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Very Recent Changes in the Ethics Rules: Wrapping Up the ABA Commission on Ethics 20/20

Client Confidentiality and Amended Model Rule 1.6

by

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A. The Text of Model Rule 1.6, as Amended

In August 2012, the ABA House of Delegates approved Revised Report and Recommendation 105F, amending Model Rule 1.6 (Client Confidentiality) by adding a new subparagraph (b)(7) and a new paragraph (c).

> Rule 1.6 Confidentiality of Information
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
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> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
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> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
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> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
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> (4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

B. The Comments on the Amended Provisions Adopted by the House of Delegates

Comments 13 and 14 are new, with later-appearing contents re-numbered. Comments 18 and 19 were amended in light of the changes to Model Rule 1.6. Comment 20 is included because it is relevant to this discussion.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

* * *

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

C. Actions by State and Local Bars

The amendments to Model Rule 1.6 is only a year old, so it would not be realistic to expect that many States would have taken action yet to address the change.

Delaware has adopted the amendments to Model Rule 1.6.

The U.S. Virgin Islands has adopted the ABA Model Rules *in toto,* so the changes will automatically apply there.

The New Mexico Supreme Court has called on the New Mexico Code of Professional Conduct Committee to consider whether to adopt the amendment. *Roy D. Mercer, LLC v. Reynolds*, 292 P.3d 466, 473 n.1 (N.M. 2012).

D. Questions Arising Under the Amendment as to Disclosure

1. Both Former and Current Clients Are Covered

It is clear from Comment 20 that the drafters of the amendment intended new subparagraph (b)(7) and its consent requirement to apply to former clients as well as current clients.

In the context of disqualification, however, a law firm representing a party in a matter can hire as a lateral partner someone who previously represented the opposing party in a matter, with notice and screening protections for the lateral's former client but without the consent of the former client. See the February 2009 amendment to Model Rule 1.10.

Some States have rejected that rule, and in the absence of the former client's consent do not allow any screening procedure to avoid disqualification of the hiring law firm where the new associate or partner had any substantial role in the prior representation. *Roy D. Mercer, LLC v. Reynolds*, 292 P.3d 466, 471 (N.M. 2012), stated:

> New Mexico's imputation rule differs significantly from the ABA Model Rule. The ABA Model Rule allows screening to remove a conflict as long as it is done timely and former clients are given notice. *See* Model Rules of Prof'l Conduct R. 1.10(a)(2) (2009). New Mexico's rule is more stringent than the ABA Model Rule in that screening is only permitted if the attorney did not play a substantial role in the matter or does not possess confidential information. It follows that this Court's decision to modify the ABA Model Rule reflects a conscious policy choice to limit the instances in which screening can be used to remove a conflict.

> New Mexico is not the only state to take such an approach. Arizona, Colorado, Massachusetts, Nevada, and Ohio have all adopted similar rules. . . .

In some States, therefore, the consent of the former client is indispensable to the lateral hiring of a partner or associate. Without that consent, the acquiring firm can be disqualified, as happened in *Roy D. Mercer, LLC.*

2. Bars to Disclosure

Comment 13 makes clear that no disclosure can be made where it would prejudice the interests of a client, unless the client gives informed consent to the disclosure.

3. Differing Client Interests

Present and former clients fall into two groups: (1) those who would continue to be represented by the acquiring firm or by the merged firm or would be free to retain them in the future, and (2) those who will be barred from continued or future representation by the acquiring or merged firm.

The former have an incentive to consent because they will be represented by a larger and presumably stronger entity and will also be denying their opponents access to a larger number of counsel than before.

The latter have every incentive to try to deny consent, so as to make sure their information is kept private.

4. Who Decides What Information Would Prejudice a Client?

Under the amended rule, the consent of a former or current client is not needed if the information being disclosed does not compromise attorney-client privilege and would not prejudice the client.

The amendment and the Comments do not make clear who decides whether a former or current client would be prejudiced by the disclosure, or whether the disclosure would breach privilege.

It seems risky for the attorney desiring to make a lateral move, or a law firm desiring to consummate a merger or acquisition, to make that determination without any check. They have an interest that may conflict with the interests of their current for former clients, and in the absence of a check on their decisions may make self-serving assumptions to the detriment of their existing or former clients.

If the client or former client is to make that determination, however, it would need to retain counsel, bring the new counsel up to speed on a matter, get the new counsel's advice, and then make its decision. That could impose a significant cost on existing or former clients.

Putting aside the need for a present or former client to retain independent counsel, giving such a client the authority to make the determination of compromising privilege or prejudice

would tend to override the distinctions in the rule. A client deciding it would not be prejudiced is then also saying there is no need for its consent, thereby in effect giving consent. A client deciding it would be prejudiced is effectively ruling out the exception to the consent requirement in the event that the client is wrong.

In practice, I suspect the attorney will have to make the initial determination, and the existing or former client will have the opportunity to protect itself after-the-fact, in a malpractice action or a motion to disqualify the acquiring or merged firm from continuing to represent its opponent.

5. The Breadth of Information to Be Disclosed

a. Issue or Positional Conflicts Among Current Clients

While issue conflicts or positional conflicts between past and current clients rarely result in disqualification, the question is much closer where there are concurrent issue or positional conflicts between current clients of the acquiring or merged law firm. For example, suppose that one client of Law Firm A has to prevail on the issue that a particular type of contract is valid, and one client of merging Law Firm B has to prevail on the issue that that type of contract is void. Such issues can arise in any field of law. Or suppose that Firm A has a client whose cause depends on a particular view of a factual setting, and Firm B has a client whose cause depends on a conflicting view of an indistinguishable factual setting.

The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) states in pertinent part in § 128, comment *f*:

> *f. Concurrently taking adverse legal positions on behalf of different clients.* A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.
>
> However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. . . .
>
> **Illustrations:**
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> 5. Lawyer represents two clients in damage actions pending in different United States District Courts. In one case, representing the plaintiff, Lawyer will attempt to introduce certain evidence at trial and argue there for its admissibility. In the other case, representing a defendant, Lawyer will object to an anticipated attempt by the plaintiff to introduce similar evidence. Even if there is some possibility that one court's ruling might

be published and cited as authority in the other proceeding, Lawyer may proceed with both representations without obtaining the consent of the clients involved.

6. The same facts as in Illustration 5, except that the cases have proceeded to the point where certiorari has been granted in each by the United States Supreme Court to consider the common evidentiary question. Any position that Lawyer would assert on behalf of either client on the legal issue common to each case would have a material and adverse impact on the interests of the other client. Thus, a conflict of interest is presented. Even the informed consent of both Client A and Client B would be insufficient to permit Lawyer to represent each before the Supreme Court.

The Report's Notes to Comment *f* mention that Formal Opinion 93-377 (1993) of the ABA's Committee on Professional Ethics took a stricter position and was not willing to assume the propriety of simultaneously taking different positions in trial courts:

> More relevant factors are identified in this Comment than are suggested in the above-quoted Comment to ABA Model Rule 1.7. ABA Formal Opinion 93-377 (1993) also finds the trial/appellate distinction insufficient and suggests that the issue should be whether the lawyer in either case would be caused to "soft-pedal" or alter arguments on behalf of one client so as not to undercut the position of the other client.
>
> See also *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir.1987) (conflict found when lawyer argued on behalf of client A that facility should be used as state mental hospital but simultaneously argued, in another proceeding pending simultaneously, on behalf of client B that it should be used to expand the state's prison facilities). Cf. *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F.Supp. 93 (S.D.N.Y.1972) (conflict found where lawyer who was defending A against antitrust charges in one case filed a very similar antitrust case against A on behalf of B).

To comply with Model Rule 1.7, therefore, it seems to me that the information to be disclosed under amended Model Rule 1.6(b)(7) would have to include the factual or legal issues on which the matter depends. Model Rule 1.7 provides:

> **Rule 1.7 Conflict Of Interest: Current Clients**
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

There are 35 comments to this rule discussing its ramifications and applications. These generally refer to the individual attorney, and not to the firm. Model Rule 1.7 and its comments do not discuss financial or informational screening, or whether the attorneys in a firm representing different clients on opposite sides of the same issue might jointly prepare the strongest positions for their respective clients by having a moot argument with each other.

The comments make clear that some concurrent conflicts are not curable by consent. A perfect example would be the representation of different clients in different matters that will be determined by a common factual or legal question, such that victory for one may bar or limit the chances of victory for the other. That type of conflict is sharpest if at least one of the disputes is before the court or administrative agency that, as a practical matter, has the last word on an issue.

As noted above, however, the ABA has questioned the approach that anything goes in the trial court, and concurrent positional conflicts are important primarily in appellate courts. *Williams v. State*, 805 A.2d 880 (Del.Supr. 2002), is a perfect example. There, attorney O'Donnell moved for leave to withdraw from the representation of Mr. Williams, who had been convicted of capital murder and as to whom the jury had recommended the death penalty. To succeed, Williams had to argue to the court that it would err if it gave great weight to the jury's recommendation. However, O'Donnell had previously argued in another case pending in the same court that the court would err if it failed to give great weight to the jury's 10-2 recommendation against the death penalty in that case. The court rejected the trial/appellate distinction, relying in part on ABA Formal Opinion 93-377, and stated at 881-82:

In determining whether a positional conflict requires a lawyer's disqualification, the question is whether the lawyer can effectively argue both sides of the same legal question without compromising the interests of one client or the other. The lawyer must attempt to strike a balance between the duty to advocate any viable interpretation of the law for one client's benefit versus the other client's right to insist on counsel's fidelity to their legal position.FN5

FN5. Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 386 (1999). See generally Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the*

Legal Services Lawyer, 67 FORDHAM L. REV. 2339 (1999); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993); Nancy Ribaudo, *Issue Conflicts*, 2 GEO. J. LEGAL ETHICS 115 (1988); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 128 cmt. f (1998).

Under the circumstances presented in Williams' case, we find that O'Donnell has identified and demonstrated the existence of a disqualifying positional conflict. It would be a violation of the Delaware Rules of Professional Conduct for O'Donnell to advocate conflicting legal positions in two capital murder appeals that are pending simultaneously in this Court. Both the United States Constitution and the Delaware Constitution guarantee each of O'Donnell's clients a right to the effective assistance of counsel in a direct appeal following a capital murder conviction. Given his clients' disparate legal arguments, O'Donnell's independent obligations to his clients may compromise the effectiveness of his assistance as appellate counsel for one or both clients, unless his motion to withdraw is granted.

b. Important Witnesses

The disclosure required by Model Rule 1.7(b)(7) should also include information about the key witnesses in pending matters.

If Firm A represents a client with a pending matter and an attorney in merging Firm B never represented the opposing party but did represent a client who will be an important witness adverse to Firm A's client, the attorney in Firm B can be disqualified from representing Firm A's client.

c. Chain Reaction Disclosures

It seems fairly clear to me that the disclosures an attorney may have had to make in order to become a lateral hire or to participate in a merged firm must be repeated if he or she subsequently pursues lateral employment in a third firm, or if the original merged firm then merges with another firm.

E. Reasonable Efforts to Prevent Disclosure

1. Case in Point: The National Security Agency's Use of Contractors

Enough said. Does any reader want to imitate the NSA's apparent lack of adequate controls?

2. Case in Point: The Defense Department's Policy of Making Everything Available to Everyone

Enough said. Does any reader want to imitate the apparent broad-access policy of the Department of Defense?

3. Employee Use of the Employer's Equipment or Connections

Even highly-placed employees are often unaware that their employers may be tracking their keystrokes, and may have on their corporate or agency servers copies of every draft of every document prepared by the employee on the employer's equipment, and every User ID and password of each of the employee's personal accounts accessed from an employer-provided desktop, laptop, tablet, smartphone, or other device, or from the employee's own equipment but transmitted over an employer-provided Internet connection.

The employer may not have the right to examine such documents if it does not have a policy clearly communicated to employees. Its counsel may not have the right to examine documents that counsel can see are attorney-client privileged or work-product privileged. Neither the employee nor its counsel have the right to use the employee's User ID and passwords to steal the employee's identity, pretend to be the employee, and hack into the employee's personal e-mail or other accounts.

Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 307-08, 990 A.2d 650, 108 Fair Empl.Prac.Cas. (BNA) 1558, 30 IER Cases 873 (N.J. 2010), succinctly stated its holding:

> This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in personal e-mails with her attorney, which she accessed on a computer belonging to her employer. Marina Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, web-based e-mail account. She later filed an employment discrimination lawsuit against her employer, Loving Care Agency, Inc. (Loving Care), and others.
>
> In anticipation of discovery, Loving Care hired a computer forensic expert to recover all files stored on the laptop including the e-mails, which had been automatically saved on the hard drive. Loving Care's attorneys reviewed the e-mails and used information culled from them in the course of discovery. In response, Stengart's lawyer demanded that communications between him and Stengart, which he considered privileged, be identified and returned. Opposing counsel disclosed the documents but maintained that the company had the right to review them. Stengart then sought relief in court.
>
> The trial court ruled that, in light of the company's written policy on electronic communications, Stengart waived the attorney-client privilege by sending e-mails on a company computer. The Appellate Division reversed and found that Loving Care's counsel had violated RPC 4.4(b) by reading and using the privileged documents.
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> We hold that, under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to notify Stengart promptly about them, Loving Care's counsel breached RPC 4.4(b). We therefore modify and affirm the judgment of the

> Appellate Division and remand to the trial court to determine what, if any, sanctions should be imposed on counsel for Loving Care.

The court held that plaintiff had a reasonable subjective expectation of privacy despite the company's policy, because she used her own web-based e-mail account, protected it with a password, and did not store her password on her company-issued laptop. *Id.* at 322. Moreover, the company's policy was silent on the key issues, making her expectation of privacy objectively reasonable as well:

> In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property.

Id. The court added an important qualifier: "Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way." *Id.* (citations omitted). Finally, the e-mails themselves contained warnings: "In addition, the e-mails bear a standard hallmark of attorney-client messages. They warn the reader directly that the e-mails are personal, confidential, and may be attorney-client communications. While a pro forma warning at the end of an e-mail might not, on its own, protect a communication . . . other facts present here raise additional privacy concerns." *Id.* The court rejected defendant's argument that she waived privilege by using its system: "As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor does the Policy fill in that gap. Under the circumstances, we do not find either a knowing or reckless waiver." *Id.* at 324. The court held that even a better-written company policy would not change the outcome:

> Our conclusion that Stengart had an expectation of privacy in e-mails with her lawyer does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. . . . For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. But employers have no need or basis to read the specific contents of personal, privileged, attorney-client communications in order to enforce corporate policy. Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual-that is, a policy that banned all personal computer use and provided unambiguous notice

> that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system-would not be enforceable.

Id. at 324-25 (citations omitted). Finally, the court rejected defendant's argument that plaintiff had left the e-mails behind on her laptop, because she did not know that the system saved e-mails in temporary cache files, and the company had to hire a forensic expert to review them. The court held that defense counsel had an obligation to stop reading the e-mails when they realized that they involved privileged communications, and had an obligation to notify plaintiff and the court to seek a ruling before proceeding. The court remanded the case to the trial court to determine the significance of the e-mails and the appropriate sanction. *Id.* at 325-27.

Holmes v. Petrovich Development Co., 191 Cal.App.4th 1047, 1068-69, 119 Cal.Rptr.3d 878, 111 Fair Empl.Prac.Cas. (BNA) 424 (Cal.App. 3d Dist. 2011), distinguished *Stengart* and held that plaintiff had no reasonable expectation of privacy in e-mails with her attorney under a different set of facts: "Holmes used her employer's company e-mail account after being warned that it was to be used only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy."

Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F.Supp.2d 548 (S.D.N.Y. 2008), surveyed cases and discussed employees' reasonable expectations of privacy notwithstanding employer policies stating that no e-mails sent over company equipment were private and that the employer could read all of them. In the case at bar, plaintiffs accessed defendants' private e-mail accounts that were not stored on plaintiffs' system, using usernames and passwords that did appear in e-mails. The court held that this violated the Stored Communications Act, 18 U.S.C. § 2701. The court stated:

> There is no sound basis to argue that Fell, by inadvertently leaving his Hotmail password accessible, was thereby authorizing access to all of his Hotmail e-mails, no less the e-mails in his two other accounts. If he had left a key to his house on the front desk at PPBC, one could not reasonably argue that he was giving consent to whoever found the key, to use it to enter his house and rummage through his belongings. And, to take the analogy a step further, had the person rummaging through the belongings in Fell's house found the key to Fell's country house, could that be taken as authorization to search his country house. We think not. The Court rejects the notion that carelessness equals consent.

Id. at 561.

4. <u>Protective Measures to Protect Employees</u>

The ABA Ethics Committee has warned of these dangers in Formal Opinion 11-459, "Duty to Protect the Confidentiality of E-mail Communications with One's Client" (2011). It is an excellent resource. The opinion recognizes the breadth of opinions and the courts' tendency to allow employers to exercise access to client communications where there was an adequately worded and disseminated policy making clear that employees cannot expect privacy in e-mails

sent using company equipment or connections. Without getting into the substance of that question, the Committee addressed the duties of plaintiff's counsel:

> This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information, including information contained in e-mail communications made in the course of a representation. In ABA Op. 99-413 (1999) ("Protecting the Confidentiality of Unencrypted E-Mail"), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients' instructions as to the mode of transmitting highly sensitive information relating to the clients' representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.
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> Clients may not be afforded a "reasonable expectation of privacy" when they use an employer's computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee's disadvantage. Under varying facts, courts have reached different conclusions about whether an employee's client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving. . . . Nevertheless, we consider the ethical implications posed by the risks that these communications will be reviewed by others and held admissible in legal proceedings. Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.
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> The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this nature will depend on the circumstances. . . .
>
> . . . Given the nature of the representation–an employment dispute–the lawyer is on notice that the employer may search the client's electronic correspondence. Therefore, the lawyer must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will use a business e-mail address for personal communications or whether the employee's position entails using an employer's device. Protective measures would include the lawyer refraining from sending e-mails to the client's workplace, as distinct from personal, e-mail address, and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

This is sound advice. The preservation of attorney-client and work-product privileges requires that all electronic communications be over the employee's own equipment and using the employee's own connection, and that the employee be warned specifically to avoid using the employer's equipment and connections, and what can happen if that advice is ignored. The advice should be given in writing; I include it in my retainer agreement.

If the employee has ever accessed a personal e-mail account while at work or using the employer's equipment or connection, I also require the employee to get a new e-mail account and never access it at work.

5. Cloud Computing

Cloud computing is increasingly used by business. Documents and data are not stored in the attorney's office, but in remote servers. That exposes confidential client information to the risk of unauthorized disclosure.

The ABA has not issued a formal opinion on cloud computing, but has organized the opinions of fourteen State Bar Ethics Committees at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html#NV. This ABA web site has clickable links to the ethics opinions cited.

The ABA has also hosted webinars on the subject that are available from the ABA Store. An example is "Moving Your Practice to the Cloud, Safely and Ethically (MP3 Audio Download)." For details, see http://apps.americanbar.org/abastore/index.cfm?pid=CET13MYPAUD&section=main&fm=Product.AddToCart.

In brief, most opinions recognize a duty of care by the attorney to obtain reasonable assurance that client data will not be compromised.

F. Surprise Clients by Website and Without Retainers

This is a problem that tends to affect smaller firms, firms representing plaintiffs, and organizations. It does not involve the Ethics 20/20 Commission, but does involve changes in technology about which attorneys need to be aware, and those changes can create client relationships that trigger the duties discussed above.

If a web site contains language inviting the visitor to share confidential information about a legal problem, such as by stating "Free Consultation" without an adequate disclaimer, some courts and ethics bodies have held that this is enough to create an attorney-client relationship that triggers the lawyer's duty to keep the information confidential, and may even disqualify the lawyer from representing a party adverse to the person submitting the form.

Similarly, the provision of detailed legal information may, without adequate disclaimers, result in a reader taking this as legal advice, to their detriment and the attorney's potential exposure to malpractice.

ABA Opinion 10-457 (2010), discusses the many factors that bear on these questions, and provides practical advice.