and attorneys who are claiming privilege on their clients' behalf will make themselves available during this period for deposition. If they fail to do so without good excuse as determined by the court, they will be precluded from giving evidence in this matter. The Statutory Liquidator will notify the court of all depositions, including the date and time.

5. A hearing is scheduled for May 12, 1994, at 9:30 a.m. in Philadelphia, in a courtroom to be designated later. Parties in possession of sealed documents shall be responsible for their delivery to the court. If necessary, an inspection, *in camera,* will be held to determine which documents the attorney-client privilege attaches.

6. Berry and Martin's request to copy documents turned over to the Statutory Liquidator is held in abeyance pending inventory.

All Citations

163 Pa.Cmwlth. 36, 641 A.2d 1

Footnotes

1 Act of May 17, 1921, P.L. 789, *as amended,* 40 P.S. § 221.14.

2 15 Pa.C.S. § 1721.

3 5 U.S.C. § 552 *et seq.*

4 Act of June 21, 1957, P.L. 390, *as amended,* 65 P.S. §§ 66.1–66.4.

PENNSYLVANIA BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

ETHICAL OBLIGATIONS FOR ATTORNEYS USING CLOUD COMPUTING/ SOFTWARE AS A SERVICE WHILE FULFILLING THE DUTIES OF CONFIDENTIALITY AND PRESERVATION OF CLIENT PROPERTY

FORMAL OPINION 2011-200

I. Introduction and Summary

If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using "cloud computing." While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely "a fancy way of saying stuff's not on your computer." [1]

From a more technical perspective, "cloud computing" encompasses several similar types of services under different names and brands, including: web-based e-mail, online data storage, software-as-a-service ("SaaS"), platform-as-a-service ("PaaS"), infrastructure-as-a-service ("IaaS"), Amazon Elastic Cloud Compute ("Amazon EC2"), and Google Docs.

This opinion places all such software and services under the "cloud computing" label, as each raises essentially the same ethical issues. In particular, the central question posed by "cloud computing" may be summarized as follows:

> May an attorney ethically store confidential client material in "the cloud"?

In response to this question, this Committee concludes:

> Yes. An attorney may ethically allow client confidential material to be stored in "the cloud" provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.

****

In recent years, technological advances have occurred that have dramatically changed the way attorneys and law firms store, retrieve and access client information. Many law firms view these

[1] Quinn Norton, "Byte Rights," *Maximum PC*, September 2010, at 12.

technological advances as an opportunity to reduce costs, improve efficiency and provide better client service. Perhaps no area has seen greater changes than "cloud computing," which refers to software and related services that store information on a remote computer, *i.e.*, a computer or server that is not located at the law office's physical location. Rather, the information is stored on another company's server, or many servers, possibly all over the world, and the user's computer becomes just a way of accessing the information.[2]

The advent of "cloud computing," as well as the use of electronic devices such as cell phones that take advantage of cloud services, has raised serious questions concerning the manner in which lawyers and law firms handle client information, and has been the subject of numerous ethical inquiries in Pennsylvania and throughout the country. The American Bar Association Commission on Ethics 20/20 has suggested changes to the Model Rules of Professional Conduct designed to remind lawyers of the need to safeguard client confidentiality when engaging in "cloud computing."

Recent "cloud" data breaches from multiple companies, causing millions of dollars in penalties and consumer redress, have increased concerns about data security for cloud services. The Federal Trade Commission ("FTC") has received complaints that inadequate cloud security is placing consumer data at risk, and it is currently studying the security of "cloud computing" and the efficacy of increased regulation. Moreover, the Federal Bureau of Investigations ("FBI") warned law firms in 2010 that they were being specifically targeted by hackers who have designs on accessing the firms' databases.

This Committee has also considered the client confidentiality implications for electronic document transmission and storage in Formal Opinions 2009-100 ("Metadata") and 2010-200 ("Virtual Law Offices"), and an informal Opinion directly addressing "cloud computing." Because of the importance of "cloud computing" to attorneys – and the potential impact that this technological advance may have on the practice of law – this Committee believes that it is appropriate to issue this Formal Opinion to provide guidance to Pennsylvania attorneys concerning their ethical obligations when utilizing "cloud computing."

This Opinion also includes a section discussing the specific implications of web-based electronic mail (e-mail). With regard to web-based email, *i.e.*, products such as Gmail, AOL Mail, Yahoo! and Hotmail, the Committee concludes that attorneys may use e-mail but that, when circumstances require, attorneys must take additional precautions to assure the confidentiality of client information transmitted electronically.

II. Background

For lawyers, "cloud computing" may be desirable because it can provide costs savings and increased efficiency in handling voluminous data. Better still, cloud service is elastic, and users can have as much or as little of a service as they want at any given time. The service is sold on demand, typically by the minute, hour or other increment. Thus, for example, with "cloud computing," an attorney can simplify document management and control costs.

[2] *Id.*

The benefits of using "cloud computing" may include:

- Reduced infrastructure and management;
- Cost identification and effectiveness;
- Improved work production;
- Quick, efficient communication;
- Reduction in routine tasks, enabling staff to elevate work level;
- Constant service;
- Ease of use;
- Mobility;
- Immediate access to updates; and
- Possible enhanced security.

Because "cloud computing" refers to "offsite" storage of client data, much of the control over that data and its security is left with the service provider. Further, data may be stored in other jurisdictions that have different laws and procedures concerning access to or destruction of electronic data. Lawyers using cloud services must therefore be aware of potential risks and take appropriate precautions to prevent compromising client confidentiality, *i.e.*, attorneys must take great care to assure that any data stored offsite remains confidential and not accessible to anyone other than those persons authorized by their firms. They must also assure that the jurisdictions in which the data are physical stored do not have laws or rules that would permit a breach of confidentiality in violation of the Rules of Professional Conduct.

III. Discussion

A. Prior Pennsylvania Opinions

In Formal Opinion 2009-100, this Committee concluded that a transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to an adverse or third party. Metadata is hidden information contained in an electronic document that is not ordinarily visible to the reader. The Committee also concluded, *inter alia*, that a receiving lawyer has a duty pursuant to RPC 4.4(b) to notify the transmitting lawyer if an inadvertent metadata disclosure occurs.

Formal Opinion 2010-200 advised that an attorney with a virtual law office "is under the same obligation to maintain client confidentiality as is the attorney in a traditional physical office." Virtual law offices generally are law offices that do not have traditional brick and mortar facilities. Instead, client communications and file access exist entirely online. This Committee also concluded that attorneys practicing in a virtual law office need not take additional precautions beyond those utilized by traditional law offices to ensure confidentiality, because virtual law firms and many brick-and-mortar firms use electronic filing systems and incur the same or similar risks endemic to accessing electronic files remotely.

Informal Opinion 2010-060 on "cloud computing" stated that an attorney may ethically allow client confidential material to be stored in "the cloud" provided the attorney makes reasonable efforts to protect confidential electronic communications and information. Reasonable efforts

discussed include regularly backing up data, installing firewalls, and avoiding inadvertent disclosures.

B. Pennsylvania Rules of Professional Conduct

An attorney using "cloud computing" is under the same obligation to maintain client confidentiality as is the attorney who uses offline documents management. While no Pennsylvania Rule of Profession Conduct specifically addresses "cloud computing," the following rules, *inter alia,* are implicated:

> Rule 1.0 ("Terminology");
> Rule 1.1 ("Competence");
> Rule 1.4 ("Communication");
> Rule 1.6 ("Confidentiality of Information");
> Rule 1.15 ("Safekeeping Property"); and
> Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants").

Rule 1.1 ("Competence") states:

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

Comment [5] ("Thoroughness and Preparation") of Rule 1.1 provides further guidance about an attorney's obligations to clients that extend beyond legal skills:

> Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. …

Competency is affected by the manner in which an attorney chooses to represent his or her client, or, as Comment [5] to Rule 1.1 succinctly puts it, an attorney's "methods and procedures." Part of a lawyer's responsibility of competency is to take reasonable steps to ensure that client data and information is maintained, organized and kept confidential when required. A lawyer has latitude in choosing how or where to store files and use software that may best accomplish these goals. However, it is important that he or she is aware that some methods, like "cloud computing," require suitable measures to protect confidential electronic communications and information. The risk of security breaches and even the complete loss of data in "cloud computing" is magnified because the security of any stored data is with the service provider. For example, in 2011, the syndicated children's show "Zodiac Island" lost an entire season's worth of episodes when a fired employee for the show's data hosting service accessed the show's content without authorization and wiped it out.[3]

[3] Eriq Gardner, "Hacker Erased a Season's Worth of 'Zodiac Island'," *Yahoo! TV* (March 31, 2011), available at http://tv.yahoo.com/news/article/tv-news.en.reuters.com/tv-news.en.reuters.com-20110331-us_zodiac

Rule 1.15 ("Safekeeping Property") requires that client property should be "appropriately safeguarded."[4] Client property generally includes files, information and documents, including those existing electronically. Appropriate safeguards will vary depending on the nature and sensitivity of the property. Rule 1.15 provides in relevant part:

> (b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

Rule 1.6 ("Confidentiality of Information") states in relevant part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> (d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Comment [2] of Rule 1.6 explains the importance and some of the foundation underlying the confidential relationship that lawyers must afford to a client. It is vital for the promotion of trust, justice and social welfare that a client can reasonably believe that his or her personal information or information related to a case is kept private and protected. Comment [2] explains the nature of the confidential attorney-client relationship:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. …

Also relevant is Rule 1.0(e) defining the requisite "Informed Consent":

> "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.4 directs a lawyer to promptly inform the client of any decision with respect to which the client's informed consent is required. While it is not necessary to communicate every minute

[4] In previous Opinions, this Committee has noted that the intent of Rule 1.15 does not extend to the entirety of client files, information and documents, including those existing electronically. In light of the expansion of technology as a basis for storing client data, it would appear that the strictures of diligence required of counsel under Rule 1.15 are, at a minimum, analogous to the "cloud."

detail of a client's representation, "adequate information" should be provided to the client so that the client understands the nature of the representation and "material risks" inherent in an attorney's methods. So for example, if an attorney intends to use "cloud computing" to manage a client's confidential information or data, it may be necessary, depending on the scope of representation and the sensitivity of the data involved, to inform the client of the nature of the attorney's use of "cloud computing" and the advantages as well as the risks endemic to online storage and transmission.

Absent a client's informed consent, as stated in Rule 1.6(a), confidential client information cannot be disclosed unless either it is "impliedly authorized" for the representation or enumerated among the limited exceptions in Rule 1.6(b) or Rule 1.6(c).[5] This may mean that a third party vendor, as with "cloud computing," could be "impliedly authorized" to handle client data provided that the information remains confidential, is kept secure, and any disclosure is confined only to necessary personnel. It also means that various safeguards should be in place so that an attorney can be reasonably certain to protect any information that is transmitted, stored, accessed, or otherwise processed through cloud services. Comment [24] to Rule 1.6(a) further clarifies an attorney's duties and obligations:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

An attorney utilizing "cloud computing" will likely encounter circumstances that require unique considerations to secure client confidentiality. For example, because a server used by a "cloud computing" provider may physically be kept in another country, an attorney must ensure that the data in the server is protected by privacy laws that reasonably mirror those of the United States. Also, there may be situations in which the provider's ability to protect the information is compromised, whether through hacking, internal impropriety, technical failures, bankruptcy, or other circumstances. While some of these situations may also affect attorneys who use offline

[5] The exceptions covered in Rule 1.6(b) and (c) are not implicated in "cloud computing." Generally, they cover compliance with Rule 3.3 ("Candor Toward the Tribunal"), the prevention of serious bodily harm, criminal and fraudulent acts, proceedings concerning the lawyer's representation of the client, legal advice sought for Rule compliance, and the sale of a law practice.

storage, an attorney using "cloud computing" services may need to take special steps to satisfy his or her obligation under Rules 1.0, 1.6 and 1.15.[6]

Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants") states:

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

At its essence, "cloud computing" can be seen as an online form of outsourcing subject to Rule 5.1 and Rule 5.3 governing the supervision of those who are associated with an attorney. Therefore, a lawyer must ensure that tasks are delegated to competent people and organizations. This means that any service provider who handles client information needs to be able to limit authorized access to the data to only necessary personnel, ensure that the information is backed up, reasonably available to the attorney, and reasonably safe from unauthorized intrusion.

It is also important that the vendor understands, embraces, and is obligated to conform to the professional responsibilities required of lawyers, including a specific agreement to comply with all ethical guidelines, as outlined below. Attorneys may also need a written service agreement that can be enforced on the provider to protect the client's interests. In some circumstances, a client may need to be advised of the outsourcing or use of a service provider and the identification of the provider. A lawyer may also need an agreement or written disclosure with the client to outline the nature of the cloud services used, and its impact upon the client's matter.

C. Obligations of Reasonable Care for Pennsylvania/Factors to Consider

[6] Advisable steps for an attorney to take reasonable care to meet his or her obligations for Professional Conduct are outlined below.

In the context of "cloud computing," an attorney must take reasonable care to make sure that the conduct of the cloud computing service provider conforms to the rules to which the attorney himself is subject. Because the operation is outside of an attorney's direct control, some of the steps taken to ensure reasonable care are different from those applicable to traditional information storage.

While the measures necessary to protect confidential information will vary based upon the technology and infrastructure of each office – and this Committee acknowledges that the advances in technology make it difficult, if not impossible to provide specific standards that will apply to every attorney – there are common procedures and safeguards that attorneys should employ.

These various safeguards also apply to traditional law offices. Competency extends beyond protecting client information and confidentiality; it also includes a lawyer's ability to reliably access and provide information relevant to a client's case when needed. This is essential for attorneys regardless of whether data is stored onsite or offsite with a cloud service provider. However, since cloud services are under the provider's control, using "the cloud" to store data electronically could have unwanted consequences, such as interruptions in service or data loss. There are numerous examples of these types of events. Amazon EC2 has experienced outages in the past few years, leaving a portion of users without service for hours at a time. Google has also had multiple service outages, as have other providers. Digital Railroad, a photo archiving service, collapsed financially and simply shut down. These types of risks should alert anyone contemplating using cloud services to select a suitable provider, take reasonable precautions to back up data and ensure its accessibility when the user needs it.

Thus, the standard of reasonable care for "cloud computing" may include:

- Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;
- Installing a firewall to limit access to the firm's network;
- Limiting information that is provided to others to what is required, needed, or requested;
- Avoiding inadvertent disclosure of information;
- Verifying the identity of individuals to whom the attorney provides confidential information;
- Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;
- Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;
- Implementing electronic audit trail procedures to monitor who is accessing the data;

- Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data;

- Ensuring the provider:
    - explicitly agrees that it has no ownership or security interest in the data;
    - has an enforceable obligation to preserve security;
    - will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
    - has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing;
    - includes in its "Terms of Service" or "Service Level Agreement" an agreement about how confidential client information will be handled;
    - provides the firm with right to audit the provider's security procedures and to obtain copies of any security audits performed;
    - will host the firm's data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania;
    - provides a method of retrieving data if the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity; and,
    - provides the ability for the law firm to get data "off" of the vendor's or third party data hosting company's servers for the firm's own use or in-house backup offline.

- Investigating the provider's:
    - security measures, policies and recovery methods;
    - system for backing up data;
    - security of data centers and whether the storage is in multiple centers;
    - safeguards against disasters, including different server locations;
    - history, including how long the provider has been in business;
    - funding and stability;
    - policies for data retrieval upon termination of the relationship and any related charges; and,
    - process to comply with data that is subject to a litigation hold.

- Determining whether:
    - data is in non-proprietary format;
    - the Service Level Agreement clearly states that the attorney owns the data;
    - there is a 3rd party audit of security; and,
    - there is an uptime guarantee and whether failure results in service credits.

- Employees of the firm who use the SaaS must receive training on and are required to abide by all end-user security measures, including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

- Protecting the ability to represent the client reliably by ensuring that a copy of digital data is stored onsite.[7]

- Having an alternate way to connect to the internet, since cloud service is accessed through the internet.

The terms and conditions under which the "cloud computing" services are offered, *i.e.*, Service Level Agreements ("SLAs"), may also present obstacles to reasonable care efforts. Most SLAs are essentially "take it or leave it,"[8] and often users, including lawyers, do not read the terms closely or at all. As a result, compliance with ethical mandates can be difficult. However, new competition in the "cloud computing" field is now causing vendors to consider altering terms. This can help attorneys meet their ethical obligations by facilitating an agreement with a vendor that adequately safeguards security and reliability.[9]

Additional responsibilities flow from actual breaches of data. At least forty-five states, including Pennsylvania, currently have data breach notification laws and a federal law is expected. Pennsylvania's notification law, 73 P.S. § 2303 (2011) ("Notification of Breach"), states:

> (a) GENERAL RULE. -- An entity that maintains, stores or manages computerized data that includes personal information shall provide notice of any breach of the security of the system following discovery of the breach of the security of the system to any resident of this Commonwealth whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person. Except as provided in section 4 or in order to take any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the data system, the notice shall be made without unreasonable delay. For the purpose of this section, a resident of this Commonwealth may be determined to be an individual whose principal mailing address, as reflected in the computerized data which is maintained, stored or managed by the entity, is in this Commonwealth.
>
> (b) ENCRYPTED INFORMATION. -- An entity must provide notice of the breach if encrypted information is accessed and acquired in an unencrypted form, if the security breach is linked to a breach of the security of the encryption or if the security breach involves a person with access to the encryption key.

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[7] This is recommended even though many vendors will claim that it is not necessary.

[8] Larger providers can be especially rigid with SLAs, since standardized agreements help providers to reduce costs.

[9] One caveat in an increasing field of vendors is that some upstart providers may not have staying power. Attorneys are well advised to consider the stability of any company that may handle sensitive information and the ramifications for the data in the event of bankruptcy, disruption in service or potential data breaches.

> (c) VENDOR NOTIFICATION. -- A vendor that maintains, stores or manages computerized data on behalf of another entity shall provide notice of any breach of the security system following discovery by the vendor to the entity on whose behalf the vendor maintains, stores or manages the data. The entity shall be responsible for making the determinations and discharging any remaining duties under this act.

A June, 2010, Pew survey highlighted concerns about security for "cloud computing." In the survey, a number of the nearly 900 internet experts surveyed agreed that it "presents security problems and further exposes private information," and some experts even predicted that "the cloud" will eventually have a massive breach from cyber-attacks.[10] Incident response plans should be in place before attorneys move to "the cloud", and the plans need to be reviewed annually. Lawyers may need to consider that at least some data may be too important to risk inclusion in cloud services.

One alternative to increase security measures against data breaches could be "private clouds." Private clouds are not hosted on the Internet, and give users completely internal security and control. Therefore, outsourcing rules do not apply to private clouds. Reasonable care standards still apply, however, as private clouds do not have impenetrable security. Another consideration might be hybrid clouds, which combine standard and private cloud functions.

D. Web-based E-mail

Web-based email ("webmail") is a common way to communicate for individuals and businesses alike. Examples of webmail include AOL Mail, Hotmail, Gmail, and Yahoo! Mail. These services transmit and store e-mails and other files entirely online and, like other forms of "cloud computing," are accessed through an internet browser. While pervasive, webmail carries with it risks that attorneys should be aware of and mitigate in order to stay in compliance with their ethical obligations. As with all other cloud services, reasonable care in transmitting and storing client information through webmail is appropriate.

In 1999, The ABA Standing Commission on Ethics and Professional Responsibility issued Formal Opinion No. 99-413, discussed in further detail above, and concluded that using unencrypted email is permissible. Generally, concerns about e-mail security are increasing, particularly unencrypted e-mail. Whether an attorney's obligations should include the safeguard of encrypting emails is a matter of debate. An article entitled, "Legal Ethics in the Cloud: Avoiding the Storms," explains:

> Respected security professionals for years have compared e-mail to postcards or postcards written in pencil. Encryption is being increasingly required in areas like banking and health care. New laws in Nevada and Massachusetts (which apply to attorneys as well as others) require defined personal information to be encrypted when it is electronically transmitted. As the use of encryption grows in areas like

[10] Janna Quitney Anderson & Lee Rainie, The Future of Cloud Computing. Pew Internet & American Life Project, June 11, 2010, http://www.pewinternet.org/Reports/2010/The-future-of-cloud-computing/Main-Findings.aspx?view=all

> these, it will become difficult for attorneys to demonstrate that confidential client data needs lesser protection.[11]

The article also provides a list of nine potential e-mail risk areas, including: confidentiality, authenticity, integrity, misdirection or forwarding, permanence (wanted e-mail may become lost and unwanted e-mail may remain accessible even if deleted), and malware. The article further provides guidance for protecting e-mail by stating:

> In addition to complying with any legal requirements that apply, the most prudent approach to the ethical duty of protecting confidentiality is to have an express understanding with clients about the nature of communications that will be (and will not be) sent by e-mail and whether or not encryption and other security measures will be utilized.
>
> It has now reached the point (or at least is reaching it) where most attorneys should have encryption available for use in appropriate circumstances.[12]

Compounding the general security concerns for e-mail is that users increasingly access webmail using unsecure or vulnerable methods such as cell phones or laptops with public wireless internet connections. Reasonable precautions are necessary to minimize the risk of unauthorized access to sensitive client information when using these devices and services, possibly including precautions such as encryption and strong password protection in the event of lost or stolen devices, or hacking.

The Committee further notes that this issue was addressed by the District of Columbia Bar in Opinion 281 (Feb. 18, 1998) ("Transmission of Confidential Information by Electronic Mail"), which concluded that, "In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security."

The Committee concluded, and this Committee agrees, that the use of unencrypted electronic mail is not, by itself, a violation of the Rules of Professional Conduct, in particular Rule 1.6 ("Confidentiality of Information").

> Thus, we hold that the mere use of electronic communication is not a violation of Rule 1.6 absent special factors. We recognize that as to any confidential communication, the sensitivity of the contents of the communication and/or the circumstances of the transmission may, in specific instances, dictate higher levels of security. Thus, it may be necessary in certain circumstances to use extraordinary means to protect client confidences. To give an obvious example, a lawyer representing an associate in a dispute with the associate's law firm could very easily violate Rule 1.6 by sending a fax concerning the dispute to the law firm's mail room if that message contained client confidential

[11] David G. Ries, Esquire, "Legal Ethics in the Cloud: Avoiding the Storms," course handbook, *Cloud Computing 2011: Cut Through the Fluff & Tackle the Critical Stuff* (June 2011) (internal citations omitted).
[12] *Id*.

information. It is reasonable to suppose that employees of the firm, other lawyer employed at the firm, indeed firm management, could very well inadvertently see such a fax and learn of its contents concerning the associate's dispute with the law firm. Thus, what may ordinarily be permissible—the transmission of confidential information by facsimile—may not be permissible in a particularly factual context.

By the same analysis, what may ordinarily be permissible – the use of unencrypted electronic transmission – may not be acceptable in the context of a particularly heightened degree of concern or in a particular set of facts. But with that exception, we find that a lawyer takes reasonable steps to protect his client's confidence when he uses unencrypted electronically transmitted messages.

E. Opinions From Other Ethics Committees

Other Ethics Committees have reached conclusions similar in substance to those in this Opinion. Generally, the consensus is that, while "cloud computing" is permissible, lawyers should proceed with caution because they have an ethical duty to protect sensitive client data. In service to that essential duty, and in order to meet the standard of reasonable care, other Committees have determined that attorneys must (1) include terms in any agreement with the provider that require the provider to preserve the confidentiality and security of the data, and (2) be knowledgeable about how providers will handle the data entrusted to them. Some Committees have also raised ethical concerns regarding confidentiality issues with third-party access or general electronic transmission (*e.g.,* web-based email) and these conclusions are consistent with opinions about emergent emergent "cloud computing" technologies.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has not yet issued a formal opinion on "cloud computing." However, the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies, published an "Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology" (Sept. 20, 2010) and considered some of the concerns and ethical implications of using "the cloud." The Working Group found that potential confidentiality problems involved with "cloud computing" include:

- Storage in countries with less legal protection for data;
- Unclear policies regarding data ownership;
- Failure to adequately back up data;
- Unclear policies for data breach notice;
- Insufficient encryption;
- Unclear data destruction policies;
- Bankruptcy;
- Protocol for a change of cloud providers;
- Disgruntled/dishonest insiders;
- Hackers;
- Technical failures;
- Server crashes;
- Viruses;

- Data corruption;
- Data destruction;
- Business interruption (*e.g.*, weather, accident, terrorism); and,
- Absolute loss (*i.e.*, natural or man-made disasters that destroy everything).

Id. The Working Group also stated, "[f]orms of technology other than 'cloud computing' can produce just as many confidentiality-related concerns, such as when laptops, flash drives, and smart phones are lost or stolen." *Id*. Among the precautions the Commission is considering recommending are:

- Physical protection for devices (*e.g.*, laptops) or methods for remotely deleting data from lost or stolen devices;
- Strong passwords;
- Purging data from replaced devices (*e.g.*, computers, smart phones, and copiers with scanners);
- Safeguards against malware (*e.g.*, virus and spyware protection);
- Firewalls to prevent unauthorized access;
- Frequent backups of data;
- Updating to operating systems with the latest security protections;
- Configuring software and network settings to minimize security risks;
- Encrypting sensitive information;
- Identifying or eliminating metadata from electronic documents; and
- Avoiding public Wi-Fi when transmitting confidential information (*e.g.*, sending an email to a client).

Id. Additionally, the ABA Commission on Ethics 20/20 has drafted a proposal to amend, *inter alia*, Model Rule 1.0 ("Terminology"), Model Rule 1.1 ("Competence"), and Model Rule 1.6 ("Duty of Confidentiality") to account for confidentiality concerns with the use of technology, in particular confidential information stored in an electronic format. Among the proposed amendments (insertions underlined, deletions ~~struck through~~):

> Rule 1.1 ("Competence") Comment [6] ("Maintaining Competence"): "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."
>
> Rule 1.6(c) ("Duty of Confidentiality"): "A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client."
>
> Rule 1.6 ("Duty of Confidentiality") Comment [16] ("Acting Competently to Preserve Confidentiality"): "Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision or monitoring. See Rules 1.1, 5.1, and 5.3. Factors to

> be considered in determining the reasonableness of the lawyer's efforts include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, and the cost of employing additional safeguards. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

In Formal Opinion No. 99-413 (March 10, 1999), the ABA Standing Committee on Ethics and Professional Responsibility determined that using e-mail for professional correspondence is acceptable. Ultimately, it concluded that unencrypted e-mail poses no greater risks than other communication modes commonly relied upon. As the Committee reasoned, "The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or dissemination of the information is a violation of the law." *Id*.

Also relevant is ABA Formal Opinion 08-451 (August 5, 2008), which concluded that the ABA Model Rules generally allow for outsourcing of legal and non-legal support services if the outsourcing attorney ensures compliance with competency, confidentiality, and supervision. The Committee stated that an attorney has a supervisory obligation to ensure compliance with professional ethics even if the attorney's affiliation with the other lawyer or nonlawyer is indirect. An attorney is therefore obligated to ensure that any service provider complies with confidentiality standards. The Committee advised attorneys to utilize written confidentiality agreements and to verify that the provider does not also work for an adversary.

The Alabama State Bar Office of General Council Disciplinary Commission issued Ethics Opinion 2010-02, concluding that an attorney must exercise reasonable care in storing client files, which includes becoming knowledgeable about a provider's storage and security and ensuring that the provider will abide by a confidentiality agreement. Lawyers should stay on top of emerging technology to ensure security is safeguarded. Attorneys may also need to back up electronic data to protect against technical or physical impairment, and install firewalls and intrusion detection software.

State Bar of Arizona Ethics Opinion 09-04 (Dec. 2009) stated that an attorney should take reasonable precautions to protect the security and confidentiality of data, precautions which are satisfied when data is accessible exclusively through a Secure Sockets Layer ("SSL") encrypted connection and at least one other password was used to protect each document on the system. The Opinion further stated, "It is important that lawyers recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult experts in the field." *Id*. Also, lawyers should ensure reasonable protection through a periodic review of security as new technologies emerge.

The California State Bar Standing Committee on Professional Responsibility and Conduct concluded in its Formal Opinion 2010-179 that an attorney using public wireless connections to conduct research and send e-mails should use precautions, such as personal firewalls and encrypting files and transmissions, or else risk violating his or her confidentiality and competence obligations. Some highly sensitive matters may necessitate discussing the use of

public wireless connections with the client or in the alternative avoiding their use altogether. Appropriately secure personal connections meet a lawyer's professional obligations. Ultimately, the Committee found that attorneys should (1) use technology in conjunction with appropriate measures to protect client confidentiality, (2) tailor such measures to each unique type of technology, and (3) stay abreast of technological advances to ensure those measures remain sufficient.

The Florida Bar Standing Committee on Professional Ethics, in Opinion 06-1 (April 10, 2006), concluded that lawyers may utilize electronic filing provided that attorneys "take reasonable precautions to ensure confidentiality of client information, particularly if the lawyer relies on third parties to convert and store paper documents to electronic records." *Id*.

Illinois State Bar Association Ethics Opinion 10-01 (July 2009) stated that "[a] law firm's use of an off-site network administrator to assist in the operation of its law practice will not violate the Illinois Rules of Professional Conduct regarding the confidentiality of client information if the law firm makes reasonable efforts to ensure the protection of confidential client information."[13]

The Maine Board of Overseers of the Bar Professional Ethics Commission adopted Opinion 194 (June 30, 2008) in which it stated that attorneys may use third-party electronic back-up and transcription services so long as appropriate safeguards are taken, including "reasonable efforts to prevent the disclosure of confidential information," and at minimum an agreement with the vendor that contains "a legally enforceable obligation to maintain the confidentiality of the client data involved." *Id*.

Of note, the Maine Ethics Commission, in a footnote, suggests in Opinion 194 that the federal Health Insurance Portability and Accountability Act ("HIPAA") Privacy and Security Rule 45 C.F.R. Subpart 164.314(a)(2) provide a good medical field example of contract requirements between medical professionals and third party service providers ("business associates") that handle confidential patient information. SLAs that reflect these or similar requirements may be advisable for lawyers who use cloud services.

45 C.F.R. Subpart 164.314(a)(2)(i) states:

> The contract between a covered entity and a business associate must provide that the business associate will:
>
> (A) Implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the electronic protected health information that it creates, receives, maintains, or transmits on behalf of the covered entity as required by this subpart;

[13] Mark Mathewson, *New ISBA Ethics Opinion Re: Confidentiality and Third-Party Tech Vendors*, Illinois Lawyer Now, July 24, 2009, available at http://www.illinoislawyernow.com/2009/07/24/new-isba-ethics-opinion-re-confidentiality-and-third-party-tech-vendors/

(B) Ensure that any agent, including a subcontractor, to whom it provides such information agrees to implement reasonable and appropriate safeguards to protect it;

(C) Report to the covered entity any security incident of which it becomes aware;

(D) Authorize termination of the contract by the covered entity, if the covered entity determines that the business associate has violated a material term of the contract.

Massachusetts Bar Association Ethics Opinion 05-04 (March 3, 2005) addressed ethical concerns surrounding a computer support vendor's access to a firm's computers containing confidential client information. The committee concluded that a lawyer may provide a third-party vendor with access to confidential client information to support and maintain a firm's software. Clients have "impliedly authorized" lawyers to make confidential information accessible to vendors "pursuant to Rule 1.6(a) in order to permit the firm to provide representation to its clients." *Id.* Lawyers must "make reasonable efforts to ensure" a vendor's conduct comports with professional obligations. *Id*.

The State Bar of Nevada Standing Committee on Ethics and Professional Responsibility issued Formal Opinion No. 33 (Feb. 9, 2006) in which it stated, "an attorney may use an outside agency to store confidential information in electronic form, and on hardware located outside an attorney's direct supervision and control, so long as the attorney observed the usual obligations applicable to such arrangements for third party storage services." *Id*. Providers should, as part of the service agreement, safeguard confidentiality and prevent unauthorized access to data. The Committee determined that an attorney does not violate ethical standards by using third-party storage, even if a breach occurs, so long as he or she acts competently and reasonably in protecting information.

The New Jersey State Bar Association Advisory Committee on Professional Ethics issued Opinion 701 (April 2006) in which it concluded that, when using electronic filing systems, attorneys must safeguard client confidentiality by exercising "sound professional judgment" and reasonable care against unauthorized access, employing reasonably available technology. *Id*. Attorneys should obligate outside vendors, through "contract, professional standards, or otherwise," to safeguard confidential information. *Id*. The Committee recognized that Internet service providers often have better security than a firm would, so information is not necessarily safer when it is stored on a firm's local server. The Committee also noted that a strict guarantee of invulnerability is impossible in any method of file maintenance, even in paper document filing, since a burglar could conceivably break into a file room or a thief could steal mail.

The New York State Bar Association Committee on Professional Ethics concluded in Opinion 842 (Sept. 10, 2010) that the reasonable care standard for confidentiality should be maintained for online data storage and a lawyer is required to stay abreast of technology advances to ensure protection. Reasonable care may include: (1) obligating the provider to preserve confidentiality and security and to notify the attorney if served with process to produce client information, (2) making sure the provider has adequate security measures, policies, and recoverability methods,

and (3) guarding against "reasonably foreseeable" data infiltration by using available technology. *Id*.

The North Carolina State Bar Ethics Committee has addressed the issue of "cloud computing" directly, and this Opinion adopts in large part the recommendations of this Committee. Proposed Formal Opinion 6 (April 21, 2011) concluded that "a law firm may use SaaS[14] if reasonable care is taken effectively to minimize the risks to the disclosure of confidential information and to the security of client information and client files." *Id*. The Committee reasoned that North Carolina Rules of Professional Conduct do not require a specific mode of protection for client information or prohibit using vendors who may handle confidential information, but they do require reasonable care in determining the best method of representation while preserving client data integrity. Further, the Committee determined that lawyers "must protect against security weaknesses unique to the Internet, particularly 'end-user' vulnerabilities found in the lawyer's own law office." *Id*.

The Committee's minimum requirements for reasonable care in Proposed Formal Opinion 6 included:[15]

- An agreement on how confidential client information will be handled in keeping with the lawyer's professional responsibilities must be included in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement that states that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect confidential client information and client property;

- The agreement with the vendor must specify that firm's data will be hosted only within a specified geographic area. If by agreement the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and the state of North Carolina;

- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm must have a method for retrieving the data, the data must be available in a non-proprietary format that is compatible with other firm software or the firm must have access to the vendor's software or source code, and data hosted by the vendor or third party data hosting company must be destroyed or returned promptly;

[14] SaaS, as stated above, stands for Software-as-a-Service and is a type of "cloud computing."

[15] The Committee emphasized that these are minimum requirements, and, because risks constantly evolve, "due diligence and perpetual education as to the security risks of SaaS are required." Consequently, lawyers may need security consultants to assess whether additional measures are necessary.

- The law firm must be able get data "off" the vendor's or third party data hosting company's servers for lawyers' own use or in-house backup offline; and,

- Employees of the firm who use SaaS should receive training on and be required to abide by end-user security measures including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

In Opinion 99-03 (June 21, 1999), the **State Bar Association of North Dakota** Ethics Committee determined that attorneys are permitted to use online data backup services protected by confidential passwords. Two separate confidentiality issues that the Committee identified are, (1) transmission of data over the internet, and (2) the storage of electronic data. The Committee concluded that the transmission of data and the use of online data backup services are permissible provided that lawyers ensure adequate security, including limiting access only to authorized personnel and requiring passwords.

Vermont Bar Association Advisory Ethics Opinion 2003-03 concluded that lawyers can use third-party vendors as consultants for confidential client data-base recovery if the vendor fully understands and embraces the clearly communicated confidentiality rules. Lawyers should determine whether contractors have sufficient safety measures to protect information. A significant breach obligates a lawyer to disclose the breach to the client.

Virginia State Bar Ethics Counsel Legal Ethics Opinion 1818 (Sept. 30, 2005) stated that lawyers using third party technical assistance and support for electronic storage should adhere to Virginia Rule of Professional Conduct 1.6(b)(6)[16], requiring "due care" in selecting the service provider and keeping the information confidential. *Id*.

These opinions have offered compelling rationales for concluding that using vendors for software, service, and information transmission and storage is permissible so long as attorneys meet the existing reasonable care standard under the applicable Rules of Professional Conduct, and are flexible in contemplating the steps that are required for reasonable care as technology changes.

IV. Conclusion

The use of "cloud computing," and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal, rather than technical and

[16] Virginia Rule of Professional Conduct 1.6(b) states in relevant part:

> To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
>
> (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

administrative, issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards.

This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated.

Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in "the cloud." Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys using "cloud" software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.

FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

"Social media" or "social networking" websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.[1]

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.

[1] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (*i.e.,* to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online "profiles," which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the "public," "friends," and "others." For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows "friends of friends" to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person's posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee's conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 3.3 ("Candor Toward the Tribunal")
- Rule 3.4 ("Fairness to Opposing Party and Counsel")
- Rule 3.5 ("Impartiality and Decorum of the Tribunal")
- Rule 3.6 ("Trial Publicity")
- Rule 4.1 ("Truthfulness in Statements to Others")
- Rule 4.2 ("Communication with Person Represented by Counsel")
- Rule 4.3 ("Dealing with Unrepresented Person")
- Rule 8.2 ("Statements Concerning Judges and Other Adjudicatory Officers")
- Rule 8.4 ("Misconduct")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

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

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 ("Misconduct"), which states in relevant part:

> It is professional misconduct for a lawyer to:
> …
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

This Rule prohibits "dishonesty, fraud, deceit or misrepresentation." Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer's ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client's social media profile, an attorney may and often should advise a client about the content on the client's profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer.[2] However, he forfeited that settlement after his daughter posted on her Facebook page "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board[3] suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.[4]

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer's duties relating to a client's use of social media.

Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

[3] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

[4] *Lester v. Allied Concrete Co.,* Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)

or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

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

Rule 4.1 states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client's social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client's profile to "private" simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject

> to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises [5]

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.[6]

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney's communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

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[5] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).

[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,[7] it would also be prohibited while using social networking websites.

Rule 4.2 states:

> 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.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,[8] that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,[9] concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

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[7] *See, e.g.,* Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.

[8] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

[9] San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,[10] concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party's social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party's private page is a prohibited communication under Rule 4.2

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

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

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person's name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

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[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,[15] the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness' social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,[16] concluding that a lawyer may not use deception to access the private portions of an unrepresented person's social networking account. The Committee noted, "A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge."

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,[17] concluding that a lawyer may request access to an unrepresented party's social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party's page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person's social networking site. A lawyer may ethically request access to the site, however, by using the lawyer's real name and by stating the lawyer's purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in *McMillen v. Hummingbird Speedway, Inc.,*[19] the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.,*[20] the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed,*[21] a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.,*[22] a New York court denied a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko,*[23] Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook account would have been needlessly intrusive.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member's skills or accomplishments. For example, LinkedIn allows a user to "endorse" the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney's performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is "endorsed" for his or her expertise on appellate litigation on the attorney's LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney's services on an attorney's social networking site, nor do they prohibit an attorney from posting comments by others.[24] Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

> (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
> (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

[24] In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,[25] concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.[26] Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee's findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client's consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.

This Committee has opined, in Formal Opinion 2014-200,[27] that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney's communications to a client are also confidential. In *Gillard v. AIG Insurance Company,*[28] the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."[29] The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO[30]. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee's recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client." This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer's services.

Also relevant is Rule 3.6, which states:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer's social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days[31] for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

[31] *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl.., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Rule 3.5 states:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
> (c) communicate with a juror or prospective juror after discharge of the jury if:
> (1) the communication is prohibited by law or court order;
> (2) the juror has made known to the lawyer a desire not to communicate; or
> (3) the communication involves misrepresentation, coercion, duress of harassment; or
> (d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror's social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits *ex parte* communications with those persons. Accessing the public portions of a juror's social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror's social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer's agent, may not request access to the private portions of a juror's social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror's or potential juror's social networking website because that type of *ex parte* communication would violate Model Rule 3.5(b). There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.[32]

Various Rules address this concern. For example, Rule 8.2 states:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that "A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no ex parte or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to "seek to influence a judge" in an unlawful way.

IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer's business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client's consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

[32] American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility
Formal Opinion 2007-100
Client Files – Rights of Access, Possession and Copying, Along with Retention Considerations

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility frequently receives questions from lawyers on the topic of ethical considerations relating to rights to client files. These inquiries include questions regarding the proper definition of the client "file", lawyer responsibilities to maintain and return the file, and lawyer and client rights to the contents of the file. A number of authorities and commentators have addressed these issues in the years since the Committee issued Formal Opinion 99-120 on this topic. Accordingly, the Committee believes that an update and restatement of the Committee's views is appropriate.

This Formal Opinion supersedes all prior inconsistent opinions of the Committee and should be reviewed for guidance by Pennsylvania lawyers when they are opening, closing or taking other action with respect to the contents of a client's file. For guidance on attorneys' retaining liens and charging liens and the circumstances under which a client is entitled to the return of a file, see Formal Opinion 2006-300, Ethical Considerations in Attorneys' Liens.[1]

A. Rights to the Client File

It is generally accepted that client files are maintained by a lawyer for the benefit of his or her principal, the client.[2] In Pennsylvania, there is authority for the proposition that not only does the client have a right of access to the file, but also the client has an ownership interest in the contents of the file.[3] This issue has not, however, been adjudicated by the Supreme Court of Pennsylvania. In the case of *Maleski v. Corporate Life Insurance Co*., the Commonwealth Court stated: "once a client pays for the creation of a legal document, and it is placed in the client's file, it is the client, rather than the attorney, who holds a proprietary interest in that document."[4]

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[1] This Formal Opinion does not address a lawyer's obligations with regard to incriminating property received from the client as discussed in *Commonwealth v. Stenhach,* 514 A.2d 114 (Pa. Super. 1986). The Formal Opinion also does not address client funds or other property within the scope of Pa. R.P.C. 1.15. The Committee believes that although some of the considerations involved with respect to client files are the same as those involved with respect to other client property governed by Pa. R.P.C. 1.15, the provisions of Pa. R.P.C. 1.15 do not directly apply to the complete client file. By way of example only, if Pa. R.P.C. 1.15 applied directly to the entire client file, it would mean that a client file would have to be kept separate from the lawyer's own property, and each item of the file would be subject to recordkeeping and maintenance requirements that would be impossible to meet.

[2] *See* PBA Informal Opinion 89-75; PBA Informal Opinion 94-146.

[3] *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994*)*. *Maleski* involved a statutory liquidator's claim to legal files held by a former law firm for an insurance company in liquidation proceedings. The law firm asserted, among other things, a work product basis for refusing to turn over the requested documents, arguing that the law firm had a proprietary interest in the files. In part based on Pa. R.P.C. 1.15(b), the court reasoned that the client held a proprietary interest in the legal files and that the firm had no right to withhold the files from the former client's statutory successor in interest.

[4] *Maleski*, 163 Pa. Commw. at 47, 641 A.2d at 6.

Client files also are business records of the lawyer. Absent some agreement or duty to the contrary, the lawyer should have the right to maintain copies of all file materials, if only as a basis for documenting the course of the representation.[5] Therefore, in the view of the Committee, the lawyer may, at his or her own expense, make and retain copies of client files.[6] Obviously, however, the lawyer is bound by any applicable duty of confidentiality with respect to the documents or their contents.[7]

Questions can arise both in the context of requests for possession of the client file and requests for access. Requests for possession generally will follow termination of the lawyer-client relationship, whereas requests for access without possession might occur during or after the relationship.[8] Generally speaking, even if a client does not seek to take possession of the physical file, the client should be given reasonable access to the file.[9] Except for situations involving attorneys' liens, disputes between a lawyer and client concerning possession of or access to the file generally can be settled by photocopying the file materials. In the case of documents with independent legal significance, determining who gets the original and who gets the copy will require some care but should not present difficult choices. In general, items such as original client business records, deeds and other real estate records, estate papers, insurance policies, and personal papers should be returned to the client unless there is a specific agreement or other reason for the lawyer to retain custody.[10]

B. The Contents of the "Client File"

In *Maleski*, the Commonwealth Court took a very broad view of the contents of the client's file. There, the court concluded that lawyer notes and memoranda are part of the goods and services "purchased" by the fee paying client and thus belong to the client.[11] Based on *Maleski*, the Legal Ethics and Professional Responsibility Committee stated in Formal Opinion 99-120 that a lawyer's file notes and, possibly, drafts of documents are part of a client's file.[12] Based in part on the continuing inquiries on this topic, however, the Committee believes some elaboration is appropriate.

The term "client file" is easily stated but can be difficult to apply. In the most simplistic sense, the term encompasses the physical items that are placed into a segregated physical storage

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[5] *See, e.g.*, Pa. R.P.C. 1.16(d) (Upon termination of representation, the "lawyer may retain papers relating to the client to the extent permitted by other law.").

[6] *Quantitative Fin. Strategies Inc. v. Morgan Lewis & Bockius, LLP*, 55 Pa. D. & C.4th 265 (Phila. Cty., March 12, 2002); *see also* PBA Informal Opinion 96-157; PBA Informal Opinion 94-17.

[7] *See* Pa.. R.Prf.C. 1.6(a), (d) (lawyer has duty to maintain confidentiality of client information).

[8] *See, e.g.,* Pa. R.P.C. 1.16(a) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers . . . to which the client is entitled. . . .").

[9] *See* PBA Formal Opinion 99-120; *see also Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994)..

[10] *See* PBA Formal Opinion 99-120; *see also* PBA Formal Opinion 2001-300 (stating that a lawyer may retain original estate documents, but only at the client's request).

[11] *Id.* at 46-47, 641 A.2d at 6.

[12] *See* PBA Formal Opinion 99-120.

place, such as a file folder, drawer or box. In reality, however, it is obvious that the file can encompass items that are not physically segregated, or are not themselves "physical" objects. For example, a client's file might consist in part of a central collection of legal documents (such as copies of pleadings in a litigation matter), documentary evidence, and correspondence. These items should be easy to define. Nevertheless, all but very small matters will have a variety of other documents relating to that particular representation, such as electronic mail messages, telephone notes, research notes, billing materials and other things. Some of these items might be collected in the physical file and others might be maintained elsewhere (as in a lawyer's desk file for telephone notes). Moreover, some of these items will relate to the substance of the representation and others might have a closer association to the administrative functions involved with running a law practice (such as assignment memos given to subordinate lawyers).

In addition, as a consequence of the proliferation of electronic mail, electronic documents, and the ability to send and receive documents via electronic mail, almost all documents will exist in multiple locations (e.g., on multiple hard drives and on multiple locations on network servers). For example, when an electronic mail message includes multiple recipients and follow-up replies, each person's retained version of such a string of communications can be extremely similar, yet different (such as when one recipient chooses to reply to only some of the original addressees).

Lawyers will need to consider the circumstances and scope of the engagement when determining the scope of the "file." Examples of items that might fall outside the scope of the formal "file" are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem.[13] Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file.

Court and ethics opinions from other jurisdictions have followed two basic approaches in attempting to categorize client files for purposes of determining client rights of access or possession:

- The majority of jurisdictions that have addressed this issue follow the "entire file" approach, concluding that the client is entitled to everything in the lawyer's possession necessary to the continued representation of the client.[14] Based on

[13] *See* PBA Informal Opinion 96-157.

[14] *See, e.g., In re Sage Realty Corp.*, 91 N.Y.2d 30, 35 (NY 1997) ("We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view"; lawyer should disclose documents unless it would violate duty owed to a third party or duty imposed by law; lawyer also not required to disclose "firm documents intended for internal law office review and use" such as notes regarding "tentative preliminary impressions") (collecting cases); D.C. Bar Opinion 333 (Dec. 20, 2005) (FDIC, as successor to bank client's interests, is entitled to "entire file", including "all material that the client or another attorney would reasonably need to take over the representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client's interests"; attorney not normally required to turn over administrative materials or materials completely unrelated to the substance of the representation); Restatement (Third) of The Law Governing Lawyers, § 46(2) (2000) (client should be given access to all documents relating to the representation unless substantial grounds exist to refuse); Nebraska Advisory Op. No. 2001.3 (general rule is that client is entitled to all documents provided to the attorney, all items obtained via litigation discovery, all correspondence, all notes, memos, briefs and "other matters" generated by counsel on the client's business, but that precise contents of "file" depends on the nature of the work,

Maleski, Pennsylvania is usually identified with this majority. Even under the majority approach, however, a lawyer is entitled to exclude from the file those things that the client has no right to receive. A lawyer might have an obligation not to provide parts of the file either due to the rights of a third party, or some other legal obligation. The best example of such a document is one that relates to secret information of a litigation adversary that is disclosed to the lawyer with the understanding that the lawyer's client will not receive the information.[15]

- A substantial subset of the "entire file" group of jurisdictions allow other "non-substantive" items, generally those associated with law practice management, to be excluded from the "file" that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel.[16]

- A small minority of jurisdictions has adopted a "limited file" approach. Under this view, the client is entitled to "core" materials, such as filed pleadings, correspondence and final memoranda on issues significant to the representation.[17] The remaining materials are not part of the client "file" and the client would not,

(continued…)

agreement between the client and counsel, and the particular circumstances of the case); *see also* Sylvia Stevens, "Client Files, Revisited: What Goes in Them – and Who Owns Them", Oregon State Bar Bulletin (Jan. 2003) (majority view, giving client access to both end product and lawyer work product and other contents of the file, including electronic documents, is the more sound view); New Hampshire Bar Association Practical Ethics Article (Dec. 1998) ("The Ethics Committee continues to believe that the majority view [giving the client access to the entire file] is the proper view"; rejecting notion that counsel can create a separate "risk management file" to segregate materials that otherwise would be in client file and open to client access); Colorado Ethics Op. 104 (April 17, 1999) (adopting majority view that "entire file" is available to client but stating that "internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product", and observing that whether client is entitled to personal attorney notes will depend on circumstances, and that redaction or summarization might be appropriate).

[15] *See, e.g.,* Utah State Bar Ethics Advisory Opinion No. 06-04 (Dec. 8, 2006) (discussing circumstances under which a lawyer in a criminal defense context could potentially withhold information from a client, even though requested and part of client's file).

[16] *See, e.g.,* Maine Ethics Op. No. 187 (Nov. 5, 2004) ("attorney should deliver the client's property and any material, not otherwise readily available to the client, that the attorney knows or has reason to know is or would be of value to the client"; generally observing that documents such as time sheets, billing records, internal case assignment and conflict check forms would not be important to client need not be delivered, but most other documents, including drafts that contain substantive information not found in later drafts, ordinarily would be important to the client); South Carolina Ethics Advisory Op. No. 92-37 (lawyer's personal impressions of the client, and documents relating to other representations that were placed into file for potential reference, need not be made available to client).

[17] *See, e.g., Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App. 1992) (client entitled to lawyer's work product only to the extent it is reasonably necessary to the client's understanding of the lawyer's "end product"); Virginia Legal Ethics Op. 1690 (June 5, 1997) ("The sense of the Committee is that, absent exigent circumstances, material prejudice [to the client] does not occur simply because the successor lawyer has to create the workproduct . . . contained in the original lawyer's files"; supporting lawyer's ability to decline to turn over work product under some circumstances); *see also* John Allen, Focus on Prof. Resp. – Ownership of Lawyer's Files About Client Representations Who Gets the "Original" Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (Michigan law does not support client "ownership" of the file but only a right of access to the file, which does not necessarily include "internal firm records").

in the view of these jurisdictions, be entitled to such materials without some showing of need.

As described more fully in the following paragraphs, the Committee adheres to the majority approach with respect to client access to and possession of file materials.

C. Lawyer-Client Agreements on File Access, Possession and Copying

Given the many fact-specific issues that can arise in the context of the content of client files, rights of access to or possession of client files, and the expense of copying, storing or searching such files, the Committee believes that this is an area that can be addressed by agreement between the client and the lawyer, so long as the agreement is clearly explained and is reasonable. Several ethics authorities from other jurisdictions have observed that a written arrangement with the client can help to define the contents of the file and the circumstances of client access or possession.[18] Nevertheless, it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer.

D. Cost of Collecting, Searching, Delivering and Copying Client File Documents

Client requests for file materials, or copies of file materials, can arise in at least three separate contexts: (1) during the course of representation; (2) during transfer of representation between counsel; and (3) following representation.

The Committee believes that, in each of these contexts, the cost of copying and delivering file materials, as well as the cost of compiling and delivery the actual file, should be handled according to the agreement between the lawyer and the client regarding costs. The Committee recommends making some provision for these circumstances in an engagement letter.

If the client is going to be asked to pay for a significant expense created by such a request, such as the expense of extensive electronic sorting or retrieval, the client should be consulted before the undertaking is commenced so that the client appreciates the consequences and expense of the request.

When a client seeks actual possession of the file, the lawyer may retain copies of client papers unless such retention is prohibited by law or other arrangement with the client.[19]

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[18] *See, e.g.,* New Hampshire Bar Assoc. Ethics Comm., "Clients Are Entitled To Their Files," Practical Ethics Article (Dec. 1998) (some documents could be excluded from the "file" if so defined in the fee agreement but exclusion of all attorney "personal notes" from the file cuts "too broad a swath;" documents needed for protection of client's interests could not be excluded from file; lawyer must "tread carefully" and explain effect and rationale for requested agreement); Nebraska Advisory Op. No. 2001.3 (the scope of the "file" to which the client is entitled depends in part on the agreement between the client and the lawyer); *see also* John Allen, Focus on Prof. Resp. – Ownership of Lawyer's Files About Client Representations Who Gets the "Original" Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter); Nebraska Advisory Op. No. 2001.3 (engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct).

[19] *See* Pa. R.P.C. 1.16(d) ("The lawyer may retain papers relating to the client to the extent permitted by other law.").

However, where the client has paid for the creation of the file, the cost of the lawyer's copy should be borne by the lawyer, absent agreement to the contrary.[20] A trial court in Philadelphia County has held that a lawyer may retain copies of client papers, even over the client's objection.[21]

E. Recommended Approach

Due to the numerous, case-specific factors that affect the contents of the "file" and the client interests, any general statement of the rule is likely to require special consideration before it is applied. At least one commentator has attempted to set forth a proposed model statute that would require a different analysis depending upon the context in which the request for file access or possession is sought.[22]

Notwithstanding the difficulty in applying any a priori rule, the Committee believes that it will be helpful to set forth a guideline. Accordingly, the Committee reconfirms that the "entire substantive file" approach is the one that best protects the client's interests while accommodating the realities of law practice. As adopted by the Committee, the recommended approach is thus:

> **A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client.**
>
> **The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in**

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[20] *Quantitative Fin. Strategies Inc.*, 55 Pa. D. & C.4th at 282; *see also* PBA Informal Opinion 96-157; Philadelphia Opinion 93-22.

[21] In *Quantitative Financial Strategies, Inc.*, the court refused to issue a writ of seizure for copies of a client's file retained by a law firm after the representation ended, where the firm returned the complete original file to the client, keeping a copy made at the firm's expense. Even so, the court stated that the copy retained by the law firm should be stored, at the law firm's expense, in an independent repository. The court further stated that the client was entitled to be notified before the firm accessed the file. The court stated that this measure would allow the client to scrutinize access to the file to prevent misuse, while at the same time protecting the law firm from unfounded claims of misuse.

[22] Fred C. Zacharias, "Who Owns Work Product?", Vol. 2006 Ill. L. Rev. 127, 163-72 (2006) (setting forth proposed model statute).

response to a generalized request for access to or possession of the "file", the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as "restricted confidential" documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request.

So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.

The Committee stresses that the touchstone for analyzing the need to provide access or possession is whether a document or other item will be useful to the client for the purpose of protecting the client's interests. In the overwhelming majority of situations, the client – not the lawyer – will be the party with the right to decide, in the event of a dispute, whether something in the possession of the lawyer is important to the client's own interests. Therefore, if a client makes a request for a particular item or category of items generated in the course of representing the client, ordinarily the client should be entitled to such information absent prior agreement or some other compelling reason.

F. Opening and Closing Client Files

Disputes over the contents of a lawyer's file and rights of retention can largely be eliminated by agreements between the client and lawyer set forth in the initial engagement letter. Even after an engagement has begun, the lawyer and client are free to modify their engagement agreement to address these matters. The Committee believes that the following topics are worth considering in connection with opening and closing client files:

(1) A lawyer should consider developing a detailed file storage, management, and retention policy. Such a policy can address the return of client documents, document retention and destruction periods, document destruction methods, and "file closing letters" to clients. A lawyer's retention policy should establish a procedure for file destruction that protects client confidentiality while ensuring complete destruction (e.g., burning, shredding, electronic shredding, etc.).

(2) A lawyer or the lawyer's assistant (with lawyer supervision when appropriate) should make the decision of how and when to destroy part or all of the file.

(3) A lawyer should consider statutes of limitations, substantive law, tolling agreements or tolling jurisprudence, the nature of the particular case and the client's particular needs when deciding to destroy a file. A dominant consideration should be the instructions and wishes of the client. In the absence of a prior agreement, the client should be consulted regarding the disposition of the file. In some cases, the lawyer may need to give consideration to the law of spoliation insofar as it would affect the client's ability to use or produce documents or data in an unrelated representation. Abandoned property or files should be handled in accordance with the statements below regarding such property.

(4) Client confidentiality obligations continue after the representation ends. File disposition or destruction should be conducted so as to protect client confidentiality.

(5) An index should be maintained regarding all files destroyed or returned to clients. Consideration should be given to permanent retention of the index and to permanent retention of copies of initial engagement letters (and any supplements or modifications), file destruction notices to clients, and client consents to destruction.

(6) The lawyer and client can consider a specific agreement for handling the client file and data in complex cases. In such situations, where client data can consume thousands of square feet of storage space or many terabytes of electronic data, special arrangements may need to be established to properly maintain, transfer or dispose of such data. In addition, in circumstances in which client property requires special handling or care, the lawyer should consider addressing such items in an engagement letter.[23]

Typically, client files are closed when the representation is terminated. However, the lawyer and client are encouraged to agree to a specific file closure and retention policy at the outset of their relationship, which can be modified as necessary.

PBA Legal Ethics and Professional Responsibility Committee

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

[23] *See* PBA Formal Opinion 99-120.

SUGGESTED MINIMUM RETENTION PERIODS

These periods are suggested minimum retention periods only. Lawyers must be guided by the individual interests, needs or requests of their clients, any court orders applicable to the file, along with any other legal standards, such as tolling standards, that may apply.

NOTIFICATION OF PROFESSIONAL LIABILITY INSURANCE Records of required disclosures must be maintained for 6 years following termination of representation. Pa. R.C.P. 1.4(c).

CRIMINAL Retain until all appeals and post-conviction habeas periods have expired.

DIVORCE Following order of dissolution, retain until time periods for performance of any terms under court order or any settlement agreement have expired.

PERSONAL INJURY Retain until all claims against potential defendants are exhausted. Retain files containing settlements for minors until two years following attainment of age of majority.

REAL ESTATE Retain five years after closing on sale or foreclosure.

ESTATE PLANNING Retain until client's death plus probate period.

PROBATE Retain until estate is settled and all IRS audit periods expired.

IRS TAX RECORDS Retain for seven years. IRS regulations give 6 years to pursue any omission of more than 25 percent of income. Add one year for cushion.

CONTRACT LITIGATION Retain five years after satisfaction of judgment or five years after filing if not brought to trial.

BANKRUPTCY Retain five years after discharge or payment or discharge of trustee or receiver.

Understanding the amendments to the Rules of Professional Conduct and Disciplinary Enforcement

Amy J. Coco

by Amy J. Coco

The focus of these amendments is to make what was formerly good practice into requirements for lawyers to create and retain documentation to easily demonstrate that they are properly receiving, maintaining and disbursing property belonging to others. The amendments comprise three main areas of interest to practicing lawyers: Amendments to Rule 1.15 ("Record-keeping Rules"), Amendments to Rules of Disciplinary Enforcement 208, 219 and 221 ("Disclosing Records Rules") and New Rule 5.8 ("Investment Products Prohibitions and Restrictions").

They are not designed to intimidate or trick the lawyer acting in good faith. Rather, they seek to reduce the risk of large-scale misappropriation of funds and give confidence to clients that their funds are properly held. Lawyers are also assured that they are handling other people's funds consistent with their fiduciary obligations. If a lawyer makes an error, the new rules will allow them to find and correct the mistake quickly, before it becomes a significant problem. The new rules will also allow lawyers to be more responsive to clients about the funds held in trust. When clients have questions about the funds held in trust, they do not want to wait weeks for answers. Properly maintained records will allow lawyers to answer those questions quickly and efficiently.

Rule 1.15 – Record Keeping Rules

Rule 1.15 comments clarify the essence of trust account rules stating "with little exception, funds belonging to a client or third party must be deposited into a Trust Account…and funds belonging to the lawyer must be deposited in a business operating account….Thus, unless the client gives informed consent, confirmed in writing, to a different manner of handling funds advanced by the client to cover fees and expenses, the lawyer must deposit those funds into a Trust Account pursuant to paragraph (i)." The lawyer must then maintain the records regarding those funds. The rule requires six types of records: Fee Agreements, Distribution Statements, Transaction Records, Check Register, Individual Client Ledgers, and Monthly Reconciliation Forms.

A lawyer shall maintain individual client ledger sheets for each trust client, showing the source, the amount and nature of all funds received from or on behalf of the client, the description and amounts of charges or withdrawals, the names of all persons or entities to whom such funds were disbursed, and the dates of all deposits, transfers, withdrawals and disbursements.

The most significant change is the requirement that an attorney perform a monthly reconciliation. The Office of Disciplinary Counsel considers the monthly reconciliation to be integral. One good way to comply with the rule is to perform a three-way reconciliation. On a date (preferably the same date monthly and immediately after the bank statement arrives), the account and the ledger sheets are reconciled. The total balances on the individual client ledgers should match the total money in the trust account checkbook register AND the most recent monthly bank statement adjusted for deposits or checks not appearing on it.

If these three numbers do not match, the account is out of trust, and the lawyer must investigate and remedy immediately. The firm must maintain records of this reconciliation for every month. If lawyers fail to do the reconciliations, they will not know of bank errors, miscalculations, or employee embezzlement. No lawyer should give the excuse he or she relied on a non-lawyer to make sure the record-keeping was being done properly. Lawyers are expected to understand the new record keeping requirements and to confirm that the records are being appropriately kept. If asked to produce records, the Office of Disciplinary Counsel will not accept the excuse that a trusted staff person was to maintain these records and she or he is away sick, just quit or stole from me. If the monthly reconciliations are being completed, lawyers can better correct their mistakes, pick up bank errors and thwart employee dishonesty, assuring clients that the money in trust is safe.

Rule 1.15 does not require the use of computer records. However, using software makes the process easier and can reduce errors due to mistakes more likely to happen when recording by hand each trust account transaction several times in the different registers. Whatever method is used to maintain the records, the records must have a backup so they are secure and always available. Computer records must be backed up daily at the end of any day on which entries have been entered into the records.

Only a lawyer admitted in Pennsylvania or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from an account holding fiduciary funds. The lawyer shall maintain his or her Rule 1.5(b) or 1.5(c) fee agreement and the individual client ledgers, as well as the other records supporting disbursements of funds, for five years following the termination of the attorney-client relationship or after distribution of the property, whichever is later.

Rules of Disciplinary Enforcement 208, 219 and 221 – Disclosing Records Rules

The amendments were also designed to allow the Office of Disciplinary Counsel to identify problems more quickly to hopefully reduce the likelihood of large-scale theft. Rule 219 provides that on the annual attorney registration form, attorneys must list each (and every) account and financial institution in which the attorney held funds of clients or third persons as of May 1 or at any time during the preceding 12 months. Lawyers must include any financial institution, including those outside of the Commonwealth, and those which do not fall under the definition of a financial institution, such as a private equity fund. Attorneys practicing in firms must list all accounts, even those for which the attorney is not a signatory, into which fiduciary funds are deposited.

Attorneys must list every business or operating account used in the practice of law. The rule requires attorneys to list every account that held funds of clients or third persons, over which the attorney had sole or shared signature authority or authorization to transfer funds to or from the account. Therefore, lawyers acting as trustees or executors likely must list those fiduciary accounts, as well. A rule of thumb is if any money goes into an account that is not the lawyer's own funds, it should be listed.

Rule 221 is the Mandatory Overdrafts rule. It mirrors Rule 1.15(c)'s record keeping requirements, including requiring attorneys to retain records for at least five years following the termination of the attorney-client relationship or the distribution of property, whichever is later. Records may be maintained electronically if printed copies can be produced. The records must be readily accessible to the lawyer in a timely manner. Disciplinary Counsel need not subpoena records, and instead can request records from the attorney by letter. If requested to provide records, the attorney has 10 days.

The rules previously provided that "refuses" to provide records was a basis for immediate temporary suspension. The rule is now "fails" to provide. The Office of Disciplinary Counsel will not accept "I don't have them" as an excuse.

A lawyer should not write checks on the IOLTA account until the lawyer is sure a deposit has cleared. If there is an overdraft, banks have mandatory reporting to the Client Security Fund. The Client Security Fund in ALL cases will by letter request an explanation of the overdraft. Writing a check before confirming the deposit has cleared is by definition "out of trust" because by using the float, the lawyer is using someone else's money. This is prohibited. It is improper for lawyers to keep a cushion in their trust account because this is by definition comingling – mixing the lawyer's and the client's funds - and also prohibited.

The Office of Disciplinary Counsel cautions that lawyers should not ignore requests from the Client Security Fund. Although not all overdraft notifications end in a referral to the Disciplinary Board, they frequently do. The Disciplinary Board will then do its preliminary investigation which will involve requesting the mandated records be provided within 10 days. If a lawyer ignores a Client Security Fund request, the matter will be referred to the Office of Disciplinary Counsel. They will consider it unusual that the lawyer did not respond.

Ten days is not an unreasonable time for a lawyer to produce his or her bookkeeping records. If a person makes a deposit to his or her bank and asks for the balance in the account, the response – let me take a couple weeks and get back to you - would not be acceptable. Likewise, it should not be acceptable for the lawyer producing records regarding the fiduciary funds. If the lawyer is complying with the Record Keeping Rules, he or she should readily be able to produce the records within 10 days.

Rule 208 allows the Office of Disciplinary Counsel to request a lawyer be placed on temporary suspension, if the lawyer fails to produce the records within 10 days.

New Rule 5.8 – Investment Products Prohibitions and Restrictions

If a client has invested in a product in which the lawyer has a personal interest and that investment loses money, the client may well feel deceived. The purpose of this new

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Bar Briefs

News and Notes

The following individuals were welcomed into ACBA membership at the ACBA Board of Governors meeting on April 21, 2015. *Active Members:* **Patrick Corcoran, James W. Doring, Tiffany Jenca, Frank Kimmel, Meredith J. Norris, Daniel L. Puskar, Nicholas Smyth, Jeremy Teaberry.** *Student Members:* **Raymond A. Sevacko, III, Nicholas Urban, Joseph Yarsky.**

Patricia Dodge

The *Pittsburgh Business Times* honored Meyer, Unkovic & Scott Managing Partner **Patricia Dodge** with a 2015 BusinessWomen First Award at a gala dinner and awards ceremony at the Omni William Penn Hotel. The *Pittsburgh Business Times* BusinessWomen First Awards recognize the most influential female business leaders in the region at both nonprofit and for-profit organizations. A panel of judges composed of 2014 award winners selected this year's honorees from a list of more than 125 nominations. As an experienced trial attorney, Dodge represents a wide range of foreign and domestic corporations, closely-held businesses, municipal agencies, and individuals in connection with complex commercial litigation, oil and gas controversies, securities fraud, products liability, and land use litigation. She also represents clients in domestic and international arbitration proceedings and serves as an arbitrator for the American Arbitration Association and as a private arbitrator. Dodge frequently serves as a mediator and neutral evaluator in lawsuits pending in federal court. She has served as the managing partner of Meyer, Unkovic & Scott since 2012.

Weiss Burkardt Kramer, LLC, now represents 15 school districts in western Pennsylvania after Canon McMillan School District voted to appoint the firm as its solicitor. Partner **Jocelyn P. Kramer** will be the district's primary solicitor, representing the school board at meetings. She will advise the district on all matters relating to employment, labor, litigation, special education, and other general business.

People on the Move

Caroselli, Beachler, McTiernan & Coleman has announced that **Craig Coleman** has become a named partner in the firm. Coleman focuses his practice on asbestos disease litigation, mesothelioma, and personal injury.

Alfred Maiello

Maiello Brungo & Maiello is pleased to announce the firm has moved to SouthSide Works. The firm's new address is: 424 South 27th Street, #210, Pittsburgh, PA 15203. The office is home to 14 attorneys, and offers an array of legal services including real estate development, construction, corporate and business law, banking and finance, labor and employment, school and municipal, litigation, and estate planning.

Change in Status

Thomas Allen Crawford, Jr. has been temporarily suspended from the practice of law by the Supreme Court of Pennsylvania and from the Bar of the Commonwealth of Pennsylvania.

Lawyers' Mart

JUDGE ALAN HERTZBERG
continued from front cover

pro bono child advocate in a dependency proceeding in 1983," said Hertzberg.

That was the beginning of what has become a lifelong penchant for pro bono work and providing equal access to justice.

"The essence of judicial responsibility is the fair resolution of disputes. This is less likely to occur when a party in a dispute cannot afford a lawyer," said Hertzberg. "The courtroom can be an intimidating place for non-lawyers where a different language seems to be spoken. By serving on the Partnership, I am able to make this situation better. Much is being accomplished by the administrative board as nearly all of its members do not just 'talk the talk,' but they personally do pro bono legal work." ■

UNDERSTANDING THE AMENDMENTS
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rule as described in Comment [2] is to "prohibit investment situations fraught with a potential for a conflict of interest or that provide an opportunity for the lawyer to control or unduly influence the use or management of the funds…." It does not prohibit the lawyer from offering investment advice.

However, Rule 5.8 prohibits a lawyer from brokering, selling, recommending, or offering to place an investment unless the attorney is licensed to do so and is without a disqualifying interest. Further, a lawyer cannot recommend or offer an investment product to a client or any person with whom the lawyer has a fiduciary relationship or invest funds belonging to such person if the lawyer or his/her spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer maintains a close familial relationship (includes a step-child), has an ownership interest in the entity or has an interest in compensation paid. The term investment product is broad and includes inter alia: an annuity contract, a life insurance contract, a commodity, a swap, an investment fund including a trust fund or real estate investment fund.

THIS RULE IS CONSIDERED A NON-WAIVABLE CONFLICT RULE. These are unqualified prohibitions on lawyers dealing with their clients and investment products. It is not imputed to other lawyers in the firm. The rule applies under any circumstances – legal services or non-legal services, such as title insurance, financial planning, accounting, trust services, real estate counseling or others as defined in Comment 1 to Rule 5.7. Lawyers cannot recommend that a client or any person with whom the lawyer has a fiduciary relationship invest in a vehicle or entity in which the lawyer or someone to whom the lawyer is "close" has an ownership interest or will get a commission. The intent is to avoid situations where the lawyer recommends an investment product and some related party has an interest, whether ownership or commission, in the investment.

Other Rules

Rules Of Disciplinary Enforcement Rule 217 deals with the responsibilities of Formerly Admitted Attorneys particularly with respect to fiduciary funds. Formerly admitted attorneys must resign all appointments as personal representative, executor, administrator, guardian, conservator, receiver, trustee, agent under a power of attorney, or other fiduciary position and close every IOLTA, trust, client and fiduciary account. They must properly disburse or otherwise transfer all client and fiduciary funds and cease using all forms of communication that express or imply eligibility to practice law in the state courts of Pennsylvania, including professional titles, letterhead, business cards, signage, websites, and references to admission to the Pennsylvania Bar. Cancel or discontinue the next regular publication of all advertisements and telecommunication listings stating or implying eligibility to practice in Pennsylvania.

Lawyers who intend to go on inactive status or are disciplined should take time to review the new requirements of this rule, particularly with respect to the notice required to clients if the lawyer is eligible and intends to complete fiduciary responsibilities or accept a fiduciary responsibility. The Note to Rule 217(d)(3) states that the amended rule does not prevent a retired or inactive attorney from serving as a personal representative, executor, administrator, guardian, conservator, receiver, trustee, agent under a Power of Attorney or other fiduciary position, but a formerly admitted attorney serving as a fiduciary or accepting a fiduciary appointment must still give notice to persons to whom a fiduciary duty is owed, as well as "supervising judges and courts" and "other recipients of the formerly admitted attorney's fiduciary services" so that the formally admitted attorney "gives all interested parties an opportunity to consider replacing the formerly admitted attorney."

All lawyers should familiarize themselves with these new rules because upon registration, lawyers will be required to sign a statement that they understand Rule 1.15 and Rules of Disciplinary Enforcement Rule 221 subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities. An attorney is subject to discipline for a false statement. The responsibility to understand these rules cannot be delegated. Keeping compliant with these rules allows lawyers to efficiently demonstrate that they handle fiduciary funds with care which instills confidence in clients. ■

Amy is a partner at the firm of Weinheimer, Schadel & Haber, P.C. For more than 20 years, her practice has focused on the defense of lawyers and other professionals. She serves as chair of the Lawyer Insurance Committee for the Allegheny County Bar Association, is vice-chair and a duty officer for the ACBA Professional Ethics Committee, and is an active member of the PBA Legal Ethics and Professional Responsibility Committee, the Professional Liability Committee and the Executive Council of the Commission on Women in the Profession. She counsels lawyers with risk management questions on the PBA operated hotline for the current bar endorsed carrier's insureds. She frequently lectures in the areas of risk management, avoiding legal malpractice and ethics.

You Work Hard for Your Money, So Start the Attorney-Client Relationship Right

By Amy J. Coco, Esq.

Every attorney-client relationship should begin with a well-drafted engagement agreement, not simply to comply with ethical requirements, but also to reduce the risk of claims and increase the likelihood of getting paid. Few would quibble that social relationships built on solid foundations tend be the more successful and fulfilling relationships. One need not look long to find a relationship advice article suggesting that open communication is pivotally important to developing healthy social and business relationships. Lawyers would do well applying those social norms when starting an attorney-client relationship with a client.

A healthy attorney-client relationship is built on a solid foundation based on a specific discussion with the client, followed up with a comprehensive written engagement laying out clearly for both lawyer and client what services the lawyer will provide and the manner in which the lawyer will proceed in the representation. When the attorney-client relationship starts in this manner, the client is better informed and the lawyer significantly reduces her risk of misunderstanding, an unhappy client, and ultimately a claim against the lawyer. Having a well-drafted engagement agreement focuses the client's expectations from the outset of the representation.

What's The Difference Between A Fee Agreement And An Engagement Agreement?

A fee agreement defines the basis or rate of fee and may be required by

the ethics rules. Pennsylvania Rules of Professional Conduct (Pa.R.C.P.) Rule 1.5 lays out when a writing is absolutely required. When the lawyer has not regularly represented the client (in other words, a new client), the basis or rate of fee must be communicated to the client in writing. If the representation is based on a contingent fee, then the agreement must be in writing. Best practices require more than the "bare minimum" required by the ethics rules. An engagement agreement is much more than just a fee agreement. Lawyer relationships with their clients are in the first instance, at least, contractual relationships. Lawyers would never advise clients to enter into a business arrangement without documenting that arrangement. Lawyers should do likewise with their clients and draft their engagement agreements using contract drafting principles.

Having a well-drafted engagement agreement focuses the client's expectations from the outset of the representation.

The well-drafted engagement agreement should not be a one size fits all form. Forms frequently equal absence of thought. Lawyers should give thought to who they represent, what they will do, and how they will do it every time they undertake a representation. Skipping this step in establishing the relationship is at the lawyer's peril. Without an agreement defining who you represent, what you agreed to do, and how you do it, you risk being sued by people you did not believe you represented, for tasks which you did not agree to undertake and you make it difficult to get paid for the work you performed.

Who Do You Represent?

The first step to establishing a solid foundation for the attorney-client relationship is to articulate who you are representing and to carefully identify that client in the engagement agreement. Sometimes it's obvious to attorney and client, but other times it may not be so clear, particularly to the client, who you are representing. This exercise of identifying the client in the engagement agreement potentially avoids misunderstandings later. If you are representing a corporation in a lawsuit or some transaction, your engagement agreement should state that you are representing the corporation's interests and not the individual shareholders' interests, which can sometimes diverge.

If you plan to represent the interest of more than one person or entity, you need to exercise special attention. Care should always be taken when representing entities, people with fiduciary interests (executors, trustees, etc.) or minors or others of limited capacity. Avoid identifying the client as "you"

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Start the Attorney-Client Relationship Right

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or "client." Be specific. It also helps to identify the lawyers and other professionals you anticipate will work on the matter. This informs the client upfront if you intend to have others assist you. Perhaps the client in his or her mind only wants you working on the file. Having this discussion at the outset of the relationship helps focus client expectations and avoids misunderstanding later.

How Many Clients Do You Have?

If you are representing multiple parties, give serious consideration to whether and how you've represented either or both parties in the past. Make sure those prior representations are disclosed in writing and any potential conflicts are waived before undertaking representation. You should describe the circumstances under which you may or may not continue to represent some of the parties if their interests diverge or they disagree. You should consider using these provisions even if your multiple clients are husband and wife. Frequently, lawyers consider husband and wife as a single client, but their interests can become diverse and potentially even adverse. You should advise in the engagement agreement that anything one client shares with you will be shared with the other and you cannot keep information confidential from the other client in a multiple client representation. Further, the possibility of aggregate settlements should also be addressed, and you should describe the process involved if one is offered. Rule 1.8(g) forbids an attorney from participating in an aggregate settlement without obtaining the informed consent of all clients in a signed, written agreement. An offer cannot be accepted unless each client consents after being made aware of the share that each person will receive.

When there are multiple clients, the conflict waiver provisions are important to obtaining informed consent and avoiding a later breach of fiduciary duty claim. If the engagement agreement is also intended to serve as a conflicts waiver letter, you will need to meet the "informed consent" requirements. Getting informed consent for a conflict waiver is a process, and not just a clause in the engagement agreement. Rule 1.0 defines "informed consent" as "the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Probably the most important thing the lawyer needs to remember about informed consent is that it's always given prospectively, but evaluated retrospectively, and it's at the lawyer's risk if it was not complete.

What Are You Going To Do For The Client?

The engagement agreement should clearly identify the scope of your undertaking. Equally important to identifying what you will do is identifying what you will not do. Many clients view the lawyer they hired as "their lawyer" for everything. If you do not clarify it in writing, courts may define the existence of an attorney-client relationship and the attorney's undertaking by the client's state of mind. If you have not undertaken a particular representation, advise the client in writing. If you undertake to represent a client in a motor vehicle accident but have no intention of representing

the client in any UIM claim, workers compensation claim or social security disability matter (regardless of your reasons), you should so state in your engagement agreement. Likewise, if you represent the client in divorce and support matters, but do not want to undertake the custody matter, so state. If you are giving estate planning advice, you may wish to advise that your advice is meant to achieve their estate planning goals and will not consider their interests in marital property or domestic disputes that may later arise. Likewise, you might undertake business advice, but are not willing or able to address tax issues. If your intent is not to undertake a part of the work or if there is a limitation on your services, that should be explicitly stated in the engagement agreement. Don't assume the client realizes it. Clients sometimes want to retain lawyers for discrete tasks, to limit their costs. A lawyer can do so, as long as the lawyer has explained the risks of such an undertaking. Pa.R.C.P. Rule 1.2(c) provides "[a] lawyer may limit the scope of the representation if the limitation is reasonable under

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Start the Attorney-Client Relationship Right

Continued from page 5

the circumstances and the client gives informed consent." The lawyer must advise the client of any significant problems a limitation might entail, the client must consent, and the fee charged must be reasonable in view of the limitation. This disclosure should be in writing.

Identify the client's goals and define success at the outset of the representation. This helps define the undertaking. The fee agreement should explain to the client that lawyers cannot guarantee outcome or success, and also that the outcome or extent of the services needed is often out of the control of either the client or the lawyer, and may depend on the other side's actions or the court. Except where you are charging a flat fee, the client should understand that you cannot guarantee a maximum fee. Later, in litigation that has become particularly costly because of conduct of the other side, or the court's requirements, you don't want to hear the words, "But you promised that this was only going to cost 'X' dollars." Don't allow a good faith estimate of fees to become a contractual obligation.

What Are The Client's Rights And Obligations?

The fee arrangement section in the engagement agreement is the most important section from the client's perspective. It answers the age-old client question, "How much is all of this going to cost me?" The lawyer's goal regarding fee arrangements is to avoid fee disputes. Describe how you will be paid. Describe what the client will pay, including internal/external costs, fees charged for lawyers and other staff, and how the retainer will work. Consider using an "evergreen" or renewing retainer. Use a clear description of any rights and obligations regarding payments. If you represent the client on multiple matters, you may wish to include a statement requiring fees on all matters be kept current as a condition of continuing work. Clearly identify the rate or basis on which interest will be computed if it is to be charged. Unless you intend to commit to a rate for the duration of the representation, include a statement that you reserve the right to periodically adjust rates or costs.

Identify the client's goals and define success at the outset of the representation.

Address what will happen if the client does not pay. Consider including an alternate dispute resolution method regarding payment. Some counties have fee dispute review boards. Include a provision regarding the lawyer's right to withdraw from representation and the manner in which the lawyer's compensation will be determined if there is a withdrawal. Similarly, include a provision regarding the client's right to terminate the services and the method of calculating the fees to the attorney if the client elects to terminate services.

Include a paragraph in the engagement agreement about what you expect the client to do, such as: be truthful and cooperative, provide all documents and information that may be relevant, including keeping you updated regarding contact and other information. If you are expecting the client to do the legwork to get documents or information and you cannot perform certain tasks until you have that information, say so. Claims against lawyers often include assertion that the lawyer should have done something, such as obtain the police report or medical records, which the lawyer understood to be a client obligation.

The agreement should advise the procedures you use to achieve confidentiality, particularly if documents and client information are stored in the cloud or transmitted via the internet. If the client elects to communicate electronically, warn the client regarding the risks inherent in email and cell phone communication, and what you

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can and cannot control. For instance, if the client is sending you email via their work email address, there is a chance those emails are not confidential.

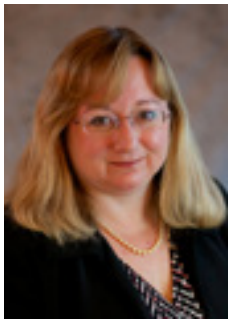
If you do not meet the professional liability insurance requirements of Pa.R.C.P. Rule 1.4, you must advise the client in writing. The engagement agreement is a good place for that disclosure.

The client owns the file materials produced during the representation, unless you have otherwise agreed. The engagement agreement is also a good place to define retention of client materials and ownership of those materials. The PBA Ethics and Professional Responsibility Formal Opinion 2007-100 provides direction. When considering retention of file materials and information related to the client, you should make certain to review the new amendments to Rule 1.15 regarding record keeping. Particularly germane to the engagement agreement considerations is the requirement that engagement agreements (Rule 1.5 writings) must be retained, along with trust account documents, for 5 years following the termination of the attorney-client relationship.

Concluding The Engagement Agreement

The last thing included in the engagement agreement is the client's signature. What if the client won't sign an engagement agreement, or hotly contests items in your engagement agreement? Then you are aware of the issues and the opportunity to "fix it" upfront. If the terms of the engagement agreement and your fee are reasonable, as they should be, you should consider whether you really wish to represent this client. The client who refuses to sign a reasonable engagement agreement is likely to be the same client who refuses to sign the checks paying your bill.

Ultimately, the goal with the engagement agreement is to set reasonable client expectations and to reduce the likelihood of a dispute. The engagement agreement can be a solid foundation on which to begin the relationship and protects both the client and the lawyer. However, like any relationship, if you don't behave according to the terms, things can go awry. Don't say in the engagement agreement you will bill monthly, then wait until the end of the matter to send a large bill. You will end up with that unhappy client. Lawyers have a continuing obligation to communicate with their clients and clients who feel you have kept them apprised are less likely to be unhappy. You work hard for that fee, and having a good engagement agreement starts the relationship right.



Amy J. Coco, Esq. is a partner at the firm of Weinheimer, Schadel & Haber, P.C. Her practice is focused on the defense of lawyers and other professionals. She counsels lawyers with risk-management questions on the PBA hotline for the current bar endorsed carrier's insureds. She frequently lectures in the areas of risk management, avoiding legal malpractice and ethics. She is chair of the Lawyer Insurance Committee for the Allegheny County Bar Association, vice-chair and a duty officer for the ACBA Professional Ethics Committee and an active member of the PBA Legal Ethics and Professional Responsibility Committee, the Professional Liability Committee and the Executive Council of the Commission on Women in the Profession.

Pennsylvania Bar Association Commission on Women in the Profession Communications Commitee

Editorial Policy

Voices & Views is a publication of the Pennsylvania Bar Association (PBA) Commission on Women in the Profession and is published by the Communications Committee three times per year. The purpose of the publication is to facilitate communication among the membership of the commission on topics and events of general interest to women lawyers. The editors of *Voices & Views* reserve the right to accept or reject any submission and to edit any submission to ensure its suitability for publication, its adherence to the Mission Statement of the Communications Committee and its furtherance of the objectives of the Commission on Women in the Profession.

The articles and reports contained in *Voices & Views* reflect the views of the writer and do not necessarily represent the position of the commission, the editors of *Voices & Views* or the Pennsylvania Bar Association.

Mission Statement

It is the mission of the PBA WIP Communications Committee to foster improved communication among its members in the furtherance of the goals of the commission. To this end, the publication, *Voices & Views*, provides a forum for professional and open exchange among the WIP membership on all issues related to women and the law. *Voices & Views* shall be utilized for the following purposes:

- To publicize opportunities and events that may be of interest to the WIP membership;
- To provide information to the membership on topics that may be of general interest to women lawyers;
- To reach a wider audience and increase the visibility of the commission;
- To inform the WIP membership of the projects and goals of the commission; and
- To share information with the WIP membership regarding accomplishments of the members, other women lawyers and public figures.

WEINHEIMER HABER & COCO

AMY J. COCO, ESQUIRE
429 Fourth Avenue, Suite 602
Pittsburgh, PA 15219
(412) 765-3399 ext. 4
ajc@whc-pc.com
www.whc-pc.com

Avoiding Practice Pitfalls: Dos and Don'ts to Decrease Your Risk of Legal Malpractice Claims

Legal malpractice claims invariably cause lawyers expense, effort and stress. However, lawyers and law firms can take some basic steps to minimize the risk of a claim and to maximize their ability to defend themselves if a claim does arise. Avoiding these pitfalls can go a long way to minimize the likelihood of dealing with the stress, expense and effort. A major goal with these Dos and Don'ts is to manage client expectations which reduces the likelihood of a dispute.

Client and Case Selection

Avoid the pitfall of accepting every client who walks in the door (or calls on the phone or emails). Avoid the pitfall of practicing in an unfamiliar area. Regardless of the merits of any particular case, some clients are better served by other lawyers. Develop a sense of those clients that you are comfortable representing and who will be comfortable with you. Matching the client type and temperament and case type to your own skill set and temperament reduces the risk of the unhappy client. Unhappy clients are the ones most like to make a claim.

- **Don't** represent everyone who knocks on your door. Some clients are better served by other counsel.

- **Do** give careful consideration to the personality match of the client and the lawyer.

- **Do** be extra cautious when you are replacing previous counsel. Perhaps the prior counsel was, in fact, doing bad work, or was simply not the right type and temperament for the prior lawyer, but frequently the client may simply have expectations which cannot be satisfied by the legal system.

- **Do** avoid conflicts of interest. Memories alone are not sufficient. Have a system in place to check names of those involved in the case before signing the client up. No less than seven rules in the Rules of Professional Conduct deal with conflicts of interest. See Rules 1.7 – 1.12 and new Rule 5.8 which is a non-waivable conflict rule. Consult the Rules and comments if there is any question about whether a conflict exists.

WEINHEIMER HABER & COCO

AMY J. COCO, ESQUIRE
429 Fourth Avenue, Suite 602
Pittsburgh, PA 15219
(412) 765-3399 ext. 4
ajc@whc-pc.com
www.whc-pc.com

- **Do** avoid the client who cannot afford to lose. If a client's situation is so desperate that his or her life will be over if they are unable to obtain custody, win the alimony petition, or receive a fair equitable distribution, etc., any dissatisfaction with the result is likely to be transferred to a dissatisfaction with counsel. Dissatisfied clients are the ones who file lawsuits against their lawyers. Although all domestic relations matters have a substantial emotional component, be cautious as that emotion frequently gives rise to claims against the lawyer. The client who insists it is not about the money, it is about the principle of the matter is more likely to be dissatisfied by the outcome in a civil litigation matter.

- **Don't** take a case you don't have the time or resources to handle.

- **Don't** dive in unknown waters. When a lawyer is unfamiliar with the area of law, he or she is more likely to make substantive errors and/or procedural errors and these errors frequently result in claims. If you do not understand and are not familiar with the legal issues involved in the matter, you have choices:

    - Hit the books. But recognize that the client is likely not going to be willing to pay for your education.
    - Get help from knowledgeable counsel or a mentor.
    - Refer the matter to someone who is able to handle it.
    - Decline or terminate the representation.

- **Do** send non-engagement letters or communications to those potential clients when you do not take the case. This is particularly important if a statute of limitations applies or some deadline looms. Courts have sometimes allowed the question of the existence of an attorney client relationship to be decided by the client's state of mind. If you have not undertaken representation, it is a very good idea to set forth the same in writing. See Rule of Professional Conduct, Rule 1.16.

Client Communications - Engagement/Disengagement/Fees

Avoid the pitfall of failing to document your retention, advice and termination of the relationship. A lawyer would never advise his or her client to go into a business relationship without a clear understanding of the agreement. Every attorney-client relationship should begin with a well-drafted engagement agreement, not simply to comply with ethical requirements, but also to reduce the risk of claims and increase the likelihood of getting paid.

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- **Do** have a specific discussion with your client laying out clearly for both lawyer and client what services the lawyer will provide and manner in which the lawyer will proceed in the representation.

- **Do** confirm your discussion with a written engagement agreement.

- **Do** identify clearly whose interests you represent, especially in the case of multiple parties or overlapping interests. Identify the client in the engagement agreement to avoid misunderstandings later. For example, if you are representing a corporation in a lawsuit or a transaction, your agreement should state that you are representing the corporation's interests and not the individual shareholders' interests, which can sometimes diverge.

- **Do** identify the lawyers and other professionals who will work on the file in order to avoid misunderstandings later.

- **Do** give serious consideration to whether and how you've represented any of the involved parties in the past. Make sure that those prior representations are disclosed in writing and any potential conflicts are waived before the representation begins.

- **Do** give serious consideration, when representing multiple parties, to whether they have interests which may diverge and make clear the circumstances under which you may or may not continue to represent some of the parties if their interests diverge. Make sure you advise in writing that anything one party shares will be shared with the other and you cannot keep information confidential from the other client in a multiple client representation.

- **Do** include a description of the scope of the work you are undertaking. Be specific. If you are not undertaking a particular part of the work, you should expressly and explicitly say so. If there is a limitation on service, it should be explicitly set forth in writing to avoid a dispute later. For example, if you are taking the car accident case, but not the UIM claim, workers compensation matter or social security disability matter, you should so state. If you are giving estate planning advice, you may wish to advise that your advice is meant to achieve their estate planning goals and will not consider their interests in marital property or domestic disputes that may arise later. If you are giving business advice, but not tax advice, say so.

- **Do** identify the client's goals and define success at the outset.

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- **Don't** guarantee success. In fact, **do** advise the client that lawyers cannot guarantee outcome or success. You should advise that outcome or extent of the services often depends on the other side's actions or on the court.

- **Do** make sure the client understands that, except where you are charging a flat fee, you cannot guarantee a maximum fee because you cannot control the other side's actions or the court's requirements. You do not want a good faith estimate of fees to become a contractual obligation.

- **Do** include a provision regarding the lawyer's right to withdraw from representation and the manner in which the lawyer's compensation will be determined if there is a withdrawal.

- **Do** use retainers to minimize fee problems. In most cases, but particularly in the domestic relations area, using a replenishing or "evergreen" retainer may reduce disputes. Many lawyers get into difficulty in fee disputes with clients, not because they did not use a retainer at the beginning of the relationship, but simply because they did not keep track of billing issues. You should have a clear understanding with your client that you will withdraw from representation if they do not meet their financial obligations. **Don't** make a bad situation worse, when the client fails to keep up his or her end of the bargain, **do withdraw.**

- **Do** bill your client regularly. If you wait until a substantial amount of work is done or until the end of the matter, and send one large bill, the client is more likely to be unhappy and balk at paying your fees.

- **Don't** sue your client for fees. There are really only two answers to a suit for fees: I don't have the money (which means you are likely not collecting). You did something wrong (which means you are likely paying your deductible to a defense lawyer to defend a legal malpractice counterclaim). Either answer frequently ends up in a losing situation for the firm given the time and effort that will be needed to prosecute the claim which could be spent on other endeavors.

- **Do** advise your client on the procedures you will use to achieve confidentiality, particularly if documents and client information are stored in the cloud or transmitted via the internet.

- **Do** warn the client of the risks inherent with email and cell phone communications if the client elects to communicate that way, and make sure the client understands what you can and cannot control. For instance, if the client is sending you email via their work email address, there is a chance that those emails are not confidential.

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- **Do** advise the clients if you do not meet the professional liability insurance requirements of Pa.R.C.P. Rule 1.4.

- **Do** include a provision regarding ownership of the client file materials and the retention/destruction of the file. See PBA Ethics and Professional Responsibility Formal Opinion 2007-100.

- **Don't** charge a contingent fee in a divorce matter (or in a criminal case). Rules of Professional Conduct, Rule 1.5(d).

- **Don't** try to limit your professional liability to your client in advance or settle a claim with a client.

- **Do** confirm client discussions and instructions **in writing**. If the client has dictated specific instructions or limitations or controls on the work to be performed, those should be stated.

- **Don't** promise what you cannot deliver. Manage your client's expectations early on. Clients are always happier when you get than more than what they were expecting but are rarely happy when their expectations are not met.

- **Do** use a termination letter. When you choose to, or must, terminate an ongoing representation, you should prepare a disengagement letter. See Rule of Professional Conduct, Rule 1.16 which, inter alia, places burdens upon lawyers to take reasonable steps to mitigate the consequences of a voluntary or involuntary termination upon the client.

Case Management and Client Relations - Timeliness, Diligence and Competence

Avoid the pitfall of failing to manage client expectations and the case flow. Avoid the pitfall of failing to be nice. Recognize that the core of many legal malpractice cases is the dissatisfied client who feels that the lawyer did not pay attention to his or her legal matter. Clients sometimes bring suit because they believe they have not been treated very professionally by the lawyer.

- **Do** return phone calls.

- **Do** prepare the client for possible bad results. **Don't** fall into the trap of believing that withholding bad information from the client will prevent a lawsuit. Instead, it frequently brings a fraud count added to the Complaint.

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Pittsburgh, PA 15219
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ajc@whc-pc.com
www.whc-pc.com

- **Do** keep the client advised. Clients should be kept up to date on the status of matters. A client is much more inclined to accept an unfavorable result if he or she has been kept advised of the proceedings and has been provided an appropriate analysis (warning) of the possibilities of unfavorable results. Avoid creating or maintaining unreasonable client expectation.

- **Do** send clients copies of everything. This not only keeps the client up to date but builds an appreciation of the value of the lawyer's services and the difficulty of obtaining an appropriate result for the client.

- **Do** make timely filings. A substantial percentage of claims result from a failure to file court papers or other documents in a timely fashion. Lawyers should use both a diary/calendar system and a docket system to ensure that matters within their responsibility are handled in a timely manner.

- **Don't** file court papers that lack support in law and fact. See Pa.R.C.P Rule 1023.1

- **Do** educate yourself about technology. The Rules of Professional Conduct require lawyers "keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology. . ." The essence of this rule is that you must have an understanding of technologies associated with the profession. In order to be competent, you must be able to advise your clients about their use of social media and you must understand what digital evidence might be available to help prove or defend in a case. See PBA Ethics and Professional Responsibility Formal Opinion 2014-300.

- **Do** keep client information confidential. While the premise is simple, in this day and age, it may no longer be easy. Rule 1.6 requires the lawyer to keep any information **related** to the representation of the client confidential. This is much broader than the attorney-client privilege. Your duties require you to take care to keep all information related to the representation of the client confidential (this includes even information that is public record). For example, if you are communicating with your clients electronically, you need to take care to make sure the information is communicated confidentially. This may include warning not communicating with clients via non-secure technology, or warning clients not to communicate with you on computers that they don't have an expectation of privacy – like a work email account. Depending on the sensitivity of the information, it may also mean you should be encrypting your communications. If you use online storage for client information, you need to make sure it's considered secure. All cloud storage companies are not necessarily recommend for storage of confidential information.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R* **May 11, 2017**

Revised May 22, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for email communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook

*The opinion below is a revision of, and replaces Formal Opinion 477 as issued by the Committee May 11, 2017. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c) and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was

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3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[7]

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

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7. *Id.* at 43.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

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13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2016). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

14. See item 3 below.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

   A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

   Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As Comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

   A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived. Therefore, the lawyer should warn the client about the risk of sending or receiving electronic communications using a computer or other device, or email account, to which a third party has, or may gain, access.[18]

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

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17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011). Formal Op. 11-459 was issued prior to the 2012 amendments to Rule 1.6. These amendments added new Rule 1.6(c), which provides that lawyers "shall" make reasonable efforts to prevent the unauthorized or inadvertent access to client information. *See, e.g.*, Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which email communications should be afforded special security protections. *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and

- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2016). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [19] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).