ETHICS AND PROFESSIONALISM
AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

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Ethics and Cyber Security Issues

By: Mark J. Sullivan and Andrew M. Feldman

With increased efficiency and convenience, expanding technological mobility has also brought new vulnerabilities for unwary lawyers. Flash drives, tablets and smartphones all can easily be lost or stolen, yet many lawyers do not encrypt their mobile devices or go to the trouble to use passwords on these devices. Anecdotal evidence suggests that many lawyers are also unaware that office hardware such as large copiers may be returned to vendors with gigabytes of residual firm data, including any confidential client materials the device printed.

The potential ethical pitfalls that accompany the rapid proliferation of digitally-stored client files has caused the American Bar Association and a number of state bars to issue a series of rule modifications and ethical opinions aimed at cybersecurity and technological issues. As one example, The Florida Bar takes the issue so seriously that its Board of Governors recently recommended the first increase in total CLE hours in 30 years, to specifically add a three-hour technology requirement to every reporting cycle. If Florida adopts this recommendation it will be the first state bar in the nation to adopt a technology-specific CLE requirement.

Cyber-attacks and other e-breaches are increasing in law firms of all sizes, and the legal industry is widely regarded as lagging behind others in planning for and responding to these threats, which were considered so significant as of November 2011 that the FBI held a meeting for New York’s 200 largest law firms to advise them of the increasing number of attacks. There
are many reasons for hackers to target the information being held by both small and large law firms. Firms collect and store large amounts of data, including corporate documents, intellectual property, and records collected through e-discovery, as well as critical personal identifying information associated with identify theft, such as social security numbers, medical and tax records, and general background information on individuals.

It is important for all lawyers to understand that the relevant threats take varied forms, from malicious outsiders to insiders of all categories, including employees who intentionally steal data to those who innocently create data breaches despite their best efforts to the contrary. Detailed examples are beyond the scope of this article, but one should be aware that inadvertent breaches are as common, and damaging, as coordinated insider or outsider attacks.

In many cases, taking a preventative step as simple as enabling a four-digit passcode on a smartphone can not only save an attorney considerable stress and uncertainty if it is ever misplaced or stolen, but may also help to mitigate the potential ethical (or civil) exposure occasioned by jeopardizing clients’ sensitive information. As the ABA and many bar associations begin to view features like basic encryption and secure electronic data storage as basic ethical components of the practice of law, the relative adequacy of a law firm’s security protocols will undoubtedly take on added significance in the event of a security breach, regardless of whether that breach is accidental or malicious.

Mark Sullivan is a partner at Klein Glasser Park & Lowe, P.L. in Miami, Florida, and has been with the firm since 2009. Andrew Feldman is an associate at Klein Glasser and has been with the firm since 2012. Both attorneys practice in the firm’s professional liability division, where they focus on defending legal malpractice claims, claims predicated on fiduciary relationships, and ethics violations in general, as well as dignitary torts such as defamation and malicious prosecution claims arising in the practice of law.

Social Media, the First Amendment, and the Rules of Professional Conduct

By: Shannon C. Burr

A recent ruling by the Louisiana Supreme Court provides guidance as whether a lawyer’s postings on social media pertaining to an ongoing judicial proceeding did fall within the category of First Amendment Free Speech. Specifically, the Louisiana Supreme Court ruled in 2015 that an attorney’s online and social media activity violated numerous Rules of Professional Conduct and was not free speech protected by the First Amendment.1 Joyce Nanine McCool, in what she proclaimed was an effort to protect two young girls from alleged abuse by their father, engaged in a social media campaign including Twitter, change.org, her blog site and online articles she authored criticizing the judges and expressing her opinions about cases pending before courts in Mississippi and Louisiana.

McCool then drafted an online petition, encouraged the public to sign the petition and posted contact information for the judges’ offices and the Louisiana Supreme Court. In addition, she

1 In Re McCool, 172 So.3d 1058 (2015).
posted comments encouraging others to contact the judges and the Court about the cases. McCool also used her personal Twitter account to post numerous messages criticizing the judges and encouraging the public to act. As a result, both judges received numerous communication from the public regarding the cases, and eventually recused themselves from the pending cases as well as others involving McCool.

The Louisiana Supreme Court held that McCool’s conduct fell into three categories 1) improper ex parte communications; 2) dissemination of false and misleading information; and 3) conduct prejudicial to the administration of justice. The court held that use of social media and the internet to “marshal public opinion against these judges and attention from this Court” violated Rules 3.5(a) and (b) and 8.4(a) of the Rules of Professional Conduct. Rule 3.5 prohibits a lawyer from seeking to influence a judge, . . . or other official by means prohibited by law and to communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order. Rule 8.4 (a) holds that it is professional misconduct for a lawyer to violate the RPC or knowingly assist or induce another to do so, or do so through the acts of another. The Court also found that McCool violated Rule 8.4(c) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, largely due to the clear and admitted “mistakes” in her statement of the facts. Finally the Court held that McCool had violated Rule 8.4 (d) prohibiting a lawyer from engaging in conduct prejudicial to the administration of justice.

McCool argued that her statements were free speech protected by the First Amendment. The Court held that attorneys in pending cases are subject to ethical restrictions on free speech not applicable to ordinary citizens. The Court held that “By holding the privilege of a law license, respondent, along with all members of the bar, is expected to act accordingly. . . . Respondent in this instance 'is not merely a person and not even merely a lawyer. [She] is an intimate and trusted and essential part of the machinery of justice, an officer of the court’ in the most compelling sense.” The court ultimately found that the online and social media campaign was intended to inflame the public sensibility and influence the Court and was not protected free speech.

For further discussions of the effect of social media on judicial proceedings, see State v. Madden, 2014 WL 931031, (not reported) concerning a criminal judge’s Facebook activity noting that in spite of privacy settings, “[I]n today’s world, posting information to Facebook is the very definition of making it public.” See also, United States v. Bowen, 969 F.Supp. 2d 546, 625-27 (E.D. La. 2013), granting motion for new trial on the grounds of prosecutors’ misconduct in posting anonymous comments regarding the trial on nola.com; Domville v. State, 103 So.3d

2 Id. at 1069. The Court also held that when the petition was printed and faxed to the court and judges’ offices, with McCool as the first signatory, it was a direct communication with the court.

3 The evidence Judge Gambrell was accused of “refusing to hear” was never offered into evidence.


5 Id. at 1077, quoting Gentile, supra.

6 Id. at 8.

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Ethical Concerns with Unbundling Legal Services

By: Siri Thanasombat

One of the continuing and significant challenges in the U.S. justice system is finding ways to increase public access to affordable legal services. However, recent research indicates that people with low income and moderate incomes increasingly are bypassing lawyers and turning to self-representation, often after referring to document preparation websites and other online companies serving the DIY market. One approach that could benefit both people with legal needs and lawyers, and that has gained more and more traction, is limited-scope representation or unbundling legal services.

In February 2013, the ABA House of Delegates adopted a resolution encouraging lawyers “to consider limiting the scope of their representation, including unbundling of legal services as a means of increasing access to legal services.” In concept, unbundling works like this: A lawyer and client agree that both individuals will split the work in a case. Such an arrangement allows the client to receive some assistance directly from a lawyer while the lawyer’s fee won’t be as high as if she had handled the entire case herself.

The starting point for lawyers who are considering offering limited-scope representation is Rule 1.2(c) of the ABA Model Rules of Professional Conduct, which provides: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

But with changes come challenges, complications, and gray areas.

One major difficulty is getting clients to fully understand exactly what they are receiving. Aligning a client’s expectations with the realities of an attorney representing them for a discrete task is one critical challenge. The client may believe that hiring a lawyer for a limited purpose will achieve a client’s overall goals, but that may be unobtainable with the limited services provided by the attorney.

The growing demand for lawyers to offer unbundled legal services also raises another challenge: How should opposing counsel communicate with individuals who may or may not...
have hired a lawyer to represent them on a limited basis? Whom should they speak with and what parts of the case may they discuss?

In November 2015, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that sought to shed some light on these questions. Although there is no clear guidance in the ABA Model Rules of Professional Conduct, Formal Ethics Opinion 472 focuses on the interplay between Model Rules 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Person).

Opinion 472 states that a lawyer directly communicating with an individual “will only violate Rule 4.2 if the lawyer knows that the person is represented by another lawyer in the matter to be discussed.” (Emphasis in the original.) “Knows” is defined in the Model Rules as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” That definition applies to communications with people when it's unclear whether they are represented by a lawyer.

The Opinion acknowledges that making such inferences can be tricky. Thus, the Committee recommends that “in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, the lawyer begin the communications by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3.” The Committee continues: “It is not a violation of the Model Rules . . . for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.” However, the Committee cautions that lawyers cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by deliberating turning a blind eye.

The Opinion states that if the individual on the opposing side is not represented by an attorney or the representation has been completed, a lawyer may communicate directly with the other person subject to Model Rule 4.3. But “when the communication concerns an issue, decision, or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person's counsel.”

One area where a lawyer easily can get tripped up is when the person on the opposing side initiates the contact, and the lawyer assumes that the person is not represented. According to legal ethics experts, even when the person on the opposing side initiates the communication, the first thing the lawyer should ask is whether the person is represented.

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Lawyers Can Make Charitable Donations and Lawyers Can Advertise, Just Not Together

By: Anna M. Outzen

Lawyers and law firms often make charitable donations. Said donations often involve a listing of the lawyer’s name or the fact of the donation. Similarly, law firms and lawyers advertise their services. The Ethics Committee of the Mississippi Bar (“Committee”) determined that it was unethical for a lawyer to advertise that a portion of the fees a lawyer received would be shared with a charitable organization.¹ As the Mississippi Rules of Professional Conduct on which the Committee relied are nearly identical to the respective ABA Model Rules of Professional Conduct, other states that have adopted similar ethical rules would likely come to the same conclusion.

According to Mississippi Rule of Professional Conduct 7.1, in attracting new clients, lawyers cannot make statements that are “false, misleading, deceptive or unfair communication about the lawyer or lawyer’s services.”² Comment 2 to Model Rule 7.1 clarifies that “a truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”³ The Committee determined that an advertisement which promised that proceeds would be charitably donated violated Rule 7.1 by implying the lawyer is more charitable or honest than others.

Furthermore, the Committee found that such a promise contradicts Rule 5.4, which prohibits lawyers from sharing legal fees with non-lawyers.⁴ Similarly, the Comment to Rule 7.2 prohibits lawyers from paying benefits to another person or organization for procuring professional work.⁵ The Committee determined that if a charitable organization received donations as result of the lawyer’s professional services, that organization would exclusively refer potential clients to that lawyer.

Although lawyers are always encouraged to make charitable donations and can advise the public of this practice, a promise to do so in connection with questing for a new client violates ethical standards.

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² Miss. Rule Prof. Conduct 7.1 (2016).
⁴ Miss. Rule Prof. Conduct 5.4 (2016); see also Model Rules of Prof’l Conduct 5.4 (2015).
NEWS AND ANNOUNCEMENTS >>

ABA Annual Meeting

August 4-6, 2016
San Francisco, California

The ABA Annual Meeting will be held August 4-6, 2016 in San Francisco, California. The YLD has a jam-packed schedule of CLE programs, networking events and meetings. Don’t miss out on this chance to network with other young lawyers, earn CLE credits, and hear from well-known speakers. It’s important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope you can be part of that discussion.

Standing Committee on Lawyer’s Professional Liability, Fall 2016 Conference

September 21-23, 2016
Chicago, Illinois

The ABA’s Standing Committee on Lawyer’s Professional Liability will have its Fall Conference September 21, 2016 through September 23, 2016 at the Swissotel in Chicago, Illinois. There are a number of young professional and young lawyer events scheduled in conjunction with the same, including a happy hour, Breakfast with Experience (young lawyer breakfast with experienced insurance professionals), Young professional CLE session and a young professional dinner. More information can be found at: http://www.americanbar.org/groups/lawyers_professional_liability/events/lpl_conference.html.

ABA Everyday Initiative

The ABA Everyday Initiative provides daily podcasts, publications, webinars, CLE and resources. Check out the calendar here: http://www.abaeveryday.org.

Call for Article Submissions

We are accepting articles for publication in our quarterly newsletter on an on-going basis on a wide variety of topics and subject matters. It is an easy way to get your work published and build up your reputation. Please submit submissions or inquiries to Melissa Lessell, Newsletter Editor, mlessell@deutschkerrigan.com. The next newsletter will be issued in October 2016.