Technology and Social Media Ethics for Lawyers

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Technology and social media ethics topics

- New Florida Bar Rule 4-1.8(c) on gifts and lawyer fiduciaries
- Proposed Florida Statute on lawyer fiduciaries
- Technology competence
- Technology and ethics: e-portal filing
- Electronic client and other file storage
- Cloud computing- use of vendors for electronic/digital storage
- Outsourcing and protection of client confidentiality
- Digital storage devices
- Metadata
- Social media and technology ethics issues
- Use of e-mails, cc and bcc, and reply all
- Receipt of unsolicited e-mail information on website
- Practice over the internet
- Use of "expert" and "specialist" in lawyer advertising
- Use of "expert" in firm's domain name

Recent Florida Bar Rule changes related to drafting documents appointing lawyer as fiduciary and gifts

Revised Rule 4-1.8(c) (effective 2/1/18) is below:

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

(c) A lawyer is prohibited from soliciting any gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

Recent Florida Bar Rule changes related to drafting documents appointing lawyer as fiduciary and gifts

The Supreme Court of Florida approved an amendment to Rule 4-1.8(c) and the Comment, which became effective February 1, 2018.

The Comment states:

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although the gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel. Subdivision (c) recognizes an exception where the client is related by blood or marriage to the donee.

Recent Florida Bar Rule changes related to drafting documents appointing lawyer as fiduciary and gifts

The revised Comment states as follows regarding lawyers who serve (will serve) as a **fiduciary** of an estate planning document that they draft:

"This rule does not prohibit a lawyer or a partner or associate of the lawyer from serving as personal representative of the client's estate or in another potentially lucrative fiduciary position in connection with a client's estate planning."

A lawyer may prepare a document that appoints the lawyer or a person related to the lawyer to a fiduciary office if:

1. The client is properly informed;
2. The appointment does not violate rule 4-1.7 [Conflicts of Interest; Current Clients];
3. The appointment is not the product of undue influence or improper solicitation; and
4. The client gives informed consent, confirmed in writing.

Recent Florida Bar Rule changes related to drafting documents appointing lawyer as fiduciary and gifts

The Comment further states:

In obtaining the client's informed consent, the lawyer should advise the client, in writing:

1. About who is eligible to serve as a fiduciary;

2. That a person who serves as a fiduciary is entitled to compensation; and

3. That the lawyer may be eligible to receive compensation for serving as a fiduciary in addition to any attorney's fees that the lawyer may earn.

Proposed amendment to F.S. § 733.617 Compensation of Personal Representative

- Proposed F.S. § 733.617 states:

- If a lawyer prepares or supervises the execution of a will that names the lawyer or a person related to the lawyer as the personal representative, neither the lawyer, nor person related to the lawyer, can receive compensation for serving as the personal representative unless certain disclosures are made to the client/testator, and the client executes a written acknowledgment.

Proposed Amendment to Florida Statute § 733.617 Compensation of a Personal Representative

Proposed F.S. § 733.617(g) states that:

A written acknowledgment signed by the client/testator that is in substantially the following form shall be deemed to comply with the disclosure requirements of this subsection:

I, (Name), declare that:

I have designated [my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney] as a trustee in my trust instrument dated_____(Date)

Before executing the trust, I was informed that:

1. Unless specifically disqualified by the terms of the trust instrument, any persons, regardless of state of residence, including family members or friends, as well as corporate fiduciaries are eligible to serve as a trustee;

2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee, and

3. Compensation payable to the trustee is in addition to any attorneys' fees payable to the attorney or the attorney's firm for legal services rendered to the trustee.

_____ (Settlor)

Dated:_____

Technology competence

- Amendment to Comment to Rule 1.1, Model Rules of Professional Conduct
- Rule 1.1 Competence
- Comment
- Maintaining Competence
- [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Technology competence

- Amendments to Rules 4-1.1 and 6-10.3, Florida Rules of Professional Conduct (effective January 1, 2017)
- Revised Rule 6-10.3 increases CLE requirements for Florida lawyers from 30 to 33 hours every three years and **mandatory three hours must be in technology related areas/courses.**
- Florida is first state/jurisdiction to require technology CLE.
- The comment to Rule 4-1.1 (competence) was revised to state that "Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

Technology and ethics: e-portal filing

- Florida Bar Ethics Opinion 12-2 (June 22, 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.

- Florida Bar Ethics 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.

Technology and ethics: e-portal filing

- *In the Matter of: John A. Goudge*, No. 1024426, Commission No. 2012PR00085.
- Associate at Chicago law firm was responsible for contract cases from USDOJ to represent U.S. in debt collection cases involving student loans.
- Under lawyer's supervision and direction, non-lawyer assistant prepared complaints and exhibits and non-lawyer assistants filed complaints and exhibits with the Ill. N. U.S. District Court for the Northern District of Illinois' CM/ECF (e-filing) system.
- CM/ECF requires box be checked stating that filings are in compliance Fed. Civil Proc. Rules and personal identifying information was redacted; however, confidential information was not redacted and became available to public and viewable on court's website.
- Lawyer admitted failure to make reasonable efforts to supervise non-lawyer, expressed remorse, and received reprimand.

Remote access to electronic client files

- New York State Bar Ethics Opinion 1019 (8/6/2014)
- Confidentiality; Remote Access to Firm's Electronic Files
- A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.

Electronic file storage

- Florida Bar Ethics 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.

Cloud computing

- Florida Bar Ethics 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.
- 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.

Outsourcing and protection of confidentiality in document transmission

- Florida Bar Op. 07-02 (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.
- 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 include "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."

Digital storage devices

- Florida Bar Ethics 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."

Metadata

- ABA Formal Opinion 06-442 and Formal Opinion 05-437
- No explicit duty regarding metadata is imposed, but a number of methods for eliminating metadata (including "scrubbing," negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are "concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata." [06-442]
- **"Mining" of metadata is not prohibited**. [06-442]
- ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly" but "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." [05-437]

Metadata

- Florida Bar Ethics 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.

Disclaimers on lawyer websites

- ABA Formal Opinion 10-457 - Lawyer Websites (August 5, 2010).
- "Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party.
- Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person. If the website uses a particular language, any waiver, disclaimer, limitation, or condition must be in the same language. The appropriate information should be conspicuously placed to assure that the reader is likely to see it before proceeding.
- Finally, a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to its warning."

Social media and technology ethics issues

- Facebook

- LinkedIn

- Twitter

- YouTube

- Instagram

- WordPress (blogs)

Social media and technology ethics issues

- Social media directed specifically to lawyers
- Avvo
- Martindale Connected
- Legal Onramp
- Lexblog

Social media and technology ethics issues

- A lawyer cannot attempt to gain access to non-public social media content by using subterfuge, dishonesty, deception, pretext, false pretenses, or an alias.
- *In the recent case of John J. Robertelli v. The New Jersey Office of Attorney Ethics (A-62-14) (075584)* (New Jersey Supreme Court 4/19/16), the NJ Supreme Court ruled that attorneys could be prosecuted for disciplinary rule violations for improperly accessing an opposing party's Facebook page.
- Ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) conclude that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to get around a social media users' privacy settings to reach non-public information.
- Ethics opinions by the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), among others, conclude that lawyers must affirmatively disclose their reasons for communicating with the third party.

Social media and technology ethics issues

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Social media and technology ethics issues

- Florida Bar Advisory Opinion 14-1 (approved June 25, 2015)
- "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."
- This advisory opinion is consistent with NYC Lawyers Association Ethics Opinion 745 (2013) which states that a lawyer may advise client to use highest level of privacy setting on the client's social media pages and may advise client to remove information from social media page prior to litigation, regardless of its relevance to a reasonably foreseeable proceeding, as long as removal does not violate substantive law regarding preservation and/or spoliation of evidence.

Social media and technology ethics issues

- Florida comprehensive revised advertising rules effective May 1, 2013
- all lawyer advertising is subject to the Bar rules, including lawyer and law firm websites, social networking and video sharing sites, and other digital media.
- lawyer and law firm websites are now subject to advertising rules.
- Bar Rule 4-7.11(a) explicitly includes "social networking and video sharing media" in the types of "media" covered by subchapter 4-7.
- Social media profiles, posts, and blogs can be advertising
- Lawyer blogs will be advertisements if primary purpose is to obtain employment/clients
- blog must be informational and educational.

Social media and technology ethics issues

- Do not make false or misleading statements
- Can happen when a lawyer creates a social media account and completes a profile without realizing that the social media platform will promote the lawyer to the public as an "expert" or a "specialist" or as having legal "expertise" or "specialties."
- Lawyers are prohibited from holding themselves out as an expert or a specialist unless certified in that specific area of practice.

Social media and technology ethics issues

- Do not disclose privileged/confidential information
- Illinois Supreme Court suspended assistant public defender for 60 days for, inter alia, disparaging judges and blogging about clients and implying in a post that a client committed perjury. *In re Peshek*, M.R. 23794 (Ill. SC May 18, 2010).
- New York State Bar Association Ethics Opinion 1032 (October 30, 2014) states that lawyers cannot reveal client confidences solely to respond to former client's criticism on lawyer-rating website.
- Georgia Supreme Court imposes reprimand on lawyer who violated attorney/client confidentiality in response to negative reviews that client had made on the internet "consumer Internet pages". *In the Matter of Margrett A. Skinner*, Case No. S14Y0661 (Ga. Supreme Court 5/19/14) .
- Virginia Supreme Court held that, although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom. *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013).

Social media and technology ethics issues

- Do not assume you can "friend" judges (and/or mediators)
- Florida Judicial Ethics Op. 2009-20 concludes that judge cannot friend lawyers on Facebook who may appear before the judge because this may suggest that the lawyer is in special position to influence the judge.
- Florida Ethics Op. 2012-12 extends same rationale to judges using LinkedIn.
- Florida Judicial Ethics Op. 2013-14 cautions judges about risks of using Twitter.
- *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012) held that trial judge presiding over criminal case was required to recuse because the judge was Facebook friends with prosecutor.
- Florida Mediator Ethics Advisory Op. 2010-001 (June 1, 2010) concluded that mediators can friend lawyers and mediation parties, but must consider disclosure if relationship presents a potential conflict of interest or would otherwise impair mediator's impartiality.
- *Herssein and Herssein v. United Services Automobile Association*, Case No.: 2015-015825-CA-43 (Florida SC Case No. SC17-1848). Law firm challenging judge's refusal to recuse in civil case when she was Facebook "friend" with lawyer in case. Currently pending before Florida Supreme Court.

Social media and technology ethics issues

- Be careful with invitations to connect or to "friend"
- invitations sent directly from a social media site via IM to 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 may be solicitations and violate Rule 4-7.4(a), unless the recipient is:
- the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer.

Social media and technology ethics issues

- Do not communicate directly with represented persons without permission
- Lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content.
- San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.
- Viewing publicly accessible social media content that does not involve communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game.
- Oregon Ethics Opinions 2013-189 and 2005-164 reached this conclusion and analogized viewing public social media content to reading a magazine article or a published book.

Social media and technology ethics issues

- Be careful if you choose to communicate with unrepresented third parties
- A lawyer may not attempt to gain access to non-public social media content by using subterfuge, dishonesty, deception, pretext, false pretenses, or an alias.
- Ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to get around a social media users' privacy settings to reach non-public information.
- Ethics opinions by the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), among others, concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

Social media and technology ethics issues

- Do not unintentionally create an attorney-client relationship
- ABA Formal Opinion 10-457 stated that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under the rules.
- Use of disclaimers in a lawyer's or a law firm's social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships (of course the lawyer's or law firm's online conduct and communications must be consistent with the disclaimer).
- South Carolina Ethics Opinion 12-03 concluded that "[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons."

Social media and technology ethics issues

- Do not unknowingly engage in the unlicensed practice of law
- Public social media post (such as a public Tweet) does not have any geographic boundaries and public social media is accessible to everyone who has an Internet connection.
- Lawyers who interact with non-lawyer social media users outside of their jurisdiction must be aware that their activities may be subject not only to the ethics rules where they are licensed, but potentially UPL rules in jurisdiction where the recipients are located.
- South Carolina Supreme Court permanently barred a Florida lawyer who was not admitted in that state from admission to practice for **soliciting over the internet and representing clients**, making false statements, and failing to respond to the allegations. In the Matter of Alma C. Defillo, SC Case No. 27431 (8/13/14). Second Florida lawyer to be barred from practicing in South Carolina in 2014.

Social media and technology ethics issues

- Testimonials, endorsements, and ratings
- LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either by peers or consumers).
- **Florida prohibits testimonials unless certain specific requirements are met.**
- Rule 4-7.13 Deceptive and Inherently Misleading Advertisements
- b) Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to, advertisements that contain:
- (8) a testimonial:
  (A) regarding matters on which the person making the testimonial is unqualified to evaluate;
- (B) that is not the actual experience of the person making the testimonial;
- (C) that is not representative of what clients of that lawyer or law firm generally experience;
- (D) that has been written or drafted by the lawyer;
- (E) in exchange for which the person making the testimonial has been given something of value; or
- (F) that does not include the disclaimer that the prospective client may not obtain the same or similar results.

Unencrypted e-mail communications with clients

- Florida Bar Ethics Opinion 00-4 (July 15, 2000)
- 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 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 . **Sending an unencrypted e-mail is not ethical violation under typical circumstances.**

Encryption of e-mail, storage, and backup

- If e-mail encryption is necessary to preserve confidentiality
- Encryption obscures the content of the email in order to prevent people other than the sender and the receptor from reading it.
- System encryption makes the data of a desktop or laptop computer inaccessible or illegible without a passkey regardless of the application with which the file was created.
- Backup system should be encrypted/secure as well. Many portable storage drives will allow encryption of backup data.
- See: ABA article - FYI: Playing it Safe With Encryption http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/FYI_Playing_it_safe.html

Issues and risks of copying and blind copying client with e-mails

- NYSBA Ethics Op. 1076 (Dec. 2015). Quote from the opinion:
- "Reasons Not to Use Either "cc:" or "bcc:" When Copying e-mails to the Client
- It is not deceptive (or a violation of the Bar Rules) for lawyer to send client blind copies of communications with opposing counsel; however, there are other reasons not to "cc:" or "bcc:" client when e-mailing.
- Using "cc:" risks disclosing the client's e-mail address and could be deemed by opposing counsel to be an invitation to send communications to client; however, Rule 4.2(a) (Florida Bar Rule 4-4.2(a)) prohibits communication with represented persons even if represented party initiates or consents to the communication.
- Sending client "bcc:" may initially avoid issue of disclosing client's email address, but it raises other problems if client mistakenly responds to e-mail by hitting "reply all." For example, if lawyer and opposing counsel communicate about possible settlement of litigation and lawyer blind copies client, and client hits "reply all" when commenting on the proposal, client may inadvertently disclose to opposing counsel confidential information. *Charm v. Kohn*, 27 Mass L. Rep. 421, 2010 (Mass. Super. Sept. 30, 2010) (blind copying a client on lawyer's e-mail to adversary "gave rise to the foreseeable risk" that client would respond without "tak[ing] careful note of the list of addressees to which he directed his reply")."

Employer's lawyer receipt of employee's e-mail communications with counsel

- ABA Formal Opinion 11-460 - Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel (August 4, 2011)
- When an employer's lawyer receives copies of an employee's private communications with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device, **neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications**. However, court decisions, civil procedure rules, or other law may impose such a notification duty, which a lawyer may then be subject to discipline for violating. If the law governing potential disclosure is unclear, Rule 1.6(b)(6) allows the employer's lawyer to disclose that the employer has retrieved the employee's attorney-client e-mail communications to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law. If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

Lawyer's receipt of unsolicited e-mail information on website

- Florida Bar Ethics Op. 07-3
- Person seeking legal services who sends information unilaterally to lawyer has no reasonable expectation of confidentiality regarding that information.
- Lawyer who receives information unilaterally from 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 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 statement on website that lawyer does not intend to treat as confidential information sent to lawyer via the website, and that such information could be used against the person by the lawyer in the future.

Practice over the internet

- Florida Bar Ethics Op. 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.
- 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.

Use of "expert" and "specialist" in lawyer advertising

- U.S. District Judge in Southern District of Florida found that Florida Bar rule prohibiting lawyers from advertising that they are experts or specialists unless certified by the Bar was unconstitutional.
- Florida Bar Board of Governors approved moratorium on enforcement of rule and Florida Bar is drafting rules to address the issue.

Use of "expert" in firm's domain name

- NYSBA Ethics Op. 1021 (9/12/2014)
- Law firm practiced exclusively in one area of law and says it "has a very successful track record." The firm wished to use as its internet website domain name a combination of the name of its sole practice area and the word "expert," for example, "realestatelawexpert" or bankruptcylawexpert," or the like. The website would contain a disclaimer that the firm does not guarantee any favorable outcomes, and that past success does not assure future results. The law firm says that the firm will not use the word "expert" except in its domain name.
- N.Y. Rule of Professional Conduct 7.5(e)(3) : lawyer or law firm may use a "domain name for an internet web site that does not include the name of the lawyer or law firm provided if it "does not imply an ability to obtain results in a matter."
- N.Y. Rule of Professional Conduct 7.4 prohibits "expert" or "specialist unless certified.
- Conclusion: law firm may not use a domain name that has the word "expert" with the law firm's area of concentration.

Lawyer use of Groupons

- ABA Formal Opinion 465 (October 21, 2013) Lawyers' Use of Deal-of-the-Day Marketing Programs
- "Deal-of-the-day or group-coupon marketing programs offer an alternative way to sell goods and services. Lawyers hoping to market legal services using these programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising, competence, diligence, and the proper handling of legal fees. It is also incumbent upon the lawyer to determine whether conflicts of interest exist. While the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules."
- "The Committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules."

The End

- Thanks for your attention and be careful out there!