

Ethics Informational Packet

TECHNOLOGY

Courtesy of
The Florida Bar
Ethics Department

TABLE OF CONTENTS

	<u>PAGE #</u>
Ethics Opinions Related to Technology	3
OPINION 14-1	4
OPINION 12-3	8
OPINION 12-2	11
OPINION 10-2	14
OPINION 07-3	18
OPINION 07-2	21
OPINION 07-1	27
OPINION 06-2	37
OPINION 06-1	41
OPINION 00-4	43
OPINION 93-3	46
OPINION 87-11 (Reconsideration)	47
Advertising Opinions and Guidelines Related to Technology	49
ADVISORY OPINION A-00-1 (Revised)	50
The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites	53
The Florida Bar Standing Committee On Advertising Guidelines for Video Sharing Sites	55

Ethics Opinions Related to Technology

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 14-1

June 25, 2015

Advisory ethics opinions are not binding.

A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.

Note: This opinion was approved by The Florida Bar Board of Governors on October 16, 2015.

RPC: 4-3.4(a)

Opinions: New York County Ethics Opinion 745; North Carolina Formal Ethics Opinion 5; Pennsylvania Bar Association Opinion 2014-300; Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5

Cases: *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); *Gatto v. United Airlines*, 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013); *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010); *Root v. Balfour Beatty Construction, Inc.*, 132 So.3d 867, 869-70 (Fla. 2nd DCA 2014)

Misc.: Guideline No. 4.A, Social Media Ethics Guidelines, New York State Bar Association's Commercial and Federal Litigation Section

A Florida Bar member who handles personal injury and wrongful death cases has asked the committee regarding the ethical obligations on advising clients to "clean up" their social media pages before litigation is filed to remove embarrassing information that the lawyer believes is not material to the litigation matter. The inquirer asks the following 4 questions:

- 1) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are related directly to the incident for which the lawyer is retained?
- 2) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are not related directly to the incident for which the lawyer is retained?
- 3) Pre-litigation, may a lawyer advise a client to change social media pages/accounts privacy settings to remove the pages/accounts from public view?

4) Pre-litigation, must a lawyer advise a client not to remove posts, photos, videos and information whether or not directly related to the litigation if the lawyer has advised the client to set privacy settings to not allow public access?

Rule 4-3.4(a) is applicable and states as follows:

A lawyer must not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

The comment to the rule provides further guidance:

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

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

Under these facts, the proper inquiry is whether information on a client's social media page is relevant to a "reasonably foreseeable proceeding," rather than whether information is "related directly" or "not related directly" to the client's matter. Information that is not "related directly" to the incident giving rise to the need for legal representation may still be relevant. However, what is relevant requires a factual, case-by-case determination. In Florida, the second District Court of Appeal has determined that normal discovery principles apply to social media, and that information sought to be discovered from social media must be "(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court." *Root v. Balfour Beatty Construction, Inc.*, 132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion. The committee is aware of cases addressing the issue of discovery or spoliation relating to social media, but in these cases, the issue arose in the course of discovery after litigation commenced. See, *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) (Sanctions of \$542,000 imposed against lawyer and \$180,000 against the client for spoliation when client, at lawyer's direction, deleted photographs from

client's social media page, the client deleted the accounts, and the lawyer signed discovery requests that the client did not have the accounts); *Gatto v. United Airlines*, 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013) (Adverse inference instruction, but no monetary sanctions, against plaintiff who deactivated his social media accounts, which then became unavailable, after the defendants requested access); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010) (Court granted request for access to plaintiff's MySpace and Facebook pages, including private and deleted pages, when plaintiff's physical condition was at issue and information on the pages is inconsistent with her purported injuries based on information about plaintiff's activities available on the public pages of her MySpace and Facebook pages). In the disciplinary context, at least one lawyer has been suspended for 5 years for advising a client to clean up the client's Facebook page, causing the removal of photographs and other material after a request for production had been made. *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013).

The New York County Lawyers Association has issued NYCLA Ethics Opinion 745 (2013) addressing the issue. The opinion concludes that lawyers may advise their clients to use the highest level of privacy settings on their social media pages and may advise clients to remove information from social media pages unless the lawyer has a duty to preserve information under law and there is no violation of law relating to spoliation of evidence. Other states have since come to similar conclusions. See, e.g., North Carolina Formal Ethics Opinion 5 (attorney must advise client about information on social media if information is relevant and material to the client's representation and attorney may advise client to remove information on social media if not spoliation or otherwise illegal); Pennsylvania Bar Association Opinion 2014-300 (attorney may advise client to delete information from client's social media provided that this does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information); and Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5 (attorney may advise a client to change the privacy settings on the client's social media page but may not instruct client to destroy any relevant content on the page). Subsequent to the publication of the opinion, the New York State Bar Association's Commercial and Federal Litigation Section adopted Social Media Ethics Guidelines. Guideline No. 4.A, citing to the opinion, states as follows:

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. [Footnote omitted.]

The committee agrees with the NYCLA that a lawyer may advise a client to use the highest level of privacy setting on the client's social media pages.

The committee also agrees that a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable

proceeding, as long as the removal does not violate any substantive law regarding preservation and/or spoliation of evidence. The committee is of the opinion that if the inquirer does so, the social media information or data must be preserved if the information or data is known by the inquirer or reasonably should be known by the inquirer to be relevant to the reasonably foreseeable proceeding.

The committee is of the opinion that the general obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings. If a client specifically asks the inquirer regarding removal of information, the inquirer's advice must comply with Rule 4-3.4(a). What information on a social media page is relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis.

In summary, the inquirer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 12-3 (January 25, 2013)

Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.

Note: This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013.

RPC: 4-1.6

Opinions: 10-2, 07-2, Alabama 2010-02, Arizona 09-04, Iowa 11-01, Nevada 33, New York State 842, Pennsylvania 2011-200

The Professional Ethics Committee has been directed by The Florida Bar Board of Governors to issue an opinion regarding lawyers' use of cloud computing. "Cloud computing" is defined as "Internet-based computing in which large groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources."¹ It is also defined as "A model of computer use in which services stored on the internet are provided to users on a temporary basis."² Because cloud computing involves the use of a third party as a provider of services and involves the storage and use of data at a remote location that is also used by others outside an individual law firm, the use of cloud computing raises ethics concerns of confidentiality, competence, and proper supervision of nonlawyers.

In other words, cloud computing involves use of an outside service provider which provides computing software and data storage from a remote location that the lawyer accesses over the Internet via a web browser, such as Internet Explorer, or via an "app" on smart phones and tablets. The lawyer's files are stored at the service provider's remote server(s). The lawyer can thus access the lawyer's files from any computer or smart device and can share files with others. Software is purchased, maintained, and updated by the service provider. Many lawyers and others are computing "in the cloud" because of convenience and potential cost savings.

The main concern regarding cloud computing relates to confidentiality. Lawyers have an obligation to maintain as confidential all information that relates to a client's representation, regardless of the source. Rule 4-1.6, Rules Regulating The Florida Bar. A lawyer may not

1 *Collins English Dictionary - Complete & Unabridged 10th Edition*. HarperCollins Publishers. 10 Sep. 2012. <Dictionary.com [http://dictionary.reference.com/browse/cloud computing](http://dictionary.reference.com/browse/cloud%20computing)>.

2 *Id.*

voluntarily disclose any information relating to a client's representation without either application of an exception to the confidentiality rule or the client's informed consent. *Id.* A lawyer has the obligation to ensure that confidentiality of information is maintained by nonlawyers under the lawyer's supervision, including nonlawyers that are third parties used by the lawyer in the provision of legal services. *See*, Florida Ethics Opinion 07-2 and 10-2.

Additionally, this Committee has previously opined that lawyers have an obligation to remain current not only in developments in the law, but also developments in technology that affect the practice of law. Florida Ethics Opinion 10-2. Lawyers who use cloud computing therefore have an ethical obligation to understand the technology they are using and how it potentially impacts confidentiality of information relating to client matters, so that the lawyers may take appropriate steps to comply with their ethical obligations.

Other states that have addressed the issue of cloud computing have generally determined that there are ethics concerns regarding confidentiality of information, but that a lawyer may compute via the cloud if the lawyer takes reasonable steps. *See, e.g.*, Alabama Ethics Opinion 2010-02 (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); Arizona Ethics Opinion 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect confidentiality of the information); Iowa Ethics Opinion 11-01 (2011) (Appropriate due diligence a lawyer should perform before storing files electronically with a third party using SaaS (cloud computing), includes determining that the lawyer will have adequate access to the stored information, the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); Nevada Formal Ethics Opinion 33 (2006) (Attorney may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York State Bar Ethics Opinion 842 (2010) (Lawyer may use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality, and the lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege); and Pennsylvania Ethics Opinion 2011-200 ("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").

This Committee agrees with the opinions issued by the states that have addressed the issue. Cloud computing is permissible as long as the lawyer adequately addresses the potential risks associated with it. As indicated by other states that have addressed the issue, lawyers must perform due diligence in researching the outside service provider(s) to ensure that adequate safeguards exist to protect information stored by the service provider(s). New York State Bar Ethics Opinion 842 suggests the following steps involve the appropriate due diligence:

- Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider

will notify the lawyer if served with process requiring the production of client information;

- Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.

Of particular practical assistance is Iowa Ethics Opinion 11-01. As suggested by the Iowa opinion, lawyers must be able to access the lawyer's own information without limit, others should not be able to access the information, but lawyers must be able to provide limited access to third parties to specific information, yet must be able to restrict their access to only that information. Iowa Ethics Opinion 11-01 also recommends considering the reputation of the service provider to be used, its location, its user agreement and whether it chooses the law or forum in which any dispute will be decided, whether it limits the service provider's liability, whether the service provider retains the information in the event the lawyer terminates the relationship with the service provider, what access the lawyer has to the data on termination of the relationship with the service provider, and whether the agreement creates "any proprietary or user rights" over the data the lawyer stores with the service provider. It also suggests that the lawyer determine whether the information is password protected, whether the information is encrypted, and whether the lawyer will have the ability to further encrypt the information if additional security measures are required because of the special nature of a particular matter or piece of information. It further suggests that the lawyer consider whether the information stored via cloud computing is also stored elsewhere by the lawyer in the event the lawyer cannot access the information via "the cloud."

This Committee agrees with the advice given by both Iowa and New York State. Additionally, this Committee believes that the lawyer should consider whether the lawyer should use the outside service provider or use additional security in specific matters in which the lawyer has proprietary client information or has other particularly sensitive information.

In summary, lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 12-2 September 21, 2012

A lawyer may provide their log-in credentials to the E-Portal to trusted nonlawyer employees for the employees to file court documents that have been reviewed and approved by the lawyer, who remains responsible for the filing. The lawyer must properly supervise the nonlawyer, should monitor the nonlawyer's use of the E-Portal, and should immediately change the lawyer's password if the nonlawyer employee leaves the lawyer's employ or shows untrustworthiness in use of the E-Portal.

[This opinion was affirmed by the Board of Governors at its December 7, 2012 meeting.]

RPC: 4-5.3, 4-5.5

Opinion: 87-11

Case: *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451, (Fla. 2012)

Rules of Judicial Administration: 2.060(d), 2.420, 2.425, 2.515

The Professional Ethics Committee has been asked by The Florida Bar Board of Governors to issue a formal opinion on whether lawyers may permit supervised nonlawyers to use the lawyer's access credentials (log-in name and password) for filing documents with a court using the E-Portal.

The Supreme Court of Florida adopted amendments on June 21, 2012, to Florida rules of court requiring mandatory electronic filing of all documents filed in Florida courts.¹ Implementation of this order is by a schedule adopted by the Court in an administrative order.² The implementation of mandatory filing will be phased in over time.³ Ultimately, all court documents will be filed electronically unless exempted by the Court.⁴ Filing will occur via the

¹ *In re Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure— Electronic Filing*. 102 So.3d 451, (Fla. 2012).

² *Id.*

³ http://www.flclerks.com/e-Filing_Authority/Resources/EFA_Documents/SC11-399/11-399_091912_OrderReqResponse.pdf

⁴ *In re Amendments, supra.*

E-Portal, which is a single website to serve all Florida courts. The Florida Court's E-Filing Authority oversees the E-Portal and "was created pursuant to legislative directive to provide oversight to the development, implementation and operation of a statewide portal designed to process the filing of court documents."⁵

Currently, the E-Portal permits only lawyers to obtain a user name and password for filing. Clerk's offices have received communications from lawyers and others asking if a lawyer may provide the lawyer's log-in name and password to nonlawyers who are supervised by the lawyer so that the nonlawyer may file documents electronically on the lawyer's behalf.

The E-Portal Authority Board met on June 15, 2011, and unanimously adopted a motion to allow a non-lawyer to use a lawyer's credentials to electronically file documents via the E-Portal under the direction or supervision of the lawyer.⁶ On September 28, 2011, the E-Filing Authority Board voted to retract the policy that was adopted on June 15, 2011 and voted not to take a position on the issue.⁷

The Florida Courts Technology Commission, which is responsible for developing standards for e-filing, adopted at its September 26-27, 2011 meeting, a requirement to add the following certification to the E-Portal:

I certify that the filing transmitted through the portal, including all attachments contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by complying with the provisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration.⁸

The certification was modified by the Florida Courts Technology Commission at its May 8-9, 2012 meeting as follows:

The attorney filing, or directing and authorizing this filing (including all attachments), certifies that it contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by

⁵ E-Filing Authority Board website: http://www.flclerks.com/eFiling_authority.html

⁶ E-Filing Authority Board June 15, 2011 minutes, available at: http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/Minutes-June_2011.pdf

⁷ E-Filing Authority Board September 28, 2011 minutes, available at: http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/Sept_2011_BOD_draft_minutes.pdf

⁸ Florida Courts Technology Commission September 26-27, 2011 minutes, available at: http://www.flcourts.org/gen_public/technology/FCTC-September2011Minutes.pdf

complying with the provisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration.⁹

The certification, which as of the date of this opinion had not yet been implemented, may be in the form of a check box required to be checked before submitting a filing through the e-portal or an affirmative statement regarding compliance with the referenced rules.

Rule 4-5.3 addresses a lawyer's responsibility for the conduct of nonlawyer employees, and provides in subdivision (c) that "[a]lthough paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants." The comment further explains a lawyer's ability to delegate, in stating that "[i]f an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee."

This Committee has previously opined that a lawyer may not permit a nonlawyer employee to sign the lawyer's name together with the nonlawyer's initials to discovery and notices of hearing in Florida Ethics Opinion 87-11. That opinion was based, in part, on the then existing Rule of Judicial Administration 2.060(d) which requires that all pleadings be signed by at least one lawyer of record in the matter who is licensed in Florida or who has obtained permission to appear in the matter in which the pleading is filed. Current Rule of Judicial Administration 2.515 is substantially the same. This Committee was of the opinion that permitting a nonlawyer to sign pleadings would be assisting in the unlicensed practice of law, in violation of Rule 4-5.5, Rules of Professional Conduct.

The Committee is of the opinion that a properly supervised nonlawyer may use the credentials of a lawyer to file documents via the E-Portal at that lawyer's direction. Such a task is akin to a nonlawyer transporting a properly prepared and signed pleading to the clerk's office and physically filing it, which is a ministerial task that may be properly delegated. The Committee cautions that the lawyer will remain responsible for the nonlawyer's conduct and must properly supervise the nonlawyer. A prudent lawyer will monitor the nonlawyer's activity and should immediately change the lawyer's password if a nonlawyer with access to the lawyer's credentials leaves the lawyer's employ or demonstrates unreliability in using the E-Portal. The Committee's opinion would remain unchanged if the certification in its current form is added to the E-Portal as a check box upon filing documents so long as the lawyer specifically reviews the documents to be filed, ensures that the documents are in compliance with the confidentiality provisions of Florida Rules of Judicial Administration 2.420 and 2.425, and instructs the nonlawyer employee to make the certification upon filing the documents. This opinion is limited to filing documents via the E-Portal and specifically does not address the issue of electronic signing of pleadings.

⁹ Florida Courts Technology Commission May 8-9, 2012 minutes, available at: http://www.flcourts.org/gen_public/technology/FCTC-May2012MeetingMinutes.pdf

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 10-2 September 24, 2010

A lawyer who chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

RPC: 4-1.1, 4-1.6(a), 4-5.3(b)

The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants (“PDA’s”), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, “Devices”) now contain hard drives or other data storage media¹ (collectively “Hard Drives” or “Storage Media”) that can store information.² Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients’ information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers.

For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier’s hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may

¹ As used in this opinion, Storage Media is any media that stores digital representations of documents.

² See Brian Smithson, *The IEEE 2600 Series: An Introduction to New Security Standards for Hardcopy Devices*, ISSA JOURNAL, Nov. 2009, at 28; Holly Herman, *Experts Warn Copiers Can Be Fertile Ground for ID Thieves*, READING EAGLE (Jun. 2, 2010, 12:28:54 P.M.), <http://readingeagle.com/article.aspx?id=222523>; Mark Huffman, *Digital Copiers Could Be an Identity Theft Threat*, ConsumerAffairs.com (May 19, 2010), http://www.consumeraffairs.com/news04/2010/05/digital_copiers.html; Armen Keteyian, *Digital Photocopiers Loaded with Secrets*, CBSNews.com (April 15, 2010), <http://www.cbsnews.com/stories/2010/04/19/eveningnews/main6412439.shtml>; Gregg Kelzer, *Photocopiers: The Newest ID Theft Threat*, COMPUTERWORLD (March 14, 2007), http://www.computerworld.com/s/article/9013104/Photocopiers_The_newest_ID_theft_threat.

choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information.

Duty of Confidentiality

Lawyers have an ethical obligation to protect information relating to the representation of a client. Rule 4-1.6(a) of the Rules Regulating the Florida Bar addresses the duty of confidentiality and states:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The comment to the rule further states:

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

A lawyer must ensure confidentiality by taking reasonable steps to protect all confidential information under the lawyer's control. Those reasonable steps include identifying areas where confidential information could be potentially exposed. Rule 4-1.1 addresses a lawyer's duty of competence:

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

The comment to the rule further elaborates:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law *and its practice*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

(emphasis added).

If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of

competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including after it leaves the control of the lawyer. Further, while legal matters are beyond the scope of an ethics opinion, a lawyer should be aware that depending on the nature of the information, misuse of these Devices could result in inadvertent violation of state and federal statutes governing the disclosure of sensitive personal information such as medical records, social security numbers, criminal arrest records, etc.

Duty to Supervise

The lawyer must regulate not only the lawyer's own conduct but must take reasonable steps to ensure that all nonlawyers over whom the lawyer has supervisory responsibility adhere to the duty of confidentiality as well. Rule 4-5.3(b) states:

(b) Supervisory Responsibility. With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

(1) 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;

(2) 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

(3) 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:

(A) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A lawyer's supervisory responsibility extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts to assist in the care and maintenance of the Devices in the lawyer's control. If a nonlawyer will have access to confidential information, the lawyer must obtain adequate assurances from the nonlawyer that confidentiality of the information will be maintained.

Sanitization

A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon

sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means.

Further, a lawyer should use care when using Devices in public places such as at copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules.

In conclusion, when a lawyer chooses to use Devices that contain Storage Media, the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition. These reasonable steps include: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-3 January 16, 2009

A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services who is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4-1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.

RPC: Preamble, 4-1.18

OPINIONS: 66-23 [since withdrawn], Arizona 02-04, California Formal Opinion 2005-168, New York City Bar Association 2001-1, San Diego County Bar Association 2006-1

The Professional Ethics Committee has been asked by The Florida Bar Board of Governors to provide guidance to Florida Bar members regarding the issue of unilateral communications to lawyers from or on behalf of persons seeking legal representation. This issue is one of interest generally, particularly with advances in technology, because persons seeking legal representation are easily able to send information to lawyers electronically and via telephone message with the ability to provide large amounts of information regardless of whether the lawyer requested the information or even agreed to consider representing the person. Questions arising from this situation include whether the recipient lawyer has a duty of confidentiality regarding information received unilaterally from a person and whether receipt of the information may create a conflict of interest for the lawyer in continuing or beginning representation of an adversary of the person sending the information. This opinion addresses unilateral communications, including but not limited to electronic mail, regular mail, telephone message and facsimile, and does not address bilateral discussions between lawyers and persons seeking legal representation.

The preamble to the Rules of Professional Conduct, Rules Regulating The Florida Bar, provide as follows:

[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider

whether a client-lawyer relationship shall be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Rule 4-1.18, adopted by the Supreme Court of Florida in 2006, defines a prospective client in subdivision (a) as "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." Subdivision (b) provides that "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client." The comment to Rule 4-1.18 provides as follows:

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Florida Ethics Opinion 66-23 [since withdrawn], written before the adoption of Rule 4-1.18, concludes that a lawyer must treat as confidential information from a person seeking legal representation even if unsolicited, unless it is clear from the circumstances that the person had no expectation of confidentiality.

There are few other state bars that have addressed this issue recently. Arizona Ethics Opinion 02-04 (September 2002) concludes that an attorney owes no duty of confidentiality to persons who send unsolicited e-mails to attorney and may disclose and otherwise use such information, but law firm websites should include disclaimers indicating whether the law firm will treat e-mails as confidential information. New York City Bar Association Ethics Opinion 2001-1 (March 1, 2001) provides that a lawyer is not disqualified from representation of an existing client when the lawyer receives an unsolicited e-mail from an adverse party, but that the lawyer may not use or disclose that information if the lawyer's website has not adequately disclosed that the law firm will not treat such communications as confidential. San Diego County Bar Association Ethics Opinion 2006-1 concludes that a lawyer does not owe a duty of confidentiality to a person who sends unsolicited information to the lawyer and may use the information received unsolicited from another in the representation of an existing client. The State Bar of California has gone so far as to conclude that a lawyer can invite persons to provide information to the lawyer via e-mail or other form of electronic communication via the lawyer's website with no duty of confidentiality attaching if the lawyer provides a clear disclaimer that he or she will not treat the information provided as confidential. See California Formal Ethics Opinion 2005-168 (2005).

The committee generally agrees with the rationale of the state bars that have addressed this issue. The committee's opinion is that a person has no reasonable expectation that a lawyer will keep confidential information that is sent by that person unilaterally. The committee concludes that such a person is not a "prospective client" within the meaning of Rule 4-1.18, because the lawyer has not discussed the possibility of representation with the person. The lawyer therefore will not have a conflict of interest in representing the adversary of a person who

has sent information to the lawyer unilaterally, and the lawyer may disclose or use that information in the representation of the adversary. On the other hand, if the lawyer has discussed the possibility of representation with a person or agreed to consider representing the person, that person is a "prospective client" under Rule 4-1.18, and the lawyer therefore owes the person a duty of confidentiality which may create a conflict of interest in representation of an adversary. In adopting this opinion, the committee withdraws Florida Ethics Opinion 66-23 [since withdrawn]. This opinion addresses only unilateral communications. The committee recommends that lawyers who invite persons seeking legal representation to provide information via the lawyer's website, and do not intend for the information to be treated as confidential, should prominently post a disclosure statement. The disclosure statement should inform the invitees that the lawyer does not intend to treat such information as confidential, that no confidential information should be disclosed, and that the information provided through the website could be used in the future against the person.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-2 January 18, 2008

A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties.

Note: This opinion was approved by The Florida Bar Board of Governors on July 25, 2008.

RPC: 4-1.6, 4-5.3, 4-5.5,

OPINIONS: 68-49, 73-41, 76-33, 76-38, 88-6, 88-12, 89-5; Los Angeles County Bar Association 518, City of New York Bar Association 2006-3

CASES: *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962)

A member of the Florida Bar has inquired whether a law firm may ethically outsource legal work to overseas attorneys or paralegals. The overseas attorneys, who are not admitted to the Florida Bar, would do work including document preparation, for the creation of business entities, business closings and immigration forms and letters. Paralegals, who are not foreign attorneys, would transcribe dictation tapes. The foreign attorneys and paralegals would have remote access to the firm's computer files and may contact the clients to obtain information needed to complete a form. In addition to the facts presented in the written inquiry, the Committee was advised that the outsourcing company employs lawyers admitted to practice in India who are capable of providing much broader assistance to law firms in the U.S. besides outsourcing merely paralegal work, including contract drafting, litigation support, legal research, and forms preparation. The details of the proposed activity are complex, and a number of issues are potentially involved.

The inquiry raises ethical concerns regarding the unauthorized practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing.

Law firms frequently hire contract paralegals to perform services such as legal research and document preparation. It is the committee's opinion that there is no ethical distinction when hiring an overseas provider of such services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm.

Rule 4-5.5, Rules Regulating The Florida Bar, prohibits an attorney from assisting in the unlicensed practice of law. In *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), judge vacated on other grounds, 373 U.S. 379 (1963) the Court found that setting forth a broad

definition of the practice of law was "nigh onto impossible" and instead developed the following test to determine whether an activity is the practice of law:

. . .if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

When applying this test it should be kept in mind that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). The Committee is not authorized to make the determination whether or not the proposed activities constitute the unlicensed practice of law. It is the obligation of the attorney to determine whether activities (legal work) being undertaken or assigned to others might violate Rule 4-5.5 and any applicable rule of law.

Rule 4-5.3, Rules Regulating The Florida Bar, requires an attorney to directly supervise nonlawyers who are employed or retained by the attorney. The rule also requires that the attorney make reasonable efforts to ensure that the nonlawyers' conduct is consistent with the ethics rules. This is required regardless of whether the overseas provider is an attorney or a lay paralegal. The comment to the rule states:

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Additionally, Florida Ethics Opinions 88-6 and 89-5 provide that nonlawyers (defined as persons who are not members of The Florida Bar) may accomplish certain activities but only under the "supervision" of a Florida lawyer.

In Florida Opinion 88-6, which discusses initial interviews that are conducted by nonlawyers, this committee advised that:

the lawyer is responsible for careful, direct supervision of nonlawyer employees and must make certain that (1) they clearly identify their nonlawyer status to prospective clients, (2) they are used for the purpose of obtaining only factual information from prospective clients, and (3) they give no legal advice concerning the case itself or the representation agreement. Any questions concerning an assessment of the case, the applicable law or the representation agreement would have to be answered by the lawyer.

Florida Ethics Opinion 89-5 provides that a law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;
2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;
3. The clients consent to the closing being handled by a nonlawyer employee of the firm. This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;
4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;
5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

The committee has specifically addressed the employment of law school graduates who are admitted in other jurisdictions in Florida Opinions 73-41 and 68-49. These opinions state that a law firm may employ attorneys who are not admitted to the Florida Bar only for work that does not constitute the practice of law.

Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality. See Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows:

[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Of particular concern is the ethical obligation of confidentiality. The inquirer states that the foreign attorneys will have remote access to the firm's computer files. The committee believes that the law firm should instead limit the overseas provider's access to only the information necessary to complete the work for the particular client. The law firm should

provide no access to information about other clients of the firm. The law firm should take steps such as those recommended by The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2006-3 to include “contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.”

The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought. It is assumed that most information outsourced will be transmitted electronically to the legal service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient assurances relative to, the risks inherent to transmittal of information containing confidential information. For example, assurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations. In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service. While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (i.e., non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services.¹

The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client’s interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services. For example, in Opinion 88-12, we stated that a law firm’s use of a temporary lawyer may need to be disclosed to a client if the client would likely consider the information to be material.

¹ See, Indian data breach hits HSBC - 28 Jun 2006 - IT Week www.itweek.co.uk/itweek/news/2159326/indian-breach-hits-hsbc, UK banks escape punishment over India data breach, www.services.silicon.com/offshoring/0,3800004877,39155588,00.htm, Indian call center under suspicion of ID breach, Cnet.com 2005-08-16 http://news.com.com/2100-1029_3-5835103.html, Florida State Data Breach Result of Inappropriate Offshoring to India, About.com 2006-04-1, <http://idtheft.about.com/b/a/256546.htm>, Outsourcing to India: Dealing with Data Theft and Misuse, Morrison & Foerster White Paper November 2006, <http://www.mofo.com/news/updates/files/update02268.html>. U.S. Firm Says Outsourcer Holding Its Data Hostage, Paul McDougall, Information Week, August 7, 2007: <http://www.informationweek.com/story/showArticle.jhtml?articleID=201204202>

In addition to concerns regarding the confidentiality of client information, there are concerns about disclosure of sensitive information of others, such as an opposing party or third party. In outsourcing, there is the possibility that information of others will be disclosed in addition to the disclosure of client information. Lawyers should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties, particularly where the information concerns medical records or financial information.

Additionally, in Consolidated Opinion 76-33 and 76-38, regarding billing for nonlawyer personnel, the committee stated:

[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.

As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research. And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.

Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.

The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be regularly available through independent contractors, e.g., investigators. The

Committee feels that such potentiality especially may exist where the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer; the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee, as proscribed hereinabove.

The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider.

In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the above ethical obligations.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-1

September 7, 2007

A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.

RPC: **4-1.2(d), 4-1.4, 4-1.6, 4-1.16(a)(1), 4-3.4(a), 4-4.4(a), 4-4.4(b), 4-8.4(a), 4-8.4(c), 4-8.4(d)**

Opinions: **93-3; ABA Formal Opinion 94-382; ABA Formal Opinion 06-440; ABA Formal Opinion 05-437; Connecticut Opinion 96-4; New Jersey Opinion 680; New York City Opinion 1989-1**

Cases: ***Anderson v. State*, 297 So. 2d 871 (Fla. 2d DCA 1974); *Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *Moldonado v. New Jersey, Administrative Office of the Courts - Probation Division*, 225 F.R.D. 120 (D. N.J. 2004); *Perna v. Electronic Data Systems, Corporation*, 916 F.Supp. 388 (D.N.J. 1995); *Quinones v. State*, 766 So. 2d 1165 (Fla. 3d DCA 1974)**

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are as follows:

I represent the petitioner/wife in a dissolution of action currently pending in [local county], Florida. Wife maintains a small professional space within an office owned by a company in which her husband is a 50% shareholder. Prior to separation of the parties, wife frequently utilized husband's corporate office space for printing, copying, computer use, etc. Since separation, wife is no longer welcome to use these amenities unsupervised or after hours. It has come to my attention that my client has done the following: (1) Removed documents from husband's office prior to and after separation; (2) Figured out husband's computer and e-mail password and, at his office, printed off certain documents, including financial documents of the corporation, husband's personal documents and e-mails with third parties of a personal nature, and documents or e-mails authored by husband's attorney in this action; (3) Accessed husband's personal e-mail from wife's home computer, and printed and downloaded confidential or privileged documents; and (4) despite repeated warning of the wrongfulness of wife's past conduct by this office, removed documents from husband's car which are believed to be attorney-client privileged.

Wife has produced to my office certain documents listed in 1-3 above, which production alerted me to this issue. This office has not reviewed those documents believed to contain attorney-client privileged information and immediately

segregated those documents and any copies in a sealed envelope. Wife claims that she is not in possession of any other documents subject to 1-3 above, and that she did not review those that contain reference to husband's attorney.

I believe documents removed from husband's car referenced in 4 above, which may be attorney-client privileged, are in the custody of wife, who claims she has not reviewed the document, but contacted counsel upon discovery of potentially confidential material.

I have reviewed the Florida and ABA opinions and contacted the Florida Bar Hotline. It does not appear that any cases specifically address obligations of disclosure to opposing counsel wherein one party obtained the documents in a potentially illegal manner. The cases appear to be limited to cases of inadvertent disclosure by the revealing party. I am unsure of my obligation of disclosure and/or to return the documents to husband's counsel without violating my obligation of confidentiality and representation to my client, and request a written staff opinion regarding same.

Discussion

Rule 4-4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." In an opinion predating the adoption of Rule 4-4.4(b), Florida Ethics Opinion 93-3, this committee came to the same conclusion.

However, the instant facts are distinguishable from the typical scenario involving inadvertent disclosure of privileged documents. There was no inadvertent disclosure. Rather, the materials were deliberately obtained by inquiring attorney's client without the permission of the opposing party. The comment to Rule 4-4.4(b) mentions such situations, but does not provide substantial guidance:

Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. *Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.* For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the

decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

(emphasis added).

The American Bar Association formerly had an ethics opinion addressing a lawyer's duties when the lawyer receives confidential information from someone who is not authorized to release the information. In Formal Opinion 94-382, the ABA Standing Committee on Ethics and Professional Responsibility determined that an attorney who receives an adverse party's confidential materials from someone who is not authorized to disclose them should refrain from reviewing the materials and either contact opposing counsel for instructions or seek a court order allowing the recipient to use them. The ABA recently withdrew that opinion in Formal Opinion 06-440, deciding that Opinion 94-382 was not supported by the rules, especially ABA Model Rule 4.4(b) which is the equivalent of Florida Rule 4-4.4(b). Specifically, the ABA committee stated:

As was noted in Formal Opinion 05-437, Rule 4.4(b) requires only that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. The Rule does not require refraining from reviewing the materials or abiding by instructions of the sender. Thus, even assuming that the materials sent intentionally but without authorization could be deemed "inadvertently sent" so that the subject is one addressed by Rule 4.4(b), the instructions of Formal Opinion 94-382 are not supported by the Rule.

It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply to the factual situation addressed in Formal Opinion 94-382. A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules. Whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).

Accordingly, because the advice presented in Formal Opinion 94-382 is not supported by the Rules, the opinion is withdrawn in its entirety.

Therefore, neither Rule 4-4.4(b) nor Opinion 93-3 directly govern the inquiring attorney's situation.

The Comment to Rule 4-4.4(b) states that the rule does not address the legal duties of a lawyer who receives documents that were wrongfully obtained. Similarly, under the Florida Bar Procedures For Ruling on Questions of Ethics it is beyond the scope of an advisory ethics opinion for this committee to resolve legal issues, such as whether the inquiring attorney has a legal duty (independent of any duty the client may have) to return the documents to their owner. Nor can this opinion resolve the legal question of whether the client's conduct violated any criminal laws. However, to merely refer the inquiring attorney to the comment to Rule 4-4.4(b) and point out that there are legal issues to be resolved does a disservice to the inquiring attorney.

While there are legal issues that this committee cannot resolve, there is ethical guidance that can be provided. Further, for the purposes of this guidance, it will be presumed that, whether or not the client's conduct was illegal, it was improper. If the client's conduct was rightful and proper the inquiring attorney would not be seeking guidance.

While Rule 4-4.4(b) does not govern the inquiring attorney's quandary, other rules are applicable. One such rule is Rule 4-1.6, the ethical duty of confidentiality. This rule states, in part:

(a) **Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) **When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) **When Lawyer May Reveal Information.** A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

The confidentiality rule makes any information relating to the representation of a client confidential, *whatever the source*. Comment, Rule 4-1.6. It is broader than the attorney-client privilege. Thus, under the rule, an attorney cannot voluntarily reveal any information relating to the representation of a client unless the client consents or an exception to the rule is applicable.

Another rule that is applicable to the inquiring attorney's situation is Rule 4-3.4(a). This rule states:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

Still other rules are applicable. Rule 4-4.4(a) prohibits a lawyer from knowingly using “methods of obtaining evidence that violate the legal rights” of third persons. Rule 4-1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. Rule 4-1.4 requires lawyers to fully advise clients. Rule 4-8.4(d) prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Rule 4-8.4(a) prohibits a lawyer from violating the rules through the acts of another.

Additionally, while there is no formal opinion in Florida providing guidance in a situation such as that facing the inquiring attorney, there is at least one disciplinary case that touches on the issues presented by the inquiring attorney. In *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997) an attorney represented a client in a wrongful death claim alleging medical malpractice arising from the death of the client’s father. After the attorney was retained, but before suit was filed, the client told the attorney that he had taken some of his father’s medical records from the hospital involved and showed the attorney the records. In discovery, the attorney asked the hospital to produce the records, which it could not. The hospital, in its own discovery request, asked for the production of any medical records the client had. The attorney did not disclose the records. The attorney stated to the court that one of the issues in the case was the hospital’s failure to maintain the records, the attorney submitted an expert report that the hospital tampered with its medical records even though the attorney knew the expert’s opinion was based on the expert’s belief that the hospital failed to maintain the records, and made other misrepresentations. After the fact that the client took the records came out during the client’s deposition, the court sanctioned the client and the attorney and filed a bar complaint against the attorney.

The Florida Supreme Court upheld the referee’s findings based on the above facts:

The referee recommended that Hmielewski be found guilty of violating the following Rules Regulating The Florida Bar: (1) rule 3-4.3, which proscribes conduct that is unlawful or contrary to honesty or justice; (2) rule 4-3.3(a)(1), which prohibits knowingly making false statements of material fact or law to a tribunal; (3) rule 4-3.3(a)(2), which prohibits failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (4) rule 4-3.4(a), which prohibits both the unlawful obstruction of another party's access to evidence and the unlawful altering, destruction or concealment of a document or other material that the lawyer knows or reasonably should know is relevant to a pending or reasonably foreseeable proceeding, or counseling or assisting another person to do such an act; (5) rule 4-3.4(d), which prohibits the intentional failure to comply with legally proper discovery requests; (6) rule 4-4.1(a), which mandates that lawyers not make false statements of material fact or law to third persons while representing a client; (7) rule 4-4.4, which prohibits the use of methods of obtaining evidence that violate the rights of

third persons; and (8) rule 4-8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

The referee recommended that Hmielewski be suspended from the practice of law for one year followed by two years of probation, noting that the character and reputation testimony presented on Hmielewski's behalf was the primary mitigating factor that saved Hmielewski from disbarment.

“A referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record.” *Florida Bar v. Berman*, 659 So. 2d 1049, 1050 (Fla.1995). We find support in the record for the referee's factual findings. These findings establish that Hmielewski improperly allowed what he perceived as his duty to his client to overshadow his duty to the justice system when he made deliberate misrepresentations of material fact to the Mayo Clinic and the Minnesota trial court. Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a member of The Florida Bar.

702 So. 2d at 220. The court suspended the attorney for three years.

Clearly, under *Hmielewski*, the inquiring attorney cannot make any misrepresentations about the documents, including in response to any discovery requests regarding the documents. Nor can the inquiring attorney make the documents, including the opponent's failure to produce them or have them in his custody, a feature of the case without disclosing that the inquirer has the documents. However, *Hmielewski* did not address what the attorney should have done when the attorney first learned that the client obtained the documents.

Other jurisdictions also have addressed the issue of a lawyer's responsibilities when the lawyer's client improperly gets confidential or privileged documents of the opposing party. Connecticut Opinion 96-4 states that an attorney whose client improperly obtained a release of the client's spouse's medical records may not permit the client to copy or view the records and must return the records to the records custodian unless a proper release is signed. New Jersey Opinion 680 (1995) dealt with a situation where opposing counsel came to the work place of another attorney's clients to examine documents during discovery. When both opposing counsel and the client's own attorney took a lunch break, the client went through a stack of the opposing attorney's papers and made copies of them. When the attorney was told of the client's action, he sought the ethics opinion. The attorney did not come into possession of any of the documents. As stated in the New Jersey opinion:

The nub of the problem posed by the inquiry lies with the fact that the clients gained access, without permission, to private, confidential documents of adversaries in litigation. Two of the principals of the client are not in accord as to the precise circumstances by which this access was gained, but in any event it was unauthorized.

No Rule of Professional Conduct directly deals with this specific situation, nor does any prior opinion of this Committee. Neither RPC 3.4 (Fairness to Opposing

Party and Counsel) nor RPC 4.1 (Truthfulness in Statements to Others) clearly and directly reaches the situation posed by the inquirer. Further, while under RPC 4.1(a)(2) in some circumstances a client's seizure of evidence in the hands of an adversary certainly could constitute "a criminal or fraudulent act," we do not have enough evidence to draw such a conclusion here. Similarly, on the facts presented, the lawyer did not "use methods of obtaining evidence that violate the legal rights of such a [third] person," under RPC 4.4, as the actions were taken by a client.

Nonetheless, the client's reading of the adversary's documents was distinctly inappropriate and improper, constituting a clear invasion of privacy at the very least. If the lawyer had committed the acts ascribed to the clients, and items of evidence were involved, it would constitute a violation of RPC 4.4. It is well established that an attorney may not do indirectly that which is prohibited directly (see RPC 8.4(a)), and consequently the lawyer cannot be involved in the subsequent review of evidence obtained improperly by the client. Furthermore, the conduct of inquirer's client may have been of benefit to that client in the litigation. For a lawyer to allow a client's improper actions taken in the context of litigation to benefit that client in such litigation would constitute "conduct that is prejudicial to the administration of justice" under RPC 8.4(d). Only disclosure to the adversary will avoid the prejudicial effect proscribed by this rule, and thus this situation falls within those in which disclosure of confidential information is permitted by RPC 1.6(c)(3) in order "to comply with other law." Mere withdrawal from representation, without disclosure, will not reverse the prejudicial conduct.

The incident that formed the basis of New Jersey Opinion 680 is also the subject of *Perna v. Electronic Data Systems, Corporation*, 916 F. Supp 388 (D. N.J. 1995). In that case, the court sanctioned the partner who viewed and copied the opposing parties documents by dismissing the partner's individual claims. Of the conduct of the partner's attorneys, the Court noted that the attorneys did not engage in any misconduct and applauded their decision to seek ethical guidance. 916 F.Supp at 394, footnote 5.

In another case from New Jersey, *Maldonado v. New Jersey, Administrative Office of the Courts – Probation Division*, 225 F.R.D. 120 (D. N.J. 2004), a plaintiff who was employed as a probation officer filed a discrimination lawsuit against his employer and two individual probation officers. Prior to the lawsuit, the plaintiff filed an administrative claim with the New Jersey Division on Civil Rights (NJDCR). The NJDCR proceeding resulted in a finding of probable cause. The two individual probation officers named wrote a letter on October 7, 2001 to their attorney regarding the credibility of the witnesses interviewed in the NJDCR matter. At a later date in 2001, a copy of the letter came into the possession of the plaintiff. The plaintiff claimed someone put it in his workplace mailbox. The defendants suspected that the plaintiff took it from one of the individual defendant's office, but were unable to prove this. The plaintiff gave the copy of the letter to his attorneys. Information from the letter was used by the attorneys in the original civil complaint filed in October 2003. However, defense counsel did not notice this until the amended complaint was reviewed in a meeting between plaintiff and defense counsel in the spring of 2004. Defense counsel then filed a motion for protective order, to

dismiss the plaintiff's complaint as a sanction or alternatively to disqualify the plaintiff's attorneys.

The court found that under the circumstances, the attorney client and work product privileges were not waived. The court further declined to dismiss the plaintiff's case, in part because it was not proven that the plaintiff intentionally took the letter. However, the Court did order the disqualification of the plaintiff's attorneys:

In sum, the record before the Court shows the following: 1) Maldonado's present counsel had access to privileged material since at least October 3, 2003; 2) counsel reviewed and relied on the October 7th letter in formulating Maldonado's case; 3) the letter was highly relevant and prejudicial to Defendants' case; 4) counsel did not adequately notify opposing counsel of their possession of the material; 5) Defendants took reasonable precautions to protect the letter and cannot be found at fault for the disclosure; and 6) Maldonado would not be severely prejudiced by the loss of his counsel of choice.

* * *

Both Matos and Hodulik did not adhere to the "cease, notify, and return" mandate of the New Jersey Supreme Court's Advisory Committee on Professional Ethics [Opinion 680] and the New Jersey Rules of Professional Conduct. The Court's decision, however, rests more appropriately on the prejudicial effect that the disclosure of the October 7th letter has on Defendants' case. This sanction is drastic; yet, in disqualification situations any doubt is to be resolved in favor of disqualification. Therefore, the Court finds that the appropriate remedy to mitigate the prejudicial effects of counsels' possession, review,*142 and use of the letter is the disqualification of Matos and Hodulik.

225 F.R.D. at 141-142.

The Association of the Bar of the City of New York in its Ethics Opinion 1989-1 addressed the issue of an attorney's obligations when a spouse in a matrimonial case intercepted communications between the other spouse and that spouse's attorney. The New York Committee came to a somewhat different conclusion than New Jersey, based on the duty of confidentiality to the client:

Where the inquirer has not suggested or initiated the practice in any way, the question to be resolved is whether any ethical obligations or prohibitions constrain the inquiring attorney's use of the copied communications. The Committee concludes that, regardless of whether the lawyer counseled the client to engage in this conduct or even knew that the client was so engaged, it would be unethical for the lawyer to use any intercepted communications to advance the client's position unless and until the lawyer (i) has disclosed to adversary counsel the fact that the documents have come into the lawyer's possession and (ii) has provided copies to adversary counsel. Even if the lawyer does not intend to make affirmative use of the documents, the lawyer must promptly disclose his

possession of the documents and return them or copies of them. *Because the intercepted communications were received by the lawyer in the course of the professional relationship, however, the lawyer may not make such disclosure without the consent of the client. DR 4-101(B). If the client refuses to permit disclosure or the return of the documents to the adversary, the lawyer must withdraw from the representation. DR 2-110(B).*

(Emphasis added).

Application to the Inquiring Attorney's Query

The inquiring attorney is in possession of certain categories of documents that the client either (1) removed from the husband's office, (2) printed from the husband's computer, including financial documents and emails, or (3) accessed on her own computer with the husband's password. The inquiring attorney segregated and has not reviewed any documents that the inquirer believes contain attorney-client privileged information. By implication, this means the inquiring attorney has reviewed documents that the inquirer believed not to be privileged.

Additionally, the inquiring attorney also states that the client removed documents from the husband's vehicle, and that the inquiring attorney believes these documents are privileged. The inquiring attorney is not in possession of this latter category of documents. Rather, the client has them and says she has not reviewed the documents.

As noted earlier in the opinion, this Committee is not authorized to decide questions of law, including whether the inquiring attorney has a duty to return or disclose the documents in the inquirer's possession. However, there can be circumstances where a lawyer would have an obligation under the law to return or disclose the documents. For instance, a lawyer would have to produce the documents in response to a valid discovery request for the documents. See Rule 4-3.4(d) (prohibits intentional failure to comply with legally proper discovery requests) and *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). If the documents themselves were stolen property, the lawyer may also have an obligation under substantive law to turn over the documents. See *Quinones v. State*, 766 So. 2d 1165, 1172 n.8 (Fla. 3d DCA 2000) ("The overwhelming authority in the nation concludes that an attorney may not accept evidence of a crime unless he or she makes the same available to the prosecutor or the investigating law enforcement agency.") and *Anderson v. State*, 297 So. 2d 871, 875 (Fla. 2d DCA 1974) (lawyer acted properly by surrendering evidence of a crime to police, and state cannot disclose circumstances in court).

Even if there is no duty under substantive law to disclose or return the documents, the inquiring attorney still has ethical obligations. The inquiring attorney owes the client the duty of confidentiality under Rule 4-1.6. Under this rule, a lawyer may not voluntarily reveal information relating to the representation of a client without the client's consent. Therefore, information which the inquiring attorney learns through the representation of the client is confidential under Rule 4-1.6, and cannot be revealed without the client's consent. There are exceptions to the duty of confidentiality. However, none seem to be applicable under the facts

presented, as any criminal act that the client may have been involved in is a past act and disclosure would not prevent a future crime.

On the other hand, the inquiring attorney cannot assist the client in conduct that the inquiring attorney knows or reasonably should know is criminal or fraudulent under Rule 4-1.2(d). Additionally, the inquiring attorney cannot engage in conduct involving dishonesty or that is considered prejudicial to the administration of justice under Rules 4-8.4 (c) and (d) and cannot violate the ethics rules through the acts of another, including the client, under Rule 4-8.4(a). Furthermore, Rule 4-3.4(a) provides that a lawyer must not “unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.”

The inquiring attorney needs to discuss the situation, including the ethical dilemma presented due to the client's actions, with the client. If the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law. The inquiring attorney should advise the client that the inquiring attorney is subject to disqualification by the court as courts, exercising their supervisory power, may disqualify lawyers who receive or review materials from the other side that are improperly obtained. *See, e.g., Maldonado v. New Jersey, Administrative Office of the Courts –Probation Division*, 225 F.R.D. 120 (D. N.J. 2004). The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct. *See Perna v. Electronic Data Systems, Corporation*, 916 F. Supp 388 (D. N.J. 1995).

Finally, the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. *See The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation. *See* Rule 4-1.16(a)(1).

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2 September 15, 2006

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC: 4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)

Opinions: 93-3, New York Opinion 749, New York Opinion 782

Case: *Williams v. Sprint/United Management Company*, 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005)

Misc: David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age*, Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined

as “information describing the history, tracking, or management of an electronic document.”¹ Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed. ²

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The Comment to Rule 4-1.6 further provides:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information

¹ *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age*, Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at <http://www.thesedonaconference.org>. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

² Further references regarding metadata and eliminating metadata from documents may be found on Microsoft’s user support websites at <http://support.microsoft.com/kb/290945> and <http://support.microsoft.com/kb/q223790/>. See also, Michael Silver, “Microsoft Office metadata: What you don't see can hurt you” *Tech Republic Gartner* 2001 http://techrepublic.com.com/5100-1035_11-5034376.html. The court’s discussion of metadata in *Williams v. Sprint/United Management Company*, 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

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

The comment to rule 4-4.4 provides additional guidance:

Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

(1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

(2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3

and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.³

(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must “promptly notify the sender.” *Id.*

The foregoing obligations may necessitate a lawyer’s continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

3 The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states. The New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously “mine” documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, “The Transmission and Receipt of Invisible Confidential Information,” 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also*, Brian D. Zall, “Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications,” 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-1

April 10, 2006

Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction.

RPC: 4-1.5(f)(4), 4-1.6, 4-1.8(j), 4-7.7(h), 5-1.2(b)(3), 5-1.2(d)

Opinions: 63-3, 71-62, 81-8, 88-11 (Rec.), ABA Informal Ethics Opinion 1127 (1970), New York County Ethics Opinion 725 (1998), New York State Ethics Opinion 680 (1996), North Carolina Ethics Opinion RPC 234 (1996)

The Professional Ethics Committee has been directed by The Florida Bar Board of Governors to issue an opinion regarding electronic storage of law firm files. The bar has received many inquiries regarding electronic storage of law firm files in the wake of natural disasters, such as hurricanes. Some lawyers have asked whether they may store files exclusively electronically, without retaining a paper copy.

There are very few Rules Regulating The Florida Bar that address records retention. Rule 4-1.5(f)(4) requires that lawyers retain copies of executed contingent fee contracts and executed closing statements in contingent fee cases for 6 years after the execution of the closing statement in each contingent fee matter. Additionally, lawyers who are paid by insurance companies to represent insureds must retain a copy of the Statement of Insured Client's Rights that the lawyer has certified was sent to the client for 6 years after the matter is closed. Rule 4-1.8(j), Rules of Professional Conduct. Copies of advertisements and records of the dissemination location and dates must be retained for 3 years after their last use. Rule 4-7.7(h), Rules of Professional Conduct. Finally, trust accounting records must be retained for 6 years following the conclusion of the matter to which the records relate. Rule 5-1.2(d), Rules Regulating The Florida Bar.

The Rules Regulating The Florida Bar, with limited exception, do not specify the method by which records must be retained. As an example of an exception, Rule 5-1.2(b)(3) requires that lawyers retain original cancelled trust account checks, unless the financial institution they are drawn on will provide only copies. [Note: Rule 5-1.2(b)(3) has since been amended to allow either original cancelled checks or copies as long as they are legible and include all endorsements and tracking information.]

The committee has indicated in prior opinions that "the attorney must place primary emphasis on the desires of the client." Florida Ethics Opinion 81-8. The committee has further determined that lawyers should make diligent attempts to contact clients to determine their wishes regarding file retention before the lawyer destroys any closed files. Florida Ethics Opinions 63-3, 71-62, and 81-8. These opinions are silent as to the method of file retention.

Many opinions from other states address records retention issues and, more specifically, whether files may be stored electronically as opposed to paper copies. These opinions, too numerous to cite, raise issues specific to electronic document retention that the committee finds worthy of mention. The opinions generally conclude that, with appropriate safeguards, electronic document retention is permissible. See, e.g., ABA Informal Ethics Opinion 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the material is available only to the particular attorney to whom the files belong, the company has procedures to ensure confidentiality, and the lawyer admonishes the company that confidentiality of the files must be preserved); New York County Ethics Opinion 725 (1998) (Permissible for a lawyer to retain only electronic copies of a file if “the evidentiary value of such documents will not be unduly impaired by the method of storage”); New York State Ethics Opinion 680 (1996) (Client’s file may be stored electronically except documents that are required by the rules to be kept in original form, but lawyer should ensure that documents stored electronically cannot be inadvertently destroyed or altered, and that the records can be readily produced when necessary); and North Carolina Ethics Opinion RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for “original documents with legal significance, such as wills, contracts, stock certificates”).

This committee concludes that the main consideration in file storage is that the appropriate documents be maintained, not necessarily the method by which they are stored. Therefore, a law firm may store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client’s interests.

The committee agrees with other jurisdictions that have noted practical considerations involved in electronic file storage. The committee cautions lawyers that electronic files must be readily reproducible and protected from inadvertent modification, degradation or destruction. The lawyer may charge reasonable copying charges for producing copies of documents for clients as noted in Florida Ethics Opinion 88-11 Reconsideration. Finally, lawyers must 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. Rule 4-1.6, Rules of Professional Conduct.

The committee encourages the use of technology, such as electronic file storage, to facilitate cost-effective and efficient records management. However, the committee is of the opinion that a lawyer is not required to store files electronically, although a lawyer may do so.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 00-4

July 15, 2000

An attorney may provide legal services over the Internet, through the attorney's law firm, on matters not requiring in-person consultation or court appearances. All rules of professional conduct apply, including competence, communication, conflicts of interest, and confidentiality. An attorney may communicate with the client using unencrypted e-mail under most circumstances. If a matter cannot be handled over the Internet because of its complexity, the matter must be declined.

Note: After this opinion was written, Rule 4-1.2 was amended to add subdivision (c) addressing representations limited in scope which provides as follows: If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

RPC: 4-1.1, 4-1.6, 4-1.7 through 4-1.12, 4-5.3, 4-5.5(b), Subchapter 4-7, 4-7.6(b), 4-8.6(a)

Opinions: 88-13; ABA Formal 99-413, Alaska 98-2, Illinois 96-10, New York 709, Ohio 99-2 and 99-9, South Carolina 94-27 and 97-08, Vermont 97-5

Cases: *In re the Joint Petition of The Florida Bar and Raymond James and Associate*, 215 So. 2d 613 (Fla. 1968); *The Florida Bar v. Consolidated Business and Legal Forms*, 386 So. 2d 797 (Fla. 1980)

A member of The Florida Bar has requested an advisory ethics opinion. The inquiring attorney would like to provide limited, on-line legal services to Florida residents on simple matters not requiring office visits or court appearances. The inquiring attorney contemplates that these services would include simple wills, incorporation papers, real estate contracts, residential leases and uncontested marital agreements. Documents would be generated at the client's option and the attorney would charge a fee less than the customary in-office charges. The documents would be reviewed by the inquiring attorney or another attorney authorized to provide legal services in Florida rather than by a paralegal or other nonlawyer. Charges would be made via credit card on a secure server. The inquiring attorney will not charge for simple forms obtainable elsewhere without cost and anticipates providing links to other sites, including The Florida Bar and the Florida Secretary of State, where those forms may be accessed directly. The inquiring attorney asks if there are ethical limitations on offering such a legal service via the Internet.

There is no express provision in the Rules of Professional Conduct that prohibit the inquiring attorney from practicing law through the Internet. As noted by the New York State Bar Association Committee on Professional Ethics in its Opinion 709, it is permissible to practice over the Internet as long as the attorney complies with the ethics rules. See also Ohio Ethics

Opinion 99-9 and South Carolina Ethics Opinion 94-27. In other words, the inquiring attorney would be held to the requirements of all of the Rules of Professional Conduct. For instance, the inquiring attorney must have a conflict screening process to avoid conflicts of interest under Rules 4-1.7 through 4-1.12. The name of the responsible attorney must also be identified. The inquiring attorney also must ensure client confidentiality under Rule 4-1.6. While the Professional Ethics Committee has yet to issue an opinion on the confidentiality implications of using e-mail to communicate with clients, almost all of the jurisdictions that have considered the issue have decided that an attorney does not violate the duty of confidentiality by sending unencrypted e-mail. However, these opinions also generally conclude that an attorney should consult with the client and follow the client's instructions before transmitting highly sensitive information by e-mail. See, e.g., ABA Formal Opinion 99-413, Alaska Ethics Opinion 98-2, Vermont Ethics Opinion 97-5, Illinois Ethics Opinion 96-10, South Carolina Ethics Opinion 97-08, and Ohio Ethics Opinion 99-2. Thus, sending the e-mail unencrypted would not be an ethical violation under normal circumstances.

Of course, the inquiring attorney is obligated to provide competent representation to these clients under Rule 4-1.1. Thus, if the client's situation is too complex to be easily handled over the Internet, the inquiring attorney must so inform the client. If the client is then unwilling to meet in person with the inquiring attorney, the inquiring attorney must decline the representation or, if representation has already begun, to withdraw.

Any work done by the inquiring attorney's nonlawyer employees must be supervised by the attorney as required by Rule 4-5.3 to ensure that the nonlawyer employee's conduct is compatible with the professional obligations of the inquiring attorney.

As the inquiring attorney's proposal involves the practice of law, the inquiring attorney can only perform the services through the attorney's law firm. Florida attorneys are not permitted to practice law through a corporate entity other than a professional service corporation, professional association or a professional limited liability company. See, Rule 4-8.6(a) and Florida Ethics Opinion 88-13. Practicing law through a regular corporation implicates the unlicensed practice of law and would result in the inquiring attorney violating Rule 4-5.5(b). See also, *In re the Joint Petition of The Florida Bar and Raymond James and Associate*, 215 So. 2d 613 (Fla. 1968) and *The Florida Bar v. Consolidated Business and Legal Forms*, 386 So. 2d 797 (Fla. 1980).

Regarding a related issue, the inquiring attorney, in order to avoid misleading appearances and to avoid any unlicensed practice of law in other jurisdictions, should indicate that the attorney can only answer questions limited to Florida law. If the inquiring attorney is admitted to practice in any other jurisdictions, the attorney should contact those jurisdictions to determine whether this proposal would meet the requirements of their rules.

Finally, the inquiring attorney's website must comply with the provisions of Rule 4-7.6(b). Any other advertising of the inquiring attorney's Internet practice must comply with the advertising rules found in subchapter 4-7 of the Rules Regulating The Florida Bar.

In conclusion, the inquiring attorney's proposal is permissible as part of the attorney's law practice through the attorney's law firm. As the proposal involves the practice of law, the

inquiring attorney owes Internet clients all the ethical duties contained in the Rules of Professional Conduct.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 93-3 February 1, 1994

An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents.

[Note: Since this opinion was adopted, the Supreme Court of Florida adopted Rule 4-4.4(b), which states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."]

Opinion: 74-7

It has come to the attention of the Professional Ethics Committee that a growing number of Florida Bar members have faced ethical problems in connection with the inadvertent receipt or disclosure of attorney-client or work product privileged documents from an adversary. Such an inadvertent disclosure might occur as part of a document production, a misdirected facsimile or electronic mail transmission, a "switched envelope" mailing, or misunderstood distribution list instructions.

Whether the disclosure was inadvertent, and whether inadvertent disclosure impliedly waives the attorney-client privilege or work product privilege, are questions of fact and law that are beyond the authorized scope of an ethics opinion. Florida Ethics Opinion 74-7. For a discussion of the legal issues, see, e.g., R.Franco & M.Pringle, The Inadvertent Waiver of Privilege, 26 Tort & Ins. L.J. 637 (1991); Meese, Inadvertent Waiver of the Attorney-Client Privilege, 23 Creighton L. Rev. 513 (1990); W. Ayers, Attorney Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases, 18 Pac. L.J. 59 (1986); J. Grippando, Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents, 39 U. Miami L. Rev. 511 (1985).

The Committee is of the opinion that an attorney, upon realizing or reasonably believing that he or she has received a document or documents that were inadvertently misdelivered, is ethically obligated to promptly notify the sender of the attorney's receipt of the documents. It is then up to the sender to take any further action.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 87-11 (Reconsideration) (June 27, 2014)

A lawyer may permit a nonlawyer to place the lawyer's signature on solely electronic documents as permitted by Florida Rule of Judicial Administration 2.515 and only after reviewing and approving the document to be signed and filed. The lawyer remains responsible for the document.

RPC: 4-5.3(c)

Opinions: 87-11

Cases: *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451 (Fla. 2012); *In re Amendments to the Florida Rules of Judicial Administration et al.*, 102 So.3d 505 (Fla. 2012)

Misc.: Fla.R.Jud.Adm. 2.515

A Florida Bar member has asked the committee to reconsider Florida Ethics Opinion 87-11, in light of recent changes to Rule of Judicial Administration 2.515 regarding electronic signatures. In Florida Ethics Opinion 87-11, the committee opined that "an attorney should not under any circumstances permit nonlawyer employees to sign notices of hearing" citing the lawyer's obligation to comply with rules of court and to avoid assisting in the unlicensed practice of law.

Since that opinion was written, the Supreme Court of Florida has required that all documents be filed electronically. *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451 (Fla. 2012). Subsequent to that order, the Rules of Judicial Administration were amended to address electronic signatures. *In re Amendments to the Florida Rules of Judicial Administration et al.*, 102 So.3d 505 (Fla. 2012). New Rule of Judicial Administration 2.515 states as follows:

(a) Attorney Signature. Every pleading and other document of a party represented by an attorney shall be signed by at least 1 attorney of record in that attorney's individual name whose current record Florida Bar address, telephone number, including area code, primary e-mail address and secondary e-mail addresses, if any, and Florida Bar number shall be stated, and who shall be duly licensed to practice law in Florida or who shall have received permission to appear in the particular case as provided in [rule 2.510](#). The attorney may be required by the court to give the address of, and to vouch for the attorney's authority to represent, the party. Except when otherwise specifically provided by an applicable rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other document; that to the best of the attorney's knowledge, information, and belief there is good ground to support it;

and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other document had not been served.

(b) Pro Se Litigant Signature. A party who is not represented by an attorney shall sign any pleading or other paper and state the party's address and telephone number, including area code.

(c) Form of Signature.

(1) The signatures required on pleadings and documents by subdivisions (a) and (b) of this rule may be:

(A) original signatures;

(B) original signatures that have been reproduced by electronic means, such as on electronically transmitted documents or photocopied documents;

(C) electronic signatures using the “/s/,” “s/,” or “/s” formats by or at the direction of the person signing; or

(D) any other signature format authorized by general law, so long as the clerk where the proceeding is pending has the capability of receiving and has obtained approval from the Supreme Court of Florida to accept pleadings and documents with that signature format.

* * *

In light of the new rule of judicial administration, the committee is of the opinion regarding electronic signatures alone that a lawyer may permit a nonlawyer employee to affix the lawyer's electronic signature using the format indicated by subdivision (c)(1)(C) above. The committee cautions that although the lawyer may delegate the electronic signing of the document under the rule of judicial administration, the lawyer must “review and be responsible for the work product” as required by Rule 4-5.3(c). Thus, lawyers may only direct a nonlawyer to affix the electronic signature permitted by the rule after reviewing and approving the document to be filed. The committee's conclusion in Florida Ethics Opinion 87-11, that generally a nonlawyer may not sign pleadings, otherwise remains unchanged.

**Advertising Opinions
and Guidelines
Related to Technology**

FLORIDA BAR STANDING COMMITTEE ON ADVERTISING

ADVISORY OPINION A-00-1 (Revised)

January 29, 2016

[Approved as revised by the Board of Governors on January 29, 2016.]
Advisory Advertising Opinions Are Not Binding

A lawyer may solicit prospective clients through Internet chat rooms, defined as real time communications between computer users, only if the lawyer complies with the rules on direct written communications and files any unsolicited communications with The Florida Bar for review. Lawyers may respond to specific questions posed to them in chat rooms. Lawyers should be cautious not to inadvertently form attorney-client relationships with computer users.

RPC: 4-7.18, 4-7.19

Opinions: 00-4, Illinois 96-10, Michigan RI-276, Philadelphia 98-6, Utah 97-10, Virginia A-0110, West Virginia 98-03

As use of the Internet becomes more and more a part of the practice of law, questions arise as to whether attorneys may ethically participate in chat rooms. As used in this opinion, the term "chat room" refers to a real time communication between computer users. A foremost concern in attorney participation in chat rooms is whether such activity constitutes impermissible solicitation. Rule 4-7.18(a)(1) provides:

(a) Solicitation. Except as provided in subdivision (b) of this rule, a lawyer may not:

(1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.

Several other states have considered the issue of whether attorney participation in chat rooms constitutes impermissible solicitation. For example, in Michigan Opinion RI-276, it was concluded that while e-mail communications were akin to direct mail communications:

A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such "real

time” communications about the lawyer's services would be analogous to direct solicitations, outside the activity permitted by MRPC 7.3.

Similarly, the West Virginia Lawyer Disciplinary Board stated in Opinion 98-03:

The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.

The Utah State Bar's Ethics Advisory Opinion Committee has likewise concluded that an attorney's use of a chat room for advertising and solicitation are considered to be in person communications for the purposes of its Rule 7.3(a) and, thus, restricted by that rule. Utah Ethics Opinion 97-10. The Virginia State Bar Advertising Committee's Lawyer Advertising Opinion A-0110 is in accord with this reasoning.

The Philadelphia Bar Association, in Opinion 98-6, acknowledged that attorneys could not engage in any activity that would be improper solicitation. The Committee further stated, "In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such." The Illinois State Bar Association, in Ethics Opinion 96-10, has also stated:

The Committee does not believe that merely posting general comments on a bulletin board or chat room should be considered solicitation. However, if a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 4-7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.

The Board of Governors is unpersuaded by the reasoning of opinions from other states that conclude that participation in chat rooms, merely because it occurs in real time, is a form of prohibited solicitation. The underlying purpose of the prohibition against direct solicitation is the inherently coercive nature of direct conversations. The Supreme Court of the United States has upheld a ban on direct solicitation, stating “Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.” *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457, 98 S. Ct. 1912, 1919, 56 L. Ed. 2d 444 (1978). The Court’s opinion cited the American Bar Association’s argument of a compelling state interest in banning direct solicitation: “to reduce the likelihood

of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.” *Id.* At 461. In contrast, written communications via a chat room, albeit in real time, do not involve the same pressure or opportunity for overreaching.

The Board therefore concludes that a direct solicitation via a chat room is permissible, but only if the communication complies with all the requirements for direct written communications set forth in Rule 4-7.18(b). Requirements of Rule 4-7.18(b) include, e.g., no contact within 30 days of an accident, beginning the communication with the word “advertisement,” providing information about the lawyer’s qualifications and experience, use of the first sentence “if you have already retained a lawyer for this matter, please disregard. . . ,” and the like. The Board’s decision is limited to participation in a chat room that does not involve live face-to-face interaction, e.g., via video telephone or video teleconference (such as Skype). Live face-to-face interaction by video would implicate the possibility of undue influence and pressure that is meant to be prohibited by Rule 4-7.18(a).

Additionally, direct solicitations in chat rooms must be filed with The Florida Bar for review in compliance with Rule 4-7.19. Filing is required only when the solicitation is unsolicited by the consumer. This opinion should not be interpreted as suggesting that a lawyer must file responses to specific requests for information about the lawyer or the lawyer’s services in a chat room that were initiated by a prospective client and not at the prompting of the lawyer. A lawyer may also respond to the posting of a general question such as “Does anyone know a lawyer who handles X type of matter?” without filing the response for review by The Florida Bar. Only a lawyer’s unsolicited offers to provide legal services or information about the lawyer’s services are required to be filed for review with The Florida Bar under Rules 4-7.19 and 4-7.20. Although solicited responses need not be filed for review, they remain subject to the substantive lawyer advertising rules found in subchapter 4-7 of the Rules Regulating The Florida Bar.

The Board believes that the most likely type of question to which a lawyer will want to respond is one involving a specific legal issue, such as “I just received a speeding ticket - what should I do?” or “I have heard that I can avoid probate if I have a trust - is that true?” The Board cautions lawyers that they may inadvertently form a lawyer-client relationship with a person by responding to specific legal inquiries, which will require that a lawyer comply with all Rules of Professional Conduct, including rules regarding conflicts of interest, confidentiality, competence, diligence, and avoiding engaging in the unlicensed practice of law. See, e.g., Florida Ethics Opinion 00-4. Although interpretation of these rules is outside the scope of an advisory advertising opinion, the Board feels obligated to point out that lawyers who engage in discussions in chat rooms may have other ethical obligations, regardless of whether the lawyer’s communications are permissible under the lawyer advertising rules.

Finally, this opinion should not be construed so broadly as to require compliance with lawyer advertising rules or filing with The Florida Bar for participation by a Florida attorney in chat rooms when it is *completely unrelated to seeking professional employment*, such as when the chat concerns the attorney's personal interests or hobbies.

The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites

(Revised May 9, 2016)

Networking sites accessed over the Internet have proliferated in the last several years. There are numerous networking sites of various types. Some networking sites were designed for social purposes, such as Facebook, MySpace, and Twitter. Notwithstanding their origins as social media, many use these social networking sites for commercial purposes. Other networking sites are specifically intended for commercial purposes, such as LinkedIn. In a networking site, a person has the capability of building a profile that includes information about that person. That profile is commonly referred to as the individual's "page." The individual chooses how much of the information on his or her page, if any, is available to all viewers of the site. Some individuals provide access to no information about themselves except to those other individuals that are invited to view the information. Others provide full access to all information about themselves to anyone on the networking site. Others provide access to some information for everyone, but limit access to other information only to those invited to view the information. Additionally, some individuals set their pages to permit posting of information by third parties. Networking sites provide methods by which users of the site may interact with one another, including e-mail and instant messaging. Twitter is a networking site in which brief posts of no more than 140 characters are sent to followers, or persons who have specifically requested to receive the postings of particular persons on Twitter. Twitter postings are generally public, but a person who posts via Twitter can choose to have Twitter postings sent only to that person's followers and not generally accessible to the public.

The SCA has reviewed the networking media, and issues the following guidelines for lawyers using them.

Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules.

Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21. Regulations include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the requirements listed in Rule 4-7.13(b)(8). Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable. Lawyers and law firms should review the lawyer advertising rules in their entirety to comply with their requirements. Additional information is available in the *Handbook on Lawyer Advertising and Solicitation* on the Florida Bar website.

Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business must meet the requirements for written solicitations under

Rule 4-7.18(b), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the page sent via e-mail must comply with the direct e-mail rules if they are sent to persons who are not current clients, former clients, relatives, other lawyers, persons who have requested information from the lawyer, or persons with whom the lawyer has a prior professional relationship. Instant messages and direct e-mail must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b). Information on complying with the direct e-mail rules is available in the *Handbook on Lawyer Advertising and Solicitation* and in the Direct E-Mail Quick Reference Checklist on the Florida Bar website.

Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.

Lawyers who post information to Twitter whose postings are generally accessible are subject to the lawyer advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as above. A lawyer may post information via Twitter and may restrict access to the posts to the lawyer's followers, who are persons who have specifically signed up to receive posts from that lawyer. If access to a lawyer's Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules, but is exempt from the filing requirement under Rule 4-7.20(e). Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above. Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a).

Finally, the SCA is of the opinion that a page on a networking site is sufficiently similar to a website of a lawyer or law firm that pages on networking sites are not required to be filed with The Florida Bar for review.

In contrast with a lawyer's page on a networking site, a banner advertisement posted by a lawyer on a social networking site is subject not only to the requirements of Rules 4-7.11 through 4-7.18 and 4-7.21, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information listed in Rule 4-7.16. See Rules 4-7.19 and 4-7.20(a).

The Florida Bar Standing Committee On Advertising Guidelines for Video Sharing Sites

(Revised May 9, 2016)

Video sharing sites accessed via the Internet have proliferated in the last several years. There are numerous video sharing sites. A video sharing site is a site accessed via the Internet that permits video viewing, uploading and sharing via search or direct link. Probably the most well-known video sharing site is YouTube, on which registered users are permitted to upload videos, but all visitors are permitted to view.

The SCA has reviewed the video sharing media, and issues the following guidelines for lawyers using them.

Videos of individual lawyers on video sharing sites that are used solely for purposes that are unrelated to the practice of law are not subject to the lawyer advertising rules.

Videos appearing on video sharing sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These videos and all information the lawyer or law firm posts with them must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21. Regulations include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the requirements listed in Rule 4-7.13(b)(8). Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable. Lawyers and law firms should review the lawyer advertising rules in their entirety to comply with their requirements. Additional information is available in the *Handbook on Lawyer Advertising and Solicitation* on the Florida Bar website.

Invitations to view or link to the lawyer's video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business must comply with requirements for direct written solicitation under Rule 4-7.18(b), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the video sent via e-mail must comply with the direct e-mail rules if they are sent to persons who are not current clients, former clients, relatives, other lawyers, persons with whom the lawyer has a prior professional relationship or persons who have requested information from the lawyer. Instant messages and direct e-mail must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b). Information on complying with the direct e-mail rules is available in the *Handbook on Lawyer Advertising and Solicitation* and in the Direct E-Mail Quick Reference Checklist on the Florida Bar website.

Finally, the SCA is of the opinion that videos posted solely on video sharing sites are information at the request of the prospective client and therefore not required to be filed with The Florida Bar for review. Rule 4-7.20(e).

In contrast with a video posted on a video sharing site, a banner advertisement posted by a lawyer on a video sharing site is subject not only to the requirements of Rules 4-7.11 through 4-7.18 and 4-7.21, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information listed in Rule 4-7.16. See Rules 4-7.19 and 4-7.20(a).