Southeast Bankruptcy Workshop

Artificial Intelligence, Technology & Ethics

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LAW-RELATED ARTIFICIAL INTELLIGENCE: ETHICS ISSUES

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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A. INTRODUCTION

As with other technological advances, artificial intelligence (AI) will dramatically affect law practice in coming years. Among other things, AI implicates several ethics issues with which our profession will have to wrestle.

Open AI's November 30, 2022 roll-out of its conversation AI ChatGPT has dramatically upped the ante. Other companies are also scrambling to develop such generative AI.

One basic question involves AI's essential nature. Is it the practice of law? If so, non-lawyers relying on AI to advise third parties may be committing the criminal unauthorized practice of law. And lawyers insufficiently involved in such a process may be guilty of assisting in such unauthorized practice of law. Lawyers using AI as a tool to assist in their practice must address multijurisdictional practice issues. Where is a lawyer practicing law when she relies on an AI vendor in another state?

Not surprisingly, lawyers relying on AI must fulfill their duties of competence to understand the new technology. They must understand the pros and cons of AI before deciding if they should use it or decide not to use it. And they must take reasonable steps to protect their clients' confidential information. Lawyers using AI technology might be tempted to limit their practice or their liability, which implicates ethics principles. Lawyers may find themselves committing malpractice when using these new tools, which also triggers ethical obligations.

Lawyers working with AI vendors must satisfy all the ethics rules governing such relationships with outside assistance. As with outsourcing, these duties include adequate due diligence of such vendors' confidentiality protections; checking for

conflicts of interest when retaining the vendors; adequately supervising AI vendors; and determining how to bill the clients for their services. Using AI can generate enormous amounts of data, results, and other material. The ABA and state bars have dealt with the ownership of such material -- in situations where clients have paid their lawyers, and where they have not paid their lawyers.

Transactional lawyers relying on AI face several questions. May they take advantage of counterparties' substantive mistakes? Similarly, may they take advantage of counterparties' scriveners' errors that may result from reliance on AI?

Litigators face different issues. Courts and bars disagree about lawyers' "ghostwriting" of pleadings for purportedly pro se litigants. Lawyers providing AI assistance to such litigants may face that principle. Relying on AI for discovery may implicate ethics opinions involving deception. AI will probably play an important role in privilege reviews. Courts have addressed whether that process even involves the practice of law, while bars have addressed the necessity of lawyers' involvement in that process. AI's use in jury selection implicates ethics issues. And AI's uncovering of adverse law may trigger a dilemma about the necessity of disclosing such adverse law. Not surprisingly, judges' use of AI raises judicial ethics issues.

The ABA has tiptoed into the AI issue.

In ABA House of Delegates Resolution 112 (8/12-13/19), the ABA recognized that “[w]e clearly are on the cusp of an AI revolution.” The ABA described many contexts in which lawyers were then using AI: electronic discovery/predictive coding; litigation analysis/predictive analysis; contract management; due diligence reviews; “wrong doing” detection; legal research; deception detection. The ABA recognized

various duties implicated by lawyers' AI use: competence; communication; confidentiality; supervision. The ABA urged courts and lawyers to address several issues:

(1) AI bias, explainability, and transparency of automated decisions made by AI;

(2) ethical and beneficial usage of AI; and

(3) controls and oversight of AI and the various vendors that provide AI.

In 2022, the ABA House of Delegates adopted a Resolution 700 (2/14/22), which urged "federal, state, local, territorial and tribal governments to ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated to demonstrate the absence of conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias."

Most recently, the ABA House of Delegates adopted Resolution 604 (2/6/23), which urged organizations that design, develop, deploy, and use artificial intelligence ("AI") systems and capabilities to follow certain guidelines." Those guidelines involved subjecting AI systems and capabilities to "human authority, oversight and control." The Resolution also suggested guidelines that would hold individuals and organizations using AI responsible for "any legally cognizable injury or harm" – unless "they have taken reasonable measures to mitigate against that harm or injury." Finally, ABA Resolution 604 indicated that AI developers should "ensure the transparency and traceability of their AI products, services, systems, and capabilities." The ABA's Resolution also urged government agencies, legislatures and regulations to follow these guidelines.

B. NATURE OF LAW-RELATED ARTIFICIAL INTELLIGENCE

1. Unauthorized Practice of Law

An obvious initial question implicated by law-related artificial intelligence is whether such a process constitutes the "practice of law" for unauthorized practice of law purposes.

Knowing whether use of artificial intelligence (including ChatGPT and similar conversational AI) to provide legal advice amounts to the unauthorized practice of law underlies the UPL assessment of (1) non-lawyers using AI without any lawyers' involvement, and (2) lawyers working with non-lawyers (not under their supervision) in those non-lawyers' use of AI.

Defining the Practice of Law

Although it may be difficult for self-absorbed lawyers to accept, both the phrase "unauthorized practice of law" and the concept are hazy and uncertain at best -- yet can form the basis for severe penalties.

The Restatement explains this strange dichotomy of uncertain definitions yet great stakes.

> To some, the expression "unauthorized practice of law" by a non-lawyer is incongruous, because it can be taken to imply that non-lawyers may engage in some aspects of law practice, but not others. The phrase has gained near-universal usage in the courts, ethics-committee opinions, and scholarly writing, and it is well understood not to imply any necessary area of permissible practice by a non-lawyer. Moreover, a non-lawyer undoubtedly may engage in some limited forms of law practice, such as self-representation in a civil or criminal matter . . . . It thus would not be accurate for the black letter to state flatly that a non-lawyer may not engage in law practice.

> A non-lawyer who impermissibly engages in the practice of law may be subject to several sanctions, including injunction, contempt, and conviction for crime.

Restatement (Third) of Law Governing Lawyers § 4 cmt. a (2000).

The Restatement also offers an understated explanation of the great difficulties courts and other state institutions have had in actually defining the practice of law. The simple truth is that it can be nearly impossible to precisely define the practice of law. The Restatement recognizes this awkward reality.

> Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequately to describe the line between permissible and impermissible non-lawyer services, such as a definition based on application of difficult areas of the law to specific situations. . . . Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts.

Restatement (Third) of Law Governing Lawyers § 4 reporter's note cmt. c (2000). As one court similarly explained,

> it is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law.

Sudzus v. Dep't of Employment Sec., 914 N.E.2d 208, 215 (Ill. App. Ct.), appeal denied, 920 N.E.2d 1082 (Ill. 2009) (unpublished opinion). Other courts have expressed similar sentiments.[1]

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[1] In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the bar's Commission on the unauthorized practice of law, and explaining that the Attorney General will now handle any UPL matters; "We conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses 'practice law' in one fashion or another in, for example, filling out legal forms, giving advice about 'what this or that means' in a form of contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the

Perhaps the best evidence of the great difficulty the legal profession has in defining itself involves the ABA's efforts to articulate a proposed definition of practicing law. The American Bar Association Taskforce on the Model Definition of the Practice of Law offered the following proposed draft definition in September 2002.

> The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. . . . A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.

ABA Ctr. for Prof'l Responsibility, Task Force on Model Definition of the Practice of Law (Draft, Sept. 18, 2002). Remarkably, the ABA could not agree on the definition of what its members do, and abandoned its task on March 28, 2003.[2] The final Task Force

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activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate and international provision of legal services."); State ex rel. Indiana State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 14 (Ind. 2010) ("Although it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today."); Sudzus, 914 N.E.2d at 215 (holding that a non-lawyer's role for his employer in an unemployment compensation hearing did not amount to the unauthorized practice of law; "Running through both contentions is an awareness that it is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law. . . . Hence, definition of the term 'practice of law' defies mechanistic formulation."); Pennsylvania LEO 90-02 (3/2/90) (explaining that "[w]hat activity constitutes the 'practice of law' in Pennsylvania is, as in most states, undefined").

[2] Later that year, the ABA adopted a fairly bland call for each jurisdiction to adopt its own definition, with certain core principles. ABA Task Force on Model Definition of the Practice of Law, Report & Recommendation to the House of Delegates (adopted Aug. 11, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.authcheckdam.pdf ("RESOLVED, that the American Bar Association recommends that jurisdiction adopt a definition of the practice of law."; "FURTHER RESOLVED, that each jurisdiction's definition should

suggested, among other things, that jurisdictions should apply their "common sense" when articulating a definition of the practice of law.[3]

The ABA Model Rules now contain a fairly sheepish comment.

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

ABA Model Rule 5.5 cmt. [2].

Some states seem to have floundered more than others in attempting to define the practice of law. For instance, in 2003 the Illinois Bar cited a 1966 case with the remarkably unhelpful guidance that if the acts being analyzed "require legal expertise or knowledge or more than ordinary business intelligence, they constitute the practice of law."[4] It is difficult to imagine any more amorphous and unhelpful definition.

Although every state defines the practice of law in a slightly different way, most identify certain core activities as constituting the practice of law -- appearing in court;

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include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity."; "FURTHER RESOLVED, that each jurisdiction should determine who may provide services that are included within the jurisdiction's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.").

[3] Id.

[4] Illinois LEO 02-04 (4/2003) ("In determining whether certain conduct constitutes the practice of law, the courts look to the character of the acts themselves. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 120, 214 N.E. 2d 771, 774 (1966). If those acts require legal expertise or knowledge or more than ordinary business intelligence, they constitute the practice of law. Id.; In re Howard, 188 Ill. 2d 423, 438, 721 N.E. 2d 1126, 1134 (1999); In re Discipio, 163 Ill. 2d 515, 523, 645 N.E. 2d 906, 910 (1994). See also Rotunda, Professional Responsibility 123 (3d ed) (noting that in general, the courts have held that a person practices law when the person applies the law to the facts of a particular case). While the charge of unauthorized practice of law typically relates to legal work performed by non-attorneys, the Committee recognizes that it also applies to attorneys licensed in other states who perform legal services within the foreign jurisdiction without being licensed or otherwise authorized to do so.").

preparing pleadings; drafting other documents that define people's rights (such as deeds, wills, etc.); and providing legal advice.

Several state courts and bars have used essentially the same words.

- Ohio UPL Advisory Op. 11-01 (10/7/11) ("The court has defined the unauthorized practice of law as 'the rendering of legal services for another by any person not admitted [or otherwise registered or certified] to practice [law] in Ohio.' Gov. Bar R. VII(2)(A). Although 'rendering of legal services' is not defined by statute or rule in Ohio, it has been addressed in a body of Supreme Court decisions dating back to the 1930's. In the seminal Dworken case, the court held, 'the practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.' Land Title Abstract & Trust Co. v. Dworken (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 193 N.E. 650, 652, quoting People v. Alfani (1919), 125 N.E. 671.").

- In re Wolf, 21 So. 3d 15, 17 (Fla. 2009) ("'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such 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.'" (citation omitted)).[5]

[5] In re Wolf, 21 So. 3d 15, 17, 17-18, 17 (Fla. 2009) (emphases added) (refusing to reinstate a suspended Florida lawyer who had engaged in the practice of law during his suspension; first explaining that the court had earlier defined the practice of law as follows: "'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such 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.'" (quoting State ex rel. Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963)); explaining that the suspended lawyer Wolf had violated this UPL standard; "[A]lthough Wolf informed his clients that he could not dispense legal advice, he was not simply identifying applicable statutes and ordinances with regard to opening arcades. In fact, Wolf testified that he would find the ordinances applicable to the jurisdiction in which an arcade was located and admittedly

- In re Wiles, 210 P.3d 613, 617, 618 (Kan. 2009) (disbarring a lawyer for engaging in the unauthorized practice of law after his license was suspended; "The focus of the hearing panel's conclusions regarding McKinney's complaint was Wiles' use of professional letterhead that portrayed him as an 'Attorney At Law' who was 'Licensed in Missouri and Kansas' after his Missouri law license had been suspended. . . . [i]n finding that Wiles violated KRPC 5.5(a) by engaging in the unauthorized practice of law."; also concluding that the lawyer had actually engaged in the unauthorized practice of law; explaining that "[a] general definition of the 'practice of law' has been quoted with approval as follows: 'As the term is generally understood, the 'practice' of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.' State ex rel. Boynton v. Perkins, 138 Kan. 899, 907-08, 28 P.2d 765 (1934) (quoting Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 [1893])." (emphasis added)).

- In re Garas, 881 N.Y.S.2d 744, 746, 745, 746, 747 (N.Y. App. Div. 2009) (explaining that "the provision of closing services such as the preparation of deeds constitutes the practice of law" (emphasis added); "Respondent formed Resale Closing Services, LLC (RCS), for the purpose of bidding on a contract with the United States Department of Housing and Urban Development (HUD) for the provision of closing agent services on the sale of previously foreclosed properties. The HUD contract required the designation as 'key personnel' of an admitted attorney. RCS consisted of two members: respondent and a non-lawyer. The non-lawyer member owned a majority share of the corporation, and the two members shared in profits and losses according to their membership interests. The non-lawyer was paid an annual salary as general manager of RCS, and respondent received an annual fee for his services as general counsel. HUD accepted the bid of RCS, and the non-lawyer member established an office in Buffalo. The services provided by non-lawyer employees of RCS included the preparation of deeds. Although respondent reviewed the prepared deeds and title searches, he had no involvement in the day-to-day operations of RCS, and he exercised no supervisory authority over the non-lawyer member, who administered the

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provided this advice based on his legal skill, which is greater than that possessed by the average citizen. Further, as stated above, Wolf gave advice on opening arcades, reported on changes in the law applicable to this area, reviewed leases, researched ordinances applicable to new arcade sites, and consulted with a representative of a state attorney's office on the proper interpretation of gaming law for an attorney's criminal client. Based on the definition in Sperry, trading on one's enhanced legal skill and knowledge to advise clients on how to legally proceed with a business transaction and on changes in the law based on statutory research and legal interpretation is the province of licensed attorneys. Accordingly, the referee's conclusion that Wolf's actions did not constitute the practice of law is erroneous and is disapproved."; "We agree with the Bar that Wolf should not be reinstated because he practiced law while under suspension and, therefore, was not in strict compliance with this Court's suspension order.").

services provided under the HUD contract. In addition, respondent and the non-lawyer member opened a noninterest-bearing trust account as joint signatories, through which the proceeds of each sale were disbursed. Non-lawyer employees of RCS attended closings for which RCS provided services."; "[w]hile the applicable statutes make it clear that the provision of closing services such as the preparation of deeds constitutes the practice of law, an exception has been recognized for a single transaction that occurred incident to otherwise authorized business and did not involve the rendering of legal advice" (emphasis added); "[w]e find that the services provided by RCS and GLF pursuant to the HUD contracts constituted the practice of law"; "We thus find that respondent has committed professional misconduct by forming a corporation with a non-lawyer for the provision of those services, failing to exercise oversight of its activities or employees and failing to safeguard sale proceeds in an adequate manner.").

- Illinois LEO 94-5 (7/1994) ("The threshold issue presented is whether the representation of a party to an arbitration proceeding is the practice of law. In general, the courts have held that a person practices law when the person applies the law to the facts of a particular case. Rotunda, Professional Responsibility 123 (3d ed. 1992). The Illinois position is consistent with the general rule. The Supreme Court has held that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. People v. Schafer, 404 Ill. 45, 87 N.E.2d 773, 776 (1949). In a case directly relevant to the present inquiry, the Supreme Court held that the representation of parties in contested workers' compensation matters before an arbitrator of the Illinois Industrial Commission constituted the practice of law. People v. Goodman, 366 Ill. 346, 8 N.E. 2d 941, [sic] (1937). The respondent in Goodman had argued that he was not practicing law because he was representing parties before an administrative agency rather than a court. The Supreme Court responded that the 'character of the act done, and not the place where it is committed' is the decisive factor. 8 N.E.2d at 947. In view of these authorities, the Committee concludes that the representation of a party in a contested arbitration proceeding would be considered the practice of law." (emphasis added)).

- Illinois LEO 93-15 (3/1994) ("The practice of law has been defined generally as giving of advice or rendering any sort of service by any person, firm or corporation when the giving of advice or rendering of such service requires the use of any degree of legal knowledge or skill. It has been defined as appearing in court or before tribunals representing one of the parties, counseling, advising such parties and preparing evidence, documents and pleadings to be presented. It has been defined as preparing documents the legal effect of which must be carefully determined according to law. It has been defined as referral to attorneys for service; advising or filling out of forms; negotiations with third parties and, in short, engaging in any activities

which require the skill, knowledge, training and responsibility of an attorney." (emphases added)).

Non-Lawyers' Preparation of Documents for Third Parties' Use

Bars and courts routinely condemn (and usually punish) non-lawyers who prepare documents for third parties – absent some statutory or regulatory exception.

- Florida Bar Advisory Opinion -- Medicaid Planning Activities by Non-lawyers, 183 So. 3d 276, 286 (Fla. 2015) ("It is the opinion of the Standing Committee that it constitutes the unlicensed practice of law for a non-lawyer to draft a personal service contract and to determine the need for, prepare, and execute a Qualified Income Trust including gathering the information necessary to complete the trust. Moreover, a non-lawyer should not be authorized to sell personal service or Qualified Income Trust forms or kits in the area of Medicaid planning."; "It is also the opinion of the Standing Committee that it constitutes the unlicensed practice of law for a non-lawyer to render legal advice regarding the implementation of Florida law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or Qualified Income Trust."; "It is the position of the Standing Committee that a non-lawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law as it is authorized by federal law. As noted earlier, it is also not the unlicensed practice of law for DCF [Dep't of Children & Families] staff to tell Medicaid applicants about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation. This proposed advisory opinion is the Standing Committee on Unlicensed Practice of Law's interpretation of the law.").

- Peter Vieth, Norfolk U.S. Bankruptcy Court stops non-lawyer bankruptcy prep firm, Va. Law. Wkly., July 6, 2012 ("A Hampton woman who prepared paperwork for people who thought they could not afford to hire a bankruptcy lawyer has been put out of business by a Norfolk bankruptcy judge."; "The June 26 order banning petitions prepared by Sonya Skinner is part of a national trend of bankruptcy officials cracking down on non-lawyers who purport to help people get out from under their debts."; "A new study shows that, while many people file for bankruptcy without a lawyer, a substantial number of those filers get help behind the scenes from unlicensed 'bankruptcy petition preparers (BPPs).' The law allows non-lawyers to prepare bankruptcy petitions and accompanying paperwork, but BPPs are not permitted to advise debtors on their legal options or prepare later pleadings for their cases, according to the study released last month by the United States Courts Administrative Office."; "'Dedicated to helping you improve the health of your credit profile,' her Facebook page reads. Through

her 'A1 Credit Services' in Hampton, she offered Chapter 7 Bankruptcy and Living Wills & Trusts, among other services. Besides her Facebook advertising, she used lawn signs to drum up business, according to one lawyer's observation.").

- In re Amendments to Rules Regulating Fla. Bar, 101 So. 3d 807. 837, 838 (Fla. 2012) (defining the impermissible activity by a non-lawyer completing various forms; Rule 10-2.2(b)-(c): "(b) Forms Which Have Not Been Approved by the Supreme Court of Florida. (1) It shall not constitute the unlicensed practice of law for a non-lawyer to engage in a secretarial service, typing forms for self-represented persons by copying information given in writing by the self-represented person into the blanks on the form. The non-lawyer must transcribe the information exactly as provided in writing by the self-represented person without addition, deletion, correction, or editorial comment. The non-lawyer may not engage in oral communication with the self-represented person to discuss the form to assist the self-represented person in completing the form."; "(2) It shall constitute the unlicensed practice of law for a non-lawyer to give legal advice, to give advice on remedies or courses of action, or to draft a legal document for a particular self-represented person. It also constitutes the unlicensed practice of law for a non-lawyer to offer to provide legal services directly to the public."; "(c) As to All Legal Forms. (1) Except for forms filed by the petitioner in an action for an injunction for protection against domestic or repeat violence, the following language shall appear on any form completed by a non-lawyer and any individuals assisting in the completion of the form shall provide their name, business name, address, and telephone number on the form: 'This form was completed with the assistance of: . . . (Name of Individual) . . . (Name of Business) . . . (Address) . . . (Telephone Number)'").

- Disciplinary Counsel v. Alexicole, Inc., 822 N.E.2d 348, 350 (Ohio 2004) ("Respondents are therefore enjoined from any further conduct that constitutes the unauthorized practice of law, as follows: 1. Respondents will not represent Ohio residents in securities arbitration matters and/or activities, including but not limited to providing legal advice as to securities and/or securities-arbitration claims, preparing statements of claims, preparing discovery, participating in prehearing conferences, participating in settlement negotiations, and attending mediation and/or arbitration hearings with or on behalf of claimants."; "2. Unless Dahdah becomes an attorney at law licensed and in good standing to practice law in the state of Ohio, Dahdah will not provide legal advice to any person in Ohio, including but not limited to advice regarding the filing of a claim for a securities violation and advice regarding a person's right as a claimant or defendant in securities arbitration, a lawsuit, or other legal or quasi-legal proceeding, including any terms and conditions of a settlement of any dispute."; "3. Unless Dahdah becomes an attorney at law licensed and in good standing to practice law in the state of Ohio, Dahdah will not represent the interest or legal position of Alexicole, Inc., or any corporation before any legal or quasi-legal body, or in any legal

> action, settlement, or dispute in the state of Ohio."; [Editor's note: Effective Feb. 1, 2007, Ohio adopted new ethics rules, including Rule 5.5(c)(3), allowing out-of-state lawyers to engage in services "reasonably related" to Ohio arbitrations]).

If non-lawyers rely on artificial intelligence such as ChatGPT to assist third parties, the UPL issue can be dispositive of whether such conduct violates states' UPL laws (most of which make non-lawyers' practice of law criminal).

If lawyers involve themselves with non-lawyers' use of artificial intelligence, they may also face allegations that they are assisting in the unauthorized practice of law by not adequately supervising and approving such non-lawyer efforts.

Lawyers' Involvement in the Unauthorized Practice of Law

Lawyers can face liability (or worse) for assisting non-lawyers in the unauthorized practice of law.

Licensed lawyers can run afoul of a state's unauthorized practice of law principles in three ways.

First, lawyers can improperly assist a non-lawyer in committing the unauthorized practice of law.[6] The Restatement articulates this principle.

> A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.

[6] In re Panel Case No. 23236, 728 N.W.2d 254 (Minn. 2007) (issuing a private reprimand of a lawyer who discovered that a lawyer under his supervision had not been authorized to practice law due to a failure to comply with CLE requirements; noting that the lawyer immediately changed the law firm's website information about the suspended lawyer, and restricted the suspended lawyer to work that could be performed by a non-lawyer; explaining that a law firm client (a governmental entity) inquired about the website change, but that the lawyer did not inform the client that the suspended lawyer had performed work for that client for over two years; explaining that the law firm eliminated the suspended lawyer's time from pending bills sent to the government client, and refunded all fees paid to the law firm based on the suspended lawyer's work during the time he should not have been practicing law; noting that the government client nevertheless filed an ethics charge; holding that the lawyer had violated the ethics rules by not advising clients of all material facts).

Restatement (Third) of Law Governing Lawyers § 4 (2000).[7] A comment provides some guidance.

> The lawyer codes have traditionally prohibited lawyers from assisting non-lawyers in activities that constitute the unauthorized practice of law. That prohibition is stated in the Section. The limitation supplements requirements that lawyers provide adequate supervision to non-lawyer employees and agents . . . . By the same token, it has prevented lawyers from sponsoring non-law-firm enterprises in which legal services are provided mainly or entirely by non-lawyers and in which the lawyer gains the profits.

Restatement (Third) of Law Governing Lawyers § 4 cmt. f (2000).

Second, lawyers can engage in activities constituting the practice of law in states where they are not licensed or otherwise permitted to practice law. This involves what is called "multijurisdictional practice" -- lawyers engaging in activities outside the states where they are licensed.[8]

Third, a lawyer can improperly assist out-of-state lawyers in committing the unauthorized practice of law in states where those lawyers are not licensed.[9]

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[7] Restatement (Third) of Law Governing Lawyers § 5 (2000) ("(1) A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code. (2) A lawyer is also subject to professional discipline under Subsection (1) for attempting to commit a violation, knowingly assisting or inducing another to do so, or knowingly doing so through the acts of another.").

[8] The ABA Model Rules contain a fairly basic prohibition:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a). A comment provides an explanation.

> A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

ABA Model Rule 5.5 cmt. [1].

[9] Id.

This deals with the first type of violation -- assisting non-lawyers in practicing law.

In a 2009 Ohio case, a court imposed over $6 million in penalties against two companies engaged in the described process.

- Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp., 916 N.E.2d 784, 786, 796, 796-97, 797 (Ohio 2009) (imposing over $6,000,000 in penalties against two companies who advertised in Ohio for customers seeking wills, trusts and other estate planning tools, despite the involvement of lawyers in preparing the documents; "[W]e have repeatedly held that these enterprises, in which the laypersons associated with licensed practitioners in various minimally distinguishable ways as a means to superficially legitimize sales of living-trust packages, are engaged in the unauthorized practice of law. We have also repeatedly held that by facilitating such sales, licensed lawyers violate professional standards of competence and ethics, including the prohibition against aiding others in the unauthorized practice of law. Today, we reaffirm these holdings and admonish those temped to profit by such schemes that these enterprises are unacceptable in any configuration."; "Here, American Family's sales agents, in the guise of selling prepaid legal plans, advised prospects on the benefits of its estate-planning tools. After signing up the prospect, the agents obtained sensitive financial information from the customer and delivered the agreement and the information to the Ohio office. The resident attorney (a virtual captive of American Family) sent a letter to the customer and the customer's information to the California home office for document preparation. The resident attorney rarely, if ever, communicated with the customer; if he did, he communicated by telephone."; "The California office prepared the documents and returned them to the Ohio office for delivery to the customers. The resident attorney spent little time reviewing the documents. Without any personal contact with the customer, the attorney could not possibly have given the customer the individualized legal advice that it was his professional and ethical duty to give. He could not determine whether the estate-planning products suited the customers, and he could not determine whether the customer was competent to enter into the estate-planning arrangements."; "The attorney left it to Heritage's insurance agents to explain the documents as they secured the signatures of the customers. These agents had no incentive to deliver the documents other than to solicit additional insurance business from the customer, which provided the agent with the only compensation he would receive in the transaction. The agent's objective was to obtain the signatures through whatever means he could, including pressure tactics, so he could then sell annuities."; "All of the foregoing establishes by a preponderance of the evidence that respondents engaged in the unauthorized practice of law.").

Other courts have reached the same conclusion about similar arrangements.

- State ex rel. Indiana State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 12, 13, 14, 13 (Ind. 2010) (finding that an insurance marketing agency had engaged in the unauthorized practice of law because its marketing process did not sufficiently involve a lawyer in a preparation of documents; explaining the insurance marketing agency's way of doing business; "Once a sale was made, the Estate Planning Assistant or Health Planning Assistant secured full or partial payment from the client on the spot. The forms containing the client's personal and financial information were routed to UFSC's in-house counsel, David McInerney, who then provided the information to one of the panel attorneys with whom UFSC has contracted. The estate plans sold by UFSC throughout the country were all processed in Indianapolis and routed to panel attorneys in Indiana and other states to draft documents for the plans." (footnote omitted); "Upon receiving a client's information, the panel attorney called the client, knowing the client had already paid for a certain estate plan. . . . UFSC insists that the panel attorneys had the freedom to exercise their own independent judgment in ensuring that the client had an estate plan suitable for his or her interests. Notably though, of the 1,306 estate plans sold in Indiana from October 2006 to May 2009, only nine of these clients downgraded to a less expensive plan following consultation with a panel attorney. Further, because a panel attorney was paid a flat fee of only $225 for drafting the estate planning documents, any consultation between the panel attorney and the client above and beyond the initial phone call generally was not financially feasible."; "The documents prepared by the panel attorney were then sent back to UFSC and bound. A Financial Planning Assistant was paid $75 to deliver the documents and assist the client in executing them."; explaining the minimal involvement of a lawyer in the process; "Several panel attorneys utilized standardized estate planning documents and forms that had been prepared and provided by UFSC, and the letters sent by the panel attorneys to the Financial Planning Assistants regarding the execution of the estate planning instruments also were prepared by UFSC. . . . Explanation to the client of the relevance and purposes of the documents being executed typically was delegated to the Financial Planning Assistants." (footnote omitted); holding that "[a]lthough it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today."; but enjoining the respondents from engaging in the practice described above, and also ordering them to pay attorneys' fees; "The disparity of fees earned, between the Estate Planning Assistants and Health Planning Assistants on the one hand (between $750 and $900 per sale of the most expensive estate plan package) and the panel attorneys on the other hand ($225 for drafting the documents and consulting with the client by phone), is indicative of an emphasis on sales and revenue rather than the provision of objective,

disinterested legal advice. So too is the fact that an estate plan is sold to the client prior to any attorney involvement whatsoever.").

- New Jersey LEO 716 (and UPL Op. 45) (6/26/09) (generally condemning New Jersey lawyers' involvement with loan modification companies; "The inquiries presented to the hotline generally involve three scenarios. In the first scenario, a for-profit loan modification company approaches homeowners directly and indicates that it is working with an attorney. The homeowner either: (1) pays one fee to the company, a portion of which the company pays over to the attorney; (2) pays one fee to the attorney named by the company, a portion of which the attorney pays over to the company; or (3) pays separate fees to the company and to the attorney."; finding the first scenario improper; "[A] New Jersey attorney is prohibited from paying monies to a for-profit loan modification company that farms legal work to the attorney or recommends the attorney's services."; explaining in more detail the second scenario; "In the second scenario, the attorney works as in-house counsel to the for-profit loan modification company and provides legal services to the company's customers. A variation of this scenario is an attorney formally affiliating or partnering with the [loan modification] company or being separately retained by the company to re-negotiate loans with its customers' lenders. In each of these situations, the loan modification company approaches homeowners directly and solicits the work."; finding this scenario improper; "A New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company."; providing more detail about the third scenario; "In the third scenario, the attorney or law firm brings a financial or mortgage analyst in-house or contracts with an analyst, who processes the homeowner's paperwork and may take initial steps in renegotiating the loan under the supervision of the attorney. The attorney or law firm solicits the work in accordance with the attorney advertising rules and the homeowners approach and retain the attorney directly."; finding this scenario acceptable under certain circumstances; "A New Jersey attorney may use an in-firm financial or mortgage analyst or contract with an analyst in the course of providing loan or mortgage modification services for homeowners who have directly retained the law firm. Just as an attorney may contract with a certified public accountant or other person with specialized knowledge to assist the attorney in the provision of legal services, an attorney may use, either within the firm or as a contractor, a financial or mortgage analyst to assist in mortgage modification work. The attorney is responsible for and must supervise the work performed by the analyst employee or contractor. The client homeowner must retain the attorney directly and the solicitation of the homeowner for mortgage modification services must be done by the law firm in accordance with the attorney advertising rules. The compensation paid for services by an analyst must, however, not be improper fee-sharing."; "[W]hile an attorney may hire a financial or mortgage analyst as employee or contract

consultant, payments for the work cannot directly or indirectly be based on the number of clients the analyst brings to the firm.").

- Missouri LEO 930172 (1993) (posing the following question: "Attorney accepts referrals for estate planning from insurance agents. Attorney is available in person or by telephone to answer legal questions. The agent is not obligated to recommend Attorney. The agent obtains basic estate planning information using a form and sends it to Attorney. Attorney is paid directly by the client and pays no part of the fee to the agent. Attorney reviews the information and contacts the client. Attorney prepares estate planning documents. Attorney gives the documents to the agent for delivery to the client. The agent assists the client with execution and transfer of assets. Clients are told to contact Attorney with questions."; answering as follows: "It appears the agent is engaging in in[-]person solicitation on Attorney's behalf in violation of Rule 4-7.3(b). Based on a review of the forms, it appears legal advice would be needed to fill them out. Since they are filled out by the agent and the client, it appears the agent is engaged in the unauthorized practice of law and Attorney is violating Rule 4-5.5 by assisting the unauthorized practice. Because the agent does not have a relationship with Attorney and is not supervised by Attorney, giving the documents to the agent for delivery would create problems with confidentiality under Rule 4-1.6 and would further involve the unauthorized practice of law.").

Not every state would be this harsh, but lawyers worried about committing UPL violations must avoid essentially forfeiting the attorney-client relationship to non-lawyers.

Artificial Intelligence as the Practice of Law

Artificial Intelligence represents the latest and perhaps the most advanced step in a continuum of non-human processes for providing what could be seen as legal advice.

Given the uncertain definition of the "practice of law," it should come as no surprise that entrepreneurs have occasionally attempted to market mechanisms for customers to prepare their own documents such as wills, divorce pleadings, articles of incorporation, etc. Predictably, bars usually have resisted such efforts, and targeted those entrepreneurs and the lawyers assisting them.

The Restatement notes that

> [c]ontroversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, non-lawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) (emphasis added).

This "controversy" has spanned decades. For instance, in the 1960s non-lawyer Norman Dacey was convicted of a misdemeanor and faced jail time in 1968 for publishing a book entitled How to Avoid Probate.[10] One author has noted that in 1966 Dacey's book outsold another book published in the same year -- Masters and Johnson's Human Sexual Response.[11] Dacey ultimately won his fight. A New York appellate court eventually upheld Dacey's claim that he had the constitutional right to publish such a book.[12]

Just a few years later, Texas dealt with a similar issue. A law review article described that incident.

> In the 1969 case of Palmer v. Unauthorized Practice Committee of the State Bar of Texas, [438 S.W.2d 374 (Tex. Civ. App. 1969)] the court enjoined the sale of blank will forms by a lay person, on the theory that a form is 'almost a

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10 Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 112-14 (explaining that a non-lawyer named Norman Dacey was convicted of a misdemeanor and faced thirty days in jail in 1968 for publishing the book How to Avoid Probate; explaining his constitutional claim was eventually upheld by the New York Court of Appeals in December 1967).

11 Id. at 112.

12 Id.

> will itself' and is 'misleading and certainly will lead to unfortunate consequences for any layman who might rely upon the 'form' and the definitions attached.' Palmer briefly acknowledged and then dismissed a possible free speech challenge to its holding, noting that '[c]onstitutional rights of speech, publication and obligation of contract are not absolute, and in a given case where the public interest is involved, courts are entitled to strike a balance between fundamental constitutional freedoms and the state's interest in the welfare of its citizens.

Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 125, 126, 127 (footnotes omitted).

Texas dealt with this issue again about 30 years later. The Texas Bar's Unauthorized Practice of Law Committee successfully obtained summary judgment in its claim that the software "Quicken Family Lawyer" violated Texas law. The bar might have won the battle, but ultimately lost the war[13] -- because the Texas legislature simply changed Texas law while the case was on appeal to the Fifth Circuit.[14]

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[13] Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 125, 126, 127 ("Despite Palmer's precedent, the constitutional issue with respect to publication of legal information reemerged in 1998. The Texas Bar's Unauthorized Practice of Law Committee attempted to enjoin the sale of a CD-ROM entitled 'Quicken Family Lawyer.' The software contained one hundred different legal forms and instructions on how to fill them out. As such, the software resembled a legal form book. Unlike the form book however, the software prompted a user for certain information -- such as state of residence -- and then would identify particular forms as being suitable for that particular state." (footnote omitted); "In 1999, a federal district court held that the sale of this computer software in Texas constituted unauthorized practice of law and was unprotected by the First Amendment. Judge Barefoot Sanders concluded that the software 'purports to select' the appropriate document, 'customizes the documents' and 'creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them.'" (footnote omitted); "The First Amendment holding did not last for long. After a vigorous lobbying campaign, the Texas State Legislature amended its unauthorized practice of law statute to permit the sale of software like Quicken Family Lawyer. In response, the Fifth Circuit vacated and remanded the district court's opinion in Unauthorized Practice of Law Committee v. Parsons Technology, Inc., without ever reaching the constitutional question. Since Parsons, no court decision has addressed the constitutional question presented by the sale of blank legal forms." (footnote omitted)).

[14] Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., Civ. A. No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999) (granting summary judgment for the bar in its allegation that "Quicken Family Lawyer" violated the UPL laws; reversed by the Fifth Circuit 5 months later, which it

The Texas experience with Quicken Family Lawyer highlighted the much broader national debate about lawyers' turf protection.

The 2000 Restatement (Third) of the Law Governing Lawyers noted what even then was a move to limit lawyers' monopoly.

> Courts, typically as the result of lawsuits brought by bar associations, began in the early part of the 20th century to adapt common-law rules to permit bar associations and lawyer-competitors to seek injunctions against some forms of unauthorized practice by nonlawyers. The courts also played a large role in attempting to define a delineate such practice. The primary justification given for unauthorized practice limitations was that of consumer protection -- to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints. Delineating the respective areas of permissible and impermissible activities has often been controversial. Some consumer groups and governmental agencies have criticized some restrictions as over-protective, anti-competitive, and costly to consumers.
>
> In the latter part of the 20th century, unauthorized practice restrictions has lessened, to a greater or lesser extent, in most jurisdictions. In some few jurisdictions traditional restraints are apparently still enforced through active programs. In other jurisdictions, enforcement has effectively ceased, and large numbers of lay practitioners perform many traditional legal services. Debate continues about the broad public-policy elements of unauthorized-practice restrictions, including the delineation of lawyer-only practice areas.

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explained as follows: "Subsequent to the filing of this appeal, however, the Texas Legislature enacted an amendment to § 81.101 providing that 'the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney,' effective immediately. H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999). We therefore VACATE the injunction and judgment in favor of plaintiff-appellee and REMAND to the district court for further proceedings, if any should be necessary, in light of the amended statute." Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).).

Restatement (Third) of Law Governing Lawyers § 4 cmt. b (2000).[15]

The bars' narrow view of permissible activities by nonlawyers has drawn complaints from numerous sources. The popular press joined this chorus. In August 2011, a Wall Street Journal article articulated a typical approach.

> The reality is that many more people could offer various forms of legal services today at far lower prices if the American Bar Association (ABA) did not artificially restrict the number of lawyers through its accreditation of law schools -- most states require individuals to graduate from such a school to take their bar exam -- and by inducing states to bar legal services by non-lawyer-owned entities. It would be better to deregulate the provision of legal services. This would lower prices for clients and lead to more jobs.
>
> . . . .
>
> The competition supplied by new legal-service providers, who may or may not have some type of law degree and may even work for a non-lawyer-owned firm, will not only lead to aggressive price competition but also a search for more efficient methods to serve clients.
>
> . . . .
>
> Allowing accounting firms, management consulting firms, insurance agencies, investment banks and other entities to offer legal services would undoubtedly generate innovations in such services and would force existing law firms to change their way of doing business and to lower prices.
>
> Entry deregulation would also expand individuals' options for preparing for a career in legal services, including attending vocational and online schools and taking apprenticeships without acquiring formal legal education. Established law schools would face pressure to reduce tuition and shorten the time to obtain a degree, which would

[15] Restatement (Third) of Law Governing Lawyers § 4 reporter's notes cmt. c (2000) ("Courts are often divided over whether a particular area on nonlawyer practice is unauthorized, for example in the situation of banks, real estate agents, or similar nonlawyers filling in blanks in standard contract forms as a part of transactions in which they are otherwise involved, although in recent years courts have shown a pronounced inclination to hold that particular activity by nonlawyers is in the public interest and thus justified. . . .").

> substantially reduce the debt incurred by those who choose to go to those schools.
>
> Supporters of occupational licensing to restrict the number of lawyers in the United States are wrong to assert that deregulation would unleash a wave of unscrupulous or incompetent new entrants into the profession. Large companies seeking advice in complex financial deals would still look to established lawyers, most of whom would probably be trained at traditional law schools but may work for a corporation instead of a law firm.
>
> Others, seeking simpler legal services such as a simple divorce or will, would have an expanded choice of legal-service providers, which they would choose only after consulting the Internet or some other modern channel of information about a provider's track record. Just as the medical field has created physician assistants to deal with less serious cases, the legal profession can delegate simple tasks.
>
> The track record of deregulation naysayers is hardly impressive—after all, some predicted in 1977 that airline deregulation would lead to a United Airlines monopoly. And while we cannot predict all the effects of legal services deregulation, we are confident that those services would be more responsive to consumers and that there would be more jobs in the legal profession.

Clifford Winston & Robert W. Crandall, Time to Deregulate the Practice of Law, Wall Street Journal, Aug. 22, 2011, at A13.

Unfortunately for lawyers, it can be difficult to identify serious societal harm caused by some of the various federal and state regulatory and court-created exceptions allowing nonlawyers to engage in what traditionally was the practice of law.

Non-lawyers' use of AI represents just the latest effort to weaken lawyers' monopoly, but perhaps the most serious ever.

2. Multijurisdictional Practice of Law

Although perhaps less elemental than the unauthorized practice of law issue, artificial intelligence also implicates multijurisdictional practice -- which is a subset of UPL.

Providing Advice about Other State's Law

Artificial intelligence used by itself or by a lawyer may involve non-lawyers or lawyers in one state generating advice about the law of another state. That implicates multijurisdictional practice issues.

Of course, both transactional lawyers and litigators dealing with issues involving other states might be called upon to provide informal advice about other states' laws. In fact, a litigator who has never left her home state and is litigating a case in her home state might have to deal with another state's laws -- if her state's choice of laws principles require that the court handling the litigation apply another state's substantive law.

ABA Model Rules. The ABA Model Rules provide somewhat mixed signals about this general issue.

ABA Model Rule 5.5(b)(1) prohibits an out-of-state lawyer (other than an in-house lawyer) from establishing

> an office or other systematic and continuous presence in this jurisdiction for the practice of law.

ABA Model Rule 5.5(b)(1). Comment [4] indicates that such a presence "may be systemic and continuous even if the lawyer is not physically present here" (emphasis added).

Although the ABA Model Rules do not explain this, presumably the comment refers to communications in and out of the state -- an issue which has become much more acute in recent years, as lawyers have been able to establish a "virtual" presence in other states through electronic communications. Thus, the ABA Model Rules recognize that a lawyer may impermissibly engage in the "systematic and continuous" unauthorized practice of law in another state without ever traveling there.

On the other hand, another comment to the ABA Model Rules provides an example of permissible activity that undoubtedly involves the lawyer providing advice about various states in which the lawyer is not licensed. ABA Model Rule 5.5 cmt. [14] indicates that a lawyer may assist a corporate client

> when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.

ABA Model Rule 5.5 cmt. [14] (emphasis added).

In its report to the ABA House of Delegates describing its proposed (and eventually adopted in February 2013) changes to Rule 5.5 (primarily dealing with foreign lawyers), the ABA Ethics 20/20 Commission provided its view on the permissibility of a lawyer providing legal advice about another jurisdiction's law.

> Some commenters have suggested that the proposed constraints on foreign in-house counsel are too restrictive (e.g., it is not necessary to require such counsel to consult with U.S. counsel when advising on issues of U.S. law). They argue that these foreign lawyers could offer advice on U.S. law to their organizational clients from their home jurisdictions, so they should be able to offer the same advice to the same clients while on U.S. soil. The Commission rejected this argument because U.S. lawyers are subject to similar constraints on where they are permitted to offer their advice. For example, a New Hampshire lawyer can offer

> advice about Missouri law while in New Hampshire, but the New Hampshire lawyer is not permitted to relocate to Missouri and offer advice on Missouri law without becoming licensed to practice. Also, as referenced above, this limitation is consistent with the limitation already contained in the Model Foreign Legal Consultant Rule.

Am. Bar Ass'n Comm'n on Ethics 20/20 (June 19, 2012) (emphasis added). Although this comment appeared in a report dealing with foreign lawyers, it certainly is consistent with the broad ABA view of permissible multijurisdictional activities.

Restatement. The Restatement does not contain ABA Model Rule 5.5's explicit dichotomy between an impermissible "virtual systematic and continuous presence" and a permissible "temporary" presence.

In fact, the Restatement specifically indicates that lawyers may communicate electronically into other states where they are not licensed.

> It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000).

The Restatement also explicitly approves lawyers' providing opinions about the laws of states in which they are not licensed.

> Some activities are clearly permissible. Thus, a lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.

Id. (emphases added). The Restatement even explains why such activity should be permissible.

> Modern communications, including ready electronic connection to much of the law of every state, makes concern about a competent analysis of a distant state's law unfounded. Accordingly, there is much to be said for a rule permitting a lawyer to practice in any state, except for litigation matters of law or for the purpose of establishing a permanent in-state branch office. Results approaching that rule may arguably be required under the federal interstate commerce clause and the privileges and immunities clause. The approach of the Section is more guarded. However, its primary focus is appropriately on the needs of clients.

Id. (emphasis added).

In what almost surely is not a coincidence, the Restatement also provides exactly the same example as the ABA Model Rules of a lawyer's permissible activity that undoubtedly involves the lawyer providing advice about states other than those in which the lawyer is licensed. Restatement § 3 cmt. e mentions

> a multinational corporation wishing to select a location in the United States to build a new facility [which] may engage a lawyer to accompany officers of the corporation to survey possible sites in several states, perhaps holding discussions with local governmental officers about such topics as zoning, taxation, environmental requirements, and the like.

Id. (emphasis added).

States' Approach. Despite the ABA Model Rules' liberal approach (and the Restatement's even more liberal approach), states take differing positions on this issue.

The 1998 California Supreme Court case arguably responsible for triggering the national multijurisdictional practice debate recognized that a lawyer providing California law advice while physically present in another state might violate the California UPL statute.

> Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 5-6 (Cal. 1998) (emphasis added).

Some state courts traditionally took a draconian approach.

One court applied what seems to be a ridiculously overbroad approach to this issue -- holding that even a lawyer's triage of matters that the lawyer can and cannot handle amounts to the unauthorized practice of law, if the lawyer is physically in that state.

The issue came up in connection with a lawyer's practice of federal law in Maryland. Of course, the Supremacy Clause allows lawyers to practice purely federal law even if they are not licensed in the state where they are physically present.

In Kennedy v. Bar Ass'n, 561 A.2d 200 (Md. 1989), the court acknowledged the possibility that a lawyer could properly draw the line between the permissible offering of federal law advice and the impermissible offering of Maryland law advice. But the court found as a practical matter that the lawyer could not adequately serve clients by trying to do so.

> We will not go so far as to say that it is theoretically impossible for Kennedy to maintain a principal office in Maryland exclusively for engaging in a practice before the federal court in Maryland and the courts in the District of Columbia. It seems, however, that it would be practically impossible to do so. Nevertheless, we shall not foreclose the possibility of Kennedy's presenting to the Circuit Court of Montgomery County, in the exercise of its continuing

> jurisdiction over the injunction, any proposal whereby Kennedy, without holding himself out as practicing law in Maryland, could first pinpoint clients whose specific matters actually required counsel before those courts where Kennedy is currently admitted to practice, and thereby could limit his legal representation in Maryland to those specific matters.

Id. at 211 (emphases added).

Significantly, the court did not focus on what the lawyer would do for the clients he represented. Instead, the court noted that the lawyer would be engaging in the practice of law (in Maryland) when deciding whether he could represent them. The court explained that

> advising clients by applying legal principles to the client's problem is practicing law. When Kennedy, who is unadmitted in Maryland, set up his principal office for the practice of law in Maryland and began advising clients and preparing legal documents for them from that office, he engaged in the unauthorized practice of law. This is so whether the legal principles he was applying were established by the law of Montgomery County, the State of Maryland, some other state of the United States, the United States of America, or a foreign nation. . . . He is not permitted to sort through clients who may present themselves at his Maryland office and represent only those whose legal matters would require suit or defense in a Washington, D.C. court or in the federal court in Maryland because the very acts of interview, analysis and explanation of legal rights constitute practicing law in Maryland. For an unadmitted person to do so on a regular basis from a Maryland principal office is the unauthorized practice of law in Maryland.

Id. at 208-10 (emphasis added). The District of Columbia Bar later suspended Kennedy for nine months because of this infraction in Maryland. In re Kennedy, 605 A.2d 600 (D.C. 1992).

Thus, a lawyer's physical presence in a state dramatically increases the risk that the lawyer will be engaging in the improper practice of law in that state. However,

avoiding such a physical presence does not automatically eliminate the risk. The trend is in favor of allowing lawyers to provide advice about the law of states in which the lawyers are not licensed.

Lawyers Establishing a "Virtual" Presence in Another State

Lawyers relying on artificial intelligence may at some point establish a presence in a state where they are not licensed -– or they may work physically in a state where they are not licensed and use artificial intelligence to practice "virtually" in a state where they are licensed.

Multijurisdictional practice issues arise when lawyers practice law in a state where they are not licensed. States' jealous hold over the practice of law within their borders has led to a somewhat counter-intuitive result: lawyers fully licensed in another jurisdiction are guilty of the unauthorized practice of law by practicing law in another state just as if the lawyers had never spent a day in law school, passed a bar exam, or met the rigorous standards for joining the professional. Although such lawyers might face less severe sanctions than non-lawyers for practicing in a state where they are not licensed, the conduct can still trigger even criminal penalties.

This harsh principle makes some sense when applied to a lawyer who moves to another state and "hangs a shingle" without taking some steps to join the new state's bar. But the increasing ability of lawyers to practice "virtually" anywhere raises numerous multijurisdictional practice issues -- with enormous stakes for the lawyers.

Although ABA Model Rule 5.5 and state parallel ethics rules take a fairly generous approach to lawyers temporarily practicing in states where they are not licensed, there are lines -- which temporary "virtual" practice might cross.

States have punished their lawyers who have practiced improperly in other states.

- In re Velahos, Dkt. No. DRB 15-109, at 6 (N.J. Supreme Court Disciplinary Review Bd. May 23, 2016) (suspending for six months a lawyer for various ethics violations; noting the disciplinary review board's findings from 3/23/16; "In fact, respondent represented clients in multiple matters in jurisdictions in which he was not authorized to practice, without the assistance of local counsel. Respondent conducted no less than eighteen mortgage modifications in the States of Georgia, Washington, New York, Pennsylvania, Virginia, Maryland, Connecticut, Texas, or Florida. Respondent misrepresented to several of these out-of-state clients in the fee agreements that FLA 'has been retained as 'Of Counsel' to Loan Law Center.' Moreover, respondent engaged in credit and debt adjustment services in Maryland over a two-year period, even after the Commissioner of Financial Regulation for the State of Maryland issued a summary order, followed by a final order to Cease and Desist. When questioned by the OAE about the orders, respondent denied that he had 'taken any money' from Maryland. However, the OAE's review of respondent's records disclosed that, during that period, respondent actively represented several Maryland clients in that state and collected fees from them. Respondent's conduct in this respect violated RPC 1.16(a)(1), RPC 5.5(a), RPC 8.1(a), RPC 8.4(c), and RPC 8.4(d).").

- In re Lenard, Cal. Bar Court Review Dep't Case No. 09-O-11175 (Apr. 15, 2013) (disbarring a lawyer for engaging in the unauthorized practice of law by providing "credit repair" services to debtors in several states where the lawyer was not licensed; "Lenard contracted with three California consumer debt relief companies: Freedom Financial Management; Beacon Debt Service; and Pathway Financial Management (the Settlement Companies). These companies paid Lenard a flat fee to provide limited legal services for clients regarding their consumer debt. Lenard testified that he customarily charged the Settlement Companies between $75 to $100 per client and spent 15 to 20 minutes on each file. He also estimated that he had over 1,000 clients 'in credit repair' among all three companies. The Settlement Companies advertised through television and radio ads in a number of states. Clients who retained one of the Settlement Companies agreed to pay retainer fees of up to 12% of the balance of their debts, contingency fees of 8% of the amount by which their debts were reduced, and monthly maintenance fees of between $15 to $25. Clients also were required to make monthly payments into the Companies' 'client trust account,' and those funds were to be used to settle their debts. The Settlement Companies represented that the clients' accounts would be 'handled by our legal counsel.'"; "Lenard practiced law and held himself out as an attorney with the authority and knowledge to settle consumer debts to Wisconsin and New York clients Burgess and Manfredi, respectively. He also represented to

their creditors that they should follow debt collection laws or his clients were prepared to take legal action. In addition, Lenard claims he reviewed their files to determine whether they should file bankruptcy, although he admitted he was 'not licensed to do a bankruptcy out of state.' Wisconsin and New York have both considered conduct similar to Lenard's to constitute UPL."; "The hearing judge found that Lenard established a systematic and continuous presence in each of the jurisdictions listed in the NDCs [Notice of Disciplinary Charge]. Based on the limited record, we do not find clear and convincing evidence of this proscription. However, we find that Lenard committed UPL by holding himself out as entitled to practice law in each of the severn states for a total of ten willful violations of rule 1-300(B)" (footnote omitted); "By implying he was licensed in the relevant states, Lenard gave the false impression to his clients and their creditors that he held an advantage over a non-attorney debt negotiator. He explicitly represented to the clients that he would provide legal services, and informed creditors that he was representing each client utilizing his law office letterhead. The written communications Lenard provided to clients (and their creditors) in those states are evidence that he violated the applicable rules of professional conduct, as well as relevant case law and advisory authority."; "He [Lenard] contends that all work was done in California and any legal opinions rendered were based on California law. However, the factors defined in comment 14 of the ABA Model Rule compel our conclusion that Lenard was not entitled to practice law even on a temporary basis in these states. Analyzing those factors, we find that he had no prior contact with the clients and they never lived in California or had substantial contact with this state. There is no evidence that California law would be relevant to any of the consumer debts in these matters. Further, Lenard has no knowledge of the specific laws of the states in which the clients resided, where they faced state collection actions and may have had assets. As such, the contact with these out-of-state clients was not reasonably related to Lenard's practice in California, and he was not authorized to provide legal services on a temporary basis under the states' versions of ABA Model Rule 5.5(c)." (footnote omitted); "[W]e reject any contention by Lenard that ABA Model Rule 5.5(d)(2) enabled him to provide legal services related to bankruptcy law. Primarily, Lenard's proposed services were not limited to issues of bankruptcy.").

Such lawyers may face other threats.

- Angela Morris, Linebarger Goggan Law Firm Settles Class Action For $3.4 Million, Tex. Lawyer, Jan. 12, 2016 ("A federal judge has approved a settlement that requires Austin-based law firm Linebarger Goggan Blair & Sampson, LLC to pay $3.4 million -- including nearly $904,000 in attorney fees and expenses -- to settle a class action that alleged it engaged in the unauthorized practice of law in California."; "The settlement ends litigation spanning back to May 2013, when plaintiff 4EC Holdings sued Linebarger, a firm that contracts with governmental agencies to collect debts. 4EC alleged

> that Linebarger sent debt collection demand letters to California residents, even though the firm did not employ lawyers in California, as allegedly required under California law. Linebarger denied the allegations.").

Lawyers' Systematic And Continuous "Virtual" Practice Where They Are Not Licensed

The ABA Model Rules contain two flat prohibitions on lawyers' provisions of legal services in states where they are not licensed.

First, a lawyer not licensed in a jurisdiction

> shall not . . . except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.

ABA Model Rule 5.5(b)(1) (emphasis added).

Second, such a lawyer may not

> hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

ABA Model Rule 5.5(b)(2).

A comment to the ABA Model Rules includes a twist -- which complicates the analysis.

> Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here.

ABA Model Rule 5.5 cmt. [4] (emphasis added).

The Restatement also deals with the rise in electronic communications, and the resulting ability of lawyers to engage in a "virtual" practice. In fact the Restatement points to this trend as a grounds for allowing lawyers licensed in one state to continuously practice in other states.

The Restatement essentially follows the ABA Model Rules standard.

> The extent to which a lawyer may practice beyond the borders of the lawyer's home state depends on the circumstances in which the lawyer acts in both the lawyer's home state and the other state. At one extreme, it is clear that a lawyer's admission to practice in one jurisdiction does not authorize the lawyer to practice generally in another jurisdiction as if the lawyer were also fully admitted there. Thus, a lawyer admitted in State A may not open an office in State B for the general practice of law there or otherwise engage in the continuous, regular, or repeated representation of clients within the other state.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphasis added).

However, the Restatement clearly takes a more liberal view than the ABA Model Rules of the type of "virtual" presence in a state that lawyers should be able to arrange.

> It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphasis added).

The ABA Ethics 20/20 Commission primarily focused on the rising use of electronic communications in the practice of law, and the increasing mobility of lawyers. Thus, one would think that the issue of a "virtual" continuous presence in another state would have been an obvious choice for proposed rules changes.

The Commission tiptoed into the issue. In its June 19, 2012, Issue Paper, the ABA Ethics 20/20 Commission described the earlier circulation of a draft proposed rules change.

> The Commission previously circulated a draft proposal that would have addressed this ambiguity in a general way by adding new sentences to Comment [4] to Rule 5.5. The new sentences would have provided as follows:

> For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may be come [sic] systematic and continuous within the meaning of Rule 5.5(b)(1).
>
> In response to this proposal, several commenters suggested that the sentences not only provide little additional guidance, but that they might have the unintended effect of deterring lawyers from engaging in forms of virtual practice that should be permissible.
>
> Based on this response, the Commission asked its Uniformity, Choice of Law, and Conflicts of Interest Working Group to evaluate whether it is possible to provide enhanced guidance on this issue, and if so, how. The Working Group has identified several possible approaches.

Am. Bar Ass'n Comm'n on Ethics 20/20 (June 19, 2012).

The Commission tentatively floated the following "trial balloon" as a way to assess such a "virtual" presence.

> One possible approach is to identify the factors that lawyers and disciplinary authorities should consider when deciding whether a lawyer's presence has become sufficiently systematic and continuous to trigger Rule 5.5(b)'s requirement that the lawyer become licensed. For example, those factors might include:
>
> - the nature and volume of communications directed to potential clients in the jurisdiction;
> - whether the purpose of the communications is to obtain new clients in the jurisdiction;
> - the number of the lawyer's clients in the jurisdiction;
> - the proportion of the lawyer's clients in the jurisdiction;
> - the frequency of representing clients in the jurisdiction;
> - the extent to which the legal services have their predominant effect in the jurisdiction; and

> - the extent to which the representation of clients in the jurisdiction arises out of, or is reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
>
> A second possibility is for the Commission to make no proposal in this area and to refer the issue to the Standing Committee on Ethics and Professional Responsibility for an opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.
>
> A third possibility is for the Commission to make no proposal in this area, but identify the relevant issues in an informational report that the Commission could file with the ABA House of Delegates to help educate the profession about this issue.

Id. at 2-3.

The ABA 20/20 Commission eventually chose option No. 2 -- essentially punting the issue to the ABA Standing Committee on Ethics and Professional Responsibility.

The Commission described its decision in a February 2013 release.

> Currently, Model Rule 5.5(b)(1) requires a lawyer to obtain a license in a jurisdiction if the lawyer has an office or a "systematic and continuous" presence there, unless the lawyer's work falls within one of the exceptions identified in Rule 5.5(d). The increased demand for cross-border practice and related changes in technology have raised new questions about the meaning of the phrase "systematic and continuous presence" in Rule 5.5(b). In particular, technology now enables lawyers to be physically present in one jurisdiction, yet have a substantial virtual practice in another. The problem is that it is not always clear when this virtual practice in a jurisdiction is sufficiently "systematic and continuous" to require a license in that jurisdiction.
>
> Currently, Comment [4] to Model Rule 5.5 identifies these issues, but provides limited guidance as to how to resolve them. The Comment states that a lawyer's "[p]resence may be systematic and continuous even if the lawyer is not physically present" in the jurisdiction. Neither the Rule nor the Comment provides any clarity as to when a lawyer who is "not physically present" in a jurisdiction nevertheless has a systematic and continuous presence there.

> The Commission released an issues paper, seeking feedback on a number of possible options for addressing these issues, including the identification of relevant factors when analyzing when a presence becomes "systematic and continuous" and referring the issue to the Standing Committee on Ethics and Professional Responsibility for a Formal Opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.
>
> The Commission, after considerable deliberations, concluded that these issues may be best addressed in the future as the nature of virtual law practice becomes clearer and as relevant technology continues to evolve.

Am. Bar Ass'n Comm'n on Ethics 20/20, Introduction and Overview (Feb. 2013) (emphasis added).

It might be fair to conclude that such "virtual" practice possibilities represent a huge threat to states' somewhat parochial and often "turf protecting" view of their power to regulate the legal profession. This may be one reason that the ABA Ethics 20/20 Commission abandoned its efforts.

Just as the ABA has recognized but not dealt with this issue, courts and bars have wrestled with it too.

Eventually, states began to de-emphasize lawyers' physical presence and acknowledge that lawyers can practice "virtually" and permanently in a state where they are not licensed -- a scenario the ABA acknowledged about the same time but never resolved.

Interestingly, the ramifications of a lawyer's "virtual" presence have arisen in several disciplinary cases. In some situations, lawyers establishing a largely "virtual" practice have also occasionally entered the state to meet with clients -- giving state disciplinary authorities a "hook" to punish the lawyers under the traditional emphasis on physical location. Not surprisingly, these generally involve lawyers practicing near a

state border, and drawing clients from a neighboring state where the lawyer is not licensed to practice law.

In 2007, the Delaware Supreme Court punished such a lawyer.

> Glover says that she did not provide legal services 'in Delaware' because she worked out of an office in Pennsylvania. Moreover, because she reasonably believed that the predominant effect of her legal work was in Pennsylvania, she should be protected by the 'safe harbor' provision in Rule 8.5(b). Glover's argument fails for several reasons. First, the record establishes that on three occasions she was physically present in Delaware, representing her Delaware clients. Second, physical presence is not required to establish that a person is providing, or offering to provide, legal services in this state. For several years, Glover accepted new clients who were: (1) Delaware residents, (2) involved in Delaware car accidents, and (3) seeking recovery under Delaware insurance policies. Glover did everything short of appearing in Delaware courts, and engaged Delaware attorneys as co-counsel only if she could not resolve the matter without litigation. We are satisfied that this regular pattern of representation of Delaware clients constituted the practice of law 'in Delaware' for purposes of Rule 8.5. (footnote omitted).; Glover may not have engaged in formal advertising to attract clients, but she certainly cultivated a network of Delaware contacts who accomplished the same result. After carefully reviewing the record, we are satisfied that there is substantial evidence to support the Board's finding that Glover established a systematic and continuous presence in Delaware for the practice of law in violation of Rule 5.5(b).

In re Tonwe, 929 A.2d 774, 778, 779-80 (Del. 2007) (emphases added). To be sure, the Delaware court might have been influenced by the lawyer's unsavory practice history and questionable representations during the disciplinary process.[16]

[16] In re Tonwe, 929 A.2d 774, 776 (Del. 2007) (disbarring a lawyer for the unauthorized practice of law in Delaware; explaining the Delaware Office of Disciplinary Counsel had filed a petition alleging that the Pennsylvania-licensed lawyer had practiced law in Delaware; explaining that "Glover graduated from law school in 1985 and was admitted to the Ohio bar shortly thereafter. She moved to Delaware a few years later. In 1989, Glover was admitted to practice in Pennsylvania and the District of Columbia. She took the Delaware bar examination, but did not pass. In 1990, Glover opened a law office in her home in

A year later, the Delaware Supreme Court applied the same basic principle.

- In re Kingsley, No. 138, 2008 Del. LEXIS 255, at *13 (Del. June 4, 2008) (holding that a lawyer licensed in Pennsylvania and New Jersey committed the unauthorized practice of law in Delaware by accepting a monthly retainer to draft estate planning documents for clients of a Delaware accountant; concluding that the lawyer established a "systematic and continuous presence" in Delaware by engaging in these activities; prohibiting the lawyer from practicing law in Delaware).

Lawyers' Systematic and Continuous "Virtual" Practice Where They Are Licensed -- While Physically In A State Where They Are Not Licensed

Most lawyers analyzing "virtual" practice focus on the scenario discussed above -- remaining physically in a state where they are licensed but "virtually" representing clients located in states where the lawyers are not licensed.

But lawyers might instead choose to live in a state where they are not licensed, while continuously practicing -- "virtually" -- in a state where they are licensed. There are several scenarios in which such a arrangement might be attractive. For instance, lawyers might want to continue practicing "big city" law while living in more attractive or less expensive rural settings. They might want to be near aging parents, or follow a spouse who will be attending graduate school for several years, etc.

One might wonder why the state where such lawyers will be physically present would care about any multijurisdictional implications. Presumably, that state has an interest in protecting its own citizens from lawyers representing them without local knowledge, without any supervision from that state's bar, etc. So why would that state

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Milford, Delaware. Glover's practice included federal immigration law and personal injury cases."; "The ODC first learned about Glover's Delaware legal practice as a result of an ongoing federal investigation. In 1991, Glover was convicted of bribing a federal immigration official, and served 37 months in prison. Following her conviction, Glover was disbarred in Pennsylvania, Ohio and the District of Columbia. She was reinstated in Pennsylvania in 2002."; rejecting the lawyer's argument that she had not practiced law in Delaware; noting that the lawyer's husband and children live in Delaware, but she claims to sleep in her Pennsylvania office – but denying that she and her husband are separated).

be concerned, as long as those lawyers do not hold themselves out to practice in the state, do not represent any citizens of that state, etc.?

In this scenario, the lawyers rather than the bar would have an interest in rejecting the old "physical presence" standard, and instead focus on the "virtual" practice factors.

A February 2013 release of the ABA Ethics 20/20 Commission noted this issue, but without reaching any conclusions.

> Conversely, a lawyer may be licensed in one jurisdiction, but live in a jurisdiction where the lawyer is not licensed. If the lawyer conducts a virtual practice from the latter jurisdiction and serves clients only in the jurisdiction where the lawyer is actually licensed, there is a question of whether the lawyer has a "systematic and continuous" presence in the jurisdiction where the lawyer is living and thus violates Rule 5.5(b) in that jurisdiction. The Rule is unclear in this regard as well.

Am. Bar Ass'n Comm'n on Ethics 20/20, Introduction and Overview, at 10 n.27 (Feb. 2013).

States have gradually began to accept the concept that lawyers from other states may practice systematically and continuously in a state where they are not licensed – as long as they are essentially “invisible” in that state.

For instance, Arizona amended its ethics rules to permit lawyers to practice continuously in Arizona (without a license there) as long as they give advice only about the law of a state where they are licensed (or federal or tribal law).

> A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction <u>may provide legal services in Arizona that exclusively involve</u> federal law, <u>the law of another jurisdiction</u>, or tribal law.

Arizona Rule 5.5(d) (emphasis added).

Other states have not amended their rules (yet), but have indicated in legal ethics opinions that lawyers practicing “invisibly” within the state have not really established a “systematic and continuous” presence there.

This approach appears to have begun in a 2005 Maine LEO, and has accelerated since then.

- Maine LEO 189 (11/15/05) (a lawyer who is not licensed in Maine does not engage in the unauthorized practice of law if that lawyer practices from her “vacation home in Maine“ or even “live[s] in Maine and work[s] out of his or her home for the benefit of a law firm and clients located in some other jurisdiction“ - as long as the lawyer does not “hold herself out to the public as admitted in Maine”).

- Virginia LEO 1856 (9/11/11) (Under Virginia Rule 5.5, non-Virginia lawyers "may not practice Virginia law on a 'systematic and continuous' basis," unless they (1) limit their practice to the "law of the jurisdiction/s where they are licensed"; (2) practice "exclusively federal law" under the federal supremacy clause (such as "lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office," although lawyers such as bankruptcy, patent or federal procurement lawyers must abide by courts' possible limitation of practice before the courts to members of the Virginia Bar, and may provide advice "such as the debtor's homestead exemption and status or priority of claims or liens" or "the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention" only under the conditions mentioned immediately below; (3) "provide advice about Virginia law or matters peripheral to federal law (described immediately above) only if they do so on a "temporary and occasional" basis and (as stated in UPL Opinion 195) "under the direct supervision of a Virginia licensed lawyer before any of the [non Virginia] lawyer's work product is delivered to the client" or if they "associate with an active member of the Virginia State Bar." This liberal multijurisdictional practice approach (allowing non-Virginia lawyers to practice systematically and continuously in Virginia as long as they limit their practice to the law of jurisdictions where they are licensed) “embrac[es]” the approach of two earlier Virginia Supreme Court-approved Virginia UPL opinions (UPL Opinions 195 (2000) and 201 (2001)). Rule 5.5 overrules an earlier UPL Opinion about which law applies to a non Virginia lawyer's practice of another state's law while physically in Virginia; thus, "New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The [non Virginia] lawyer's physical presence in Virginia may not be a sufficient basis

to apply Virginia's rules over New York's rules governing foreign lawyer practice." Contract lawyers hired to "work on a matter involving Virginia law" must either "be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis" although such a lawyer's practice "could be regarded as 'continuous and systematic'" if the non Virginia contract lawyer is hired "to work on several and various Virginia matters/cases over a period of time." Such contract lawyers need not be licensed in Virginia if the lawyer is "hired to work only on matters involving federal law or the law of the jurisdiction in which the [non Virginia] contract lawyer is admitted." [Approved by the Supreme Court of Virginia 11/2/16]).

- Utah LEO 19-03 (5/14/19)(holding that non- Utah lawyers physically present in Utah on a non-temporary basis may practice law as long as they do not hold themselves out as Utah lawyers and only represent clients in states where they are licensed; describing two scenarios that do not amount to the in authorized practice of law in Utah; "An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients."; "An attorney from California may relocate to Utah for family reasons (e.g., a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients."; explaining that "The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business."; "[i]t seems clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or 'other systemic and continuous presence' for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed,'" and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct."; "The question posed here is just as clear as the question before the Ohio Supreme Court [In re Application of Jones, 2018 WL 5076017 (Ohio Oct. 17, 2018)]: what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.") (emphases added).

Thus, this gradual movement started before the COVID-19 pandemic. But, the pandemic undoubtedly caused states to revisit the issue, because many lawyers moved out of cities or states with a high COVID-19 risk – to work “remotely” from safer and perhaps cheaper locations (such as a vacation home or their parent’s home).

In 2020, the ABA joined the trend.

- ABA LEO 495 (12/16/20)(A lawyer's "physical presence in the local jurisdiction [where she is physically located while representing clients in other jurisdictions] is incidental; it is not for the practice of law" – as long as the lawyer "is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed." Thus, such a lawyer does not violate ABA Model Rule 5.5 as long as she does not hold out to the public that she is authorized to practice in that jurisdiction, and does not practice that jurisdiction's law. Although a jurisdiction might consider that conduct to be the unauthorized practice of law, and has an interest in ensuring that such a lawyer is "competent," such a "local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction." Maine LEO 189 (2005) and Utah LEO 19-03 agree with this analysis. Among the various ABA Model Rule 5.5 provisions allowing lawyers to practice in a jurisdiction where they are not licensed, lawyers can also rely on ABA Model Rule 5.5 (c)(4's) provision permitting "temporary" practice under specified conditions where they are not licensed – and "[h]ow long that temporary period lasts could vary significantly based on the need to address the pandemic.") (emphases added).

Since ABA LEO 495 (12/16/20), several other bars have adopted the same forgiving approach.

- San Francisco LEO 2021-1 (8/21) (holding that non-California lawyers may practice law in San Francisco as long as they "will not advertise otherwise hold [themselves] out as admitted to practice law in California and will make clear that [they are] only licensed" in their home state, and limit their practice "to representing clients in accord with the rules of [the state] where [they are] licensed"; emphasizing California law's emphasis on protecting California residents; "Lawyer must not (1) 'practice law in California' within the meaning of B&P Code Section 6125; (2) establish an office or a 'systematic or continuous presence' in California' for 'the practice of law' in violation of CRPC Rule 5.5(b)(1); or (3) 'hold out to the public or otherwise represent that the lawyer is admitted to practice law in California 'in violation of CRPC Rule 5.5(b)(2). The determination of these questions depends on a number of factors, including the extent to which Lawyer's activities require the protection of California persons or entities from incompetent or unethical attorneys."; noting that states taking a more restrictive view focus on lawyers' representation of clients in states where they are physically practicing and not licensed; "Consistent with this analysis, other jurisdictions have found violations of versions of ABA Model Rule 5.5 when out-of-state lawyers systematically reached out to 'create' multiple relationships with individual clients in a state where the lawyer was not admitted, and to represent those

clients in matters centered in that state. See, e.g., In re Tonwe, 929 A. 2d 774, 778, 778-89 (Del. 2007) (out-of-state lawyer, who regularly represented in-state clients in in-state matters, and 'cultivated a network of in-state contacts' to attract clients, took steps to establish a systematic and continuous presence); In re Kingsley, 2008 Del. Lexis 255, 950 A.2d 659 at *13 (Del. 2008) (out-of-state lawyer, who had monthly retainer with in-state accountant to draft documents for in-state clients, established a systematic and continuous presence); Illinois LEO 12-09 (March 2012) (out-of-state lawyer sought work from in-state clients and sought to perform work while present in the state). These cases support the view that versions of ABA Model Rule 5.5, such as CRPC rule 5.5, are centrally aimed at preventing harm to clients in the jurisdiction where the lawyer is not admitted."; favorably mentioning Florida LEO 2019-4 (5/20/21), without mentioning that the Florida LEO involved a lawyer practicing purely federal law; also favorably mentioning Utah and Maine LEOs; "The Utah Ethics Advisory Committee Opinion 19-03 (2019) puts it this way: 'what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.' See also Maine Ethics Opinion 189 (2005).") (emphasis added).

- New Jersey LEO 742 (jointly issued as New Jersey UPL 59) (10/6/21) (explaining that non-New Jersey lawyers may work remotely from their New Jersey home; "Non-New Jersey licensed lawyers may practice out-of-state law from inside New Jersey provided they do not maintain a 'continuous and systematic presence' in New Jersey by practicing law from a New Jersey office or otherwise holding themselves out as being available for the practice of law in New Jersey. A 'continuous and systematic presence' in New Jersey requires an outward manifestation of physical presence, as a lawyer, in New Jersey."; "Such outward manifestations of physical presence include, most significantly, practicing from a law office located in New Jersey. See Jackman, supra, 165 N.J. at 558 (Massachusetts lawyer practicing from a New Jersey law firm office). Other outward manifestations include, but are not limited to, any advertisement or similar communication stating that the non-New Jersey licensed lawyer engages in a legal practice in New Jersey; any advertisement or similar communication referring to a location in New Jersey for the purpose of meeting with clients or potential clients; any advertisement or similar communication stating that mail or deliveries to the lawyer should be directed to a New Jersey location; and otherwise holding oneself out as available to practice law in New Jersey. Accordingly, non-New Jersey licensed lawyers who are associated with an out-of-state law firm, or are in-house counsel for an out-of-state company, and who simply work remotely from their New Jersey homes but do not exhibit such outward physical manifestations of presence, are not considered to have a 'continuous and systematic presence' for the practice of law in New Jersey. Such non-New Jersey licensed lawyers are not considered to be engaging in the unauthorized practice of New Jersey law.") (emphases added).

Not surprisingly, all eyes have been on Florida – which is among the most defensive of states in resisting non-Florida lawyers' presence there.

In May 2021, the Florida Bar issued a lengthy legal ethics opinion that seems to follow this new approach.

- Fla. Bar re Advisory Op.—Out-of-State Attorney Working Remotely, 318 So. 3d 538, 539-40, 541-42, 542 (Fla. 2021) (analyzing Florida's multijurisdictional Rule 5.5; explaining that a New Jersey lawyer domiciled in Florida may practice federal law without being a Florida Bar member, under certain circumstances; not explaining whether the opinion would have reached the same favorable conclusion about the non-Florida lawyer's systematic and continuous presence in Florida if the lawyer had not been practicing purely federal law, and thus unable to rely on the Supremacy Clause for the freedom to practice in Florida without being a member of the Florida Bar; describing the lawyer's situation: "[h]e is licensed to practice law in New Jersey, New York, and before the United States Patent and Trademark Office (hereinafter 'USPTO'). He is not licensed to practice law in Florida. He recently retired from his position as chief IP counsel for a major U.S. Corporation. That position was in New Jersey. He moved from New Jersey to Florida. He started working as an attorney with a New Jersey law firm specializing in federal IP law. The firm has no offices in Florida and has no plans to expand its business in Florida. His professional office will be located at the firm's business address in New Jersey, although he will do most of his work from his Florida home using a personal computer securely connected to the firm's computer network. In the conduct of his employment with the firm, he will not represent any Florida persons or entities and will not solicit any Florida clients. While working remotely from his Florida home, he will have no public presence or profile as an attorney in Florida. Neither he nor his form will represent to anyone that he is a Florida attorney. Neither he nor his firm will advertise or otherwise inform the public of his remote work presence in Florida. The firm's letterhead and website, and his business cards will list no physical address for him other than the firm's business address in New Jersey and will identify him as 'Of Counsel – Licensed only in NY, NJ and the USPTO.' The letterhead, website, and business cards will show that he can be contact ted by phone or fax only at the firm's New Jersey phone and fax number. His professional email address will be the firm's domain. His work at the firm will be limited to advice and counsel on federal IP rights issues in which no Florida law is implicated, such as questions of patent infringement and patent invalidity. He will not work on any issues that involve Florida courts or Florida property, and he will not give advice on Florida law.'" (footnotes omitted); endorsing the reasoning of Utah LEO 18-03 (May 2019); "In paragraph 16 of its opinion, the UEAOC posed the following question: '[W]hat interest does the Utah State Bar have in

> regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? . . . [T]he answer is . . . none.'; Like the UEAOC, the Standing Committee's concern is that the Petitioner does not establish an office or public presence in Florida for the practice of law. As discussed above, neither is occurring here. And in answering the same question posed by the UEAOC, it is the opinion of the Standing Committee that there is no interest that warrants regulating Petitioner's practice for his out-of-state clients under the circumstances described in his request simply because he has a private home in Florida." (alterations in original); pointing to the pandemic in supporting its conclusion: "In light of the current COVID-19 pandemic, the Standing Committee finds the written testimony of Florida-licensed attorney, Salomé J. Zikakis, to be particularly persuasive: 'I believe the future, if not the present, will involve more and more attorneys and other professionals working remotely, whether from second homes or a primary residence. Technology has enabled this to occur, and this flexibility can contribute to an improved work/life balance. It is not a practice to discourage. There are areas of the law that do not require being physically present, whether in a courtroom or a law office. Using the attorney's physical presence in Florida as the definitive criteria [sic] is inappropriate. So long as the attorney is not practicing Florida law, is not advertising that he practices Florida law, and creates no public presence or profile as a Florida attorney, then there is no UPL simply because the attorney is physically located in Florida. There is no harm to the public. These facts do not and should not constitute UPL in Florida.'" (alteration in original); concluding as follows: "[i]t is the opinion of the Standing Committee that the Petitioner who simply establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence under the circumstances described in this request does not establish a regular presence in Florida for the practice of law. Consequently, it is the opinion of the Standing Committee that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and no Florida law) and without having or creating a public presence or profile in Florida as an attorney." (emphases added)).

Unfortunately for anyone seeking clarity, this seemingly dramatic new Florida approach might have a catch. The non-Florida lawyer described in the legal ethics opinion would: (1) essentially be "invisible" in Florida; and (2) would limit his practice to purely federal intellectual property law. Of course, under the Supremacy Clause, Florida could not stop him from doing that anyway – even if he was not "invisible" while practicing in Florida. The Florida legal ethics opinion would have been great news for

those favoring liberalization of the multijurisdictional practice rules if the lawyer was not so limiting his practice, but instead intended to conduct a regular practice of transactional or litigation law governed by the state or states where the lawyer was licensed.

C. BASIC LAW-RELATED ARTIFICAL INTELLIGENCE ISSUES

1. Competence

Lawyers relying on AI must assure their competence to understand the risks of such new technology – especially the confidentiality issues. And of course lawyers must be competent in AI issues in order to determine that they do not need to rely on such a new tool.

ABA Model Rule 1.1 addresses lawyers' basic competence duty. ABA Model Rule 1.1 contains the unsurprising requirement that lawyers "shall provide competent representation to a client." ABA Model Rule 1.1 then explains that such competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

ABA Model Rule 1.1 cmt. [1] addresses the standards for determining whether lawyers can provide competent representation. ABA Model Rule 1.1 cmt. [1] lists several factors "[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter." The word "employs" seems odd. The sentence seems focused on lawyers' pre-representation ability – rather than the lawyer's post-retention conduct. And of course the word "employs" normally refers to an employment situation, although it clearly has a broader meaning.

The factors focus on both the matter and the lawyer. The former analysis assesses "the relative complexity and specialized nature of the matter." The latter analysis examines the lawyer's training, experience, preparation, etc. The latter analysis also considers "whether it is feasible" to refer the matter to another competent lawyer or involve another competent lawyer in the matter.

The reference to lawyers' possible referral of the matter to "a lawyer of established competence in the field in question" seems misplaced. If the lawyer completely refers the matter to a different "competent lawyer," the referring lawyer has no further involvement. Theoretically it makes sense to assess the competence of the referral (such as determining whether the referring lawyer has competently selected a lawyer who will handle the case going forward), but the thrust of ABA Model Rule 1.1 cmt. [1] clearly involves the original lawyer going forward herself rather than handing off the matter. This contrasts with the possibility of the lawyer continuing with the matter – but involving another lawyer who might be more "competent in the field in question."

ABA Model Rule 1.1 cmt. [1] describes two levels of such involvement – mentioning "whether it is feasible to . . . associate or consult with" such a clearly competent lawyer. Presumably the word "associate" involves a more intimate continuing relationship than the word "consult." But either one of those possibilities presumably permits the original lawyer to arrange for such other lawyers' involvement to competently handle the case going forward rather than entirely referring it to another lawyer. Of course, involving another lawyer would implicate a number of other ethics issues, such as fee-sharing under ABA Rule 1.5(e).

ABA Model Rule 1.1 cmt. [1] concludes by noting that "[i]n many instances, the required proficiency is that of a general practitioner," but "in some circumstances" "[e]xpertise in a particular field of law may be required."

ABA Model Rule 1.1 cmt. [2] addresses various ways in which lawyers may competently handle a representation. ABA Model Rule 1.1 cmt. [2] first assures lawyers that they "need not necessarily have special training or prior experience to handle legal

problems of a type with which the lawyer is unfamiliar." That presumably reflects lawyers' ability to bring themselves "up to speed" in a new legal area.

The Comment then acknowledges that "newly admitted lawyer[s] can be as competent as a practitioner with long experience." That may be a bit more of a stretch, but certainly applies if the newly admitted lawyer studied that particular area in law school or is otherwise familiar with it.

ABA Model Rule 1.1 cmt. [2] next notes that "all legal problems" require certain important legal skills: (1) "analysis of precedent"; (2) "the evaluation of evidence"; and (3) "legal drafting." The ABA Model Rule Comment also pinpoints "[p]erhaps the most fundamental legal skill" that "necessarily transcends any particular specialized knowledge" – "determining what kind of legal problems a situation may involve."

The Comment concludes by recognizing two other ways that lawyers may "provide adequate representation." The word "adequate" seems inapt. Although the term presumably is intended to be synonymous with the term "competent," it seems to define a lower standard of care than the term "competent." First, such lawyers may provide such adequate representation "in a wholly novel field through necessary study." Second, they can provide "[c]ompetent representation" "though the association of a lawyer of established competence in the field in question."

ABA Model Rule 1.1 cmt. [3] addresses lawyers' representation "[i]n an emergency." ABA Model Rule 1.1 cmt. [3] does not provide any guidance about what constitutes an "emergency" triggering these ethical principles. In that situation, lawyers may "give advice or assistance in a matter" even if they do not have "the skill ordinarily required" – it would be "impractical" to refer the matter to or consult with another lawyer

about the matter. But even then, such emergency assistance "should be limited to that reasonably necessary in the circumstances."

ABA Model Rule 1.1 cmt. [4] addresses lawyers' ability to achieve the required competence. ABA Model Rule 1.1 cmt. [4] first acknowledges that lawyers without the necessary competence may nevertheless "accept representation where the requisite level of competence can be achieved by reasonable preparation." In other words, lawyers may take a matter even if handling it competently will require preparation. ABA Model Rule 1.1 cmt. [4] then notes that this principle also applies to "appointed…counsel for an unrepresented person" – referring to ABA Model Rule 6.2. ABA Model Rule 6.2 explains that lawyers "should not seek to avoid appointment by a tribunal to represent a person, except for good cause." ABA Model Rule 6.2 cmt [2] indicates that "[g]ood cause exists if the lawyer could not handle the matter competently" (referring back to ABA Rule 1.1). Thus, ABA Model Rule 1.1 cmt. [4] seems to indicate that lawyers may not seek to avoid tribunal appointment under ABA Model Rule 6.2 by pointing to their lack of competence – if they could gain that competence after the appointment. ABA Model Rule 1.1 cmt. [5] acknowledges that competent handling of a matter includes legal and factual inquiry and analysis, as well as using the "methods and procedures" of competent practitioners. The ABA Model Rule Comment also notes that competent handling includes "adequate preparation," which varies depending on "what is at stake" in the matter (making the obvious point that "major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence").

ABA Model Rule 1.1 cmt. [5] understandably acknowledges that major matters "ordinarily require more elaborate treatment than matters of lesser complexity and consequence."

ABA Model Rule 1.1 cmt. [5] contains a concluding sentence indicating that "[a]n agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c)." That point seems inherent in an attorney-client relationship, although obviously there are ethical limits on such contractual restrictions on lawyers' representation. Presumably this scope limitation concept involves lawyers limiting a representation's scope to matters that the lawyers can competently handle. That concept seems appropriate, although it would be easy to violate the ethics rules and duties to clients if the clients would be materially harmed by such lawyers' carving out of some key issue that the scope-limiting lawyer would be unable to handle. ABA Model Rule 1.2(c) acknowledges that lawyers "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

ABA Model Rule 1.1 cmt. [6] addresses what steps lawyers should take to maintain their ability to competently handle a client's matter. ABA Model Rule 1.1 cmt. [6] first explains that lawyers "should engage in continuing study and education in the areas of practice in which the lawyer is engaged," in order "[t]o maintain the requisite knowledge and skill." The ABA Model Rules Comment then notes that "[a]ttention should be paid to the benefits and risks associated with relevant technology."

ABA Model Rule 1.1 cmt. [7] addresses allocation of work when lawyers from different law firms both represent the same client on the same matter. ABA Model Rule

1.1 cmt. [7] explains that lawyers from different firms who are providing legal services to the same client on a matter "ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them." The ABA Model Rule Comment refers to ABA Model Rule 1.2, which specifically addresses allocation of authority between the client and the lawyer.

ABA Model Rule 1.1 cmt. [7] concludes by acknowledging that such "allocations of responsibility" in a matter "pending before a tribunal" may impose "additional obligations" on lawyers and parties that are "a matter of law beyond the scope of these Rules". ABA Model Rule 1.1 cmt. [7] does not explain that statement. Presumably it refers to tribunals' common requirement that local counsel accompany to court hearings, etc., other lawyers who are admitted in the case pro hac vice.

In 2012, the ABA adopted a new Comment to ABA Model Rule 1.1 that focuses on technology,

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in 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.

ABA Model Rule 1.1 cmt. [8].

That Comment obviously includes new evolving technology such as AI.

2. Communication About AI Use

Once a lawyer has assured his or her competence in understanding the pros and cons of using AI (including generative AI such as ChatGPT), the lawyer must communicate with the client about the possible use of AI (or the lawyer's decision not to use AI, which could be a cost-saving alternative to the lawyer's hourly rates or fixed fees.

The ABA Model Rules understandably recognize a broad general duty to communicate with clients.

- ABA Model Rule 1.4(a) ("A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information.").

- ABA Model Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

Several ABA Model Rule 1.4 Comments echo this general duty.

- ABA Model Rule 1.4 cmt. [1] ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.").

- ABA Model Rule 1.4 cmt. [2] ("If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.").

Not surprisingly, ABA Model Rule 1.4's communication duty includes the critical decision about a representation's objectives and the means by which the lawyer will seek to meet the client's chosen objectives.

ABA Model Rule 1.2 addresses those key determinations. In essence, the client chooses a representation's objectives, and the lawyer chooses the means after consulting with the client.[1]

Such client-lawyer communication about the means might well include a discussion about the pros and cons of using AI.

- ABA Model Rule 1.2 cmt. [2] ("On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such a disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdrawal from the representation. See Rule 1.16(b)(4. Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).").

The decision to use or refrain from using AI might change during the course of the representation.

- ABA Model Rule 1.2 cmt. [3] ("At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.").

ABA Model Rule 1.4 cmt. [3] reinforces this allocation of decision-making.

- ABA Model Rule 1.4 cmt. [3] ("Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting

[1] ABA Model Rule 1.2(a); ABA Model Rule 1.2 cmt. [1].

> with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.").

The ABA Model Rules understandably assume that lawyers may take such action as is impliedly authorized to carry out the representation.[2]

Such implied authorization almost surely changes as technology evolves. For instance, before cell phone use because ubiquitous (and their security became more sophisticated), lawyers probably were not impliedly authorized to use cell phones. They certainly are now.

AI is at such an early state of evolution that lawyers presumably could not rely on such implied authorization now.

This issue parallels the ethics issues involved in lawyers' duty of confidentiality (discussed below) lawyers' involvement with third parties while representing their clients (also discussed below).

[2] ABA Model Rule 1.2 cmt. [1].

3. Confidentiality

Lawyers relying on artificial intelligence must take reasonable steps to become competent in understanding and using it. Perhaps most importantly, this competence must include their ability to protect their clients' and their own confidentiality.

Lawyers using AI may be able to rely on these new tools without disclosing any client confidences. For instance, a lawyer might ask ChatGPT to prepare a generic draft pleading articulating the summary judgment standard under Virginia law. That would not implicate confidentiality issues. But what if the lawyer uses ChatGPT to prepare a draft motion in limine to exclude evidence of her client's infidelity? Information about the client's identity and that misconduct presumably now resides on some server. Such a disclosure would almost certainly violate the lawyer's confidentiality duty absent client consent to the disclosure.

The original 1908 ABA Canons dealt with confidentiality almost as an afterthought in Canon 6 ("Adverse Influences and Conflicting Interests").

> The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added). Thus, this original Canon recognized lawyers' obligation not to divulge protected client information, but did not articulate an affirmative duty to protect against other types of disclosure.

The 1928 ABA Canons (amended in 1937) similarly emphasized lawyers' duty to maintain former clients' confidences, without providing much explanation.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them

> should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937 (emphasis added).

The ABA Model Rules contain a more extensive discussion of this duty.

First, ABA Model Rule 1.6(a) prohibits lawyers from disclosing "information relating to the representation of a client," absent some exception. ABA Model Rule 1.6(a).

Second, lawyers must take reasonable steps to avoid the accidental disclosure of client information.

> 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.

ABA Model Rule 1.6(c). The ABA Ethics 20/20 Commission, which focused primarily on mobility and technology, suggested the addition of this provision, which was approved by the ABA House of Delegates on August 6, 2012.

At the same time, the ABA approved substantial revisions to a comment which is now ABA Model Rule 1.6 cmt. [18], quoted below.

Two comments describe predictable requirements.

> 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. . . . . 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 non-lawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

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.

ABA Model Rule 1.6 cmt. [18], [19] (emphases added).

Third, ABA Model Rule 1.9 deals with lawyers' duties to former clients. ABA Model Rule 1.9(c)(2). A comment confirms an obvious principle.

> After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality.

ABA Model Rule 1.9 cmt. [1].

Fourth, ABA Model Rule 1.15 deals with lawyers' safe keeping of client property. That rule primarily focuses on trust accounts, but applies to other client information in the lawyer's possession.

The Restatement takes essentially the same approach.

> [T]he lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

Restatement (Third) of Law Governing Lawyers § 60(1)(b) (2000). A comment provides additional guidance.

> A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it . . . . This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality. In responding to a discovery request, for example, a lawyer must exercise reasonable care against risk that confidential client information not subject to the request is inadvertently disclosed . . . . A lawyer should so conduct interviews with clients and others that the benefit of

> the attorney-client privilege and work-product immunity are preserved.

Restatement (Third) of Law Governing Lawyers § 60 cmt. d (2000) (emphasis added).

The Restatement specifically addresses lawyers' obligation to carefully destroy client files.

> The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client. Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files. A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice.

Restatement (Third) of Law Governing Lawyers § 60 cmt. e (2000) (emphasis added).

To comply with their broad duty of confidentiality, lawyers must also take all reasonable steps to assure that anyone with whom they are working also protects client information.

For instance, in ABA LEO 398 (10/27/95), the ABA indicated that a lawyer who allows a computer maintenance company access to the law firm's files must ensure that the company establishes reasonable procedures to protect the confidentiality of the information in the files. The ABA also indicated that the lawyer would be "well-advised" to secure the computer maintenance company's written assurance of confidentiality.

In its more recent legal ethics opinion generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's

premises, computer network, and perhaps even its recycling and refuse disposal procedures." ABA LEO 451 (7/9/08).[3]

Lawyers must also be very careful when dealing with service providers such as copy services.

- Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing

[3] ABA LEO 451 (7/9/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and non-lawyers, "regardless of whether the other lawyer or the non-lawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; lawyers generally may add a surcharge (without advising the client) to a contract lawyer's expenses before billing the client; if the lawyer "decides" to bill those expenses as a disbursement, the lawyer may only bill the client for the actual cost of the services "plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies"; the same rules apply to outsourcing, although there may be little or no overhead costs).

the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

Not surprisingly, lawyers using new forms of communication and data storage must take care when disposing of any device containing confidential client communications.

- Florida LEO 10-2 (9/24/10) ("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 non-lawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility of 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." (emphasis added)).

As in so many other areas, bar committees amending, interpreting and enforcing ethics rules have scrambled to keep up with technology.

One of the first bars to deal with unencrypted email held that lawyers could not communicate "sensitive" material using unencrypted email.

- Iowa LEO 95-30 (5/16/96) ("[S]ensitive material must be encrypted to avoid violation of DR 4-101 and pertinent Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers and related Formal Opinions of the Board." (emphasis added)).

However, the Iowa Bar quickly backed away from a per se prohibition.

- Iowa LEO 96-01 (8/29/96) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system."), amended by Iowa LEO 97-01 ("[W]ith sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms

of proprietary networks to be protected as agreed between counsel and client.").

At what could be called the dawn of the electronic age, some bars required lawyers to obtain their clients' consent to communicate their confidences using unencrypted email or cell phone technology.

- New Hampshire LEO 1991-92/6 (4/19/92) ("In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer's representation of the client unless the client has consented after full disclosure and consultation. (Rule 1.4; Rule 1.6; Rule 1.6(a)). An exception to the above exits [sic], where a scrambler-descrambler or similar technological development is used. (Rule 1.6).").

- Iowa LEO 96-01 (8/29/96), as amended by Iowa LEO 97-01 (9/18/97) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, as agreed between counsel and client.").

Other bars did not go quite as far, but indicated that lawyers should warn their clients of the dangers of communicating confidences using such new technologies. Some bars simply approved lawyers' general use of such electronic communications in most circumstances. In 1999, the ABA settled on this position.

- ABA LEO 413 (3/10/99) (lawyers may ethically communicate client confidences using unencrypted email sent over the Internet, but should discuss with their clients different ways of communicating client confidences that are "so highly sensitive that extraordinary measures to protect the transmission are warranted").

As technology improved, the risks of being overheard or intercepted diminished. More importantly, the law caught up with the technology, and now renders illegal most interception of such electronic communications. These changes have created a legal expectation of confidentiality, which renders ethically permissible the use of such communications.

After all, every state and bar has long held that lawyers normally can use the United States Postal Service to communicate client confidences -- yet anyone could steal an envelope from a mailbox and rip it open.

More recently, the analysis has shifted to newer forms of technology. Not surprisingly, bars have warned about the danger of using various wireless technologies that might easily be intercepted.

A later wave of ethics opinions also dealt with various forms of data storage, such as the "cloud." Bars dealing with such storage do not adopt per se prohibitions. Instead, they simply warn the users to be careful.

In 2017, the ABA updated its general guidance about lawyers' confidentiality duty when using technology.

- ABA LEO 477 (5/11/17) (Because communication technology, its accompanying risks and the ethics rules have changed since ABA LEO 413 (3/10/99), lawyers must take the following steps when communicating with their clients using new technology: comply with the ABA Model Rules 2012 "technology amendments"; assess what "reasonable efforts" a lawyer must make when protecting client confidentiality (which "is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors"); consider using encryption for sensitive client communications, although "the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication"; recognize that for "certain highly sensitive information" lawyers might have to "avoid[]" the use of electronic methods or any technology to communicate with the client altogether"; understand the nature of threats to client confidentiality, including how client information is transmitted, stored -- and the vulnerability of security at "[e]ach access point"; understand and use reasonable "electronic security measures"; recognize that "'deleted' data may be subject to recovery," so it may be necessary to "consider whether certain data should ever be stored in an unencrypted environment, or electronically transmitted at all"; carefully label client confidential information; train lawyers and nonlawyers in the use and risk of electronic communications and storage; undertake reasonable due diligence on communication technology vendors; inform clients about

the risks of communicating sensitive information; comply with clients' requirements for special protective measures).

Not surprisingly, lawyers must take special care when practicing virtually.

- ABA LEO 498 (3/10/21) (providing guidance for lawyers' virtual practice, defined as follows: "This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm. A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office."; addressing: (1) competence, diligence and communication; (2) confidentiality; (3) supervision; also providing advice about "virtual practice technologies": (1) "Hard/Software Systems"; (2) "Accessing Client Files and Data"; (3)"Virtual meeting platforms and video conferencing" (including the following advice: "Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for business/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction. Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation, to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality." (footnote omitted); (4) "Virtual Document and Data Exchange Platforms"; (5) "Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices" (including the following advice: "Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking."; also providing advice about lawyers' supervision duties over their subordinates/assistants and their vendors; concluding with a reminder that: (1) "lawyers practicing virtually must make sure the trust accounting rules, which vary significantly across states, are followed"; (2) "lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office"; and (3) "[i]f a lawyer will

not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.") (emphasis added).

The ABA and state bars have also addressed lawyers' duties if they experience a data breach.

- ABA LEO 483 (10/17/18) (In addition to complying with the guidance in ABA LEO 477R (5/11/17) lawyers dealing with a databreach or cyberattack ("a data event where material client confidential information is misappropriated, destroyed, or otherwise compromised, or where a lawyer's ability to perform legal services for which the lawyer is hired is significantly impaired"): (1) must comply with their competence duty, including monitoring for databreaches (making "reasonable efforts," because not immediately detecting a databreach may not constitute an ethics violation); (2) "act reasonably and promptly to stop the breach and mitigate damage resulting from the breach" (and "should consider proactively developing an incident response plan"); (3) make "reasonable attempts to determine whether electronic files were accessed, and if so, which ones"; (4) comply with their confidentiality duty (although lawyers' competence in preserving client confidences "is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable"), including considering any implied authorization to disclose client confidences to law enforcement to the reasonably necessary to assist in "ending" the breach or recovering stolen information," in light of considerations such as the disclosure's harm to the client); (5) advise current clients about such databreach or cyberattack (whether or not client data deserves protection under Rule 1.15 – which remains an "open question"); (6) in responding to a databreach or cyberattack involving former clients' data, consider "reach[ing] agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession" (noting that "the Committee is unwilling to require notice [of a databreach or cyberattack] to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice"); (7) consider their obligation to notify clients depending on the type of breach (for instance, lawyers need not alert their clients of a ransomware attack if "no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons"; (8) must comply with state and federal law if "personally identifiable information or others is compromised as a result of a data breach").

Interestingly, at least one state disagreed with the ABA's limited disclosure duty to current clients only.

- Maine LEO 220 (4/11/19) (generally adopting the articulation of lawyers' duties upon discovering a data breach cyberattack adopted by ABA LEO 483 (10/17/18) with one exception; "While the Commission agrees with the analysis contained in ABA Form Opinion No. 483 concerning notification of a current client, the Commission departs from the ABA with respect to a former client. The ABA reviewed Model Rules 1.9 and 1.16 and concluded that notice to a former client is not required. However, Maine's Rule 1.9 provides that 'a lawyer who has formerly represented a client shall not thereafter: (2) reveal confidences or secrets of a former client except as these rules would permit or require with respect to a client.' The duty of confidentiality survives the termination of the client-lawyer relationship. M.R. Prof. Conduct 1.6 cmt. (18). Indeed, trust is the 'hallmark of the client-lawyer relationship,' id., cmt. (2), whether for a current or a former client. The Commission concludes that a former client is entitled to no less protection and candor than a current client in the case of compromised secrets and confidences. A former client must be timely notified regarding a cyberattack or data breach that has, or may have, exposed the client's confidences or secrets.").

Traditionally, the ethics rules allowed disclosure of client confidences only with explicit client consent.

The 1908 ABA Canons of Professional Ethics addressed confidentiality mostly as creating conflicts of interest dilemmas, but acknowledged that the client's "knowledge and consent" permitted disclosure of protected client information.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937.

The 1969 ABA Model Code of Professional Responsibility took the same basic approach.

> A lawyer may reveal . . . [c]onfidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

ABA Model Code of Professional Responsibility, 4-101(C). An Ethical Consideration provided an explanation.

> The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

ABA Model Code EC 4-2 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct parallel these earlier formulations.

> 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).

ABA Model Rule 1.6(a) (emphasis added). A comment describes the consent requirement.

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

ABA Model Rule 1.6 cmt. [2]. ABA Model Rule 1.0(e) defines "informed consent."

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

ABA Model Rule 1.0(e).

The Restatement takes the same common-sense approach.

> A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.

Restatement (Third) of Law Governing Lawyers § 62 (2000) (emphasis added). A comment contains an equally obvious principle, requiring lawyers to adequately provide sufficient information for the client to make an informed decision.

> A lawyer is required to consult with a client before the client gives consent under this Section. The legal effect of failure to consult depends upon whether the question concerns the lawyer's duty to the client or the rights or interests of third persons. When the question concerns the lawyer's duty to the client, the client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances. When the question concerns the effect of consent with respect to the client's legal relationship with third persons, the principles of actual and apparent authority control.

Restatement (Third) of Law Governing Lawyers § 62 cmt. c (2000).

Absent client consent, lawyers must turn elsewhere in the ethics rules for authority to disclose protected client information outside their firm.

Lawyers may wonder if they can rely on a client's implied authorization to disclose confidential client information to AI providers.

The 1908 ABA Canons of Professional Ethics did not deal with the possibility of implied client consent to disclose client confidences, perhaps because they addressed confidentiality in the context of conflicts of interest rather than in the abstract.

The 1969 ABA Model Code of Professional Responsibility mentioned explicitly with lawyers' disclosure outside the firm that enabled lawyers to practice law.

> Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

ABA Model Code EC 4-3 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct added a phrase to the black letter rule recognizing implied client authority.

> 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).

ABA Model Rule 1.6(a) (emphasis added). To be sure, the accompanying comment seems more limited than one might expect.

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added).

The Restatement acknowledges that this implied authorization sometimes permits lawyers to disclose protected client information outside a law firm or law department.

> A lawyer also may disclose information to independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf . . . . Such disclosures are not permitted contrary to a client's instructions, even within the lawyer's firm . . ., or when screening is required to avoid imputed disqualification of the lawyer's firm.

Restatement (Third) of Law Governing Lawyers § 60 cmt. f (2000) (emphasis added).

Of course lawyers disclosing protected client information to outsiders assisting the lawyer must take reasonable steps to assure that the recipients protect the information.

> A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties . . . . A lawyer may act reasonably in relying on other responsible persons in the office or on reputable independent contractors to provide that instruction and supervision . . . . The reasonableness of specific protective measures depends on such factors as the duties of the agent or other person, the extent to which disclosure would adversely affect the client, the extent of prior training or experience of the person, the existence of other assurances such as adequate supervision by senior employees, and the customs and reputation of independent contractors.

Restatement (Third) of Law Governing Lawyers § 60 cmt. d (2000) (emphases added).

A Restatement reporter's note articulates the same approach.

> The same implied authority permits a lawyer to disclose confidential client information to the extent necessary to obtain assistance from appropriate experts, lawyers, and other agents outside the lawyer's firm.

Restatement (Third) of Law Governing Lawyers § 60 cmt. reporter's note cmt. f (2000) (emphasis added).

This Restatement section's comments elaborate on this general principle.

> A lawyer's authority to disclose information for purposes of carrying out the representation is implied and therefore does not require express client consent . . . . Agents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client.

Restatement (Third) of Law Governing Lawyers § 60 cmt. f (2000). The next comment provides examples of permissible disclosure.

> A lawyer may disclose confidential client information for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken. Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

Restatement (Third) of Law Governing Lawyers § 60 cmt. g (2000) (emphasis added).

Another Restatement provision takes the same basic approach, but does not explicitly frame the disclosure as impliedly authorized.

> A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.

Restatement (Third) of Law Governing Lawyers § 61 (2000).

This provision relies on lawyers to decide whether the disclosure sufficiently advances the client's interest. A comment provides some examples.

> A lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation . . . . This Section is a particular application of that general authority. No explicit request or grant of permission is required.
>
> . . .
>
> This Section requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. In certain instances, permissible use or disclosure under this Section may create a risk, reasonable in the circumstances, that may extend beyond what is permitted under § 60(1) alone. The fact that the client's interests are not in fact furthered does not demonstrate that the lawyer's belief at the point of use or disclosure was unreasonable. A lawyer must often contend with uncertainties, unexpected decisions, and the need for

> immediate action. For example, offering a witness reasonably believed to have generally favorable testimony may entail the risk of also revealing embarrassing or counterproductive facts about the client. So long as reasonably calculated to advance the client's interests, such use or disclosure is permissible under this Section.

Restatement (Third) of Law Governing Lawyers § 61 cmt. b (2000) (emphasis added).

The Restatement provides several additional examples from the litigation setting.

> A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, governmental agency, or other forum in behalf of a client. Thus, a lawyer may disclose such information in pleadings or other submissions, in presenting the testimony of witnesses and other evidence, in submitting briefs and other memoranda, or in discussing the matter with potential witnesses. Information thus disclosed may be not entirely favorable to the client. For tactical reasons, a lawyer may reasonably decide to present partly unfavorable information, even though it is confidential. A lawyer may do so in the interest of mitigating its damaging effect (for example, to prevent it from being brought out first by an adversary) or in order to present a complete account and thus gain the confidence of the factfinder.
>
> A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege . . . . For example, a lawyer may acquiesce in an adversary's eliciting testimony from the lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

A reporter's note provides further guidance.

> The law generally permits a lawyer negotiating a settlement to make statements "without prejudice" or under a similar rubric that makes the statements inadmissible in evidence to establish liability in subsequent proceedings. . . . Modern evidence codes generally make inadmissible in evidence, at least for most purposes, both settlement offers and statements made in settlement discussions, even without the

> ceremony of stating that a disclosure is "without prejudice." . . . Ordinarily a lawyer will be well advised to consult with a client in advance when a lawyer proposes to take the risk of divulging particularly compromising client information that need not otherwise be divulged.

Restatement (Third) of Law Governing Lawyers § 61 reporter's note cmt. d (2000).

The Restatement comment dealing mostly with litigation also mentions lawyers' disclosure of protected client information in a transactional setting.

> A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. In so using or disclosing information, a lawyer must use due care . . . to avoid unintended waiver of the attorney-client privilege or other injury to the interests of the client.

Restatement (Third) of Law Governing Lawyers § 61 cmt. d (2000) (emphasis added).

Although most states follow the ABA Model Rules in recognizing lawyers' implied authorization to disclose protected client information in certain circumstances, not all states have adopted that ABA Model Rules provision. For instance, in 2006 the ABA/BNA Lawyers' Manual of Professional Conduct noted that several large states as of that time did not have the implied authorization provision.

> There are some jurisdictions whose confidentiality rules make no mention of 'implied' authorization to reveal confidential information. These include California, Illinois, Maine, Michigan, New York, and Ohio. The absence of a specific black-letter provision permitting disclosures that are impliedly authorized does not, however, mean that such disclosures are prohibited. These jurisdictions have confidentiality rules that, like DR 4-101 of the Model Code, protect from disclosure a client's 'confidences' and 'secrets,' rather than 'information relating to the representation.' 'Confidences' and 'secrets' as defined in these jurisdictions'

> rules do not encompass information 'impliedly authorized to carry out the representation.'

ABA/BNA Lawyers' Manual on Professional Conduct, 55:502. The acknowledgement that as of that time these states followed the more logic ABA Model Code confidentiality formulation highlights the ABA Model Rules formulation's overbreadth.

Although the issue rarely comes up in case law, courts occasionally deal with lawyers' reliance on the implied authorization provision when challenged by their clients for having disclosed protected client information.

- Client Funding Solutions Corp. v Crim, No. 10-cv-482, 2014 U.S. Dist. LEXIS 43022, at *34-36 (N.D. Ill. Mar. 31, 2014) (holding that a lawyer could justifiably have relied on the implied authorization provision then in the Illinois ethics rules; disclosing protected client information in connection with a loan; "Although the text of Rule 1.6 did not expressly provide that information could be disclosed with 'implied authorization' or 'when the lawyer reasonably believes that doing so would advance the interests of the client in the representation,' expert George Collins testified to the former, Tr. 80, July 12, 2013, and expert Mary Robinson testified to the latter. Tr. 66, July 12, 2013. The Court concludes that either or both of these conditions were satisfied as to Crim's [client] desire to check the numbers. To the extent that Vrdolyak [lawyer] was not formally or expressly authorized to disclose information about Crim's desire to check the numbers pursuant to the loan documents that Crim signed, see VLG 31, he was impliedly authorized to do so under the circumstances. See Tr. 81, July 12, 2013. Vrdolyak had, with Crim's authorization, already told Lustig [third party] that he could have the check; Lustig was on his way to pick up the check when Crim rescinded Vrdolyak's authorization to release it to him. Vrdolyak was left with little choice but to provide Lustig with some explanation for why he was unable to hand over the check. As Collins put it, 'the relationship requires an explanation, and that's not wrong to do that.' Tr. 81, July 12, 2013. Providing an explanation also improved Vrdolyak's subsequent ability to obtain information about Crim's loans from Lustig, thereby advancing her interests by providing her with the information she sought to make an informed decision about releasing payment to CFS.").

Not surprisingly, the "implied authorization" issue has arisen more frequently as legal practice has become more sophisticated. Perhaps most acutely, lawyers'

increasing use of electronic communications and related services focuses attention on this standard.

In 2013, a New York legal ethics opinion concluded that a lawyer's proposed disclosure did not meet that standard.

- NY LEO 991 (11/12/13) (analyzing the following situation: "A lawyer who handles foreclosure matters in mediation and at trial desires to provide leads on desirable properties to friends in the real estate business"; "The 'impliedly authorized' exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is 'necessary to take protective action to safeguard the client's interests.' See Rule 1.6, Cmt. [5] (giving examples of circumstances in which disclosure of confidential information is impliedly authorized). Nothing suggests that those situations apply here." (emphasis added)).

As law practice has become more sophisticated and efficiency-driven, lawyers have increasingly used third parties to make copies, run their back-office operations, etc. Somewhat surprisingly, bars seem not to require lawyers to either obtain their client's explicit consent or point to a black letter confidentiality exception before such disclosure.

- Texas LEO 572 (06/06) (explaining that lawyers may disclose protected client information to third party independent contractors such as copy service, as long as they take reasonable steps to assure confidentiality; "The Committee . . . concludes that, unless the client has instructed otherwise, a lawyer may deliver materials containing information subject to the lawyer-client privilege to an independent contractor hired by the lawyer to provide a service to the lawyer in furtherance of the lawyer's representation of the client without the express consent of the client if the lawyer reasonably expects that the independent contractor will not disclose or use materials or their contents except as directed by the lawyer. Although the lawyer's expectations as to the independent contractor's confidential treatment of the materials could be based on the reputation of, or the lawyer's prior experiences in dealing with, the independent contractor, a good basis for such expectations would normally be a written agreement between the lawyer and the independent contractor as to the confidential treatment required for materials provided by the lawyer to the independent contractor.").

This emphasis on lawyers' duty of care rather than client consent or reliance on a confidentiality exception reflects both lawyers' and clients' evolving expectations. When lawyers and their employees handled nearly every aspect of the practice, lawyers and their clients would probably have expected the lawyer to obtain client consent before bringing in a temp, using a courier to run a pleading to court, etc. Clients now understand that they benefit when lawyers use more efficient means of delivering legal services. Still, one would expect legal ethics opinions to at least make a passing reference to the implied authorization confidentiality exception.

At the dawn of the electronic age, the ABA issued an ethics opinion explaining that lawyers could give third parties access to protected client information as long as they were careful.

- ABA LEO 398 (10/27/95) (explaining that a law firm may provide a computer maintenance company access to the law firm's computer system which contains clients' files; "The subject situation -- like many that arise in this era of rapidly developing technology -- is not specifically mentioned in the Model Rules. The Committee is nevertheless aware that lawyers now use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing, and paper disposal. Such use of outside service providers that inevitably entails giving them access to client files involves a retention of nonlawyers that triggers the application of Rule 5.3." (emphasis added); "Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus, when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard." (emphasis added); "In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality." (emphasis added); also explaining that a lawyer may be obligated to advise the client if there is a breach of confidentiality in such a setting, and would be required to disclose such a breach if the

"unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation").

More recent legal ethics opinions dealing with lawyers' use of electronic communications and storage warn lawyers to be careful when doing so -- but do not address the possible need for client consent or application of the implied authorization exception.

For instance, the growing series of legal ethics opinions permitting lawyers to use electronic storage (including the "cloud") simply do not deal with the issue. Instead, these opinions essentially assume that lawyers carefully vetting such arrangements do not disclose protected client information, and therefore do not require client consent or an applicable exception.

- Florida LEO 10-2 (9/24/10) ("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 of 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.").

- Illinois LEO 10-01 (7/2009) ("A law firm's utilization of an off-site network administrator to assist in the operation of its law practice will not violate the Illinois Rules of Professional Conduct regarding the confidentiality of client information if the law firm makes reasonable efforts to ensure the protection of confidential client information.").

- Maine LEO 194 (12/11/07) ("An attorney has asked for guidance on the ethical propriety of using third party vendors to process and store electronically held firm data. The data would be transmitted to the third parties over a presumptively secure network connection. Processing of firm data may include transcription of voice recordings and transfer of firm computer files to an off-site 'back-up' of the firm's electronically held data. More specifically, the question is whether the use of such services and

resources, which may involve disclosure of client information to technicians who maintain the relevant computer hardware and non-lawyer transcribers outside the sphere of the attorney's direct control and supervision, would violate the lawyer's obligation to maintain client confidentiality."; finding that the lawyer may undertake such activities, as long as the lawyer assured confidentiality; "At a minimum, the lawyer should take steps to ensure that the company providing transcription of confidential data storage has a legally enforceable obligation to maintain the confidentiality of the client data involved.").

- Nevada LEO 33 (2/9/06) ("The lawyer's duty to protect client confidentiality under Supreme Court Rule 156 is not absolute. In order to comply with the rule, the lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure. This may be accomplished while storing client information electronically with a third party to the same extent and subject to the same standards as with storing confidential paper files in a third party warehouse. If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate SCR 156 simply by contracting with a third party to store the information, even if an unauthorized or inadvertent disclosure should occur."; "Subsequent ABA opinions concerning client confidentiality in the electronic age have to some degree reflected the evolution of electronic technology itself. In 1986, an ABA committee issued a report cautioning lawyers against electronic client communications and concluded that an attorney should not communicate with clients electronically without first obtaining the client's informed consent or being reasonably assured of the security of the electronic system in question. ABA Committee on Lawyers' Responsibility for Client Protection, Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication (1986). The committee did not ban all such communication, but rather described the lawyer's obligation in this regard as an affirmative duty to competently investigate the electronic communications system and form a reasonably conclusion as to its security. Id. The ABA Committee addressed an issue much closer to that discussed here in Formal Opinion number 95-398, and concluded that a lawyer may give a computer maintenance company access to confidential information in client files, but that in order to comply with the obligation of client confidentiality, he or she 'must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information.' The ABA Committee recognized in that opinion the growing practicality and availability of third party electronic data services, but clearly concluded that the duty of confidentiality is not breached so long the attorney is reasonable and competent in the creation and management of the outside contractor arrangement. In a later formal opinion, the ABA Committee continued this trend and retreated substantially from the 1986 opinion concerning the encryption of e-mail. That opinion concluded that sending confidential client communications by unencrypted email does not violate the lawyer's duty of

confidentiality because unencrypted email still affords a reasonable expectation of privacy from both legal and technological standpoints. ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999). The committee left open the likelihood, however, that cases of particularly sensitive client communications may require extraordinary security precautions, since the reasonableness and competence of the lawyer's actions must be judged in the context of the relative sensitivity of the particular confidential information or communication at stake. See Model Rule 1.6, comments 16 and 17.").

Given the fast-paced development of electronic communications the issue seems to come up again and again.

- Daniel J. Siegel, Are You Unknowingly Disclosing Client Information to Google?, Legal Intelligencer, Sept. 24, 2013 ("How would you feel if you learned that the U.S. Postal Service was opening and reading every letter you sent or received from your clients, scanning the letters so it could market additional products to you and also claimed it had the right to disclose the contents of your mail to anyone it wanted? You would be outraged."; "Fortunately, it is a federal offense for someone to read your mail. It isn't a federal offense, however, for an email provider to do exactly what the post office cannot -- email providers can read, store and even disseminate the contents of your email, and do so with impunity. Why? Because when you signed up for your account, you agreed to their terms of service, which you almost certainly didn't read."; "If you use Google's Gmail service, for example, you have agreed that your presumably confidential attorney-client communications are no longer private, and are instead available for Google to use in almost any way it wants."; "Similarly, if you use AOL as your email provider, you are no better off. AOL's privacy policy states that 'you or the owner of any content that you post to our services retain ownership of all rights, title and interests in that content. However, by posting content on a service, you grant us and our assigns, agents and licensees the irrevocable, royalty-free, perpetual, worldwide right and license to use, reproduce, modify, display, remix, perform, distribute, redistribute, adapt, promote, create derivative works and syndicate this content in any medium and through any form of technology or distribution. We own all rights, title and interests in any compilation, collective work or other derivative work created by us using or incorporating your content (but not your original content).'"; "Thus, it is clear that email users give these mega-corporations literally free rein to do anything they want with their customers' email. This isn't supposition. In a recent Associated Press [AP] report, Google attorney Whitty Somvichian said it was 'inconceivable' that Gmail users would not be aware that the information in their email would be known to Google. The article further explained that 'Google repeatedly described how it targets its advertising based on words that show up in Gmail messages,' although the company claims that 'the process is automated and no humans read your email.'"; "Although Google

> believes it is inconceivable that its customers don't know that the contents of their email are known to Google, the opposite is actually true. Every time I consult with a law firm about email security or lecture to attorneys about the dangers of unprotected email, they profess incredulity when they learn this information. As the AP article noted, quoting Consumer Watchdog President Jamie Court, '"People believe, for better or worse, that their email is private correspondence, not subject to the eyes of a $180 billion corporation and its whims."'"; "By simply using Gmail, AOL and similar services, you risk disclosing confidential client communications and violating your ethical obligation to preserve that information. This danger is not confined to online email services such as Gmail; it applies to all email."; "Despite the lack of privacy with email, it is not difficult for lawyers and law firms to take affirmative actions to protect their electronic communications with or about clients. I suggest the following initial steps: Stop using services like Gmail and AOL for client-related communications. Instead, set up a private email account for your law firm. In other words, get a Web domain such as weareyourlawyers.com and set up email accounts for you and your staff. Stop using these online services. This will, at a minimum, avoid allowing Google and others to read, index and use your email for whatever purposes they want."; "Disclose to clients in your fee agreements and engagement letters that email communications may not be private, and also explain that the client must (1) decide whether to permit email communications, and (2) if the client approves, determine how to preventing disclosure of confidential information.").

Given the fragility of the attorney-client privilege, lawyers must also remember the risk of jeopardizing that protection if they disclose protected client information to third parties. In nearly every situation, third-party service providers fall within the narrow group of non-clients considered necessary for the lawyers' communications with their clients or otherwise necessary for the lawyers to do their job. A classic example is an outside copy service whose workers read highly confidential privileged communications as they copy. Even as fragile as the law considers it, the privilege survives such disclosure if lawyers take care to select the copier.

However, every now and then an aberrational case comes to a shocking conclusion.

- Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of

inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

4. Limiting the Representation or User Liability

Lawyers relying on artificial intelligence to assist in their provision of legal advice might be tempted to limit the scope of their representation to avoid AI's use, or attempt to limit their liability for any mistakes if they use AI. Ethics rules apply to such attempted limitations.

Limiting the Representation. For obvious reasons, lawyers may not limit their liability to their clients by cleverly defining the scope of their work so narrowly as to essentially eliminate any responsibility for failure.

Clients and their lawyers can agree to a limited representation. See, e.g., ABA Model Rule 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent").[4] ABA Model Rule 1.2 cmt. [6].

[4] New York City LEO 2001-3 (2001) (explaining that a lawyer may ethically limit the scope of a representation in an effort to avoid conflicts; providing a litigation example; "In one common litigation situation, a law firm may agree to defend a corporate client in a lawsuit which does not appear to pose a conflict with any other client of the law firm. As fact development proceeds, an amendment to the complaint is filed adding as a defendant an additional party, such as the company's accounting firm, which is also a client of the attorney's firm in unrelated matters. At this juncture, an actual conflict still may not exist if the positions of the client company and its accounting firm appear to be united in interest or are not directly adverse. But if facts develop that suggest the client company may possess a cross-claim against the accounting firm, or vice versa, a conflict may emerge that could impact the lawyer's ability ethically to continue its representation of the corporate client. In this context, the question arises whether the law firm can ethically avoid the conflict by limiting the scope of the engagement for the corporate client to exclude any involvement in the aspect of the matter that is adverse to the accounting firm. Absent the ability of the lawyer to limit the engagement, the Code requires the attorney to withdraw from her representation of the corporate defendant."; "The Committee concludes that the scope of a lawyer's representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client, provided that the client whose engagement is limited consents to the limitation after full disclosure and the limitation on the representation does not render the lawyer's counsel inadequate or diminish the zeal of the representation. An attorney whose representation has been limited, however, must be mindful of her duty of loyalty to both clients. Where the portion of the engagement to be carved out is discrete and limited in scope, such a limitation may well resolve the conflict presented.").

However, the ethics rules recognize some limits on this freedom.

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

ABA Model Rule 1.2 cmt. [7].

The Restatement takes essentially the same approach.

> (1) Subject to other requirements stated in this Restatement, a client or lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances. (2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.

Restatement (Third) of Law Governing Lawyers § 19 (2000). A comment explains the basis for this rule.

> Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice . . . . In some instances, such as an emergency, a restricted

> representation may be the only practical way to provide legal services . . . .
>
> On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers . . . . Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

Restatement (Third) of Law Governing Lawyers § 19 cmt. b (2000).

The next comment explains the many limitations on this general rule -- obviously designed to assure that lawyers do not take advantage of clients.

> Clients and lawyers may define in reasonable ways the services a lawyer is to provide (see § 16), for example to handle a trial but not any appeal, counsel a client on the tax aspects of a transaction but not other aspects, or advise a client about a representation in which the primary role has been entrusted to another lawyer. Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed. They are therefore treated separately under many lawyer codes as contracts limiting the objectives of the representation. Clients ordinarily understand the implications and possible costs of such arrangements. The scope of many such representations requires no explanation or disclaimer or broader involvement.
>
> Some contracts limiting the scope or objectives of a representation may harm the client, for example if a lawyer insists on agreement that a proposed suit will not include a substantial claim that reasonably should be joined. Section 19(1) hence qualifies the power of client and lawyer to limit the representation. Taken together with requirements stated in other Sections, five safeguards apply.

First, a client must be informed of any significant problems a limitation might entail, and the client must consent (see § 19(1)(a)). For example, if the lawyer is to provide only tax advice, the client must be aware that the transaction may pose non-tax issues as well as being informed of any disadvantages involved in dividing the representation among several lawyers . . . .

Second, any contract limiting the representation is construed from the standpoint of a reasonable client . . . .

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation . . . .

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modifications.

Fifth, the terms of the limitation must in all events be reasonable in the circumstances . . . . When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver -- typically, a reduced legal fee or the ability to retain a particularly able lawyer -- could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were potential circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

The extent to which alternatives are constrained by circumstances might bear on reasonableness. For example, a client who seeks assistance on a matter on which the statute of limitations is about to run would not reasonably expect extensive investigation and research before the case must be filed. A lawyer may be asked to assist a client concerning an unfamiliar area because other counsel are unavailable. If the lawyer knows or should know that the lawyer lacks competence necessary for the representation, the lawyer must limit assistance to that which the lawyer believes reasonably necessary to deal with the situation.

> Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval.

Restatement (Third) of Law Governing Lawyers § 19 cmt. c (2000).

Several illustrations provide examples of such limitations. The first two illustrations represent acceptable limitations.

> Corporation wishes to hire Law Firm to litigate a substantial suit, proposing a litigation budget. Law Firm explains to Corporation's inside legal counsel that it can litigate the case within that budget but only by conducting limited discovery, which could materially lessen the likelihood of success. Corporation may waive its right to more thorough representation. Corporation will benefit by gaining representation by counsel of its choice at limited expense and could readily have bargained for more thorough and expensive representation.
>
> A legal clinic offers for a small fee to have one of its lawyers (a tax specialist) conduct a half-hour review of a client's income-tax return, telling the client of the dangers or opportunities that the review reveals. The tax lawyer makes clear at the outset that the review may fail to find important tax matters and that clients can have a more complete consideration of their returns only if they arrange for a second appointment and agree to pay more. The arrangement is reasonable and permissible. The clients' consent is free and adequately informed, the clients gain the benefit of an inexpensive but expert tax review of a matter that otherwise might well receive no expert review at all.

Restatement (Third) of Law Governing Lawyers § 19 illus. 1, 2 (2000).

The third illustration provides an example of an unacceptable limitation.

> Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information. Moreover, allowing such

> general waivers would seriously undermine competence requirements essential for protection of the public, with little compensating gain. On prohibitions against limitations of a lawyer's liability, see § 54.

Restatement (Third) of Law Governing Lawyers § 19 illus. 3 (2000).

Interestingly, lawyers can also agree to expand their responsibilities to clients.

> The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act . . . or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar . . . or by forbidding the lawyer to speak on matters of public concern whenever the client disapproves.
>
> Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting witness interviews.

Restatement (Third) of Law Governing Lawyers § 19 cmt. e (2000).

Limiting Liability

The ABA and many state bars have retreated from what was once a strict prohibition on limiting liability to clients in advance of the work.

Under the current ABA Model Rules,

> A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1) (emphasis added).

A Comment to this Model Rule provides an explanation.

> Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particulary if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and the effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

ABA Model Rule 1.8 cmt. [14].

Interestingly, the Restatement still takes a very strict approach prohibiting such prospective limitations of liability.

> For purposes of professional discipline, a lawyer may not: (a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Restatement (Third) of Law Governing Lawyers § 54(4) (2000).

To emphasize the point, the Restatement elsewhere indicates that

> An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Id. § 54(2). A comment explains the Restatement's approach.

> An agreement prospectively limiting a lawyer's liability to a client . . . is unenforceable and renders the lawyer subject to

> professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.

Id. § 54 cmt. b.

Given this stark contrast between the ABA Model Rules and the Restatement, it should come as no surprise that not every state follows the liberal ABA Model Rule approach. For instance, Virginia follows a more traditional approach, which prohibits all outside lawyers from limiting their liability in any fashion. See, e.g., Virginia Rule 1.8(h) ("[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement").

5. Malpractice

Lawyers relying on AI might make substantive mistakes (or fail to correct mistakes that the AI makes). ChatGPT has been reported to generate some false information and even historical facts.

And lawyers' adversaries who rely on AI might also make mistakes. The former situation implicates lawyers' malpractice, and the latter situation implicates lawyers' ethical duties or freedom in the face of transactional or litigation adversaries' mistakes (discussed below).

Lawyers working with artificial intelligence to provide legal advice may commit malpractice, especially if they are unfamiliar with such a new and evolving process.

Legal malpractice claims raise special issues arising from the unique attorney-client relationship, which sometimes generate fascinating debates among the states.

Malpractice claims can arise at nearly any time in the attorney-client relationship, and involve work performed years before.

- Shu v. Butensky, No. A-2396-07, 2009 WL 417265 (N.J. Super. Ct. App. Div. Feb. 23, 2009) (unpublished opinion) (holding that a lawyer could be sued for malpractice by a client for a mistake that the lawyer made in 1986 during a real estate transaction).

- Steele v. Allen, 226 P.3d 1120, 1124 (Colo. Ct. App. 2009) (holding that a lawyer may be liable for malpractice for providing advice during even a preliminary discussion with a prospective client; "[W]hether statements are made during an initial consultation for legal services or in a casual manner in a social setting may ultimately be determinative of whether a lawyer is liable for negligent misrepresentation.").

Furthermore, malpractice claims can be based on a nearly endless variety of lawyer mistakes.

- Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629-30 (8th Cir. 2009) ("We predict that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim

> creates a conflict of interest that would disqualify the lawyer from representing the client. . . . Thus, the lawyer must know that there is a non-frivolous malpractice claim against him such that 'there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by' his own interest in avoiding malpractice liability. . . . It follows that a lawyer's duty to disclose his own errors must somehow be connected to a possibility that that client might be harmed by the error. For a fiduciary duty to be implicated, the lawyer's own interests in avoiding liability must conflict with those of the client. A lawyer may act in the client's interests to prevent the error from harming the client without breaching a fiduciary duty.").

- CenTra, Inc. v. Estrin, 538 F.3d 402 (6th Cir. 2008) (holding that a former client could file a malpractice action based on its lawyer's simultaneous representation of an adversary).

- Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP, Case No. 07cv280-IEG(RBB), 2008 U.S. Dist. LEXIS 98612, at *19 (S.D. Cal. Dec. 4, 2008) ("California courts have not imposed any requirement that a plaintiff alleging breach of fiduciary duty under similar circumstances prove actual disclosure of confidential information. To the contrary, California courts have explicitly held that in an action for breach of fiduciary duty, the plaintiff is not required to show confidences were actually disclosed.").

- Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773 (S.D. Miss. 2006) (holding that a client could sue a law firm for negligence and breach of fiduciary duty for failure to disclose a conflict).

- Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300 (Idaho 2005) (allowing a client to sue its lawyer for malpractice based on a law firm's disclosure of client information to firm lawyer who was supposed to be screened from the matter).

- Virginia LEO 966 (9/30/87) (a law firm hired to advise on a real estate matter must disclose to the client that the law firm mistakenly failed to obtain an extension of time to file a tax return, even though the law firm was not hired to file the return).

The Restatement deals with several other issues relating to malpractice claims.

First, the Restatement explains that a continuing fiduciary relationship between a lawyer and a client generally delays commencement of the statute of limitations period for malpractice claims.

> Claims against a lawyer may give rise to issues concerning statutes of limitations, for example, which statute (contract,

tort, or other) applies to a legal-malpractice action, what the limitations period is, when it starts to run, and whether various circumstances suspend its running. Such issues are resolved by construing the applicable statute of limitations. Three special principles apply in legal-malpractice actions, although their acceptance and application may vary in light of the particular wording, policies, and construction of applicable statutes.

First, the statute of limitations ordinarily does not run while the lawyer continuously represents the client in the matter in question or a substantially related matter. Until the representation terminates, the client may assume that the lawyer, as a competent and loyal fiduciary, will deflect or repair whatever harm may be threatened. . . . That principle does not apply if the client knows or reasonably should know that the lawyer will not be able to repair the harm, or if the client and lawyer validly agree (see Subsection (3) hereto) that the lawyer's continuing the representation will not affect the running of the limitations period.

Second, even when the statute of limitations is generally construed to start to run when the harm occurs, the statute does not start to run against a fiduciary such as a lawyer until the fiduciary discloses the arguable malpractice to the client or until facts that the client knows or reasonably should know clearly indicate that malpractice may have occurred. Until then, the client is not obliged to look out for possible defects (see Comment d hereto) and may assume that the lawyer is providing competent and loyal service and will notify the client of any substantial claim . . . .

Third, the statute of limitations does not start to run until the lawyer's alleged malpractice has inflicted significant injury. For example, if a lawyer negligently drafts a contract so as to render it arguably unenforceable, the statute of limitations does not start to run until the other contracting party declines to perform or the client suffers comparable injury. Until then, it is unclear whether the lawyer's malpractice will cause harm. Moreover, to require the client to file suit before then might injure both client and lawyer by attracting the attention of the other contracting party to the problem. Whether significant injury has been inflicted by a lawyer's errors at trial when appeal or other possible remedies remain available is debated in judicial decisions. Compliance with decisions holding that injury occurs prior to affirmance on appeal (or similar unsuccessful outcome) may require that a

> protective malpractice action be filed pending the outcome of the appeal or other remedy.

Restatement (Third) of Law Governing Lawyers § 54 cmt. g (2000).

Second, a Restatement comment addresses comparative and contributory negligence in malpractice cases.

> In jurisdictions in which comparative negligence is a defense in negligence and fiduciary-breach actions generally, it is generally a defense in legal-malpractice and fiduciary-breach actions based on negligence to the same extent and subject to the same rules. The same is true of contributory negligence and comparative or contributory fault generally. . . . In appraising, those defenses, regard must be had to the special circumstances of client-lawyer relationships. Under fiduciary principles, clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty . . . and to fulfill a lawyer's duty to notify a client of substantial malpractice claims . . . . The difficulty many clients face in monitoring a lawyer's performance is one of the main grounds for imposing a fiduciary duty on lawyers. Except in unusual circumstances, therefore, it is not negligent for a client to fail to investigate, detect, or cure a lawyer's malpractice until the client is aware or should reasonably be aware of facts clearly indicating the basis for the client's claim . . . . Whether a client should reasonably be so aware may depend, among other factors, on the client's sophistication in relevant legal or factual matters.
>
> Those considerations are weaker when a nonclient asserts a claim based on a duty of care under § 51. In those circumstances, no fiduciary relationship ordinarily exists. Accordingly, it is often more appropriate to conclude that, under general legal principles, a nonclient has been comparatively or contributorily negligent, for example in unreasonably accepting without investigation a lawyer's representation about facts that are also readily available to the nonclient.

Restatement (Third) of Law Governing Lawyers § 54 cmt. d (2000).

Third, another comment addresses the in pari delicto defense.

> The defense of in pari delicto bars a plaintiff from recovering from a defendant for a wrong in which the plaintiff's conduct

> was also seriously culpable. To the extent recognized by the jurisdiction for other actions, the defense is available in legal-malpractice actions, subject to consideration of lawyer fiduciary duties and the characteristics of client-lawyer relationships . . . . The defense is thus available only in circumstances in which a client may reasonably be expected to know that the activity is a wrong despite the lawyer's implicit endorsement of it, for example when a client claims to have followed the advice of a lawyer to commit perjury.

Restatement (Third) of Law Governing Lawyers § 54 cmt. f (2000).

Fourth, the Restatement also makes it clear that a lawyer cannot be held liable in malpractice for complying with an ethics rule requirement, even if that harms the client.

> When, for example, a jurisdiction's professional rule requires a lawyer to disclose a client's proposed crime when necessary to prevent death or serious bodily harm (compare § 66), a lawyer who reasonably believes that disclosure is required is not liable to a client for disclosing. Similarly, if the rule forbids disclosure of a client's proposed unlawful act not constituting a crime or fraud, a lawyer who reasonably believes that disclosure is forbidden is not liable to a nonclient . . . .

Restatement (Third) of Law Governing Lawyers § 54 cmt. h (2000).

Lawyers' Duty to Disclose Their Own Malpractice

Authorities agree that a lawyer's duty of communication and diligence requires lawyers to report their possible malpractice to clients.

Under ABA Model Rule 1.4(a)(3) lawyers "shall … keep the client reasonably informed about the status of the matter." And under ABA Model Rule 1.4(b), lawyers "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

As painful as it might be for lawyers, these communication duties understandably require lawyers to disclose to their clients the lawyers' malpractice.

In 2018, the ABA explained the scope of this duty.

- ABA LEO 481(4/17/18) ("The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry." "No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation." "Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client." An attorney-client relationship ends when: the engagement letter specifies such a time; the lawyer or the client explicitly end the relationship; "when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended"; or "when it would be objectively unreasonably to continue to bind the parties to each other." An "episodic" client might be a continuing client in the absence of any ongoing matter if the client periodically engaged the lawyer, and the client "reasonably expects that the professional relationship will span any [such] intervals and that the lawyer will be available when the client next needs representation.").

The ABA's recognition of this duty followed many states' articulation of such an obligation.

- North Carolina LEO 2015-4 (7/17/15) (explaining lawyers' duty to disclose any material mistakes to their clients; "In the spectrum of possible errors, material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are minor, harmless errors that do not prejudice the client's rights or interests. These include nonsubstantive typographical errors in a pleading or a contract or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests." (footnote omitted; "Whether the lawyer must disclose an error to a client depends upon where the error falls on the spectrum and the circumstances at the time that the error is

discovered."; "[I]t is clear that material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim must always be reported to the client. Conversely, if the error is easily corrected or negligible and will not materially prejudice the client's rights or interests, the error does not have to be disclosed to the client."; "Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error. Rule 1.4. When a lawyer does not know whether disclosure is required, the lawyer should err on the side of disclosure or should seek the advice of outside counsel, the State Bar's ethics counsel, or the lawyer's malpractice carrier."; explaining that a lawyer making such a disclosure did not automatically have to withdraw from the representation; "Rule 1.7(b) allows a lawyer to proceed with a representation burdened by a conflict if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing. If the lawyer reasonably concludes that she is still able to provide the client with competent and diligent representation -- that she can exercise independent professional judgment to advance the interests of the client and not solely her own interests -- the lawyer may seek the informed consent of the client to continue the representation."; "Of course, when an error is such that the client's objective can no longer be achieved, as when a claim can no longer be filed because the statute of limitations has passed, the lawyer must disclose the error to the client and terminate the representation."; further explaining that the lawyer did not have to confess to malpractice or provide details about how the client might proceed with their malpractice action; "[T]he lawyer is required to tell the client the operative facts about the error and to recommend that the client seek[] independent legal advice about the consequences of the error."; "Under this approach, the lawyer is not required to inform the client of the statute of limitations applicable to legal malpractice actions, nor is she required to give the client information about the lawyer's malpractice insurance carrier or information about how to file a claim with the carrier. Nevertheless, the lawyer should seek the advice of her malpractice insurance carrier prior to disclosing the error to the client, and should discuss with the carrier what information, if any, should be provided to the client about the lawyer's malpractice coverage or how to file a claim."; "The lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about legal malpractice.").

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the

representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.'); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.'); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.'); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.')."; also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must

reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").

- California LEO 2009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a

possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Lawyers falling short of this duty might be professionally punished (especially if they keep representing their client).

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "'The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan.'" (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition.

Lawyers' malpractice may involve a data breach or cyberattacks – an increasing risk in situations involving lawyers' sharing of client data with such third parties as AI providers.

A lawyer sued, accused, or even criticized by a client for some wrongdoing obviously faces a conflict of interest if the lawyer continues to represent the client. While bound by ethical and fiduciary duties to advance the client's interests, the lawyer obviously will be considering his or her own interests as well.

This type of conflict requires a careful analysis, and does not permit a "one size fits all" conclusion.

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

> there is a <u>significant risk</u> that the representation of one or more clients will be <u>materially limited</u> by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphases added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty, or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more

subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provides "informed consent." ABA Model Rule 1.7(b).[5]

A lawyer's concern about her own possible liability represents a classic "rheostat" conflict. A client's sarcastic comment about a lawyer "screwing up" at a deposition almost surely would not create a conflict preventing the lawyer from continuing to represent the client. On the other hand, it might be difficult for a lawyer to continue representing a client (absent consent) if the client has repeatedly complained that the lawyer committed malpractice during the course of discovery.

An ABA Model Rules comment recognizes the possibility that the lawyer faces a conflict if the client questions the lawyer's conduct.

> [I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

ABA Model Rule 1.7 cmt. [10].

One legal ethics opinion held that lawyers must withdrawal from representation after disclosing its malpractice.

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited,

[5] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.

the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

In dealing with the abstract issue, several courts and bars have avoided a per se rule prohibiting such continued representation.

- California LEO 2009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal

malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.'); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.'); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.'); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.')."; also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").

- Oregon LEO 2009-182 (10/2009) (analyzing the effect of a client's filing of a bar complaint against a lawyer representing the client in a matter set for trial one week later; holding that the lawyer was not obligated to withdraw, but

"should consider whether the filing of a Bar complaint creates a conflict of interest under Oregon RPC 1.7, such that continued representation would potentially result in a violation of the Rules. If so, withdrawal would likely be required by Oregon RPC 1.16(a)(1)."; "Under Oregon RPC 1.7(a)(2), Lawyer has a conflict of interest if there is a 'significant risk' that Lawyer's representation will be 'materially limited' by a 'personal interest' of Lawyer. Under the facts presented, the potentially limiting interest would presumably be Lawyer's desire to avoid discipline by the Bar. It is also possible that Client's filing a Bar complaint could create such personal resentment that it would compromise Lawyer's ability to effectively represent Client. Regardless of the specific personal interest involved, if it creates a substantial risk that Lawyer's representation would be materially limited, Lawyer may continue the representation only with Client's informed consent, confirmed in writing. Moreover, Lawyer may seek Client's consent only if Lawyer reasonably believes that competent and diligent representation can be provided to Client notwithstanding the conflict." (emphasis added); explaining that "[w]hile it is apparent that the filing of a disciplinary complaint could raise concerns on a case-by-case basis, it does not appear to create a per se conflict of interest." (emphasis added); "Although it has repeatedly rejected a per se approach, the Supreme Court has clearly suggested that at some point a potential malpractice claim might cause the interests of lawyer and client to diverge, thereby implicating Oregon RPC 1.7.").

- Los Angeles County LEO 521 (5/21/07) ("The Committee concludes: (1) a fee dispute does not require a lawyer or law firm to seek to withdraw; (2) a fee dispute, by itself, does not create an ethical conflict of interest; and (3) a fee dispute, where the lawyer does not have any lien rights, is not an adverse pecuniary interest in a client's property."; also holding that a lawyer would not be able to sue the client for fees unless the lawyer withdraws as counsel of record for the client).

In some circumstances, clients seek to have their lawyers continue the representation despite complaints about the lawyer.

Several bars have approved such continued representations.

- Connecticut LEO 2014-05 (6/18/14) (concluding that an immigration lawyer could keep representing the client, at the client's request, even after committing malpractice; "Two years later, at a final adjustment hearing, it was discovered that the handwritten 1-130 petition incorrectly reported that the previous 1-130 petition had been 'approved' when it should have been reported as having been 'revoked.' As a result, the Trial Counsel for the Department of Homeland Security ('DHS') had the 1-130 petition sent back for a review. The Immigration Court closed your client's file without prejudice to reopening it once the resubmitted 1-130 petition is approved or revoked."; "After learning of the mistake, you promptly met with your client in your office

and explained to her, in her own language, the mistake you had made. You also provided her with a written letter explaining the error and the potential consequences of the mistake. The client signed the letter. You also advised her to speak to other attorneys to confirm your explanation. You apologized to the Trial Counsel for DHS twice and asked that there be no negative inference to your client. You have offered to refund your client's legal fees which amount to $1,000.00. Additionally, your client has paid approximately $2,500.00 in filing fees to USCIS, which you would like to reimburse. Your client wishes to continue with you as her lawyer."; "The first issue presented is whether your error or your firm's error creates a potential or actual conflict under the Rules of Professional Conduct. This scenario is often called a 'prior work' conflict."; "On the facts presented, we see no indication that your continued representation of the client presents such a risk or would affect your ability to properly represent your client. Any steps you take to advance your client's 1-130 petition will have the secondary effect of mitigating your firm's malpractice exposure. Further, your conduct does not reflect any action that could be construed as an attempt to mitigate your malpractice exposure at the expense of your client's interests. To the contrary, you have promptly and candidly admitted the mistake to both the client and Trial Counsel for DHS. You have taken steps to correct the mistake and asked that the mistake be attributed to you and not to your client. You have taken the additional step of providing your client with a written letter explaining the error and the potential consequences of the mistake. See Rule 1.4 of the Rules of Professional Conduct."; "We see no indication that your mistake has interfered with or will interfere with your professional judgment or that you will fail to pursue appropriate courses of action on your clients' behalf. Accordingly, the Committee is of the opinion that you may continue your representation of your clients. If, however, upon reflection, you assess that there is a significant risk that you would take actions to cause your client's 1-130 petition to be denied for reasons other than your mistake, thereby limiting your firm's malpractice exposure, there would be a clear conflict of interest under Rule 1.7(a)(2), requiring your withdrawal from representing the client.").

- Delaware LEO 2008-3 (9/30/08) (explaining that a city attorney who had sued the City in an employment case may still represent the City, as long as the lawyer is not handling cases similar to his or her lawsuit against the City; "[I]f Attorney's duties include representing the City in age discrimination cases or other areas of labor law that raises issues that significantly overlap with the issues raised in his lawsuit, then there may be a 'significant risk that the representation of [the City] will be materially limited by . . . a personal interest of the lawyer.' The Committee, however, has not been informed that such circumstances exist here. Moreover, the City can and should take steps to ensure that such a set of circumstances does not develop in the future. Attorney is subordinate to more senior City lawyers. Those senior lawyers have the authority to delegate assignments to Attorney and should implement appropriate safeguards to avoid implicating Rule 1.7(a)(2). . . . Also, Attorney and the defendants in the Superior Court action are represented by outside

counsel, which should help to ensure that both Attorney's and the defendant's confidences and strategy in the lawsuit are protected."; "[T]he Committee assumes that, as suggested, the City will take appropriate measures to minimize the risk of a conflict, such as avoiding the assignment to Attorney of cases and projects involving the same or similar factual or legal issues raised in his lawsuit.").

- Virginia LEO 1637(4/19/95) (as long as the client consents, a law firm may continue to represent it even though the client is suing the firm for unrelated legal malpractice; "[A]n informed consent is a product of an adequate explanation of the nature, extent and implications of a conflict of interest, including the possible effect on the exercise of the lawyer's independent professional judgment on behalf of the client."; the law firm must advise the client that one of its lawyers will cross-examine the client in the malpractice action; the firm may not reveal to its malpractice counsel any confidences or secrets it obtained from its client through a representation of the client in unrelated matters; although "[c]onsent may be oral or written," written consent would be best here; "Significantly, client consent is not contractually binding; it may be withdrawn at any time.").

In other circumstances, lawyers have sought to withdraw from a representation after clients complained about their services -- apparently over the clients' objections. In both criminal and civil settings, some courts have permitted such withdrawals.

- United States v. Blackledge, 751 F.3d 188, 191, 192, 194-95, 196, 198-99 (4th Cir. 2014) (vacating and remanding a criminal conviction, because the trial court erroneously refused to allow a criminal defendant's lawyer to withdraw; "On July 10, 2012, Attorney Allen filed a motion to withdraw as counsel on the ground that an internal conflict had arisen and she could 'no longer continue to ethically represent' Blackledge. . . . Speaking carefully to avoid violating client confidences or revealing trial strategies, Attorney Allen represented at a hearing on the motion that her internal ethical conflict arose from the fact that Blackledge requested to see certain items that she could not provide him. She added that Blackledge wished to proceed with new counsel and that she had located a panel attorney experienced in § 4248 hearings who could take over the matter immediately. Blackledge also stated at the motions hearing that Attorney Allen had failed to provide him certain documents he requested, and that he felt ignored by her, which made it very difficult for them to communicate."; "On July 23, 2012, Attorney Allen appealed the magistrate judge's ruling to the district court, and on July 30, 2012, she filed a second motion to withdraw. The second motion asserted that Blackledge had filed a state bar grievance against her, causing a conflict of interest where she could not defend against the bar complaint while also representing Blackledge." (emphasis added); "In this case, the district court did not meet its obligation to thoroughly inquire into the extent of the

communications breakdown or the basis of the asserted conflict. Despite the representations from Attorney Allen and Blackledge on the morning of trial that they had not done any trial preparation or spoken about whether Blackledge would testify, the court did not ask when they had last seen each other or communicated about the case. . . . The court's failure to probe deeply into the basis of Attorney Allen's conflict seriously undermines its decision, and this factor weighs heavily against the court's ruling." (emphasis added); "Certainly, not every bar complaint against an attorney by her client will result in a conflict of interest, and we have previously expressed our unwillingness to 'invite [those] anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial.'. . . However, in this case, Blackledge threatened and ultimately submitted a seemingly non-frivolous grievance against Attorney Allen that forced her to choose between protecting her own reputation and arguing in her client's best interest that Blackledge should not be made to bear the consequence of her own errors in submitting the renewed motion to appoint Dr. Plaud (expert)." (emphasis added); "Attorney Allen also asserted an internal ethical conflict, and because the district court failed to conduct an adequate inquiry, it is unclear if this conflict was ever resolved prior to trial. Moreover, the district court made no inquiry whatsoever into the scope and nature of this conflict. As a result, we have no way of knowing whether Attorney Allen's internal ethical conflict was indeed so significant that it required her withdrawal as counsel. The fact that she told the magistrate judge that she would represent Blackledge zealously 'with great difficulty' if the motion were denied . . . is of little help, because, having been made aware of its existence, the court had a sua sponte obligation to examine the extent of this conflict. . . . '[A] trial court must inquire into a conflict of interest 'when it knows or reasonably should know that a particular conflict exists.') . . . Indeed, to the extent that Attorney Allen did opine that she could continue to represent Blackledge, this assertion cannot be isolated from her repeated protestations that she could not do so ethically." (emphasis in original); "In total, in proceedings that could result in lifelong incarceration for a person who has already served his full sentence, Blackledge was forced to be represented by a lawyer asserting multiple conflicts of interest with whom he had not prepared for trial because of their inability to communicate. We cannot conclude that the court's abuse of discretion in requiring Attorney Allen to continue as counsel was harmless. We therefore vacate the court's judgment as to the motions to withdraw and remand for the court to reconsider these motions after engaging in the appropriate inquiry regarding the extent of Attorney Allen's conflicts." (emphasis added)).

- MasTec N. Am., Inc. v. Consol. Edison, Inc., 2008 N.Y. Slip Op. 30565U, at 3, 3-4, 4 (N.Y. Sup. Ct. Feb. 1, 2008) (addressing a situation in which the law firm of Cozen O'Connor sought to withdraw as counsel for a client who had claimed that Cozen had committed malpractice; "While MasTec [client] itself cites these opinions, it represents that it is generally satisfied with Cozen's work and that it wishes to continue to be represented by Cozen. MasTec

further contends that a conflict of interest will not develop if Cozen successfully prosecutes its remaining causes of action, in which event it will not have a claim for malpractice based on the loss of the lien foreclosure cause of action." (emphasis added); "This contention is without merit. As the ethics opinions persuasively reason, in the case of a potential irremediable malpractice claim 'not only [is] there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued.'. . . Cozen also cogently points out that its continued representation of MasTec would place it in the anomalous position of having to demonstrate the merits of MasTec's claims, while at the same time anticipating a malpractice defense that would require it to establish that MasTec could not have prevailed on its claim."; "While the court thus finds that a conflict of interest exists, the parties have not addressed or submitted authority on the issue of whether the conflict is waivable under the circumstances of this case by MasTec, a sophisticated commercial entity. On this record, therefore, the court will not reach the issue of whether Cozen's withdrawal is mandatory. Nor need the court do so because permissive withdrawal is, in any event, proper.").

D. LOGISTICAL ISSUES

1. Working With Third Parties

Lawyers considering use of AI in a representation must start the analysis by checking the pertinent state's Rule 1.2 -- which provides guidance about the allocation of authority between a client and his or her lawyer (as explained above).

ABA Model Rule 1.2(a) begins by requiring that lawyers "shall abide by a client's decision concerning the objectives of representation." ABA Model Rule 1.2(a) then requires lawyers to "consult with the client as to the means by which [those objectives] are to be pursued." This dual approach is consistent with the normal allocation between clients (who select a representation's objectives) and lawyers (who normally choose the means by which those objectives will be pursued, after consulting with the client).

ABA Model Rule 1.2(a) assures lawyers that they "may take such action on behalf of the client as in impliedly authorized to carry out the representation."

So the necessity of a lawyer's client to consult with the client about using AI depends on whether such use would be "impliedly authorized." Given AI's novelty and the possibility of client confidence disclosure during the lawyer's use of AI, the answer is likely a "no."

The ethics aspects of lawyers' use of AI depends on whether AI is best analogized to (1) an automatic process like copying a hard drive, collecting data from various servers, etc., or (2) hiring a contractor or temp lawyers, or outsourcing.

Under the first possible characterization, the issues are the lawyer's confidentiality duty (discussed above) and how the lawyer can bill for the AI use

(discussed below). Under the second possible characterization, lawyers can look to several places for ethics guidance.

Lawyers working with artificial intelligence vendors must comply with the ethics rules governing lawyers' confidentiality duty(discussed above), and their dealings with all such third parties who are assisting the lawyer in providing legal advice.

Ethics Rules' Application to Conduct by Lawyer's Non-lawyer Assistants

Outside and in-house lawyers use assistants from within their own firms or departments and from the outside. In both scenarios, lawyers must take reasonable steps to assure that their assistants act in a way that is compatible with the lawyers' professional obligations.

The ABA changed its pertinent rule in 2012, and courts and bars also seem to be altering their attitude about these issues.

The main ABA Model Rule governing lawyers' supervision of non-lawyers has always been ABA Model Rule 5.3.

Because there was some misunderstanding about this requirement's reach, the ABA Ethics 20/20 Commission cleverly recommended changing the title of ABA Model Rule 5.3 from "Responsibilities Regarding Non-lawyer Assistants" to "Responsibilities Regarding Non-lawyer Assistance" (emphasis added).

This amendment probably brings AI into the analysis. That process presumably amounts to “assistance” by itself. And employees and consultants who assist lawyers in their use of AI certainly meet that definition.

The ABA 20/20 Commission Report dealt primarily with what is commonly called "outsourcing." ABA Commission on Ethics 20/20 Report (8/2012). However, the Report

described the Commission's reasoning for suggesting a new Comment to ABA Model Rule 5.3.

> The rest of proposed Comment [3] describes a lawyer's obligations when using non-lawyer services outside the firm. The Comment states that, when using such services, the lawyer has an obligation to ensure that the non-lawyer services are performed in a manner that is compatible with the lawyer's professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer's obligations in this regard. The Comment also references several other Model Rules that lawyers should consider when using non-lawyer services outside the firm.
>
> The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to non-lawyers outside the firm when retaining or directing those non-lawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes an assignment, but the lawyer's instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator's conduct is compatible with the lawyer's professional obligations.

Id. (emphases added).

After the ABA's 2012 approval of the Commission's suggestions, ABA Model Rule 5.3 describes supervising lawyers' responsibilities as follows:

> With respect to a non-lawyer employed or retained by or associated with a lawyer . . .[,] a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to insure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3(b).

In addition, a law firm's management must make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [non-lawyer's]

conduct is compatible with the professional obligations of the lawyer." ABA Model Rule 5.3(a).

ABA Model Rule 5.3(c) governs a lawyer's ethical liability for a non-lawyer's unethical conduct.

> With respect to a non-lawyer employed or retained by or associated with the lawyer . . .[,] a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

ABA Model Rule 5.3 cmt. [1] addresses supervising and managing lawyers' responsibilities.

ABA Model Rule 5.3 cmt. [1] begins by focusing on lawyers "with managerial authority within a law firm" - who must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer" (emphasis added). The phrase "nonlawyers outside the firm" "presumably" refers to black letter ABA Model Rule 5.3's "retained by" category, and perhaps the mysterious undefined "associated with" category. It parallels the clever ABA Model Rule 5.3 title change from "Assistants" to "Assistance."

ABA Model Rule 5.3 cmt. [1] next refers to ABA Model Rule 1.1 cmt. [6] and ABA Model Rule 5.1 cmt. [1]. Both of those ABA Model Rule Comments address lawyers working with other lawyers, not with nonlawyers. The former addresses lawyers cooperating with other lawyers from other law firms in representing their clients. The latter addresses lawyers' duties when managing and supervising lawyers within the same law firm. Presumably ABA Model Rule 5.3 cmt. [1] mentions those other ABA Model Rules Comments to remind lawyers that they must apply the same standards to their supervision of nonlawyers, although that is not clear.

Somewhat ironically, ABA Model Rule 5.1 (which actually governs lawyers' working with other lawyers) does not cite those other ABA Model Rule Comments.

ABA Model Rule 5.3 cmt. [1] then confirms that ABA Model Rule 5.3(b) "applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm." The term "inside the firm" presumably refers to nonlawyers "retained by…a lawyer." But like the remainder of ABA Model Rule 5.3, ABA Model Rule 5.3 cmt. [1] does not provide any hint of what constitutes the undefined relationship "associated with a lawyer" that is one of three relationships mentioned in black letter ABA Model Rule 5.3's introductory sentence.

ABA Model Rule 5.3 cmt. [1] concludes with a similar statement about ABA Model Rule 5.3(c) – explaining that the provisions of that ABA Model Rule apply to conduct of such nonlawyers within or outside the firm "that would be a violation of the [ABA Model] Rules of Professional Conduct if engaged in by a lawyer." That description tends to support the conclusion that ABA Model Rule 5.3(a)'s "compatible" standard requires nonlawyers to act in the same way as lawyers act when lawyers represent

clients (but perhaps not when lawyers act in a non-representational or even in a non-professional role).

ABA Model Rule 5.3 cmt. [3] addresses nonlawyers "outside the firm [who] assist the lawyer in rendering legal services to the client." The phrase "assist the lawyer in rendering legal services to the client" makes much more sense than ABA Model Rule 5.3 cmt. [2]'s second sentence's phrase "act for the lawyer in rendition of the lawyer's professional services." (emphasis added).

ABA Model Rule 5.3 cmt. [3] next provides examples of such "nonlawyers outside the firm": (1) "the retention of an investigative or paraprofessional service"; (2) "hiring a document management company to create and maintain a database for a complex litigation"; (3) "sending client documents to a third party for printing or scanning"; and (4) "using an Internet-based service to store client information." Perhaps these are the type of nonlawyers who are "associated with a lawyer" (ABA Model Rule 5.3's introductory sentence's term). But despite ABA Model Rules' failure to define the key word "associated" anywhere, it seems inapt to say that a third party that prints and scans client documents is somehow "associated with the lawyer who arranges for that service. So the mystery continues.

ABA Model Rule 5.3 cmt. [3] then explains that "[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations." That essentially parrots ABA Model Rule 5.3(a) and (b). The reference to "the services [that] are provided" presumably limits what would otherwise be quite a chore. For instance, lawyers presumably would not be expected to "make reasonable efforts" to ensure that

a cloud data service provider's conduct is "compatible with the lawyer's professional obligation" in all respects. It would be reasonable for lawyers to take such steps focusing on the cloud data service provider's confidentiality protections, etc. – but not all of the other ABA Model Rules governing lawyers' representational, professional and even non-representational and non-professional conduct.

ABA Model Rule 5.3 cmt. [3] then understandably explains that "[t]he extent of this obligation [to "make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations"] will depend upon the circumstances." ABA Model Rule 5.3 cmt. [3] provides examples as "including": (1) "the education, experience and reputation of the nonlawyer"; (2) "the nature of the services involved"; (3) "the terms of any arrangements concerning the protection of client information"; and (4) "the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality." As discussed above, limiting lawyers' duty to certain "circumstances" understandably focuses on the type of services such nonlawyers will provide.

One might wonder how a nonlawyer's "reputation" would affect a lawyer's obligations. Perhaps the inclusion of that term permits lawyers to rely in part on such nonlawyers' "reputation" in vetting and supervising them.

ABA Model Rule 5.3 cmt. [3] refers to several ABA Model Rules: ABA Model Rule 1.1 (addressing competence); ABA Model Rule 1.2 (addressing allocation of authority); ABA Model Rule 1.4 (addressing lawyers' duty to communicate with their clients); ABA Model Rule 1.6 (the core ABA Model Rule confidentiality provision); ABA Model Rule 5.4(a) (addressing fee-sharing with nonlawyers, among other things); ABA

Model Rule 5.5(a) (addressing nonlawyers' unauthorized practice of law, among other things).

ABA Model Rule 5.3 cmt. [3] concludes with warning that lawyers "retaining or directing a nonlawyer outside the firm…should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." This obligation makes sense. Presumably lawyers would help fulfill their ABA Model Rule 5.3 obligations by engaging in such communications – either through written guidelines, or oral communications.

ABA Model Rule 5.3 cmt. [4] addresses clients' involvement in selecting nonlawyer assistants.

ABA Model Rule 5.3 cmt. [4] begins by explaining that lawyers "ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer" – "[w]here the client directs the selection of a particular nonlawyer service provider outside the firm." This scenario presumably describes clients' selection of nonlawyer service providers, and helpfully suggests that lawyers and their clients should agree about who should monitor such nonlawyer service providers. ABA Model Rule 5.3 cmt. [4] refers to ABA Model Rule 1.2, which generally addresses allocation of authority between clients and their lawyers.

Because clients might not be familiar with all of their lawyers' ethics duties, it would seem improper in many situations for lawyers to delegate to their clients full responsibility for monitoring nonlawyers' actions to assure those nonlawyers' compatibility with lawyers' ethics duties. In fact, that would seem to be a non-delegable

duty (although perhaps lawyers could call upon clients to monitor the factual aspects of such nonlawyer assistant's conduct, rather than that conduct's compatibility with lawyers' ethics duties).

ABA Model Rule 5.3 cmt. [4] concludes by explaining that "lawyers and [litigation] parties may have additional obligations that are a matter of law beyond the scope of these [ABA Model] Rules" – when "[m]aking such an allocation in a matter pending before a tribunal." That recognition presumably refers to tribunals' imposition of additional requirements governing nonlawyers assisting the litigation parties' lawyers - such as confidentiality provisions covering nonlawyers who compile or maintain information.

Lawyers relying on such outside assistants must also focus on two additional ABA Model Rules that might limit actions undertaken by such assistants.

First, under ABA Model Rule 4.4(a),

> [i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a) (emphasis added). This Rule generally prohibits lawyers from obtaining evidence by trespassing on a third party's property, etc.

Second, ABA Model Rule 4.2 contains the familiar prohibition on lawyers communicating ex parte with third persons they know to be represented by another lawyer in the matter.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.

Interestingly, the 1969 ABA Model Code of Professional Responsibility explicitly prohibited lawyers from indirectly engaging in such prohibited communications.

> During the course of his representation of a client a lawyer shall not . . . [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

ABA Model Code of Professional Responsibility DR 7-104(A)(1) (emphasis added) (footnote omitted). Some states (including New York) have retained the "or cause another" language in their rules. New York Rule 4.2(a).[1]

Although the ABA Model Rules do not contain a specific reference to lawyers indirectly engaging in improper ex parte communications, a catch-all rule applies to lawyers indirectly engaging in such communications or in any other misconduct (such as trespassing).

> It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

ABA Model Rule 8.4(a).

Just as the ABA Model Rules have moved in the direction of requiring lawyers to train and take responsibility for their assistants, the legal ethics opinions and case law have trended in the same direction.

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[1] A comment to New York Rule 4.2 (adopted by the New York Bar but not the New York courts) explains that investigators are not considered "clients" for purposes of permitting clients to speak directly with clients. New York Rule 4.2 cmt. [11] (". . . Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so.").

Bars' and courts' attitudes toward lawyers' assistants' misconduct has evolved over time.

Older legal ethics opinions tended to diminish lawyers' responsibility for such third parties' misconduct, and some even permitted lawyers to use the fruits of that misconduct.

- Virginia LEO 278 (1/29/76) (a client's wife stole a document from the client's employer to use in a lawsuit; as long as the client's lawyer was not involved in the theft, the lawyer may continue to represent the client and use the document; overruled in LEO 1702, which would require lawyer to return stolen document).

- Virginia LEO 1141 (10/17/88) (a lawyer representing a widow in a medical malpractice/wrongful death action may use files taken by the widow from the treating physician's office; the files are not "fruits of a crime" but the lawyer should advise the widow to return the original of the file; the lawyer could keep and use a copy of it).

- Maryland LEO 96-38 (6/19/96) ("You ask whether a lawyer who represents a client suing a corporate defendant may review documents of the corporation which were obtained from the dumpsters on the corporation's premises by a third party. The third party gave the documents to the client, who then delivered them to the lawyer. You state that: (a) the lawyer did not solicit the retrieval of the documents; (b) the client believes that the documents are relevant to the pending suit; and (c) as a result of the pending suit and a related suit you believe the corporation may be disposing of sensitive information adverse to it. We are of the opinion that you are under no obligation to reveal the matter to the court in which the litigation is pending documents, and regardless whether they are privileged or confidential. . . . However, if the documents are originals, you may be obliged to return them to the owner.").

- Philadelphia LEO 2001-10 (11/2001) (holding that a lawyer could use surveillance audio tape the client's investigator obtained without the lawyer's knowledge or involvement, and would have required the investigator to communicate ex parte with a represented adversary; "In April 2001, the TPA [third-party administrator] arranged for surveillance to be conducted upon the claimant; defense counsel was not aware of the surveillance at the time it was ordered. As part of the surveillance, an investigator transported the claimant to and from an independent medical examination (IME). During the trip to the IME, the claimant spoke with the investigator and allegedly disclosed information or made a statement contrary to his claim of ongoing disability."; "The investigator in this case was not employed by counsel, but

> was instead employed by the TPA, and his existence was unknown to counsel at the time of the disputed conduct. Thus, there was no basis to impute to the lawyer a violation of the Rules by the conduct of someone wholly unrelated to him."; "A different conclusion may result, however, if the TPA had advised counsel of its retention of the investigator, and the assignment given to him, or if counsel either had actual knowledge, or had reason to believe from prior dealings with the TPA that the conduct was occurring. In that situation, counsel would be ratifying the investigator's conduct by virtue of his use of the information obtained."; "[T]he attempted proffer of the surveillance evidence does not constitute a ratification of the conduct by counsel. Of note is Rule 3.3 ('Candor Toward the Tribunal'), which precludes an attorney from introducing evidence that is 'untrustworthy,' but requires candor to the tribunal. In this situation, defense counsel was candid to the Judge and counsel by disclosing the facts surrounding the evidence as soon as he knew them.").

In 1995, the ABA issued a legal ethics opinion that took a surprisingly narrow view of lawyers' responsibilities when dealing with third-party assistants, and a surprisingly broad view of lawyers' freedom to use improperly obtained evidence.

> Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)). The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact. . . . Rule 8.4(a) imposes similar, albeit narrower, ethical limits on what a lawyer can direct an investigator to do. . . . Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1). "Ratify" is defined by Black's Law Dictionary (6th ed. 1990) as: "To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise

> approve, retroactively, an agreement or conduct either expressly or by implication."

ABA LEO 396 (7/28/95) (emphases added). Thus, the ABA did not require the hypothetical lawyer to forego using the evidence -- unless the lawyer had actual knowledge of the investigator's misconduct. It is unclear whether the ABA would take the same approach now.

More recent legal ethics opinions and court decisions have tended to demand more oversight from lawyers, and prohibit lawyers from using the fruits of improper investigations. The trend seems clear.

- District of Columbia LEO 321 (6/2003) ("Counsel for a respondent may send an investigator to interview an unrepresented petitioner in preparation for a contempt proceeding in which the petitioner has alleged that the respondent has violated the terms of a domestic violence civil protection order, provided that respondent's counsel makes reasonable efforts to ensure that the investigator complies with the requirements of the D.C. Rules of Professional Conduct. These obligations include ensuring that the investigator does not mislead the petitioner about the investigator's or the lawyer's role in the matter and that investigators do not state or imply that unrepresented petitioners must or should sign forms such as personal statements or releases of medical information. Counsel should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding.").

- Sutton v. Stevens Painton Corp., 917 N.E.2d 91, 93 (Ohio Ct. App. 2011) (analyzing a personal injury plaintiff's lawsuit against the Thompson Hine firm and one of its private investigators for alleged tortious activity during an investigation of the plaintiff; "Thompson Hine represented Terex [defendant] in the action. In an effort to obtain evidence concerning the extent of Sutton's alleged injuries, Thompson Hine engaged Shadow Investigations, Inc. ('Shadow'), a private investigative firm, to conduct surveillance of Sutton. The surveillance materials were disclosed to plaintiffs in the course of discovery. Thompson Hine asserts that '[u]pon receipt of the surveillance materials in June 2007, plaintiffs' counsel immediately threatened to file invasion of privacy claims against Terex, Shadow, and/or Thompson Hine, and from at least that point forward, Thompson Hine was anticipating litigation against it and/or Terex.'" (internal citation omitted)).

- Lynn v. Gateway Unified Sch. Dist., No. 2:10-CV-00981-JAM-CMK, 2011 U.S. Dist. LEXIS 143282 (E.D. Cal. Dec. 15, 2011) (analyzing the impact of a client's theft of privileged documents, and disclosure of those documents to her lawyer; ultimately disqualifying the lawyer and his law firm).

- Joel Cohen, The Use of Illegally Obtained Evidence, N.Y. L.J., Oct. 12, 2012 ("Law professors love to torture their students with this scenario: The client, a defendant in a murder case, comes to your office with a brown paper bag. He hands you the bag and says, 'You decide how to deal with it.' Of course, the existence of the gun might be extremely damaging, and you never want it to surface. While you can neither toss it into the sewer nor tell your client to do so, it certainly does you no good for your client to take the gun home. Taking into consideration a lawyer's legal and ethical responsibilities, as well as his defense strategy, the defense counsel's decision-making here will be difficult at best. Nowadays, however, the more typical situation that likely keeps the criminal bar awake at night is where the client comes to his lawyer with evidence actually helpful to his defense, but which he obtained by (likely) violating the law -- whether by traditional theft or, these days, via computer hacking. For a lawyer may expose himself criminally, or at least ethically, if he tries to use the evidence so obtained, thereby acknowledging its existence. Using the evidence could also expose the client to additional criminal liability. Then too, the possibilities that a court may rule the evidence inadmissible and that the lawyer may risk discipline or even prosecution, may factor into whether the attorney decides to 'surface' the material." (footnote omitted); "As Michael Ross, an ethics and criminal law attorney who formerly served as Assistant United States Attorney in the Southern District of New York, pointed out in his presentation at the 2012 Fall Bench & Bar Retreat, an attorney who accepts stolen physical evidence from his client may indeed open the door to his own criminal liability. In New York, a person is guilty of criminal possession of stolen property in the fifth degree -- a Class A misdemeanor with a potential one-year jail sentence -- when he knowingly possesses stolen property with the intent to benefit himself or another person and to impede recovery by the property's owner. As a result, a lawyer who knows that the property his client handed over is stolen risks being charged with criminal possession of stolen property, not to mention potential criminal liability for his client." (footnotes omitted).

To be sure, some bars and courts occasionally still follow the more traditionally laissez-faire approach.

- Virginia LEO 1786 (12/10/04) (analyzing a series of hypotheticals in which a lawyer receives documents about an adversary that might be useful; explaining that: lawyers may not direct clients to obtain evidence via a method that the lawyers themselves may not engage in; determining whether lawyers must return documents that their clients have removed from the client's employer's office depends on a number of factors, including the

client's authorization to handle the documents and the absence or presence of privileged communications in the documents; although the ABA has changed the Model Rules to replace a "return unread" policy with a notice requirement in the case of inadvertent transmission of privileged communications, Virginia has not changed its rules -- so under LEO 1702 lawyers should return unread an adversary's privileged documents given to the lawyer by clients, even if the client "had the documents as part of his employment"; lawyers are not required to notify the opposing party of such receipt of privileged documents if a whistleblower statute permits the lawyer to refrain from providing notice; an additional exception to the "return unread" rule applies if the client/employee made a copy of the employer's documents rather than took originals; LEO 1702 applies only to documents containing privileged communications of an adversary -- thus, lawyers may review and use non-privileged documents as long as the lawyer has not obtained the documents through the use of methods "that violate the legal rights of a third person" under Rule 4.4; determining whether Rule 4.4 would prohibit the lawyer's use of the documents "depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation"; lawyers should remember that stolen documents might amount to "fruits or instrumentalities of a crime" and thus have to be turned over to law enforcement authorities; all of these rules would not prohibit government lawyers from engaging in the collection of documents that is "part of the lawful operation" of a U.S. Attorney's investigation).

Legal ethics opinions and case law focusing on conduct by clients and non-lawyers that would violate the lawyer ethics rules generally involve predictable scenarios.

For instance, lawyers have been punished for themselves engaging in, or arranging for their non-lawyer assistants to engage in, clearly illegal conduct.

- Amanda Bronstad, Christensen slapped with three-year prison term in wiretap case, Nat'l L.J. Online, Nov. 25, 2008 ("A federal judge has sentenced Terry Christensen to three years in federal prison, concluding that the attorney's decision to wiretap his opponent in a child support case 'marred the legal profession.' Christensen was convicted this summer on charges that he hired private investigator Anthony Pellicano to wiretap the ex-wife of his client, billionaire Kirk Kerkorian, in a child support case. On Monday, one of Christensen's lawyers, Terree Bowers, a partner in the Los Angeles office of Howrey, said his client did not financially benefit from the wiretapped conversations, nor did he obtain an advantage in the litigation. In hiring Pellicano, he was simply attempting to identify the biological father of the child at the center of the dispute. The fact that his client is an attorney,

> he added, has 'no relevance' to the conduct at issue. He also said Christensen was not the responsible party. 'Mr. Christensen was a customer. Mr. Pellicano held all the cards, all the controls,' he said. Christensen, who earlier had submitted a letter to [U.S. District Judge Dale] Fischer claiming he regretted hiring Pellicano, declined to comment further at Monday's hearing. Assistant U.S. Attorney Dan Saunders noted that Christensen's letter addressed his regret in hiring Pellicano, but not for the actual wiretapping. He also said that Christensen's being an attorney strikes at the 'heart of the underlying conduct.' 'This crime was a rational, calculated choice, something he did because he wanted to, not because he needed to,' Saunders said. In a strongly worded criticism, Fischer called Christensen's conduct 'shocking and outrageous.' 'Mr. Christensen has not taken responsibility for his criminal conduct, much less expressed remorse for it,' she said. She frequently cited the 'absolutely astounding telephone conversations' between Pellicano and Christensen, former managing partner of what is now Los Angeles-based Glaser, Weil, Fink, Jacobs & Shapiro, in her sentencing decision. In the recordings, Christensen discussed with Pellicano the settlement position, legal fees and deposition strategies of his opponent, she said. He also kept his client happy, thus realizing an economic gain, and was responsible for Pellicano's conduct. And he abused his position as an attorney by eavesdropping onto conversations that are protected by the attorney-client privilege – a 'sacrosanct' relationship, she said. 'Because he was an attorney, he knew what information was important and how it could be used,' she said. His behavior, she said, affected hundreds of people. In addition to the prison time, Fischer ordered Christensen to pay a $250,000 fine within 30 days. Christensen remains free on bond, however, pending the appeal of his conviction. After Monday's hearing, one of his lawyers, Patricia Glaser, a partner at his firm, said she was disappointed in the judge's sentence but grateful that her client was released on bond. Saunders, after the hearing, said the sentence was 'fully appropriate.' 'As the court stated, this was a shocking and outrageous crime,' he said.).

In stark contrast, courts justifiably analyzing the "best interest of the child" in custody and other domestic relations matters usually take into consideration even illegally or improperly obtained evidence.

- Kearney v. Kearney, 974 P.2d 872 (Wash. Ct. App. 1999) (allowing use of an illegally obtained tape in a child custody dispute; noting that the children's mother had taped conversations between her former husband and the children to show the former husband's emotional abuse).

- Maryland LEO 97-5 (10/11/96) (addressing a tape illegally made by a child's father of the mother threatening to kill herself and the child; ordering the lawyer to maintain the tape but not transfer it to a third party).

A common scenario raising these issues involves feuding spouses' efforts to obtain evidence against each other.

Some courts take a restrictive view of lawyers' ability to use such improperly obtained evidence.

- Steve Eder and Jennifer Valentino-DeVries, A Spy-Gear Arms Race Transforms Modern Divorce, Wall Street Journal, Oct. 5, 2012 ("The legality of spousal spying is complicated. Not all courts agree on what constitutes a 'reasonable expectation of privacy' in a marriage."; "In one 2011 Nebraska case, a mother who embedded a listening device in her daughter's teddy bear to record the girl's father was found guilty of violating the Federal Wiretap Act. And in a 2008 Iowa ruling, a court found that a man had violated his wife's privacy by taping her with a camera surreptitiously installed in an alarm clock in her bedroom in their home."; "All together, at least five of the 13 United States circuit courts have found that the Federal Wiretap Act does prohibit surveillance within marriages. But at least two have ruled that the law doesn't prohibit recording your spouse."; "In October 2010, for instance, a federal judge in Texas ruled against Rhea Bagley, who, while divorcing her husband, sued him over allegations that he had put spyware on a computer she used and placed a recording device in the family home before he moved out. District Court Judge Lee Rosenthal cited a 1974 circuit court precedent that the Federal Wiretap Act didn't apply to 'interspousal wiretaps.'"; "Occasionally, both husband and wife are spying on each other. In Oakland County, Michigan, prosecutors charged Leon Walker under the state's anti-hacking statute after he read his wife's emails in a password-protected account on a shared computer. Then, this past July, they dropped the charge, claiming that his wife was snooping, too, by reading his text messages."; "Near Philadelphia, Jay Ciccarone, a father of two young boys, is facing criminal charges stemming from allegations he installed a $97 spyware program on his family's computer."; "In September 2010, about six months after Mr. Ciccarone filed to divorce his now ex-wife, she went to police claiming he had been monitoring her, according to court records. According to the records, Mr. Ciccarone's ex-wife told police she discovered his alleged spying when he left his personal email account logged in on the family computer, and she read an email he had written to his lawyer."; "She didn't respond to requests for comment."; "Nearly a year later, police arrested Mr. Ciccarone and charged him with unlawfully using a computer, intercepting electronic and oral communications, and unlawfully accessing stored communications. Mr. Ciccarone is accused of using a program called Web Watcher, which is designed to record all activity on a computer—capturing email, logging keystrokes and monitoring Internet activity. He has pleaded not guilty and is seeking to have his case dismissed."; "[Danny Lee] Hormann, who lives about two hours outside Minneapolis, said he got the

idea of sticking a GPS tracker on his wife's car in 2009 from an ad. The one he bought let him observe in real time where his wife drove her Mitsubishi Eclipse. It cost him $500 to buy, plus a monthly fee."; "'Pretty amazing stuff,' said Mr. Hormann, a former investment salesman and now a truck driver. At least four times in late 2009 and early 2010, he used it to locate his then-wife, Ms. Mathias, court records say."; "Ms. Mathias said she and her three children suspected for some time that Mr. Hormann was spying. 'He knew where I was constantly,' Ms. Mathias said. She said she never cheated. 'If you have a device on your phone, your computer, your car,' she said, 'how the hell are you supposed to have any affairs?'"; "In March 2010, the month she filed for divorce, Ms. Mathias had a mechanic look for a tracking device. One was found magnetically attached to the car's underside. She contacted police and the county prosecutor charged Mr. Hormann with stalking and using a mobile tracking device on her car."; "'She couldn't leave the house without him knowing exactly what she was doing,' said prosecutor Tim Hochsprung."; "In July, 2010, a jury convicted Mr. Hormann of two charges, stalking and tracking the car. He spent 30 days in jail. On appeal, a judge reversed the tracking charge, saying he had 'sufficient ownership interest' of the car and thus could legally track its whereabouts.").

- North Carolina LEO 192 (1/13/95) (addressing the lawyer's obligation upon receiving from a client an illegal tape-recording of the client's spouse and paramour; holding that the lawyer may not even listen to the tape; "The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(D). See also Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, et seq., particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.").

In contrast, some courts emphasize lawyers' confidentiality duty in such settings, or otherwise take a broader view.

- New York State LEO 945 (11/07/12) (posing the following question: "A lawyer represents a client in a matrimonial litigation. The client has disclosed that the client has access to, and has been reading, the spouse's e-mails, including e-mails with counsel. Although the client has not provided the spouse's lawyer-client e-mails or disclosed their contents to the lawyer, the client may be using knowledge of their contents in making decisions about the litigation. Must the lawyer disclose the client's conduct?"; concluding as follows: "A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no remedial measures other than

disclosure will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.").

- Minakan v. Husted, 27 So. 3d 695, 698, 699, 699-700 (Fla. Dist. Ct. App. 2010) (declining to disqualify a lawyer representing a wife in a divorce case; explaining that the wife had obtained the husband's e-mails from the husband's computer; finding that the court acted too quickly in disqualifying the wife's lawyer; "The wife raises several arguments, the first of which is dispositive. The wife contends that the court violated her right to due process by not allowing her to testify and present other evidence on the factual question of whether the husband failed to treat the e-mail as confidential, thereby waiving the privilege. The husband responds that whether he failed to treat the e-mail as confidential is irrelevant because there was no question the wife had the e-mail forwarded to her attorney, thus rendering her testimony unnecessary."; "Even if the wife's evidence would not have impressed the court, a party has the right to present evidence and to argue the case at the conclusion of all the testimony. . . . Thus, it is necessary to grant the wife's petition, quash the order disqualifying her counsel, and remand for continuation of the hearing, at which the wife may present her evidence."; "[B]ased on the court's statement that it did not know whether the wife gained some advantage by having the email, the record does not suggest the court took that factor into account before disqualifying the wife's attorneys. The record also does not indicate whether the court considered the possible lesser remedies of precluding any discovery based on the e-mail's contents, precluding the use of the e-mail at trial, or both. On remand, the court can consider those matters further.").

- Castellano v. Winthrop, 27 So. 3d 134, 137 (Fla. Dist. Ct. App. 2010) (upholding the disqualification of a mother's lawyer who read a USB drive that the mother had illegally obtained from the father; "For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from further representation. Fla. Bar Prof'l Ethics Comm. Formal Op. 07-1." (footnote omitted)).

- Philadelphia LEO 2008-2 (3/2008) (assessing a situation involving an ex-husband's desire to use email between his ex-wife and her lawyer; "The inquirer has a client whose ex-wife has sued the client regarding an estate matter. The client has revealed to the inquirer that he, the client, has access to the ex-wife's e-mail through the computer in his home which she used while they were married. She never changed her password until recently. The client has told the inquirer that he has e-mails between his ex-wife and

her attorney that would devastate her case against the client. The inquirer does not know anything further because he advised his client that the e-mails were privileged communications and that he, the inquirer did not want to know anything further. The client wants to reveal the e-mails to the Orphans Court. The inquirer asks if he is correct that these communications should not be revealed and cannot be subpoenaed. The issues of whether the communications are, in fact, privileged and are or are not accessible via subpoena are mixed questions of fact and law which are beyond the purview of the Committee (however see discussion of the privilege below). However, the Committee understands this inquiry to be whether the inquirer is constrained by the Pennsylvania Rules of Professional Conduct (the "Rules") from (a) reviewing these e-mails and/or (b) making use of them in the litigation between the inquirer's client and the client's ex-wife."; noting that a Pennsylvania law renders illegal use of e-mail communications in certain circumstances, but explaining that there were insufficient facts to determine that law's applicability; "[I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them. There are several reasons for this. First, the mere fact that the e-mail communications in question are between the client's ex-wife and her attorney does not render them privileged, per se. The scope of the privilege is statutory in nature; see, 42 Pa.C.S. § 5928, as well as case law interpreting the statute, and extends, inter alia, only to those communications that are 'for the purpose of securing primarily either an opinion of law or legal services. . . .' Accordingly, the Committee feels that the inquirer may not be able to make any judgments on the privilege issue without subjecting the e-mails to some kind of review. The Committee appreciates the inquirer's concern about coming into possession of e-mails between the client's ex-wife and her lawyer that may turn out to have been inadvertently sent. In the event that the inquirer should determine that the e-mails came into the client's possession inadvertently the inquirer's ethical duties are limited to notifying the sender as provided by Rule 4.4(b). As previously stated, the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law. However, should use of the e-mail be a possibility several other ethical issues must be examined."; holding that the lawyer must deal with the e-mails rather than just indicate to the client that the lawyer will not analyze or possibly use them; "In the present case, the client clearly wishes the inquirer to use the subject e-mails. Because the inquiry does not make the nature of the litigation between the client and his ex-wife entirely clear, the Committee cannot guess at the objectives of the representation. The Committee notes that the inquirer and the client, if they have not done so already, should clarify those objectives and at least discuss how and whether the e-mails can or should be used. This is entirely consistent with the inquirer's duty under Rule 1.4 Communication specifically, Rule 1.4(a)(2)

which obligates a lawyer to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished.' The Committee finds that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.").

- Florida LEO 07-1 (9/7/2007) (explaining that a lawyer faced the following situation in his representation of a wife in a divorce case; "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 warnings 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."; explaining that neither the wife nor the lawyer reviewed the documents, and that the lawyer placed them in a sealed envelope; ultimately concluding that "[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."; explaining that the documents were not "inadvertently" transmitted to the lawyer, so that Rule 4-4.4(b) did not apply; noting that the lawyer would have to produce the documents if they were responsive to a document request; also explaining that the lawyer might have statutory or other responsibilities if the documents were stolen; explaining that the lawyer had a duty to keep the client's role confidential, but that the lawyer could not assist the client if that conduct was criminal or fraudulent; "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. . . . The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct."; "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. . . . If the client

refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.").

Perhaps the largest number of legal ethics opinions and cases involving this issue deal with investigators' ex parte communications with represented persons. Intrusive AI may trigger the same issues.

As explained above, some states have retained the old ABA Model Code's prohibition on a lawyer "causing another" to engage in such ex parte communications. And the ABA and states adopting the ABA Model Rules formulation have struggled with reconciling the prohibition on lawyers' use of another to evade the ethics rules and clients' ability to freely communicate ex parte with represented adversaries.

Bars and courts have severely sanctioned lawyers who have directed investigators to engage in improper ex parte communications.

- United States v. Koerber, 966 F. Supp. 2d 1207, 1220, 1223 (D. Utah 2013) (finding that federal prosecutors violated the ex parte communication rule by arranging for FBI and IRS agents to communicate ex parte with a represented criminal target; "During the February 9, 2009 interview, Agent Saxey [FBI agent] stated that 'Rick, you were represented for a while, and we're not permitted to talk to you, but in the future I plan on talking to you about what information you might have.'. . . Defendant expressed immediate surprise at Agent Saxey's off-hand remark."; "At that point Agent Saxey asked Defendant if he wanted to stop the interview and Defendant said 'No I'm all right.'. . . After nearly four hours of interview, however, Defendant reiterated his surprise at the agent's belief that he was not represented: 'Uh, I'm surprised about the whole Max thing. As far as I'm concerned Max still does represent me. He might be a little pissed that I came and talked to ya.'" (internal citation omitted); "Agent Saxey became unsure about whether Defendant was, in fact, represented or not after these comments, but he continued to interview and did nothing following the interview to verify whether Defendant was represented. Agent Saxey explained that he 'trusted Mr. Walz and the prosecutors I was working with' as to their position on whether Defendant was represented when they had instructed the agents to proceed with the ex parte interview. . . . Agent Marker confirmed that he also did nothing during or after the first interview to verify whether Defendant was, in fact, represented by any of the Defendant's attorneys of whom he had personally become aware in connection with the investigation."; "[T]he simple fact is the Government knew that Defendant was represented in this matter

as early as March 2007 and reaffirmed in March of 2008 through direct correspondence with Max Wheeler. Nothing occurred at any time before February 13, 2009 that would support a reasonable inference that the representation had changed. And the record supports no inference that Mr. Skousen had ceased representing Defendant, not to mention the other attorneys with whom agents had worked and of whom prosecutors were aware. As the court mentioned during oral argument on April 18, 2013, 'it would be so simple to simply call up and say, Max -- they have known each other a long time -- we want to interview Mr. Koerber, do you have any objection? If they had done that, we wouldn't be here today.'" (internal citation omitted)).

- Bratcher v. Ky. Bar Ass'n, 290 S.W.3d 648, 648-49, 649 (Ky. 2009) (imposing a public reprimand based on the following situation: "Movant [lawyer] represented Dennis D. Babbs in a wrongful termination action against his former employer, R.C. Components, Inc. After suit was filed, Movant learned of a company called Documented Reference Check ('DRC'), which could be hired to determine the type of reference being given by a former employer. Movant obtained an application form from DRC and provided it to her client. Movant also paid DRC's fee on behalf of her client. An employee of DRC subsequently called the owner of R.C. Components, identified herself as a prospective employer of Mr. Babbs, and requested information about him. The telephone conversation was transcribed and provided to Movant."; "Movant sent a copy of the transcript to defense counsel as a part of discovery in the case. After receiving the transcript, R.C. Components sought to have Movant disqualified as Mr. Babb's counsel and to have the DRC transcript suppressed."; "Then Circuit Judge John Minton presided over the case. He entered an order disqualifying Movant and suppressing the transcript. He also found that Movant's conduct violated SCR 3.130-4.2, which prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by counsel, and SCR 3.130-8.3(a), which prohibits a lawyer from violating the Rules of Professional Conduct through the conduct of another.").

- Allen v. Int'l Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720, at *1-2, *25 (S.D. Ind. Sept. 6, 2006) (as a result of defendant's inadvertent filing one of its law firm's billing records in court, the plaintiffs discovered that the defendant had hired a "private investigation company to conduct an undercover investigation into allegations of racial hostility at its Indianapolis facility"; the court criticized defendant's lawyer Littler Mendelson, who knew or should have known that the investigator was engaging in improper ex parte contacts with represented adversaries; describing "Defendant's ostrich-styled defense"; explaining this "Defendant's counsel's culpability is compounded by their failure to affirmatively advise, instruct or otherwise act to prevent contact with represented employees or to prevent contact with unrepresented employees under false pretenses").

- Midwest Motor Sports v. Arctic Car Sales, Inc., 347 F.3d 693, 698 (8th Cir. 2003) (affirming an evidentiary sanction (precluding admission of gathered evidence), and denial of a monetary sanction, against lawyers whose investigator communicated ex parte with represented adversaries; explaining that the lawyer hired the investigator to visit a franchisee, and that the investigator spoke with the franchisee's represented owner during the investigation; "Arctic Cat's attorneys attempt to shield themselves from responsibility by 'passing the buck' to Mohr [Investigator]. They allege that they directed Mohr to speak only to low-level salespeople for the purpose of becoming familiar with the Arctic Cat line. Even if these factual assertions were true, lawyers cannot escape responsibility for the wrongdoing they supervise by asserting that it was their agents, not themselves, who committed the wrong. Although Arctic Cat's attorneys did not converse with Becker themselves, the Rules also prohibit contact performed by an investigator acting as counsel's agent. . . . In other words, an attorney is responsible for the misconduct of his non-lawyer employee or associate if the lawyer orders or ratifies the conduct. Model Rule of Prof'l Conduct R. 5.3. Accordingly, we conclude that Arctic Cat's attorneys are ethically responsible for Mohr's conduct in communicating with Becker as if they had made the contact themselves.").

Courts and bars have been somewhat more forgiving if investigators essentially act on their own, although some courts have prevented lawyers from using the fruits of any improper communications.

- North Carolina LEO 2003-4 (7/25/03) (explaining that a lawyer may not use a private investigator's testimony about conversations the investigator had with the plaintiff in a workers' compensation case, which tended to show that the plaintiff was not as severely injured as he claimed; explaining that the lawyer "instructed the private investigator not to engage Plaintiff in conversation," but that "[d]uring the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation"; concluding that "to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence"; also concluding that the lawyer may still use evidence "gained through the investigator's visual observations of Plaintiff" -- because "[v]isual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)").

- Jones v. Scientific Colors, Inc., 201 F. Supp. 2d 820 (N.D. Ill. 2001) (denying plaintiffs' motion for sanctions and to disqualify defendant's lawyer for arranging for undercover investigators to speak with represented employees

to determine if they were engaging in wrongdoing; explaining that the lawyer had not specifically directed the undercover investigators to speak with the represented employees).

In 2005, an Eastern District of Virginia decision ultimately exonerated a lawyer in connection with an investigator's improper ex parte communications, but extensively discussed both the lawyers' and the investigators' responsibilities.

- United States v. Smallwood, 365 F. Supp. 2d 689, 691, 693, 695, 696, 699 (E.D. Va. 2005) (analyzing a situation in which a lawyer's investigator communicated ex parte with a represented person, and also tape-recorded a telephone call; noting that "[a]t issue, therefore, is whether an investigator hired by a lawyer must abide by an attorney's ethical obligations in Virginia not to (i) communicate with a person known to be represented by counsel regarding the subject of the representation, or (ii) electronically record a conversation with a third party without the full knowledge and consent of the other party."; explaining that the investigator's silence during the tape-recording gave the wrong impression about who he was; "Significantly, the Investigator did not disclose his true identity as an investigator working for Smallwood, nor did he say anything to correct Brown's mistaken impression that the person on the line, i.e. the Investigator, was Dyer's uncle."; "[N]otably, a violation of Rule 4.2 occurs even where the represented party consents to the communication. . . . Because such consent is uncounseled, it cannot qualify as the knowing and intelligent consent required for the Rule."; "The Investigator pointed out at the hearing that Brown, not the Investigator, initiated the recorded telephone conversation and that the call took the Investigator by surprise. Yet, this is ultimately of no consequence, for what matters under the Rule is not which party initiated the communication, but that the communication occurred. Nor does it matter that the Investigator was surprised by the call; his surprise did not compel him to accept the call and participate in the communication; he could, of course, quite easily have declined to speak with Brown. The Investigator did not terminate the conversation once Brown came on the line, nor did he inform Brown that he was an investigator working on Smallwood's behalf. Instead, he permitted Brown to remain under the mistaken impression that the Investigator was a relative of Dyer interested in aiding Dyer by purchasing information from Brown so that Dyer could obtain government assistance in securing a sentence reduction. It follows, therefore, that this communication, if conducted by a lawyer, would have constituted a breach of the lawyer's professional ethics, subjecting the lawyer to discipline." (footnote omitted); "Given that a lawyer plainly could not ethically have communicated with Brown as the Investigators did here, it is necessary to consider whether the Investigators, as the lawyers' assistants and agents, may be held to the same ethical standard even though they are not members of the Bar. The answer to this question is readily apparent. Simply put, a lawyer should not

be able to avoid ethical strictures that bind lawyers by using an assistant to engage in the proscribed conduct. In other words, in general, what a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead. Were this not so, a lawyer might easily circumvent many ethical obligations through the use of an assistant or investigator who, given only a hint, cunningly perceives that his employer's cause can be aided by engaging in conduct that might be ethically forbidden to the lawyer. Further, it would give unscrupulous lawyers an incentive to provide those in their charge with only limited ethical direction. For these reasons, the Virginia Rules of Professional Conduct plainly contemplate that a lawyer's investigators or assistants, when acting on the lawyer's behalf, must abide by the ethical obligations of the legal profession as the Rules establish an affirmative duty for a lawyer to 'make reasonable efforts to ensure that [his non-lawyer assistants'] conduct is compatible with the professional obligations of the lawyer. See Rule 5.3, Va. R. Prof'l Conduct (2000). To be sure, a lawyer must, of necessity, often act through and with the help of assistants who are non-lawyers in order to accomplish the lawyer's work, and thus the prudential concerns and ethical bounds that constrain the legal professional are of equal importance whether a lawyer acts directly or through the efforts of assistants or investigators. In general, therefore, a lawyer's assistants or investigators must abide by the lawyer's ethical obligations when they act on behalf of the lawyer." (footnotes omitted) (emphases added); concluding that "the lawyers in this case did not engage in any improper conduct nor did they knowingly authorize the Investigators to do so. At most, the lawyers may be faulted for failing to anticipate that events would occur that would require them to instruct the Investigators regarding their ethical obligations. Arguably, these events were not reasonably foreseeable in the circumstances. Nonetheless, the facts of this case are a useful reminder that lawyers are obligated to take affirmative steps to instruct and supervise their investigators or other assistants to ensure that they are aware of, and ultimately comply with, the lawyers' ethical obligations; in other words, it is incumbent upon an attorney to take all reasonable steps necessary to avoid inadvertent deception or unethical conduct carried out by his assistants or investigators." (emphasis added); "[A]n investigator or other assistant has an affirmative duty to learn and abide by a lawyer's ethical obligations; he may not simply claim ignorance of these duties and proceed to act with impunity; instead, investigators or other assistants should seek direction from their lawyer-employers when presented with areas of ethical ambiguity or uncertainty." (emphasis added); ultimately concluding that "[i]n the end, it is clear that neither the lawyers nor the Investigators knowingly engaged in any improper conduct"; allowing payment of the Investigator's bill).

Confidentiality Duties When Working with Service Providers

To comply with their broad duty of confidentiality, lawyers must take all reasonable steps to assure that anyone with whom they are working also protects client confidences.

For instance, in ABA LEO 398 (10/27/95), the ABA indicated that a lawyer who allows a computer maintenance company access to the law firm's files must ensure that the company establishes reasonable procedures to protect the confidentiality of the information in the files. The ABA also indicated that the lawyer would be "well-advised" to secure the computer maintenance company's written assurance of confidentiality.

In its legal ethics opinion generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures." ABA LEO 451 (7/9/08).[2]

[2] ABA LEO 451 (7/9/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and non-lawyers, "regardless of whether the other lawyer or the non-lawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; lawyers

Lawyers must be very careful even when dealing with service providers such as copy services. Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents). These and other confidentiality issues are discussed above.

Ethics Implications of Outsourcing

Using artificial intelligence presumably amounts to "outsourcing" work to the third party artificial intelligence vendor. It is therefore worth examining the ethics rules governing outsourcing.

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generally may add a surcharge (without advising the client) to a contract lawyer's expenses before billing the client; if the lawyer "decides" to bill those expenses as a disbursement, the lawyer may only bill the client for the actual cost of the services "plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies"; the same rules apply to outsourcing, although there may be little or no overhead costs).

The ABA has explicitly explained that lawyers may hire "contract" lawyers to assist in projects -- although the ABA focused on billing questions.[3]

State bars have also dealt with ethics issues implicated by lawyers employing "temps"[4] and "independent contractor" lawyers.[5]

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[3] ABA LEO 420 (11/29/00) (a law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a "reasonable expectation" that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client (although some state bars and courts require disclosure of both the hiring and the surcharge); or (2) costs, in which case the law firm can only bill the actual cost incurred "plus those costs that are associated directly with the provision of services" (as explained in ABA LEO 379)); ABA LEO 356 (12/16/88) (temporary lawyers must comply with all ethics rules arising from a lawyer's representation of a client, but depending on the facts (such as whether the temporary lawyer "has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working") may not be considered "associated" with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations); lawyers hiring temporary lawyers to perform "independent work for a client without the close supervision of a lawyer associated with the law firm" must obtain the client's consent after full disclosure; lawyers need not obtain the client's consent to having temporary lawyers working on the client matters if the temporary lawyers are "working under the direct supervision of a lawyer associated with the firm"); lawyers need not advise clients of the compensation arrangement for temporary lawyers "[a]ssuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement").

[4] Virginia LEO 1712 (7/22/98) (this is a comprehensive opinion dealing with temporary lawyers ("Lawyer Temps"); a lawyer temp is treated like a lateral hire for conflicts purposes (although lawyer temps who are not given "broad access to client files and client communications" could more easily argue that they had not obtained confidences from firm clients for which they had not directly worked); as with lateral hires, screening lawyer temps does not cure conflicts; lawyer temps may reveal the identity of other clients for which they have worked unless the clients request otherwise or the disclosure would be embarrassing or detrimental to the former clients; paying a staffing agency (which in turn pays the lawyer temp) does not amount to fee-splitting because the agency has no attorney-client relationship with the client and is not practicing law (the New York City Bar took a different approach, suggesting that the client separately pay the lawyer temp and agency); if a firm lawyer closely supervises the lawyer temp, the hiring of lawyer temps need not be disclosed to the client; a lawyer must inform the client before assigning work to a lawyer other than one designated by the client; because "[a] law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee," the firm must disclose it to the client if the "payment made to the staffing agency is billed to the client as a disbursement, or a cost advanced on the client's behalf"; on the other hand, the firm "may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services" without disclosing the firm's cost, just as firms bill a client at a certain rate for associates without disclosing their salaries; in that case, the "spread" between the salary and the fees generated "is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit"; because the relationship between a lawyer temp and a client is a traditional attorney-client relationship, the agency "must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle"; agencies may not assign lawyer temps to jobs for which they are not competent).

[5] Virginia LEO 1735 (10/20/99) (a law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the

Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing. See, e.g., District of Columbia UPL Op. 16-05 (6/17/05) (holding that contract lawyers who are performing the work of lawyers rather than paralegals or law clerks must join the D.C. Bar if they work in D.C. or "regularly" take "short-term assignments" in D.C.).

The ABA and a number of state bars have explicitly approved foreign outsourcing of legal services as long as the lawyers take common-sense precautions.

- Virginia LEO 1850 (12/28/10) (in a compendium opinion, providing advice about lawyers outsourcing, defined as follows: "Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example."; explaining that, among other things, a lawyer engaging in such outsourcing must: (1) "exercise due diligence in the selection of lawyers or non-lawyers"; (2) avoid the unauthorized practice of law (explaining that the Rules: "do not permit a non-lawyer to counsel clients about legal matters or to engage in the unauthorized practice of law, and they require that the delegated work shall merge into the lawyer's completed work product" and direct that "the initial and continuing relationship with the client is the responsibility of the employing lawyer," ultimately concluding that "in order to avoid the unauthorized practice of law, the lawyer must accept complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."); (3) "obtain the client's informed consent to engage lawyers or non-lawyers who are not directly associated with or under the direct supervision of the

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lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own"; the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure if the "temporary or contract attorney works directly under the supervision of an attorney in the Firm"; the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules).

lawyer or law firm that the client retained"; (4) assure client confidentiality; noting that "if payment is billed to the client as a disbursement," the lawyer must pass along any cost without mark-up unless the client consents (although the lawyer may also pass along any overhead costs -- which in the case of outsourced services "may be minimal or nonexistent"), and that "if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work," the client must consent to such a billing arrangement "in cases where the non-lawyer is working independently and outside the direct supervision of a lawyer in the firm"; explaining that a lawyer contemplating outsourcing at the start of an engagement "should" obtain "client consent to the arrangement" and provide "a reasonable explanation of the fees and costs associated with the outsourced project." [The remainder of the opinion appears to allow a law firm hiring outsourced service providers working under the direct supervision of a lawyer associated with the firm to treat them as if they were lawyers in the firm -- both for client disclosure and consent purposes, as well as for billing purposes.]; acknowledging that a lawyer can treat as inside the firm for disclosure and billing purposes an outsourced service provider who handles "specific legal tasks" for the firm while working out of her home (although not meeting clients there), who has "complete access to firm files and matters as needed" and who "works directly with and under the direct supervision" of a firm lawyer, but that a law firm may not treat (for consent and billing purposes) outsourced service providers as if they are in the firm who are working in India and, who conduct patent searches and prepare applications for firm clients, but who "will not have access to any client confidences with the exception of confidential information that is necessary to perform the patent searches and prepare the patent applications"; explaining that the same is true of lawyers whom the law firm occasionally hire, but who also work "for several firms on an as needed contract basis"; noting that a lawyer does not need to inform the client when a lawyer outsources "truly tangential, clerical or administrative" legal supports services, or "basic legal research or writing" services (such as arranging for a "legal research 'think tank' to produce work product that is then incorporated into the work product" of the firm). [The Bar's hypotheticals do not include the possibility of an overseas lawyer or a lawyer working for several U.S. law firms on an "as needed contract basis" -- but who work under the "direct supervision" of a lawyer associated with the firm.]; concluding that lawyers "must advise the client of the outsourcing of legal services and must obtain client consent anytime there is disclosure of client confidential information to a non-lawyer who is working independently and outside the direct supervision of a lawyer in the firm, thereby superseding any exception allowing the lawyer to avoid discussing the legal fees and specific costs associated with the outsourcing of legal services").

- Ohio LEO 2009-6 (8/14/09) (offering guidance for lawyers outsourcing legal services; defining "legal services" as follows: "[L]egal services include but are not limited to document review, legal research and writing, and preparation of briefs, pleadings, legal documents. Support services include, but are not

limited to ministerial services such as transcribing, compiling, collating, and copying."; ultimately concluding that a lawyer was not obligated to advise the client if a "temp" lawyer was working inside the firm under the direct supervision of a firm lawyer; also ultimately concluding that a lawyer can decide whether to bill for outsourced services as a fee, but that the lawyer must advise the client of how the lawyer will bill for those services; "[P]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyer or non-lawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a non-lawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice."; explaining how the lawyer may bill for the outsourced services; explaining how the duty of confidentiality applies; "[P]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise or professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.").

- ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service," or "foreign outsourcing"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and non-lawyers, "regardless of whether the other lawyer or the non-lawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of

> scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; explaining that (among other things) lawyers can charge "reasonable" fees for the outsourced lawyer's work by deciding whether to treat the outsourced lawyer in one of two ways: (1) like a contract lawyer (noting that "a law firm that engaged a contract lawyer [and directly supervises the contract lawyer] could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client," and that "the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer" as long as the fee is reasonable); or (2) as an expense to be passed along to the client (noting that "[i]f the firm decides to pass those costs through to the client as a disbursement," the lawyer cannot absent client consent add any markup other than "associated overhead" -- which in the case of outsourced legal services "may be minimal or nonexistent" to the extent that the outsourced work is "performed off-site without the need for infrastructural support")).

Lawyers' use of AI might implicate conflicts issues – if an AI provider is also assisting an adversary. That issue has arisen in the outsourcing context.

For domestic outsourcing, it makes sense to apply the same standards for imputed disqualification as most bars follow in the case of temp lawyers. That standard looks at whether a temp lawyer is "associated" with the firm -- which in turn depends on whether the temp lawyer has general access to the firm's other clients' confidential information.

In 2012, a court applied this standard -- declining to impute to an entire law firm the individual disqualification of a lawyer working out of her home on specific matters for a law firm.

- Brown v. Fla. Dep't of Highway Safety & Motor Vehicles, Case No. 4:09-cv-171-RS-CAS, 2012 U.S. Dist. LEXIS 145159, at *3-4, *6-7, *7-8, *7-9, *9 (N.D. Fla. Oct. 5, 2012) (because a lawyer's individual disqualification is only imputed to a law firm if the lawyer is "associated" with the law firm, individual disqualification of a lawyer working for the law firm in an outsourcing arrangement is not imputed to the whole firm; explaining the factual context; "Ms. Moore left employment at the OAG to work at Sniffen & Spellman, P.A. For personal and family reasons, Ms. Moore resigned her associate position with the Sniffen firm and went to work instead for the firm of Marie A. Mattox, P.A. The relationship was not a typical associate relationship. Ms. Moore was to work from home preparing summary-judgment responses on specific cases as assigned. There was some prospect that in the future Ms. Moore might also draft complaints. Ms. Moore was to be paid a set hourly rate without the health and retirement benefits available to attorneys employed at the firm's offices. The firm and Ms. Moore did not address how long the relationship would last and did not define the relationship with precision. This was a relationship of indefinite duration, terminable at will by either side, with no exception that Ms. Moore would ever have client contact or responsibility for cases beyond drafting papers for review by another attorney. There was no expectation that Ms. Moore would advance to a different or higher position with the firm."; "Under the plain language of Rule 4-1.10(b), the Mattox firm is disqualified if Ms. Moore became 'associated' with the firm. The meaning of 'associated' is not completely clear. But one thing *is* clear: not every lawyer who is paid by a law firm to do work of a legal nature is 'associated' with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. . . . An attorney to whom work is outsourced -- for example, an attorney who contracts to do research or draft pleadings from the attorney's own premises on the attorney's own schedule -- ordinarily is not an associate."; "Determining whether an attorney is associated or unassociated requires an analysis of all the circumstances. No one factor is determinative in every case. Here Ms. Moore works only from home, does only work for review by another attorney of a kind that can properly be outsourced, has no client contact or expectation of advancement, and does not receive the health and retirement benefits the firm makes available to associates. Ms. Moore works only for the Mattox firm -- it can provide as much work as she currently wishes to do so -- but Ms. Moore is free to do contract work for others as well, if at any time she chooses to do so. In substance, this is an outsourcing relationship. The Rule 4-1.10 imputed-disqualification provision does not apply."; "In reaching this conclusion, I have not overlooked two additional considerations. First, some superficial indicia cut the other way. Ms. Moore obtained a Mattox-firm email address, called herself an associate and used the firm's physical address when she updated her Florida Bar filing, and received a first paycheck that treated her as an employee, not as an independent contractor."; "Second, Defendant's lay representation are

concerned that Ms. Moore sat in on confidential discussions and now has a relationship with the plaintiff's law firm. The concern is understandable. But Ms. Moore has an obligation to maintain the defendant's confidences. For all that appears in this record, Ms. Moore has complied with her obligation and will continue to do so. This order mandates it.").

In another domestic outsourcing situations, a court declined to disqualify a vendor working for both sides of a case.

- Victor Li, Judge Refuses to Disqualify Electronic Data Discovery Vendor for Playing Both Sides, Law Tech. News, July 16, 2013 ("Kaleida Health isn't taking a May decision by United States Magistrate Judge Leslie Foschio (Western District, New York) lying down. Foschio refused to disqualify e-discovery vendor D4 Discovery."; "On Friday, Kaleida, the largest non-profit health care provider in Western New York, filed papers with the United States District Court in Buffalo reaffirming its stance that Foschio erred and D4 should have been disqualified. Kaleida had originally hired D4 in 2010 after Kaleida was sued by a group of employees in a wage-and-hour class action alleging that they were owed regular and overtime wages. According to Foschio's opinion, Kaleida did not retain D4 for its e-discovery consulting services. Instead, Kaleida's attorneys at Nixon Peabody had decided to use predictive coding to go through its gigantic cache of 300,000 to 400,000 emails, and had hired D4 to provide scanning and coding services. In 2011, D4 entered into a contract to provide e-discovery consulting services to the plaintiffs. Despite D4's representation that its consultants had not been involved in the project for Nixon Peabody, Kaleida and Nixon Peabody objected."; "According to Foschio, there was no conflict of interest because D4's involvement with Kaleida was limited to scanning and coding documents and that Kaleida failed to show that D4 had access to any confidential information. Foschio drew a distinction between D4's duties to Kaleida, which he called 'a routine clerical function' and similar to photocopying documents, and the consulting services D4 provided to the plaintiffs, which Foschio described as 'requiring expert knowledge or skills.' Foschio held that D4 had not provided expert services to Kaleida, merely routine clerical work. As such, Foschio ruled that there was no conflict of interest when its consultants signed up to provide expert services to the plaintiffs."; "Foschio also found that Nixon Peabody's exposure to D4 was extremely limited. D4 had only been hired to code objective information into assigned fields and was not asked to identify substantive case issues or make subjective decisions about the documents. Foschio also noted that D4's was even more minimal since it had actually subcontracted its work for Kaleida to Infovision 21, Law 360's interface in Ohio. Additionally, Foschio pointed out that Nixon Peabody had utilized other companies, such as the Ricoh Company and Pangea 3 to provide other e-discovery services, as well as its own in-house e-discovery services."; "E-discovery consultant George Socha told Law Technology News that it is extremely rare to see an e-discovery vendor on both sides of the

> same case. Socha says that the Electronic Discovery Reference Model Code of Conduct, which he helped draft, encourages vendors to avoid these types of situations. 'It's never been my view that that's appropriate,' says Socha. 'If you are working for me on a matter as a e-discovery provider, what I'm looking for from your is your advice and counsel. That means you're on my team.'").

Both of these fact-intensive analyses presumably would apply to overseas outsourcing as well -- with the almost inevitable result that the overseas outsourcing arrangement involves a much more tenuous relationship with the hiring law firm.

Surprisingly, the several ethics opinions dealing with outsourcing do not extensively address conflicts of interest. All of them address the lawyer's duty of diligence in selecting the service provider, obligation to assure that the service provider provides confidentiality, and (with differing results) the lawyer's possible duty to disclose to the client that the lawyer has engaged in offshore outsourcing. However, the ethics opinions do not address a basic question -- does a lawyer arranging for offshore outsourcing have to confirm that the service provider is not simultaneously (1) working for the other side on the same matter, or (2) not working for one of the lawyer's client's other adversaries in an unrelated matter.

New York City LEO 2006-3 (8/2006) contained the following discussion under the heading "The Duty to Check Conflicts when Outsourcing Overseas."

> DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be

> expected to have learned confidences or secrets of a client's adversary.
>
> As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients.

New York City LEO 2006-3 (8/2006) (emphasis added).

Unfortunately, the legal ethics opinion did not explain what the lawyer should do with the information once the lawyer has obtained it.

It seems very unlikely that lawyers working for an overseas service provider would be considered "associated" with the law firm that hired them. When applied to temp lawyers, that status normally requires that the temporary lawyer have access to other law firm clients' confidences. ABA Model Rule 1.10(a); ABA LEO 356 (12/16/88).

Treating the lawyers working overseas as temp lawyers, it would seem that the lawyers would not be "associated" with the law firm that arranged for their involvement.

In contrast, to the extent that an overseas service provider is considered a "law firm" -- rather than a collection of temp lawyers -- for conflicts analysis, any individual lawyer's disqualification might be imputed to the entire operation overseas. That would prevent the service provider from assisting both sides of the same case.

Of course, every bar recognizes that a temporary lawyer's own involvement in a matter might result in the temp lawyer's acquisition of client confidences -- resulting in

his or her individual disqualification. That would prevent the same overseas lawyer from working on both sides of the same case. However, it would seem that the overseas service provider could establish a screen between two groups of lawyers working on opposite sides of the same case. However, such a tactic could would create an enormous risk, because a court or bar might find it almost inevitable that such an internal screen would not be effective (especially with no daily oversight from the lawyers in the United States handling the matter).

Although there are some variations among these bars' analyses, all of them take the same basic approach.

First, lawyers must avoid aiding non-lawyers in the unauthorized practice of law. This requires the lawyers to take responsibility for all of the outsourced work. The lawyers must ultimately adopt the outsourced work as their own.

Second, lawyers must provide some degree of supervision -- although the exact nature and degree of the supervision is far from clear. Lawyers should consider such steps as researching the entity that will conduct the outsourced work, conducting reference checks, interviewing the folks who will handle the outsourced work, specifically describing the work the lawyers require, and reviewing the work before adopting it as their own.

Third, lawyers must assure that the organization they hire adequately protects the client's confidences. This duty might involve confirming that the foreign lawyers' ethics are compatible with ours, and might also require some analysis of the confidentiality precautions and technologies that the foreign organization uses.

Fourth, the lawyers arranging for such outsourcing should avoid conflicts of interest. At the least the lawyers should assure that the organization handling the outsourced work is not working for the adversary. Some of the bars warn lawyers to take this step to avoid the inadvertent disclosure of confidential communications rather than to avoid conflicts.

Fifth, lawyers must bill appropriately. As explained above, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In that situation, the lawyer generally may add overhead expenses to the bill (although the ABA noted that there will be very few overhead expenses in a foreign outsourcing operation).

Sixth, lawyers usually must advise their clients that they are involving another organization in their work. As the various legal ethics opinions explain, such disclosure may not be required if the contract or temporary lawyers act under the direct supervision of the law firm -- but disclosure is always best, and almost surely would be required in a situation involving a foreign law organization. For instance, the ABA indicated that the lawyer's lack of immediate supervision and control over foreign service providers means that they must obtain the client's consent to send work overseas. The North Carolina Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.

Lawyers working with third parties (including those related to their use of AI) must also consider the risk to their client’s attorney-client evidentiary protection.

The majority rule extends such attorney-client privilege protection to: (1) the client’s agents/consultants only if they were necessary (some courts say “nearly

indispensible") to the communications between the lawyer and his or her clients (examples include translators or interpreters); (2) the lawyer's agents/consultants only if they were similarly necessary to the lawyer's rendering of legal advice to the client.

Most clients and many lawyers have learned to their dismay that most agents/consultants fall outside the protected status, such as public relations consultants, financial advisors, etc.

Fortunately, both categories of agents/consultants generally are inside work produce protection – meaning that disclosing existing work product to them does not waive that robust protection. But many such agents or consultants (such as public relations consultants) cannot themselves create protected work product.

2. Billing

Not surprisingly, lawyers will be interested in how they may ethically bill for that use of AI, such as ChatGPT.

Some of this billing analysis seems obvious. Lawyers billing by the hour may bill for the reasonable time they spend working with AI tools. Lawyers having arranged for a fixed fee may not separately bill for those hours. If the fixed fee arrangement did not include expenses, presumably lawyers may charge the client for any expenses associated with their use of AI (such as the charge from a service provider who set up a necessary link or other AI-related hardware or software infrastructure.

If lawyers use free AI resources, they may not charge for it. If lawyers must pay for AI resources, they must be careful to limit their bill to their clients for those resources.

- ABA LEO 379 (12/6/93) (providing guidance about lawyers' billing for his or her time, and for disbursement; "It is the view of the Committee that, in the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement items. In the same regard, if a lawyer receives a discounted rate from a third party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements."; "We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator).").

The more difficult billing analysis involves the lawyer's ethical freedom to bill the client for more than the lawyer's hours and such resource provider's charge.

For instance, lawyers may hire independent contractors to assist with their use of AI.

The bottom line is that lawyers generally may earn a profit on contract or temp lawyers if the supervising lawyers “adds value” to their work. Otherwise, lawyers may only bill the client for what the lawyers pay such persons.

- ABA 451 (7/9/2008) (Lawyers may outsource "legal or non-legal support" services as long as they bear various ethics requirements in mind -- mentioning outsourcing to foreign lawyers as only one example of outsourcing, along with "the use of a local photocopy shop" to copy documents, retaining a "document management company" in litigation, using third party vendors "to provide and maintain a law firm's computer system" and reliance on a "legal research service" to conduct research. Lawyers arranging for such outsourcing must ultimately assure competent service by anyone assisting in the lawyer's work for the client. Lawyers' duties under ABA Model Rule 5.1 and 5.3 "apply regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm" -- despite the reference to "a firm" in ABA Model Rule 5.1 Comment [1]. Lawyers arranging for the outsourcing must adequately investigate the people who will be conducting the outsourced work (including even such issues of confidentiality as "recycling and refuse disposal procedures." Lawyers arranging for overseas outsourcing should assess such issues as: the foreign lawyers' legal training and dedication to "core ethical principles" similar to U.S. lawyers, the possibility of confidential materials being seized in "judicial or administrative proceeding" and other threats to confidentiality. Lawyers arranging for outsourcing may have to alert their clients, if the outsourcing services will be performed independently of the lawyer (referring to ABA LEO 356, which deals with temporary lawyers). Because "ordinarily" the lawyer will not exercise a "high degree of supervision and control" over the work that is being performed, the lawyer generally will have to provide notice to their clients. Lawyers providing confidential client information to a third party may do so only with the client's consent, and the "implied authorization" to reveal client confidences in performing legal services "does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control." Lawyers must be very careful to assure confidentiality, and "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships." In fulfilling their duty to "minimize the risk of potentially wrongful disclosure," lawyers arranging for the outsourcing "should verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters." In charging fees for the outsourced work, lawyers should comply with the standards articulated in ABA LEO 420. Lawyers may generally add a surcharge to the cost paid to

those performing outsourced work (without notice to the client), as long as the total fee is reasonable. Lawyers deciding to pass the cost along to the client as a disbursement may not mark up the cost, but may only bill the client the actual cost "plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies for the individuals under contract." In the case of outsourced services, the overhead cost may include "a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services." Lawyers arranging for outsourcing must avoid assisting anyone in the unauthorized practice of law, although generally there should be no UPL problem if lawyers performing the outsourced work assist the lawyers (who remain ultimately responsible for the work) and do not hold themselves out as being admitted in the jurisdiction.).

- ABA LEO 420 (11/29/2000) (A law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a "reasonable expectation" that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client (although some state bars and courts require disclosure of both the hiring and the surcharge); or (2) costs, in which case the law firm can only bill the actual cost incurred “plus those costs that are associated directly with the provision of services” (as explained in ABA LEO 379).

- ABA LEO 356 (12/16/1988) (Temporary lawyers must comply with all ethics rules arising from a lawyer's representation of a client, but depending on the facts (such as whether the temporary lawyer "has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working") may not be considered "associated" with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations). Lawyers hiring temporary lawyers to perform "independent work for a client without the close supervision of a lawyer associated with the law firm" must obtain the client's consent after full disclosure. Lawyers need not obtain the client's consent to having temporary lawyers working on the client matters if the temporary lawyers are "working under the direct supervision of a lawyer associated with the firm." Lawyers need not advise clients of the compensation arrangement for temporary lawyers "assuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement.").

State bars seem to take the same approach.

- Virginia LEO 1735 (10/20/1999) (A law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-

up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to the Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own;" the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure (and obtain consent)if the "temporary or contract attorney works directly under the supervision of an attorney in the Firm;" the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules.).

- Virginia LEO 1712 (7/22/1998) (This is a comprehensive opinion dealing with temporary lawyers ("lawyer temps"). A lawyer temp is treated like a lateral hire for conflicts purposes (although lawyer temps who are not given "broad access to client files and client communications" could more easily argue that they had not obtained confidences from firm clients for which they had not directly worked). As with lateral hires, screening lawyer temps does not cure conflicts. Lawyer temps may reveal the identity of other clients for which they have worked unless the clients request otherwise or the disclosure would be embarrassing or detrimental to the former clients. Paying a staffing agency (which in turn pays the lawyer temp) does not amount to fee-splitting because the agency has no attorney-client relationship with the client and is not practicing law (the New York Bar took a different approach, suggesting that the client separately pay the lawyer temp and agency). If a firm lawyer closely supervises the lawyer temp, the hiring of lawyer temps need not be disclosed to the client. A lawyer must inform the client before assigning work to a lawyer other than one designated by the client. Because "a law firm's mark-up of or surcharge on actual costs paid the staffing agency is a fee," the firm must disclose it to the client if "payment made to the staffing agency is billed to the client as a disbursement, or cost advanced on the client's behalf." On the other hand, the firm "may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services" without disclosing the firm's cost, just as firms bill a client at a certain rate for associates without disclosing their salaries. In that case, the "spread" between the salary and the fees generated "is a function of the cost of doing business including fixed

and variable overhead expenses, as well as a component for profit. "Because the relationship between a lawyer temp and a client is a traditional attorney-client relationship, the agency "must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle." Agencies may not assign lawyer temps to jobs for which they are not competent.).

- New York State LEO 1090 (3/31/16) ("We find nothing in the Rules that would prohibit a sponsoring law firm from billing for the services of a law student-intern on a fee basis, even if the sponsoring firm is compensating neither the intern nor the sending law school, provided that the client has been advised of the firm's intent to charge for the intern's services and the basis of the charge (e.g., per task or per hour or some fraction thereof) and provided, further, that the fee is neither excessive nor illegal.").

- Georgia LEO 65-9 (4/13/06) (analyzing a lawyer's retention of a temporary lawyer; "One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or corporate law department for which he or she is temporarily working, the normal rules governing imputed disqualification apply."; "If a temporary attorney is directly supervised by an attorney in a law firm, that arrangement is analogous to fee splitting with an associate in a law firm, which is allowed by Rule 1.5(e). Thus, in that situation there is no requirement of consent by the client regarding the fee. Nevertheless, the ethically proper and prudent course is to seek consent of a client under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed even if there is no direct supervision if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee splitting situation and consents; and (3) the total fee is reasonable."; "In that the agency providing the temporary lawyer is not authorized to practice law, any sharing of fees with such an agency would be in violation of Rule 5.4(a). Therefore, while it is perfectly permissible to compensate an agency for providing a temporary lawyer, such compensation must not be based on a portion of client fees collected by the firm or the temporary lawyer."; "[E]mployment as a temporary lawyer and use of temporary lawyers are proper when adequate measures, consistent with the guidance offered in this opinion, are employed by the temporary lawyer and the employing firm or corporate law department. These measures respond to the unique problems created by the use of

temporary lawyers, including conflicts of interest, imputed disqualification, confidentiality, fee arrangements, use of placement agencies, and client participation. Generally, firms employing temporary lawyers should: (1) carefully evaluate each proposed employment for conflicting interests and potentially conflicting interests; (2) if conflicting or potentially conflicting interests exist, then determine if imputed disqualification rules will impute the conflict to the firm; (3) screen each temporary lawyer from all information relating to clients for which a temporary lawyer does not work, to the extent practicable; (4) make sure the client is fully informed as to all matters relating to the temporary lawyer's representation; and (5) maintain complete records on all matters upon which each temporary lawyer works.").

- Washington LEO 2201 (2009) (finding that a law firm may pay a foreign law consultant to provide translations nd paralegal services to the firm's non-English-speaking clients; ultimately concluding that the lawyer may accept referrals from the consultant, and retain the consultant to provide the services; explaining that the law firm and the consultant can split fees under the ethics rules; also analyzing the foreign consultant's conduct as a paralegal; "Where the FLC [foreign law consultant] is hired to act as a paralegal, legal assistant or translator for the client, the FLC is acting as a non-lawyer professional. As such, the inquiring lawyer may compensate the FLC as any third party cost would be paid. This is permissible because there is no difference between such third-party costs and that for other third-party costs, including copy services, and court reporters."; "The client, however, must be ultimately responsible for such costs. The inquiring lawyer must inform the client about the fees to be paid to the FLC and describe the services. The client should initially agree to the third-party cost in the engagement letter, and the inquiring lawyer should include the cost to the client on any subsequent bills. Absent an express agreement by the client (preferably in writing), a mark-up on third-party costs is impermissible.").

- Texas LEO 594 (2/2010) (holding that a lawyer must pass along any discounts to the client that the lawyer receives from a service provider; "[I]n the absence of disclosure and agreement to the contrary, a lawyer may recoup only the amount of expenses actually paid by the lawyer. In such circumstances, a client may reasonably be expected to understand that the amounts of third-party expenses incurred by a lawyer and recouped from the client, as reflected on a statement from the lawyer, are the amounts actually paid by the lawyer for the expenses shown. Absent an agreement to the contrary, a lawyer may not mark up or increase the amount of an expense being recouped from the client, and if a lawyer receives a discount on payment of the expense, the amount of the expense recouped from the client must take into account the discount.").

- North Carolina LEO 2005-11 (1/20/06) (holding that a law firm does not have to establish a trust account to hold money that belongs to the law firm; also holding that a lawyer may mark up overnight and courier fees after making the following disclosure and obtaining a client's consent to the following statement; "I/we hereby acknowledge and agree that certain charges on my HUD-1 Settlement Statement, including but not limited to overnight/courier and recording fees, may not reflect the actual costs and in fact may be more than the actual costs to the settlement agent. The additional amount(s) may vary and are to help cover the administrative aspects of handling the particular item or service. I/we hereby consent to and accept the above-referenced up-charges.").

It can be tricky to allocate bills if lawyers pay (for instance) a fixed price per month for such service.

- Pennsylvania LEO 2006-30 (6/13/06) (finding that a lawyer could charge clients for computer research that the law firm paid for on a fixed monthly charge using one of two methods: "'Method 1 – Direct Actual Costs Per Minute Charge. Under this method, I would calculate the average number of billable minutes per month during which the [CALR] service could be used based on an average day (21 work days per month x 7.5 hours per day = 158 average hours per month x 60 minutes per hour = 9,450 average minutes per month and arrive at a per minute charge of use of less than $.10. This uniform per minute charge would be available to charge each client for whom the Computer Research would be used during the month. Depending on the volume of client usage, this method may not permit me to recoup my actual monthly costs for the [CALR] service.'"; also allowing the law firm to use another method of charging clients for the computer research "so long as the clients gave informed consent to those charges after full disclosure of the method by which the charges would be calculated. Such disclosure would necessarily include an explanation of how per minute charges could vary dramatically from month to month, depending upon Inquirer's overall rate of CALR usage in a given month; also describing the other possible way of charging clients; "'Method 2 – Proportionate Allocation of Actual Costs Per Minute Charge. Under this method, I would calculate the total minutes used by all clients for whom the [CALR] services were used in a given month and obtain the percentage of the total minutes used by each client and then apply that percentage to the fixed monthly charge. The resulting figure for each client would be the charge for each client for that month. In sum, this method pro rates each client's monthly usage by the total usage of all clients in the given month and recoups the entire monthly charge by spreading the actual cost over all clients' usage during the month regardless of actual volume of usage. It should be noted that Method 2 can result in different per minute

> charge rates per month for the same client depending upon the client volume of monthly usage.'").

Of course, some (if not many) clients explicitly require their law firms to pay such charges without billing the clients for them.

3. AI Material Ownership

Lawyers working with artificial intelligence vendors will obviously generate electronic and perhaps even hard copy material. The ethics rules govern ownership of such material if the client has fully paid the lawyer, or if the client has not fully paid the lawyer.

Introduction

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its

state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

However, even lawyers whose clients have fully paid them must deal with file ownership issues.

Lawyers' Duty to Maintain Client Files

ABA Model Rule 1.15 requires lawyers to safeguard the client's or a third person's property in the lawyer's possession. Although that rule generally focuses on money, it also extends to documents that clients give their lawyers.

General ABA rules governing diligence, communication, etc. implicitly recognize that lawyers will create files while representing clients. Some ABA Model Rules specifically require written communications with clients, such as those dealing with certain types of conflicts. Lawyers' general diligence duties presumably require lawyers to memorialize their work, which will involve file creation. And ABA Model Rule 1.16(d) recognizes this file creation in addressing lawyers' obligations upon the representation's end. This is discussed below.

The Restatement addresses the lawyer's obligation to safeguard property that the client has given the lawyer, or which the lawyer has created during the representation.

> (1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.
>
> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer

> relating to the representation, unless substantial grounds exist to refuse.
>
> (3) Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(1), (2), (3) (2000). A comment provides a further explanation of this duty.

> A lawyer's duty to safeguard client documents does not end with the representation . . . . It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.
>
> The lawyer need take only reasonable steps to preserve the documents. For example, a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence. Similarly, a lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

Restatement (Third) of Law Governing Lawyers § 46(1), (2), (3) (2000).

Electronic Client Files

State bars generally permit lawyers to essentially retain all of their files in electronic form -- as long as that way of maintaining the files does not prevent lawyers from complying with all of the applicable ethics rules.

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

- Arizona LEO 07-02 (6/2007) ("In appropriate cases, a lawyer may keep current and closed client files as electronic images in an attempt to maintain a paperless law practice or to more economically store files. After digitizing paper documents, a lawyer may not, without client consent, destroy original paper documents that belong to or were obtained from the client. After digitizing paper documents, a lawyer may destroy copies of paper documents that were obtained from the client unless the lawyer has reason to know that

the client wants the lawyer to retain them. A lawyer has the discretion to decide whether to maintain the balance of the file solely as electronic images and destroy the paper documents.").

- Florida LEO 06-1 (4/10/06) ("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.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.").

The increasing use of electronic files has generated its own issues. For instance, some bar have understandably concluded that lawyers do not need to retain hard copies of documents if those documents are available electronically.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

Some bars have also wrestled with the length of time that a lawyer should keep a file after a matter has closed.

- Cruz v. Dollar Tree Stores, Inc., Case No. 07-04012-SC, 2012 U.S. Dist. LEXIS 68685, at *3, *6 (N.D. Cal. May 16, 2012) ("Rule 4-100(B)(3) requires an attorney to retain a complete record of all client funds and other properties coming into the possession of the attorney for at least five years after the conclusion of a litigation." (emphasis added); "Rule 4-100 deals primarily with preserving the identity of funds and other property held in trust for a client. While the scope of a client's property under Rule 4-100 may have been expanded to include attorney work product, . . . the Court is aware of no authority which has further broadened the rule so as to encompass the confidential information disclosed by an opposing party through discovery. Indeed, it strains credulity to suggest that another party's confidential materials become the property of a client when they are produced in discovery pursuant to a protective order. Further, reading Rule 4-100 so broadly would hamper the private resolution of discovery disputes. Parties might be unwilling to stipulate to protective orders or otherwise disclose confidential documents if they know that those documents could be retained by opposing counsel indefinitely.").

- Illinois LEO 12-06 (1/2012) ("A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period of most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information." (emphases added); "There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia 2002-01 (March 2002)."; "Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim." (emphasis added)).

Bars have explained that clients and lawyers can agree in a retainer letter how long the lawyer will retain the file.

- N.Y. City LEO 2010-1 (2010) ("Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions."; offering the following sample provision: "Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that 'materials' include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process."; "Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.").

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphasis added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

File Ownership if Clients Have Fully Paid Lawyers

Ethics and property law considerations affect states' approach to clients' ownership of files generated by their lawyers.

It is important to recognize the distinction between a lawyer's ethics duty to turn over all or part of a file to a former client (either with or without the former client's request) and a lawyer's obligation to produce documents in response to a discovery request in a dispute between the lawyer and the former client. The normal discovery rules generally define the latter duty.

ABA Model Rules. In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Presumably, such "other law" includes the ABA Model Rule governing any property that clients give their lawyers for safekeeping. ABA Model Rule 1.15. Lawyers generally must relinquish those to clients when the representation ends (or even before then, if the client requests return of that property).

The more complicated issue involves documents that the lawyers created or collected while representing the client.

ABA LEO 471 (7/1/15). In 2015, the ABA addressed fully paid lawyers' ethics obligations to provide portions of the lawyer's files to former clients. ABA LEO 471 (7/1/15).

The ABA largely rejected the majority "entire file" approach, under which lawyers must point to an exception when withholding any portion of their files requested by a client or former client. The ABA instead adopted the "end product," approach, although

indicating lawyers may have a duty to surrender internal law firm documents, drafts, etc., if withholding those would prejudice former clients -- especially in the context of the lawyer's unfinished work.

Under ABA Model Rule 1.15, the lawyer must return documents received from the client -- because those documents constitute property that the client has given to the lawyer.

Under ABA Model Rule 1.16(d), lawyers must take "reasonably practicable" steps to protect former clients upon a representation's termination -- including "surrendering papers and property to which client is entitled."

ABA LEO 471 (7/1/15). However, the rule does not describe which of the lawyer-created documents lawyers must surrender.

Most states follow the "entire file" approach, which

> assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Id.

Under that standard, lawyers may withhold documents requested by clients or former clients only when a "specific exception applies."

> Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person; materials containing a lawyer's assessment of the client; materials containing information, which if released, could endanger the health, safety, or welfare of the client or others; and documents reflecting only internal firm communications and assignments.

Id. (footnotes omitted).

A minority of states follow the "end-product approach," which requires a more limited surrender of files to former clients. Under this approach, lawyers must surrender

> correspondence by the lawyer for the benefit of the client; investigative reports and other discovery for which the client has paid; and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and other similar documents prepared by the lawyer for the client.

Id. (footnotes omitted). Lawyers may decline to surrender other documents.

> Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest, the client's creditworthiness, time and expense records, or personnel matters, are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes, drafts of legal instruments or documents to be filed with a tribunal, other internal memoranda, and legal research are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Id. (footnotes omitted). Under this "end-product" approach, "[f]inal documents supersede earlier drafts." Id.

The ABA endorsed the minority "end-product" approach, which it had articulated in ABA Informal LEO 1376 (1977).

However, lawyers in some circumstances may be required to surrender documents other than "end-product" documents,

> For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

Id. Although the determination of a matter before completion does not require lawyers to surrender all internal documents,

> at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.

Id.

In applying these general principles to a hypothetical client municipality which terminated a ten-year representation, the ABA explained that the terminated lawyers must surrender -- for completed matters,

> any materials provided to the lawyer by the municipality; legal documents filed with a tribunal -- or those completed, ready to be filed, but not yet filed; executed instruments like contracts; orders or other records of a tribunal; correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy; discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits; legal opinions issued at the request of the municipality; and third party assessments, evaluations, or records paid for by the municipality.

Id. (footnotes omitted). On the other hand, the lawyers in the hypothetical scenario do not have to surrender

> [d]rafts or mark-ups of documents to be filed with a tribunal; drafts of legal instruments; internal legal memoranda and research materials; internal conflict checks; personal notes; hourly billing statements; firm assignments; notes regarding an ethics consultation; a general assessment of the municipality or the municipality's matter; and documents that might reveal the confidences of other clients.

Id.

For "a matter that is not completed," the lawyer may be obligated to provide former clients

> materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.

Id.

For instance, the lawyer's must surrender the following documents for uncompleted matters:

> (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's [former client] matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

Id.

A lawyer's earlier supplying of documents during the representation "is not dispositive" of whether the lawyer must provide the materials again upon termination.

Id.

Similarly, the lawyer's earlier furnishing of document is not dispositive

> of who -- the lawyer or the client -- should pay for the time and cost of duplication of such materials upon termination of the representation.

Id.

In a footnote, the ABA encouraged lawyers "to explain in their retainer letters who is responsible for the costs of copying and under what circumstances." Id. n.35. Similarly, the ABA agreed with the reasoning of D.C. LEO 357 -- which explained that "'[l]awyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form;

entering into such agreements is prudent and can help avoid misunderstandings.'" D.C. LEO 357 (10/2012).

Restatement. The Restatement deals with a lawyer's file in two sections -- articulating a general rule and also explaining a lawyer's right to retain the file under certain conditions.

As a general matter, the Restatement explains that

> [o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> . . . Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(2), (3) (2000) (emphasis added).

Another Restatement provision discusses the client's right to the documents.

> As stated in Subsection (3), a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer, subject to the right to retain property under a valid lien . . . and to other justifiable grounds as discussed hereafter.
>
> A client is ordinarily entitled to inspect and copy at reasonable times any document relating to the representation in the possession of the client's lawyer . . . . A client's failure to assert the right to inspect and copy files during the representation does not bar later enforcement of that right, so long as the lawyer has properly not disposed of the documents . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000).

A comment describes the type of documents that a lawyer must furnish the client even without the client asking.

> Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances -- for example, when a client retained a lawyer to recover and destroy a confidential letter -- a lawyer may keep copies of documents when furnished to a client.
>
> If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. d (2000).

Another comment describes three situations in which a lawyer may refuse to provide the client access to the file.

First,

> [a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another . . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime . . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000) (emphasis added).

Second,

> [u]nder conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

Id. (emphasis added).

Third,

> [a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

Id. (emphasis added).

The Restatement also addresses the lawyer's right to be paid for this effort.

> Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000) (emphasis added).

Separate Restatement provisions deal with the lawyer's obligation to return the client's or a non-client's property.

> (1) Except as provided in Subsection (2), a lawyer must promptly deliver, to the client or nonclient so entitled, funds or other property in the lawyer's possession belonging to a client or nonclient.
>
> (2) A lawyer may retain possession of funds or other property of a client or nonclient if:
>
> (a) the client or nonclient consents;
>
> (b) the lawyer's client is entitled to the property, the lawyer appropriately possesses the property for purposes of the representation, and the client has not asked for delivery of the property;
>
> (c) the lawyer has a valid lien on the property (see § 43);
>
> (d) there are substantial grounds for dispute as to the person entitled to the property; or
>
> (e) delivering the property to the client or nonclient would violate a court order or other legal obligation of the lawyer.

Restatement (Third) of Law Governing Lawyers § 45 (2000). A comment explains the timing of this requirement.

> A lawyer's basic obligation under this Section is to deliver property of a client or nonclient promptly to that client or person unless an exception stated in Subsection (2) applies. The obligation covers all kinds of property. For example, a lawyer who has received a deposit against future fee bills must return the unearned portion of the deposit when the representation ends . . . .
>
> How soon the delivery must occur depends on the circumstances . . . . When the owner asks for delivery of the property, the lawyer must comply with the request. If the lawyer knows that the owner has need to possess the property by a given time, the lawyer should if reasonably possible deliver it by that time. The lawyer ordinarily should not delay longer than necessary to record and transmit the

> funds . . . . A client entitled to proceeds of a judgment normally should not have to wait more than a few days to receive the property from the client's lawyer. When the representation ends, moreover, any delay in delivering the client's property can hamper the client's affairs . . . . On the other hand, during the representation a lawyer is not required, in the absence of client request, to deliver items that might turn out to be needed for the representation . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. b (2000).

The next Restatement provision deals with the client's consent to the lawyer's continued possession of the property.

> Clients and others often ask a lawyer to retain possession of property. No formal contract is required. Most clients would expect that during a representation the lawyer would keep property needed for further steps in the representation, unless the client indicates to the contrary. Thus, during the representation a lawyer need not return documents or court exhibits unless the client so requests. For treatment of documents after the representation ends, see § 46. In some circumstances, for example, when the client agrees that the lawyer will invest client funds, the arrangement constitutes a business transaction with the client subject to the requirements of § 126.

Restatement (Third) of Law Governing Lawyers § 45 cmt. c (2000).

The Restatement deals with the lawyer's obligation if there is a dispute about the property.

> When it is unclear who is entitled to property in the lawyer's possession, the lawyer is not required to deliver the disputed property to either claimant; indeed, if the lawyer delivers the property to one claimant, the lawyer can later be held liable to the other. The lawyer should therefore safeguard the property until the disputants resolve it by contract or an appropriate procedure . . . . If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs. If a lawyer holds funds as an advance fee payment, the lawyer is not obliged to deliver those funds to

> the client when the client disputes the lawyer's good-faith claim that the sum withheld is due to the lawyer, but the lawyer may not transfer the disputed funds to the lawyer's personal account . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. d (2000). Not surprisingly, lawyers must comply with any court order dealing with the property.

> A court may order a lawyer to deposit property in court or in an interest-bearing account pending further court orders. A court might also require a lawyer to surrender an object to another party or allow its inspection at the lawyer's office, regardless of the wishes of the lawyer's client. Such a court order ordinarily binds a client's lawyer even if only the client is named in the order. A lawyer might also be constrained by a legal obligation not arising from a court order, for example a lien asserted by a third party. A lawyer is not required by any supposed duty to a client to deliver property to a claimant when doing so would cause the lawyer to violate a court order or other legal obligation.

Restatement (Third) of Law Governing Lawyers § 45 cmt. e (2000).

Finally, the Restatement addresses the interesting situation in which a lawyer receives stolen property.

> The lawyer's duties of confidentiality do not prevent a lawyer from complying with the requirement of this Section to return promptly to its owner property that a client has stolen and placed in the lawyer's possession. The client's transfer of the property as such is ordinarily not a communication subject to the attorney-client privilege . . . . Although the lawyer's knowledge that the goods are stolen from a given person will usually derive from confidential client information . . . , a lawyer who knowingly retains stolen goods is helping the thief conceal them from their proper owner, which is a crime. The same would be true were the lawyer, once having taken possession of the goods, to return them to the thief. By asking the lawyer to possess stolen goods, moreover, the client has lost the protection of the attorney-client privilege for any accompanying communications . . . .
>
> Although the lawyer must return the goods, there is no requirement that the lawyer explain their provenance or

> name the thief. To do so voluntarily might well violate the lawyer's duties of confidentiality . . . , even though a tribunal might be able to require disclosure . . . . In representing the client in defending against a charge of crime, the lawyer may retain the goods long enough to test or inspect them in preparation for the client's defense, though this does not authorize keeping them secret until the trial. . . .
>
> Finally, if a genuine dispute exists as to ownership of the property, the lawyer need not deliver it . . . , but must then notify each person having a substantial claim of the lawyer's possession . . . so that the lawyer's possession does not conceal the property from its owner.

Restatement (Third) of Law Governing Lawyers § 45 cmt. f (2000).

The general Restatement requirement that lawyers provide documents in their possession is subject to lawyers' right to

> decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4) (2000). This right involves what is commonly called "retaining liens."

State Courts and Bars. The debate over a lawyer's obligation to provide the file to a former client involves several aspects.

First, states applying their Rule 1.15 generally require lawyers to return any documents or other items that the clients gave the lawyers in connection with the representation.

- Sacksteder v. Senney, 2014-Ohio-2678, at ¶¶ 10, 11, 12 (Ohio Ct. App. 2014) (analyzing a former clients' right to a lawyer's file under Ohio law; "A client has the right to any original paper or document that he gave the lawyer because these are the client's personal property. Here, there are no such papers or documents in the case files. According to the trial court, it is 'undisputed that none of the documents in defendants' possession include any original documents or papers which had been previously provided to defendants by plaintiffs.' Opinion and Judgment Entry, 4 (Aug. 2, 2013)."; "A

client also has the right to any original paper or document that is reasonably necessary to the client's representation."; "As to any other original paper or document in the case files, Sacksteder fails to convince us that he either owns it or has the immediate right to possess it. We note that there is ongoing litigation and that the content of the case files could be in question. Also, we suspect that some of the documents in the case files were created, and are stored, electronically and therefore may have no physical form. An electronic document has no single original -- 'original' is any printed copy.").

If a lawyer cannot locate the client who has given the lawyer such documents, lawyers normally must try their best to locate the client. Lawyer who cannot successfully locate the client may have to apply their state's escheat statute.

- Alaska LEO 2015-2 (2015) ("Generally a lawyer does not have a responsibility to hold documents or property that a client has delivered unsolicited and that are not in connection with the representation, however the Ethics Committee recommends treating such items as abandoned property and following the guidelines set forth in Alaska Ethics Opinion 90-3."; "Even though the items may not be connected with the representation, and the lawyer may not have consented to hold anything -- in which case no true professional obligation arises -- the Ethics Committee recommends that, out of an abundance of caution and concern for the due process rights of the property owner, lawyers *may* follow the guidance set forth in Alaska Bar Association Ethics Opinion 90-3 (former rule DR 9-102(B)). This Opinion concerns the proper procedure when a lawyer cannot locate a former client for whom the lawyer is holding money in a trust account. The Ethics Committee concluded that the lawyer must exhaust reasonable efforts to locate the client, hold the funds for the requisite period of time, and then dispose of them as abandoned property pursuant to Alaska Statute 34.45.110-34.45.430. These statutes require periods of one to three years depending upon the type of property and the holder and this can impose a significant burden upon a lawyer who has not consented to hold the property and did not acquire the property for purposes of the representation, therefore the Committee recommends this only as precaution, but it is not required by any rule of professional responsibility.").

Second, states disagree about what portions of the file a lawyer must turn over to a former client. Case law and ethics opinions acknowledge and then choose between two approaches -- often called the "entire file" and the "end product" standards.

- Jones v. Comm'r, 129 T.C. 146, 157 (T.C. 2007) (noting the debate among the states about ownership of a lawyer's file; finding it unnecessary to decide how Oklahoma would address the issue, because the material at issue did not amount to work product and therefore belonged to the client; "Because

the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have served a property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under either approach, the documents in issue in this case belong property to petitioner's client, McVeigh [Oklahoma City bomber], and not to petitioner.").

- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)." (footnote omitted); "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).") (emphasis added).

Most states follow the majority "entire file" rule, which requires lawyers to turn over essentially their entire substantive file, unless some exception justifies withholding the documents.

- Virginia Rule 1.16(e) ("All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.").

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual

turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "'probate or estate matters, homicide cases, life sentence cases and lifetime probation case.'"; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those

> documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter." (emphasis added)).

A minority of states follow the "end-product approach" -- under which lawyers may withhold from clients non-final documents such as drafts, legal memoranda, etc. As explained above, ABA LEO 471 (7/1/15) explicitly adopted this admittedly minority view.

- Citizens Development Corp. v. Cnty. of San Diego, Case No. 3:12-cv-0334-GPC-KSC, 2015 U.S. Dist. LEXIS 169001, at *18-19 (S.D. Cal. Dec. 17, 2015) (holding that a lawyer hired by an insurance company to represent its insured did not act improperly; explaining among other things that the law firm had not improperly withheld from the insurance company the litigation file the firm created while representing the insured and the insurance company; "At issue appears to be what is meant by the 'complete litigation file.' CDC's lead counsel appears to take the position that the 'complete litigation file' includes 'a full and complete copy of ALL communications between your respective firms and the insured's carriers,' as well as the participation of C&J in 'ALL future oral and/or written communications between your law firms and the

insurance carriers.'. . . The Court finds that CDC overstates the meaning of 'complete litigation file.' First, CA Bar Guidance 2 contemplates that the litigation 'file' refers to physical or written records, including records of oral communications, but not the oral communications themselves. . . . It does not appear to contemplate that the insured should have the right to participate in all oral communications between the counsel and the insurer. Second, CA Bar Guidance 2 states that '[a]ny communication between the insurer and the retained attorney concerning the defense of insured's claim is a matter of common interest to both insured and insurer [to which] insured has a right.'. . . Thus, WS [law firm] is not required to turn over communications between itself and the insurer that are unrelated to the case.").

- 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at *4 n.2, *5 (E.D. Wis. Feb. 29, 2008) (analyzing implications of a joint representation by the law firms of Blank Rome and Quarles & Brady and a parent and its wholly owned subsidiary, which the parent sold to another company; noting that the change in the subsidiary's "ownership does not alter its existence"; explaining that the former subsidiary had now sued its former parent; "The parties agree that Wisconsin law governs the issues of document ownership and attorney-client privilege inasmuch as this is a diversity case. In Wisconsin, 'end product' documents such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client or opposing counsel belong to the client." (emphasis added); ultimately concluding that the two law firms jointly represented the parent and the wholly owned subsidiary in the sales transaction, and therefore had to produce pre-transaction documents and some post-transaction documents that referred to the law firm's service before the transaction).

- Pennsylvania LEO 2007-100 (2007) (holding that the client owns the files created by a lawyer while representing the client; explaining that the client might not be entitled to some internal documents; "Examples of items that might fall outside the scope of the formal 'file' are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem. Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file." (footnote omitted); noting the debate between states following the "entire file" approach and the "limited file" approach; following the latter, but with a proviso: "A substantial subset of the 'entire file' group of jurisdictions allow other 'non-substantive' items, generally those associated with law practice management, to be excluded from the 'file' that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel."; noting that clients and lawyers can address file ownership in a retainer agreement, although "it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer"; adopting the following guidelines: "A client is entitled to

> receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client. The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in response to a generalized request for access to or possession of the 'file', the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request. So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.").

Third, under either the "entire file" or the "end-product" approach, most states permit lawyers to withhold from their former clients purely administrative internal law firm documents.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working

lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Ohio LEO 2010-2 (4/9/10) ("Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer." (emphasis added); relying on a unique Ohio Rule 1.16(d): "'As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.'"; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 Tenn. App. LEXIS 84, at *19 (Tenn. Ct. App. Feb. 25, 2009) (holding that a lawyer did not have to make invoices available to the client; "We agree that the invoices are property of the law firm. . . . The invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather

the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered." (emphasis added)).

Fourth, not surprisingly, lawyers normally may also withhold other clients' documents that have been placed in the file.

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist.") (emphasis added).

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled." (emphasis added); also explaining that lawyers

may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request").

Fifth, some states allow lawyers to withhold other material.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is

> entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

Sixth, states differ in their approach to a lawyer's right to charge former clients for copying documents that lawyers surrender to those former clients.

The Restatement addresses a lawyer's right to charge the client for copying the file.

> Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000) (emphasis added).

Courts also disagree about lawyers' ability to bill former clients for copies of documents the former clients' request.

Some bars have explained that a lawyer may charge the client for such copies.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working

lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Illinois LEO 94-14 (1/1995) ("All original papers delivered to the lawyer by the client must be returned to the client. The lawyer may make copies of such material, if desired, at the lawyer's expense. With respect to other parts of the lawyer's file to which the client is entitled to access, including copies of documents that the client has already received, the originals may be retained by the lawyer and the client should be permitted to have copies at the client's expense. Consistent with Opinion No. 94-13, the Committee does not believe that a lawyer is required to act as a storage facility for clients, and therefore the lawyer is entitled to compensation for the reasonable expense involved in retrieving the files in question and providing copies of materials that the client has already received. The lawyer is also entitled to compensation for the reasonable expense of providing copies of any materials, such as routine administrative correspondence with third parties, that the client may not have received because the lawyer had no duty to provide the client with copies of such materials in the normal course of the representation, but to which the client is entitled to access upon reasonable request.").

Other bars hold that lawyers must pay for such copies themselves.

- Ohio LEO 2010-2 (4/9/10) ("Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- Pennsylvania LEO 1996-157 (11/20/96) ("Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

Seventh, one bar has indicated that lawyers may retain a copy of the client's file at the lawyer's expense -- even over the client's objection.

- New York LEO 780 (12/8/04) (assessing a lawyer's right to retain a copy of the client's file after termination of the attorney-client relationship; "Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest."; "In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense. This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." (footnote omitted); also holding that "[a] lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.").

This principle could become important if the lawyer suspects that the client has used the lawyer's services to engage in some wrongdoing, and wants to retain a copy in case anyone challenges the lawyer's actions.

File Ownership if Clients Have Not Paid Lawyers

States take different positions on a client's right to the file a lawyer generates while representing the client.

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not

been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy in case law, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

ABA Model Rules. In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representative, a lawyer shall take steps to the extent reasonably practicable to protect a client's

> interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Restatement. The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

At the end of the lengthy Restatement sections discussing lawyers' obligation to turn over their files to clients who have fully paid them, the Restatement notes an exception if the clients have not fully paid their lawyers.

The general Restatement requirement that the lawyer provides documents in the lawyer's possession is subject to the lawyer's right to

> decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4) (2000).

Another expansive Restatement section deals with such retaining liens.

> Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

Restatement (Third) of Law Governing Lawyers § 43(1) (2000).

Another Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

> Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

Restatement (Third) of Law Governing Lawyers § 43(2) (2000).

Not surprisingly, the Restatement acknowledges tribunals' ability to deal with such liens.

> A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

Restatement (Third) of Law Governing Lawyers § 43(3) (2000).

A comment provides more explanation.

> Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

A comment provides an explanation.

> Under this Section a lawyer generally does not acquire a nonconsensual lien on property in the lawyer's possession or recovered by the client through the lawyer's efforts. The Section thus does not recognize retaining liens on the client's documents except as provided by statute or rule . . . , although a lawyer may retain possession of a document when the client has not paid the lawyer's fee for preparing the document . . . .
>
> Security interests in property of nonclients, for example a mortgage on the house of a client's relative, are not as such subject to this Section. However, the nonclient might have a close relationship with the client, such as that of parent or spouse, and thus might be subject to similar pressures. Such security arrangements must meet the requirements of general law, which might treat such transactions as subject to obligations similar to those stated in this Section.

Restatement (Third) of Law Governing Lawyers § 43 cmt. a (2000).

Another comment explains how a lawyer's "retaining" lien applies to the file.

> A lawyer ordinarily may not retain a client's property or documents against the client's wishes . . . . Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid . . . . That law is not followed in the Section; instead it adopts the law in what is currently the minority of jurisdictions.
>
> While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute arises, a retaining lien would give little advance assurance of

> payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges . . . . Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However[,] the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

The next comment deals with a lawyer's right to retain particular documents that the client has not specifically paid for.

> A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert) ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client . . . .
>
> A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effective of the document would be seriously compromised by the lawyers retention of it.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000).

The Restatement provides two useful illustrations of how this principle works.

> Client retains Lawyer to prepare a series of memoranda for an agreed compensation of $100 per hour. Lawyer is to send bills every month. Client pays the first two bills and

> then stops paying. After five months, Client requests copies of all memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 1 (2000).

> The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 2 (2000).

State Courts and Bars. States have also dealt with a lawyer's right to withhold the file from a client who has not fully paid the lawyer.

This issue involves the propriety of viewing a lawyer's relationship with a client as essentially the same as the relationship between an auto mechanic and a customer. Auto mechanics normally can keep a customer's car until the customer pays the bill. Traditionally, lawyers have had the same power. However, the trend is clearly in the opposite direction.

Bars (and to a lesser extent, courts) take one of three basic approaches. First, some still follow the traditional "auto mechanic" approach, allowing lawyers to retain essentially all of the file until they are paid. Second, some have softened that traditional approach, and compel lawyers to turn over files if the clients would suffer in some way without the file. Third, some have essentially eliminated lawyers' retaining liens.

It makes sense to address this issue in historical order, because the trend is moving from the traditional approach to the elimination of retaining liens.

First, some courts and bars have articulated the traditional approach -- essentially allowing lawyers to retain a file until the client fully pays for them (all lawyers should check the current status of the pertinent state's approach -- given the trend against lawyers' assertion of retaining liens).

- Grimes v. Crockrom, 947 N.E.2d 452, 454-55 (Ind. Ct. App. 2011) (holding that a lawyer could assert a retaining lien even if the lawyer did not provide a detailed record of the lawyer's work to the client; "A common law retaining lien on records in the possession of an attorney arises on rendition of services by the attorney. . . . Crockrom does not direct us in any legal authority tying the validity of a retaining lien to the provision of an itemized bill to the client. Indeed, a retaining lien is complete and effective without notice to anyone. . . . And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established. . . . We hold that Grimes has a valid retaining lien over the medical records.").

- Brickell Place Condo Ass'n v. Joseph H. Ganguzza & Assocs., P.A., 31 So. 3d 287, 289, 290 (Fla. Dist. Ct. App. 2010) (holding that a lawyer who had arranged to charge an condominium association a flat fee for collection and foreclosure matters was bound by the ethics rules governing contingent fees, because the law firm was not paid until collection; ultimately holding that the law firm could not refuse to turn over its files until the contingency had occurred; "[T]he law firm filed a retaining lien and refused to provide the Associations with a copy of their files unless the Associations paid the law firm for its services on the pending collection and foreclosure cases even though the delinquent unit owners had not brought their accounts current."; "The Associations, therefore, claimed that the law firm[] could only recover the reasonable value for its services, limited by the maximum contract fee, upon the successful occurrence of the contingency. Because the contingency upon which the services were based has not yet occurred (the collection of the delinquent unit owners' fees), the law firm is not yet entitled to be paid for its services and the retaining lien filed by the law firm cannot be legally or ethically maintained. We agree."; "It is well recognized, and the Associations do not dispute, that an attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted." (emphasis added); "American courts, with few exceptions, have held that in cases where the client, not the attorney, terminates the relationship, the client cannot compel his former attorney to deliver up papers or documents in the attorney's possession that are secured by a retaining lien. Wintter, 618 So. 2d at 377 [Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 1993)]. The exceptions are where the client pays the fees due; the client furnishes adequate security for the payment which may be due or which is subsequently found to be due;

there is a clear necessity in a criminal case and a defendant cannot post security; or a lawyer's misconduct caused his withdrawal. . . . An additional exception is in contingency fee cases where the contingency has not occurred."; "An attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. Because the contingency has not occurred, the law firm could not assert a retaining lien for fees it contends it is owed on collection matters that were still pending when it was discharged. If the law firm believes it is owed money for services it rendered in the collection of delinquent unit owner fees, it may file a charging lien and is entitled to the reasonable value of its services on the basis of quantum meruit, limited by the contract flat fee the parties agreed to.").

- Moore v. Ackerman, 876 N.Y.S.2d 831, 833, 834, 835, 837, 838 (N.Y. Sup. Ct. 2009) (addressing a successor counsel's motion to compel former to turn over files; recognizing a retaining lien, and allowing replaced counsel to charge a copying fee as a condition to releasing the file to replacement counsel; "'The three remedies of an attorney discharged without cause -- the retaining lien, the charging lien, and the plenary action in quantum meruit -- are not exclusive but cumulative.'" (citation omitted); "The authorities are uniform . . . that '[a] court has discretion "to secure the fees and to order the files to be returned to the client before the fees have been paid."'"; "Otherwise applicable law . . . does not clearly establish whether the outgoing attorney is entitled to be paid or reimbursed copying charges for reproducing the client's file before releasing the original to the incoming attorney."; "Neither the Disciplinary Rules nor the Rules of the Second Department make any exception to the retention requirements where the attorney withdraws from representation or is discharged."; "Payment of the reasonable cost of copying the file could be charged to the client as a condition to a release of the client's file to incoming counsel."; "Which is not to say that a charge of $.75 per page is reasonable.").

Although courts and bars taking this traditional approach might provide some comfort to lawyers who want to withhold the file, those lawyers must also bear in mind the possible liability issues. A client claiming some prejudice due to the lawyer's withholding the file might file a malpractice claim against the lawyer, or file a malpractice counterclaim if the lawyer sues the former client for payment of the lawyer's bills. Withholding of the file might not violate the ethics rules, but it could support a malpractice claim or counterclaim, and at the least affect the "atmospherics" of the dispute over the lawyer's fees. In fact, those other issues normally "trump" the ethics

consideration, and prompt lawyers to turn over the file even if the ethics rules do not require it.

Second, some courts and bars have moved away from the traditional "auto mechanic" approach to a retaining lien

These courts and bars sometimes articulate standards under which the client can obtain the file without paying the lawyer. These standards represent a spectrum of prejudice the client must claim (or prove) before the lawyer becomes ethically obligated to turn over the file even if the client has not paid the lawyers.

Such courts and bars have articulated the following standards.

Substantial Prejudice[6]

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily

[6] This is the Restatement standard. Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000) ("A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effect of the document would be seriously compromised by the lawyer's retention of it.") (emphasis added).

for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.") (emphasis added).

Prejudice

- Arizona LEO 04-01 (1/2004) ("The inquiring attorney's assertion of a retaining lien on the entire file is improper. Because the inquiring attorney's asserted retaining lien does not extend to materials given to inquiring attorney for use at trial, it is unethical to assert a lien as to such materials. As to the remaining items in the file against which the inquiring attorney desires to assert a lien, the inquiring attorney bears the burden of establishing that his lien attaches to identified items in the file based on a particularized inquiry into the circumstances, and the requirements of Arizona law. No lien can attach to documents when the attachment would prejudice the client's rights. The limited facts provided by the inquiring attorney do not establish that he is entitled to a lien on the documents in the file. Therefore, he should assert no lien on the documents, and should promptly return or provide to the client the documents on which he has no lien claim. Not only do the plain terms of ER 1.16 compel the documents' return upon the client's request, so do the requirements of ER 1.15(d), which states '[A] lawyer shall promptly deliver to the client or third person any . . . other property that the client . . . is entitled to receive and, upon request by the client . . ., shall promptly render a full accounting regarding such property.") (emphasis added).

Harm

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . .

> However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.") (emphasis added).

Some courts and bars address the same issue, but from a different direction. Rather than requiring clients to prove the harm they will suffer if deprived of the file, these courts and bars explain that clients must prove how much they need those files.

Such bars and courts have articulated the following standards:

Pressing Necessity

- Conde & Cohen, P.L. v. Grandview Palace Condominium Assoc., No. 3D15-1109, 2015 Fla. App. LEXIS 11696 (Fla. Ct. App. 3d Aug. 5, 2015) ("It is well established that in this state any attorney has a right to a retaining lien on all of the client's property in the attorney's possession, whether related to only one specific matter, until the attorney is paid."; "In this case, no determination has been made as to the validity of any of the law firm's retainer agreements; no determination has been made as to the validity as to the law firm's retaining liens; and no determination has been made as to whether the law firm has been paid. Certainly, absent such determination, no order compelling the law firm to hand over its files may be entered without the requisite showing of pressing necessity and the posting of adequate security. Anything less amounts to a departure from the essential requirements of the law which will cause irreparable harm by nullifying the law firm's retaining liens.").

Essential Need

- Alaska LEO 2004-1 (1/15/04) ("In summary, an expert or investigator's report is part of the client's file. . . . A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount. The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case." (footnote omitted).

Third, at the other extreme, some states explicitly indicate that lawyers must relinquish all or a portion of the file even if the client has not paid them.

- Virginia Rule 1.16(e) (requiring Virginia lawyers to turn over certain portions of their file to clients "whether or not the client has paid the fees and costs owed the lawyer").

- Martin Bricketto, New Jersey Advisory Panel Backs Ban On Attorney Retaining Liens, Law360, Nov. 26, 2012 ("A New Jersey Supreme Court advisory committee has recommended prohibiting attorneys from clinging to client files and other property to collect on unpaid legal bills, despite arguments from the state bar association that the practice remains a legitimate avenue for pursuing payment."; "The Advisory Committee of Professional Ethics was charged with weighing the pros and cons of the common law retaining lien. As part of that process, the panel sought the participation of the New Jersey State Bar Association (NJSBA), which said the liens should continue to be an option for attorneys as long as clients' rights are protected."; "However, in a report made available on November 19, the committee found that the lien is most effective when it hurts clients."; "'A qualification that the lien should not be asserted when it causes prejudice to clients renders the lien ineffective as a method to obtain payment,' the committee said, recommending that the state Supreme Court amend the Rules of Professional Conduct to ban the practice."; "The committee said lawyers with "any sense of professionalism" rarely assert a common law retaining lien when a client urgently needs the file."; "'Assertion of the lien at a time when it is effective -- when the inconvenience to the client in being denied access to his or her property is most intense -- is unduly destructive of the lawyer-client relationship and impacts the public confidence in the bar and the judicial system,' the committee said."; "A lawyer, often when he or she has withdrawn or been terminated from a case, can use the lien to keep a client's file or other property if the client refuses to pay up, the report said. However, a court can order a client's former attorney to turn over such papers if retaining them prejudices the client in continuing to pursue a legal claim or defense, according to the report."; "The Restatement of the Law has been advocating doing away with the common law lien, and some scholars have found that retaining liens can raise concerns such as potential overreaching and breach of fiduciary duty, the report said."; "According to the committee, declining use of the lien in recent years arguably reflects evolving public policy in the state to protect clients, the less powerful party in an attorney-client relationship."; "The state Supreme Court will ultimately decide the fate of the common law retaining lien, and comments are now being accepted on the advisory committee's report and recommendation. Any such feedback is due by January 31.").

- Mary Pat Gallagher, New Jersey Erects Ethical Bar to Common-Law Liens on Client Files, N.J. L.J., Mar. 26, 2013 ("As of April 1, lawyers no longer will be able to hold onto client files and papers to collect fees. An amendment to Rule of Professional Conduct (RPC) 1.16(d), effective that date, states flatly, 'No lawyer shall assert the common law retaining lien.'").

- Brussow v. Utah State Bar, 286 P.3d 1246, 1249, 1252, 1253, 1354 (Utah 2012) (relying on an explicit Utah ethics rule in holding that a Utah lawyer cannot retain a client's file under a retaining lien; "Mr. Brussow [lawyer] acknowledged that he had received requests for Ms. Langley's [client] file

> from Ms. Langley and her new attorney, but he argued that he was entitled to retain the file because Ms. Langley had failed to pay the fees for the deposition transcripts. He also argued that he had functionally provided the file to Ms. Langley by sending her copies of his work as he performed it. Finally, he claimed that retaining the file did not cause any harm to Ms. Langley."; "[T]he comments [to Utah Rule 1.16] state that '[t]he Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.'"; "[T]he plain language of rule 1.16(d) does not allow attorneys to assert a lien on a client files to secure payments from a client."; "[A]lthough Mr. Brussow may have sent Ms. Langley copies of his work as he performed it, her client file likely contained more than the documents that he drafted, such as documents submitted by the opposing party in the proceeding, discovery materials, depositions, or witness statements. Further, Ms. Langley testified at the hearing before the Screening Panel that she and her new lawyer had to 'try to catch up on what was going on without the file by getting copies of the court records.' This testimony indicates that Ms. Langley did not have the information that she needed from her client to move forward with her case. Thus, regardless of whether Mr. Brussow sent Ms. Langley copies of his work as he performed it, rule 1.16(d) required him to provide her file to her upon her request.").

Under this approach, lawyers essentially must treat their files as if they have been fully paid. This is not to say that they must automatically turn over all of their files. Even if they are fully paid, lawyers must determine what files the ethics rules require them to turn over to their clients or former clients. Most bars take what is called the "entire file" approach, which generally requires lawyers to turn over drafts of documents, etc. A minority of some bars use what is commonly called the "end-product" approach, under which they must give clients only the final version of documents, etc. Under either approach, lawyers generally may withhold purely internal administrative documents relating to staffing, etc.

Under any of these standards, other issues can arise. For instance, bars take different positions on whether certain types of documents are immune to otherwise permissible retaining liens.

- In re Attorney G., 302 P.3d 248, 252-53 (Colo. 2013) (holding that a lawyer could not assert an attorney lien over a client's passport; "[A] United States passport is a sui generis type of federal property that does not fall within a client's 'papers' on which a retaining lien may be asserted under section 12-5-120.").

Bars also disagree about whether clients can charge their clients for copies of documents that the lawyers must turn over to the clients.

- New York City LEO 2008-1 (07/2008) ("In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided."; "In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

E. TRANSACTIONAL ISSUES

1. Adversaries' Substantive Mistakes

Lawyers whose transactional or litigation adversaries have used artificial intelligence and made a substantive mistake face ethics issues.

In some situations, a negotiation/transaction adversary makes a substantive mistake. For instance, the adversary might forget to ask for an indemnity in a situation which would normally call for an indemnity. Or the adversary might make changes in one part of a lengthy contract that has implications in another part of the contract, which the adversary does not realize. These mistakes differ from what might be considered drafting mistakes (sometimes called "scrivener's errors"), such as overlooking a necessary comma, or failing to include a provision that the negotiating parties agree to add to a contract, etc. Those are discussed below.

Courts and bars seem to agree that lawyers generally have no duty to transactional adversaries, other than to avoid fraudulent representations or asserting clients' misconduct.

The ABA Model Rules recognize a limited duty by lawyers to correct a negotiation adversary's misunderstanding not resulting from the lawyer's or the client's factual misstatements.[1]

[1] Authorities agree that lawyers must correct their own misstatements or their client's misstatements that might mislead a transactional counterparty. Restatement (Third) of Law Governing Lawyers § 98 cmt. d (2000) ("A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. . . . Disclosure, being required by law . . . , is not prohibited by the general rule of confidentiality . . . . Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement."); Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, ABA Litigation Ethics 1 (Summer 2005) (explaining that a lawyer learning that her client had lied to a transactional counterparty must correct the client's lie before consummating a settlement).

> In the course of representing a client a lawyer shall not knowingly:
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1(b).

Comment [1] provides some explanation.

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

The Restatement deals in several places with a lawyer's silence in the face of a negotiation/transactional adversary's misunderstanding of facts.

In one section, the Restatement explains that

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
>
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a

> writing, evidencing or embodying an agreement in whole or in part.
>
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of the Law (Second) Contracts, § 161 (1981). A comment sets a fairly high disclosure duty.

> One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief . . . . In the case of standardized agreements, these rules supplement that of § 211(3), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

Restatement of the Law (Second) Contracts, § 161 cmt. e (1981).

The Restatement includes an illustration of this concept.

> A, seeking to induce B to make a contract to sell a tract of land to A for § 100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage, and he knows that it does not contain such a provision but does not disclose this to B. B signs the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164. Whether, at the request of B, the court will decree that the writing be reformed to add the provision for assumption is determined by the rule stated in § 166.

Restatement of the Law (Second) Contracts, § 161 cmt. e, illus. 12 (1981).

Another Restatement section states a more obvious rule -- requiring lawyers to comply with any legal compulsion requiring disclosure of facts.

> A lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law.

Restatement (Third) of Law Governing Lawyers § 98(3) (2000).

A Restatement comment bluntly states that

> In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Bars and courts have taken differing positions on a lawyer's duty in this setting.

Some states have seemingly increased lawyers' disclosure obligation by removing the confidentiality reference. For instance, Virginia's Rule 4.1(b) indicates as follows:

> [i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Virginia Rule 4.1(b). Deleting the phrase "unless disclosure is prohibited by Rule 1.6" removes the confidentiality duty's ability to "trump" the disclosure duty.

Most authorities go the other way -- requiring lawyers to stay silent in the face of an adversary's factual misunderstanding that the lawyer or the lawyer's client did not induce.

For instance, a 1965 ABA legal ethics opinion emphasized lawyers' duty of confidentiality in describing lawyers' approach to negotiations.

- ABA LEO 314 (4/27/65) (explaining that lawyers who learn that their clients have provided false information to the IRS may withdraw, but may not disclose the client's deception, because the IRS is not a tribunal; "The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it."; "The Internal Revenue Service is neither a true tribunal, nor even a quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute."; "The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances."; "Fundamentally, subject to the restrictions of the attorney-client privilege imposed by Canon 37 [emphasizing "the duty of a lawyer to preserve his client's confidences"], the lawyer may have the duty to withdraw from the matter. If for example, under all circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very fact of disassociation would have the effect of violating Canon 37. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer." (emphasis added); withdrawn in ABA LEO 352 (7/7/85), which explained the criticism of ABA LEO 314's position that lawyers may take positions with the IRS "just as long as there is a reasonable basis" for doing so; concluding that lawyers "may advise reporting a position on a [tax] return" even though the lawyer "believes the position probably will not prevail," there is no "substantial authority" supporting the position -- as long as the position satisfies ABA Rule 3.1's requirement that lawyers may assert a position "which includes a good faith argument for an extension, modification or reversal of existing law.").

A thoughtful 1980 article published by the American Bar Foundation bluntly stated that all settlement negotiations involve deception.

> On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker

> player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 927 (1980).

Thus, some ethics opinions take a narrow view of lawyers' duty to correct a negotiating counterparty's misunderstanding.

- N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (holding that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure; "A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead. If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction." (emphases added); "It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.").

- New York County LEO 686 (7/9/91) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.").

Some ethics opinions seem to require such disclosure. A 2015 California legal ethics opinion presented one scenario in which a lawyer would violate the ethics rules by failing to disclose a material fact unknown to the adversary. The scenario involved a lawyer scheduling settlement negotiations in an unemployed client's case against a former employer seeking lost wages, among other things. In the Bar's scenario, the lawyer deliberately scheduled the settlement negotiations the day before the client was to begin a new job, which allowed the client and lawyer to honestly say to the adversary that the client was still unemployed. However, the Bar explained that a wage-loss claim assumes continuing losses in the future -- which would be inconsistent with the lawyer's knowledge that the client would start a new job the next day.

- California LEO 2015-194 (2015) (finding that a lawyer making a true but misleading statement about a client's employment had a duty to disclose additional facts to avoid an impermissibly misleading statement to an adversary; "The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be $75,000.00. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney

> makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component."; "This example raises two issues: the failure to disclose the new employment, and client's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, assuming that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job, including in the list of Plaintiff's damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because the Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. See, e.g., Scofield v. State Bar (1965) 62 Cal.2d 624, 629 [43 Cal.Rptr. 825] (attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant, disciplined for making affirmative misrepresentations with the intent to deceive); Pickering v. State Bar (1944) 24 Cal.2d 141, 144 [148 P.2d 1] (attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)). Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client's instructions, rule 3-700(B)(2) requires withdrawal if an attorney's representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff's instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If the client refuses, Attorney must withdraw under rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Formal Opn. No. 2013-189; 8/ see also Los Angeles County Bar Association Opn. No. 520).").

Other bars have also indicated that lawyers in some situations must affirmatively disclose adverse facts to the adversary.

- Pennsylvania LEO 97-107 (8/21/97) (analyzing a settlement agreement that was premised on a client's inability to convey a timeshare by deed; explaining that after negotiating a settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the timeshare by deed; holding that

> the lawyer must disclose that fact; "Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false." (emphasis added)).

Courts show the same dichotomy.

Some courts find that lawyers need not disclose adverse facts to an adverse party entering into settlement negotiations before the completion of discovery.

- Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").

- Brown v. County of Genesse, 872 F.2d 169, 173, 175 (6th Cir. 1989) (reversing a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement); first noting that "counsel for Brown could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct."; criticizing the lower court's analysis; "[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. 'An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to "fraud upon the court" for purposes of vacating a judgment under Rule 60(b).'" (emphasis added) (citation omitted); also noting that the county's lawyer was not certain that the claimant misunderstood the facts; "The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.").

In contrast, several courts either criticized, imposed liability, refused to dismiss cases or otherwise condemned lawyers who did not disclose adverse facts.

- Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28-29, 32 n.6, 33, 38 (Cal. Ct. App. 2004) (reversing a dismissal of a fraud action against Jones Day for representing a buyer in a corporate transaction who did not advise the seller of shares of a "toxic" financing deal that adversely affected the value of the shares in the new company that the seller obtained; affirming dismissal of a negligent misrepresentation claim against Jones Day, but declining to find against Jones Day on

the fraud claim; noting in the description of the case that Jones Day won summary judgment in other similar cases against it; "A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his valuable stock in the acquired company for 'toxic' stock in the acquiring company. The law firm demurred. It contended it made no affirmative misstatements and had no duty to disclose the terms of the third party investments to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction." (emphases added); "The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. . . . Since no positive assertions are alleged, other than the comments that the financing was 'standard' and 'nothing unusual,' no claim for negligent misrepresentation is stated."; "Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.'" (citation omitted) (emphasis added); "Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in MonsterBook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree."; "While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits.").

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735 (Conn. App. Ct. 2001) (suspending for five years a lawyer for making a true but misleading statement -- providing lenders copies of his tax return, but failing to explain that he had not actually paid the taxes; "As a condition to receiving the loans, the defendant provided Sanborn [mortgage company] and the Picards [couple whose property defendant purchased, who also made a $30,000 loan to him] with

copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of $93,603 and a tax liability of $26,210. His 1993 federal income tax return stated that the adjusted gross income was $116,950, with a tax owing of $31,389."; "As of the date of the closing, however, the defendant had in fact not paid, not even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax obligations.").

- Neb. v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who knew that an unrepresented counterparty was unaware of a $1,000,000 insurance policy that the lawyer's client had available; "On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for $45,000 of the State Farm settlement of $100,000, and an additional $15,000 if and when Medina settled with Allstate, plus another $5,000 if the settlement proceeds from Allstate exceeded $40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent Addison."; "In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).").

- Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a $1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

In 1999, the District of New Mexico dealt with what the court found was "sharp practice." A plaintiff's lawyer, who had deliberately picked an effective date of a release

knowing the release would not cover an additional claim that his client eventually asserted. The court held that the plaintiff had not acted unethically, but decried the unprofessional conduct.

- Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 640, 638, 640-41, 641 (D.N.M. 1999) (rejecting defendant's claim for sanctions based on "a material misrepresentation by Plaintiff's attorney as to why he sought the change in the effective date of the release in CIV 96-1472."; finding that defendant's argument procedurally defective; also finding plaintiff's claim for sanctions against defendant procedurally defective; describing the background of the parties' competing claims for sanctions: "Defendant's counsel drafted the settlement documents in the prior action unaware of the CNMCF Warden's August 28, 1997 letter or Plaintiff's retaliation claim. As drafted, the effective date of the release was to be the date Plaintiff executed the document. On September 2, 1997, Plaintiff's counsel (Mr. Mozes) requested that the release be effective only through August 21, the date of the settlement conference. When questioned why, Plaintiff's counsel responded that such was his normal practice. Defendant contends that based on this representation, its counsel agreed to the request. Plaintiff's counsel discussed the change in a September 2, 1997 letter indicating that 'we will release the "State" up through the date of the Settlement Conference, August 21, 1997.'" (emphases added); "Although Rule 11(c)(1)(A) provides that 'if warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [for sanctions]' (emphasis added), the court does not believe that such fees are warranted, even in the face of Defendant's non-compliance with the safe-harbor provisions of Rule 11, because of the sharp practices engaged in by the Plaintiff's counsel."; "As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, 'it's a short road that doesn't have a bend in it.' The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. See 2 N.M. R. Ann. (1998), Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities ('As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.'); id. § 16-401 ('In the course of representing a client a lawyer shall not knowingly [] make a false statement of material fact or law to a third person.'); id § 16-804(C); ABA/BNA Lawyers' Manual on Professional Conduct,

> § 71:201 ('An omission of material information that is intended to mislead a third person may constitute a 'false statement.'). The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. See Restatement (Second) of Torts § 529 & cmt. A ('A statement containing a half-truth may be as misleading as a statement wholly false.') (1977)."; "What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse." (emphasis added); "Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end." (emphasis added)).

In 2015, a Michigan appellate court vigorously rejected plaintiff's argument that she should be entitled to recover from defendant Progressive $28,000 to cover a hospital bill -- which arrived after she had given Progressive a full release in return for a $78,000 settlement on a personal injury claim. The court repeatedly blamed the plaintiff's predicament on her lawyer rather than defendant Progressive or its lawyer.

> When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. . . . Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is

> conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge. . . . If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. . . . If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement. . . . Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts. . . . Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.

Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-20 (Mich. Ct. App. Mar. 5, 2015)[2] (emphasis added).

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[2] Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-4, *4-5, *5, *16, *19-20, *20 (Mich. Ct. App. Mar. 5, 2015) (analyzing efforts by a car accident plaintiff who settled her personal injury protection claim against defendant Progressive for $78,000 for which she gave Progressive a full release; noting that days after the settlement she received a $28,000 from the hospital at which she was treated, which was in addition to the surgeon's bill; explaining that plaintiff sought to void the settlement agreement because Progressive was aware of the hospital bill but that she was not aware of it at the time she settled with Progressive; reversing the trial court's order voiding the settlement; noting plaintiff's lawyer could have handled the settlement differently, but had failed to protect his client; "When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. There are many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the slate clean of any claims incurred prior to the date of settlement. But they did not do so. Instead, they settled for a complete waiver of claims for $78,000, and Progressive paid this sum to buy its peace and achieve finality in this litigation." (footnote omitted); "Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's

Other courts take the same approach, although perhaps without the vehement language.

- Lighthouse MGA, L.L.C. v. First Premium Ins. Grp., Inc., 448 F. App'x 512, 516, 517, 518 (5th Cir. 2011) (holding that the general counsel of a party in a transaction did not jointly represent the counterparty, and did not engage in an affirmative misrepresentation about a forum selection clause in the contract; concluding that the lawyer did not have a duty to tell the unrepresented counterpart about the forum selection provision; finding that the lawyer did not have a conflict under Rule 1.7; "Lighthouse's Director of Marketing has affirmed that the general counsel was 'the attorney for First Premium,' and there is no evidence in the record that the general counsel ever undertook to give legal advice to Lighthouse or purported to draft the contract on Lighthouse's behalf. As First Premium notes, even if Lighthouse subjectively believed that First Premium's general counsel was also Lighthouse's attorney, such a belief would not be reasonable." (footnote omitted); finding the lawyer did not violate Rule 4.3 by providing advice to an unrepresented party; "As First Premium notes, no authority supports Lighthouse's contention that First Premium's general counsel provided legal advice to Lighthouse merely by drafting the contract."; concluding that the lawyer did not violate Rule 8.4(c)); "There is no evidence that the general

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interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge." (footnotes omitted); "If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. And, were we to credit the theory that opposing counsel had a duty to notify plaintiff of the $28,000 charge, then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer. It is the obligation of plaintiff's attorney to ensure his client knows that a settlement, like the one at issue here, encompasses all claims. If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement."; "Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts."; finding that the settlement did not result from a "mutual mistake," but rather because plaintiff's lawyer had not protected his client; "Here, plaintiff seeks to engage in exactly this sort of obligation shifting: because her trial attorney did not consider that she might face additional (and perhaps unknown) charges for PIP benefits incurred before November 5, 2013 -- i.e., the $28,942 Synergy billing -- she argues that Progressive had a duty to inform her of this billing during the settlement negotiation. Of course, Progressive has no such duty. Progressive, as a defendant in litigation, is in an adversarial position with plaintiff, and, as such, has every right to protect its interest and to expect that courts will uphold a settlement freely entered into by the parties. Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.").

counsel made any false or misleading statements to Lighthouse. To the extent that Lighthouse's argument is based on the general counsel's failure to point out of explain the forum selection clause to Lighthouse, First Premium's general counsel did not have a fiduciary relationship with Lighthouse that would give rise to a duty to convey that information under Louisiana law.").

- Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (holding that a lawyer did not have a duty of professional care to an unrepresented counterparty in a real estate transaction).

A 2013 California legal ethics opinion dealt with a transactional adversary's substantial mistake. California LEO 2013-189 (2013)[3] started with a basic scenario:

[3] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's

> Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete.

California LEO 2013-189 (2013).

Scenario A involves an adversary's substantive mistake.

> Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless,

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Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

> because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.

Id.

The legal ethics opinion started its analysis with a general statement:

> Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. (emphasis added). On the other hand,

> an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of this scenario:

> In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an

> affirmative duty to disclose the apparent error to Buyer's Attorney.

Id. (emphasis added).

Scenario B involved what would be considered an adversary's scrivener's error -- which raises different issues.

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

2. Adversaries' Scrivener's Errors

Documents prepared by artificial intelligence might contain scrivener's errors. This triggers ethics implications.

In some situations, lawyers or their clients make what could be called a scrivener's error. These differ from substantive mistakes, such as forgetting to negotiate a provision that would normally be found in a contract, etc.

A scrivener's error often involves a typographical mistake, a failure to highlight a change, etc. In today's fast-paced and electronic communication-intensive world, such mistakes can occur easily.

- Jim Carlton, Fresh Dispute Mars Bay Area Transit Deal, Wall St. J., Nov. 18, 2013 ("An unusual dispute threatens to undo a contract agreement between management and labor leaders of the Bay Area Rapid Transit (BART) system, raising the possibility of another crippling public-transit strike."; "The dispute centers on a provision in the contract that allows workers to take up to six weeks of paid family leave. Management says the provision was never agreed to and was left in as a result of a clerical error. Representatives of the two unions, Amalgamated Transit Union (ATU) Local 1555 and Service Employees International Union (SEIU) Local 1021, say BART negotiators were fully aware of it."; "Labor experts said that, while unusual, it isn't unprecedented for a dispute to arise over the terms of a labor contract after it has been ratified. 'There are a number of cases that arise in arbitration over the allegation that something is in the agreement as a result of a mutual mistake,' said William B. Gould IV, emeritus professor of law at the Stanford Law School and former chairman of the National Labor Relations Board."; "In the BART case, 'there is certainly some kind of screw-up,' Mr. Gould added. 'The question is really going to be, if they are unable to resolve this through discussion and negotiations, was this a mutual mistake?'").

- BBC News (Europe), Bank Clerk Falls Asleep On Keyboard And Accidentally Transfers £189 Million To Customer, June 10, 2013 ("A German labour court has ruled that a bank supervisor was unfairly sacked for missing a multi-million-euro error by a colleague who fell asleep during a financial transaction. The clerk was transferring 64.20 euros (£54.60) when he dozed off with his finger on the keyboard, resulting in a transfer of 222,222,222.22 euros (£189Million). His supervisor was fired for allegedly failing to check the transaction. But judges in the state of Hesse said she should have only been reprimanded.").

- Brad Heath, Small Mistakes Cause Big Problems, USA Today, March 30, 2011 ("If you're reading this in New York, you're probably too drunk to drive. That's because lawmakers accidentally got too tough with a get-tough drunken-driving law, inserting an error that set the standard for 'aggravated driving while intoxicated' below the amount of alcohol that can occur naturally. The one-word mistake makes the new law unenforceable, says Lieutenant Glenn Miner, a New York State Police spokesman. However, drivers with a blood-alcohol content of 0.08% or higher can still be prosecuted under other state laws. In the legislative world, such small errors, while uncommon, can carry expensive consequences. In a few cases around the nation this year, typos and other blunders have redirected millions of tax dollars or threatened to invalidate new laws. In Hawaii, for instance, lawmakers approved a cigarette-tax increase to raise money for medical care and research. Cancer researchers, however, will get only an extra 1.5 cents next year -- instead of the more than $8 million lawmakers intended. That's because legislators failed to specify that they should get 1.5 cents from each cigarette sold, says Linda Smith, an adviser to Governor Linda Lingle."; "New York's mistake came in a bill meant to set tougher penalties and curb plea bargains for drivers well above the legal intoxication standard. Instead of specifying blood alcohol as a percentage, as most drunken-driving laws do, New York set its threshold as 0.18 grams --'so low you can't even measure it,' Miner says.").

- Anahad O'Connor, New York State Backs Remorseful Buyers at Rushmore Tower, The New York Times, April 9, 2010 ("Call it the multimillion-dollar typo. On Friday, the New York State attorney general's office ruled in favor of a group of buyers who were looking to back out of their multimillion-dollar contracts at The Rushmore, an expensive Manhattan condominium building along the Hudson River. The buyers found an unusual loophole -- a seemingly minor typo in a date in the densely worded 732-page offering plan -- and used it to argue that they deserved their hefty deposits back."; "In this case, the typo got in the way. Instead of stating that buyers had the right to back out if the first closing did not occur before September 1, 2009, the offering plan stated that buyers had the right to back out if the first closing did not occur before September 1, 2008, which was the first day of the budget year, not the last. Ultimately, the first closing took place in February 2009. The sponsors argued that they made a trivial mistake -- a typo that lawyers refer to as a 'scrivener's error' -- that should be overlooked. But the attorney general's office disagreed. It sided with the buyers.").

- Mizuho Securities Sues Tokyo Stock Exchange Over 41 Billion Yen Trade Fiasco, Kyodo News, Oct. 28, 2006 ("Mizuho Securities Company filed a lawsuit Friday against Tokyo Stock Exchange (TSE) Inc. at the Tokyo District Court for 41.5 billion yen in damages, claiming the bourse caused it huge losses when the TSE computer system failed to process a correction to an erroneous order the brokerage placed last December. The suit brought by Mizuho Securities, a unit of Mizuho Financial Group Inc., marks the first time

a brokerage has sued the operator of the Tokyo Stock Exchange over equity trading. Last December, a Mizuho Securities clerk mistakenly entered a sell order for 610,000 shares in staffing company J-Com Company for 1 yen each. The actual order was one share for 610,000 yen. As soon as the brokerage noticed the mistake, it tried to withdraw the sell order but the TSE's computer system took time to process the cancellation order. Sources said earlier this month that Mizuho lost about 40.7 billion yen buying back all the shares from people who bought at the erroneous price and said the brokerage has calculated 40.4 billion yen of that loss was due to a system failure at the TSE.").

- Grant Robertson, Comma Quirk Irks Rogers Communications, The Globe & Mail, Aug. 6, 2006 ("It could be the most costly piece of punctuation in Canada. A grammatical blunder may force Rogers Communications Inc. to pay an extra $2.13-million to use utility poles in the Maritimes after the placement of a comma in a contract permitted the deal's cancellation. The controversial comma sent lawyers and telecommunications regulators scrambling for their English textbooks in a bitter 18-month dispute that serves as an expensive reminder of the importance of punctuation. Rogers thought it had a five-year deal with Aliant Inc. to string Rogers' cable lines across thousands of utility poles in the Maritimes for an annual fee of $9.60 per pole. But early last year, Rogers was informed that the contract was being cancelled and the rates were going up. Impossible, Rogers thought, since its contract was iron-clad until the spring of 2007 and could potentially be renewed for another five years. Armed with the rules of grammar and punctuation, Aliant disagreed. The construction of a single sentence in the 14-page contract allowed the entire deal to be scrapped with only one-year's notice, the company argued. Language buffs take note -- Page 7 of the contract states: The agreement 'shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.'"; "Had it not been there, the right to cancel wouldn't have applied to the first five years of the contract and Rogers would be protected from the higher rates it now faces. 'Based on the rules of punctuation,' the comma in question 'allows for the termination of the [contract] at any time, without cause, upon one-year's written notice,' the regulator said. Rogers was dumbfounded. The company said it never would have signed a contract to use roughly 91,000 utility poles that could be cancelled on such short notice. Its lawyers tried in vain to argue the intent of the deal trumped the significance of a comma. 'This is clearly not what the parties intended,' Rogers said in a letter to the CRTC.").

- Gladwin Hill, For Want of Hyphen, N.Y. Times, July 27, 1962 ("The omission of a hyphen in some mathematical data caused the $18,500,000 failure of a spacecraft launched toward Venus last Sunday, scientists disclosed today. The spacecraft, Mariner I, veered off course about four minutes after its launching from Cape Canaveral, Florida, and had to be blown up in the air.

> The error was discovered here this week in analytical conferences of scientists and engineers of the National Aeronautics and Space Administration, the Air Force and the California Institute of Technology Jet Propulsion Laboratory, manager of the project for N.A.S.A. Another launching will be attempted sometime in August. Plans had been suspended pending discovery of what went wrong with the first firing. The hyphen, a spokesman for the laboratory explained, was a symbol that should have been fed into a computer, along with a mass of other coded mathematical instructions. The first phase of the rocket's flight was controlled by radio signals based on this computer's calculations. The rocket started out perfectly on course, it was stated. But the inadvertent omission of the hyphen from the computer's instructions caused the computer to transmit incorrect signals to the spacecraft.").

In an AI-created document, it might be impossible to distinguish a substantive mistake from a scriviners error.

A lawyer's own scriviner's error may or may not amount to malpractice – which is discussed elsewhere.

A lawyer's duty when aware of an adversary's scriviners error involves a fascinating contrast with the situation raised by an adversary's substantive mistake.

Ethics authorities usually do not deal with such drafting errors, but rather with more substantive mistakes or misunderstanding.

In 1986, the ABA explained that a lawyer in this situation did not have to advise a client of the adversary's scrivener's error.

- Informal ABA LEO 1518 (2/9/86) (analyzing the following situation: "A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance." (emphasis added); concluding that the lawyer must advise the adversary of the mistake but need not advise the lawyer's client of the mistake; "The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee

> concludes that the error is appropriate for correction between the lawyers without client consultation. A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983)." (emphases added); "The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by A and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."; providing a further explanation in a footnote; "The delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer." (emphasis added); also analyzing the impact of ABA Model Rule 1.6, and the opinion's deliberate lack of an analysis if the client wanted to take advantage of the adversary's mistake; "Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion' -- in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to expl[oi]t the error.").

The next question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA LEO 1518 (2/9/86). As explained above, the ABA concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57

(Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

Predictably, courts have little patience with transactional or litigation adversaries' attempt to exploit a scrivener's error.

- Cadbury UK Ltd. v. Meenaxi Enterprise, Inc.,, Cancellation No. 92057280, Trademark Trial & Appeal Board,at 3, 4, 9, 10, 11, 13 (USTPO July 21, 2015) (compelling responses to document requests, and rejecting the recipient's delay in responding to the document requests based on requesting party's obviously incorrect designation of the entity from which it sought the document; "As to the merits, this dispute centers on a typographical error. Respondent concedes that it made a typographical error in its document requests, inadvertently referring in the preamble to Petitioner as 'Venture Execution Partners, Inc.,' instead of 'Cadbury UK Limited.'"; "Petitioner argues that the typographical error was a crucial mistake, the result of which is that the document requests were never directed to Petitioner."; "The isolated reference to Venture Execution Partners, Inc., was clearly a typographical error; it did not cause a matter of real confusion or misunderstanding. The motion to compel is the result of Petitioner's attorney apparently concluding, upon the discovery of a typographical error, that he had found an excuse to become pedantic, unreasonable, and uncooperative. The Board expects each party to every case to use common sense and reason when faced with what the circumstances clearly show to be a typographical error." (emphasis added); "Although the mistake of mentioning a third party in the preamble to Respondent's First Set of Requests for the Production of Documents and Things suggests that the document requests were modeled from another case in which Respondent or its prior counsel was involved, the refusal of Petitioner to provide any response to the requests is untenable. If Petitioner had any doubt as to the document requests, it should have contacted Respondent for clarification rather than simply refusing to respond."; "The Board expects that when there is an obvious and inadvertent typographical error in any discovery request or other filing -- particularly where, as here, the intended meaning was clear—the

parties will not require the Board's intervention to correct the mistake." (emphasis added); "It also must be stressed that Petitioner's conduct has not demonstrated the good faith and cooperation that is expected of litigants during discovery. Such conduct has delayed this proceeding, unnecessarily increased the litigation costs of the parties, wasted valuable Board resources, and interfered with Respondent's ability and, indeed, its right, to take discovery. If Respondent perceives Petitioner as not having complied with the terms of this order, or can establish any further abusive, uncooperative, or harassing behavior from Petitioner, then Respondent's remedy will lie in a motion for entry of sanctions. Sanctions the Board can order, if warranted, may include judgment against Petitioner.").

- Stare v. Tate, 98 Cal. Rptr. 264, 266, 267 (Cal. Ct. App. 1971) (analyzing a situation in which a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement; noting that the husband nevertheless signed the settlement without notifying his former wife of the errors; explaining the predictable way in which the issue arose: "The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: 'PLEASE NOTE $100,000.00 MISTAKE IN YOUR FIGURES. . . .' The present action was filed exactly one month later."; pointing to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected."; revising the property settlement to match the parties' agreement).

A lawyer may even face bar discipline for trying to take advantage of an adversary's drafting error.

- Alan Cooper, Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 ("Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than $11,000, but the order switched the parties, and stated the man owed the money. McGarry's position was that the order had been entered and had become final. The judge later corrected the order. The VSB [Virginia State Bar] 8th District Disciplinary Committee issued a public reprimand without terms, citing the disciplinary rule that prohibits taking action that 'would serve merely to harass or maliciously injure another.' . . . The husband's attorney, Stacey Strentz, drafted the final order, but inadvertently said in it that the husband owed the sister the child's support arrearages. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry

> notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia Code § 8.01-428.2. The provision is an exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill. Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. . . . On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected. He cited cases in support of his position that the findings of fact . . . did not support that conclusion. . . . The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false state[ment] of fact or law. Although McGarry said he believed the committee strayed across the line and considered a legal matter rather than an ethical one, he emphasized that he has no criticism of the committee. 'I don't want anybody to think I'm trying to re-chew this bitter cabbage,' he said."

In 2013, a California legal ethics opinion[4] dealt with a similar situation, although the lawyer seeking the opinion had made a scrivener's error by not highlighting a

[4] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.";

change that the lawyer intended to point out to the transactional adversary as part of the negotiation process.

> After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies

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analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

> Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

California LEO 2013-189 (2013) (emphasis added).

The legal ethics opinion started its analysis with a general statement:

> Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. On the other hand,

> an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of Scenario B:

> Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and

> circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing. . . . Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.

Id. (emphases added) (footnote omitted).

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Not all authorities agree that lawyers must disclose an adversary's mistake of this sort.

In 1989 a Maryland legal ethics opinion seemed to take the opposite position -- in an analogous situation.

- Maryland LEO 89-44 (1989) ("The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client?"; "[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false

> statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the transaction. In either case, Rule 5.1(a), based on these facts, does not require you to bring the omission to the other side's attention." (emphasis added)).

This situation fell somewhere between a pure scrivener's error (such as those discussed above) and a more substantive error such as failing to negotiate for an indemnity provision that most parties would normally have included in an agreement.

F. LITIGATION ISSUES

1. Ghostwriting

Clients generally may represent themselves pro se in court, and thus presumably may rely on AI to assist themselves.

But to the extent that a lawyer works with a supposedly pro se client who is relying on artificial intelligence to prepare a pleadings, the lawyer may be governed by the somewhat confusing ethics rules and case law governing ghostwriting.

Bars' and courts' approach to undisclosed ghostwritten pleadings has evolved over the years. This issue has also reflected divergent approaches by bars applying ethics rules and courts' reaction to pleadings they must address.

ABA Approach. As in other areas, the ABA has reversed course on this issue.

In ABA Informal Op. 1414 (6/6/78), the ABA explained that a pro se litigant who was receiving "active and rather extensive assistance of undisclosed counsel" was engaging in a misrepresentation to the court. The lawyer in that situation helped a pro se litigant "in preparing jury instructions, memoranda of authorities and other documents submitted to the Court." Id. The ABA took a fairly liberal approach to what a lawyer could do in assisting a pro se litigant, but condemned "extensive undisclosed participation."

> We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting pro se.
>
> Obviously, the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation. Extensive

> undisclosed participation by a lawyer, however, that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

Id. (emphases added).

In 2007, the ABA totally reversed itself.

> In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

ABA LEO 446 (5/5/07).

The ABA rebutted several arguments advanced by those condemning such a practice.

> Some ethics committees have raised the concern that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.

Id. (footnote omitted). The ABA even explained that the lawyer involved in such a practice may have a duty to keep it secret.

> [W]e do not believe that non-disclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court

> would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleadings and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

Id. (footnotes omitted).

Bars' Approach. Not surprisingly, state bars' approach to ghostwriting mirrors the ABA reversal -- although some state bars continue to condemn ghostwriting.

Bars traditionally condemned lawyers' undisclosed drafting of pleadings for an unrepresented party to file in court.

- New York City LEO 1987-2 (3/23/87) ("Non-disclosure by a pro se litigant that he is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). Accordingly, we conclude that the inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself beforehand to disclose such assistance to both adverse counsel and the court. Less substantial services, but not including the drafting of pleadings, would not require disclosure." (emphases added); "Because of the special consideration given pro se litigants by the courts to compensate for their lack of legal representation, the failure of a party who is appearing pro se to reveal that he is in fact receiving advice and help from an attorney may be seriously misleading. He may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected."; "If a lawyer is rendering active and substantial legal assistance, that fact must be disclosed to opposing counsel and to the court. Although what constitutes 'active and substantial legal assistance' will vary with the facts of the case, drafting any pleading falls into that category, except where no more is involved than

assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants. Such assistance or the making available of manuals and pleading forms would not ordinarily be deemed "active and substantial legal assistance." (footnote omitted)).

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for pro se clients will be called upon by the court, any disregard by either the attorney or the pro se litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a pro se litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).

- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement. We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a pro se litigant unless it is adequately investigated and can be prepared in good faith." (emphasis added)).

- Kentucky LEO E-343 (1/91) (holding that a lawyer may "limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings"; "On the other hand, the same committees voice concern that the Court and the opponent not be misled as to the extent of the

counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Accordingly, the opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by pro se litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleading. It should go without saying that counsel should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the scenes representation. On the 'flip side,' the opponent cannot reasonably demand that counsel providing such limited assistance be compelled to enter an appearance for all purposes. A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.").

- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If *an attorney drafts court papers (other than an initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required*. In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c). We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the

pleading must be filed, the representation should be declined." (emphasis in italics added)).

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").

- Massachusetts LEO 98-1 (1998) (explaining that "significant, ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"; "An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.

- Connecticut Informal Op. 98-5 (1/30/98) ("A lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs. Whether there is misrepresentation in a particular matter is a question of fact. . . . Counsel who prepare and control the content of pleadings, briefs and other documents filed with a court could evade the reach of these Rules by concealing their identities." (emphasis added)).

- Virginia LEO 1803 (3/16/05) (lawyers practicing at a state prison may type up legal documents for inmates without establishing an attorney-client relationship with them, but should make it clear in such situations that the lawyer is not vouching for the document or otherwise giving legal advice; if the lawyer does anything more than act as a mere typist for an inmate preparing pleadings to be filed in court, the lawyer "must make sure that the inmate does not present himself to the court as having developed the pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

However, a review of state bar opinions shows a steady march toward permitting such undisclosed ghostwritten pleadings as a matter of ethics.

- Illinois LEO 849 (12/83) ("It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding for dissolution of marriage to the preparation of pleadings,

without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice to the client's rights.").

- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).

- Alaska LEO 93-1 (5/25/93) ("According to the facts before the Committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance." (emphases added)).

- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis. Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending. If an attorney, who is not 'of record' in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney. Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not,

without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim." (emphasis added)).

- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).

- New Jersey LEO 713 (1/28/08) (holding that a lawyer may assist a pro se litigant in "ghostwriting" a pleading if the lawyer is providing "unbundled" legal services as part of a non-profit program "designed to provide legal assistance to people of limited means"; however, such activity would be unethical "where such assistance is a tactic by lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance"; specifically rejecting many other state Bars' opinions that a lawyer providing a certain level of assistance must disclose his role, and instead adopting "an approach which examines all of the circumstances"; "Disclosure is not required if the limited assistance is part of an organized R. 1:21(e) non-profit program designed to provide legal assistance to people of limited means. In contrast, where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

- Utah LEO 08-01 (4/8/08) ("Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals pro se and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although

> providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention." (emphasis added)).

Interestingly, one bar seems to have taken the opposite direction.

In Florida LEO 79-7 (1979; revised 6/1/05), the Florida Bar indicated that "[i]t is ethical for an attorney to prepare pleadings without signing as attorney for a party." The Florida Bar explained that

> there is no affirmative obligation on any attorney to sign pleadings prepared by him if he is not an attorney of record. It is not uncommon for a lawyer to offer limited services in assisting a party in the drafting of papers while stopping short of representing the party as attorney of record. Under these circumstances, there is no ethical impropriety if the attorney fails to sign the pleadings.

Florida LEO 79-7 (6/1/05). The Florida Bar reconsidered this opinion on February 15, 2000, and again on June 1, 2005, and did not renumber. In the second version of Florida LEO 79-7, the Florida Bar indicated that

> [a]ny pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate "Prepared with the Assistance of Counsel." An attorney who drafts pleadings or other filings for a party triggers an attorney-client relationship with that party even if the attorney does not represent the party as attorney of record.

Florida LEO 79-7 Reconsidered (2/15/00). The Florida Bar explained why it reconsidered its earlier opinion.

> County Court Judges who responded to an inquiry from the Committee about Opinion 79-7 expressed concern about pro se litigants who appear before them having received limited assistance from an attorney and having little or no understanding of the contents of pleadings these litigants have filed. Almost unanimously the judges who responded believed that disclosure of professional legal assistance would prove beneficial, at least where the lawyer's assistance goes beyond helping a party fill out a simple

> standardized form designed for use by pro se litigants. The Committee concurs.

Id.

Courts' Approach. Courts have usually taken a far more strict view of lawyers ghostwriting pleadings for per se litigants.

This is not surprising, because courts might feel mislead by reading a pleading they think has been filed by a pro se litigant herself, but which really reflects the careful preparation by a skilled lawyer.

In contrast to the bars' evolving trend toward permitting lawyers' involvement in preparing pleadings for a pro se plaintiff, courts' analysis has shown a steady condemnation of such practice.

- Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231, 1232 (D. Colo. 1994) ("It is elementary that pleadings filed pro se are to be interpreted liberally. . . . Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party."; "Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P."; "I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.").

- Laremont-Lopez v. Southeastern Tidewater Opportunity Project, 968 F. Supp. 1075, 1077-78, 1078, 1079-80, 1080 (E.D. Va. 1997) ("The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding pro se is

inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers."; "When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation of the Court."; "The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, there is no specific rule which deals with such ghost-writing. Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted."; "This Opinion and Order sets forth this Court's unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.").

- Ricotta v. California, 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthousedoor [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper."; In the instant case it appears to the Court that Ms. Kelly was involved in drafting seventy-five to one hundred percent of Plaintiff's legal arguments in his

oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).

- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank[r]. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and "interferes with the efficient administration of justice. . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).

- Ostevoll v. Ostevoll, Case No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug.16, 2000) ("Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. . . . We agree. Thus, this Court agrees with the 1st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. . . . Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial

assistance from counsel. . . . We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.").

- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings, . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and "this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").

- Washington v. Hampton Roads Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 & n.6 (E.D. Va. May 30, 2002) (explaining that pro se plaintiffs are "given more latitude in arguing the appropriate legal standard to the court"; holding that "[g]host-writing is in violation of Rule 11, and if there were evidence of such activity, it would be dealt with appropriately").

- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghostwriting of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghostwriting."; "[G]hostwriting must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive

rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").

- In re West, 338 B.R. 906, 914, 915 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with universal disfavor in the federal courts."; "This Court has been able to Find no authority which condones the practice of ghostwriting by counsel.").

- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghostwriting Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.". . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and

(improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007.").

- Delso v. Trustees for Ret. Plan for Hourly Employees of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally construe pleadings of pro se litigants liberally. . . . Courts often extend the leniency given to pro se litigants in filing their pleadings to other procedural rules which attorneys are required to follow. . . . Liberal treatment for pro se litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to [D.N.J. Local R. 56.1], and to the review given to stated claims."; "In many of these situations an attorney would not have been given as much latitude by the court. . . . This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires. . . . Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."; "It is clear to the Court that Shapiro's 'informal assistance' of Delso fits the precise description of ghostwriting. The Court has also determined that undisclosed ghostwriting is not permissible under the current form of the RPC in New Jersey. Although the RPC's are restrictive, in that they assume traditional full service representation, all members of the Bar have an obligation to abide by them. In this matter, Shapiro's ghostwriting was not affirmatively disclosed by himself or Delso. Delso's Cross Motion for Summary Judgment, on which Shapiro assisted, was submitted to the Court without any representation that it was drafted, or at least researched, by an attorney. Thus, for the aforementioned reasons the Court finds that undisclosed ghostwriting of submissions to the Court would result in an undue advantage to the purportedly pro se litigant.").

- Anderson v. Duke Energy Corp., Civ. Case No. 3:06cv399, 2007 U.S. Dist. LEXIS 91801, at *2 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical.").

- Kircher v. Charter Township of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007) ("Although attorney Ward may not have drafted the Complaint, it is evident that he provided the Plaintiff with substantial assistance. All three Complaints are similar, and attorney Ward was able to provide Defendants' counsel with the reasoning that motivated Plaintiff to file the pro se Complaint. . . . This shows that he may have spoken with and assisted Plaintiff with his pro se pleading."; "While the Court declines to issue sanctions or show cause attorney Ward, he is forewarned that the Court may do that in the future if he persists in helping Plaintiff file pro se pleadings and papers.").

Thus, courts have uniformly condemned undisclosed lawyer participation in preparing pleadings, while bars have moved toward a more liberal approach.

Many states' experience reflects this continuing mismatch. For instance, as indicated above, several older Virginia legal ethics opinions prohibited ghostwriting. Similarly, several Virginia federal courts condemned ghostwriting.

Seven years after the ABA reversed course, in 2007 the Virginia Bar indicated that certain lawyers could engage in ghostwriting if they do not violate applicable court rules.

- Virginia LEO 1874 (7/28/14) (Lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant." After reviewing ABA and other states' legal ethics opinions, "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." Lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court." [overruling inconsistent portions of LEOs 1127, 1592, 1761 and 1803]).

However, as with the national experience, Virginia courts continue to condemn ghostwriting -- even doubling down on their sanctions. In 2014, the Western District of

Virginia Bankruptcy Court held that lawyers may not ghostwrite, specifically warning Virginia lawyers not to rely on the then month-old Virginia legal ethics opinion allowing certain ghostwriting under the ethics rules.

- In re Tucker, 516 B.R. 340 n.3 (Bankr. W.D. Va. 2014) ("The Court accepts the Debtor's testimony that she received no undisclosed assistance on the Motion. However, given the nature of the Motion and the manner in which it was drafted, it raised the suspicion of having been 'ghost-written.' The Virginia State Bar recently released Legal Ethics Opinion 1874 ('LEO 1874') on the subject of 'ghost-writing' for pro se litigants, finding it to not be objectionable in certain circumstances. To the extent that the practicing bar may intend to rely on LEO 1874 in the future to 'ghost-write' in this Court, all counsel should be aware that this Court takes a different view. This Court agrees with those courts that find, at a minimum, the practice of ghost-writing transgresses counsel's duty of candor to the Court and such practice is expressly disavowed. See, e.g., Chaplin v. DuPont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 2004) ('[T]he practice of ghost-writing will not be tolerated in this Court.'); In re Mungo, 305 B.R. 762, 767-70 (Bankr. D.S.C. 2003).").

In 2015, the Eastern District of Virginia adopted an explicit Local Rule designed to smoke out ghostwriting.

- Eastern District of Virginia Local Rule 83.1 (M) (as of 12/1/18) ("(1) Any attorney who prepares any document that is to be filed in this Court by a person who is known by the attorney, or who is reasonably expected by the attorney, to be proceeding pro se, shall be considered to have entered an appearance in the proceeding in which such document is filed and shall be subject to all rules that govern attorneys who have formally appeared in the proceeding."; "(2) All litigants who are proceeding pro se shall certify in writing and under penalty of perjury that a document(s) filed with the Court has not been prepared by, or with the aid of, an attorney or shall identify any attorney who has prepared, or assisted in preparing, the document."; "Each document filed with the court by a pro se litigant shall bear the following certification: . . . that . . . No attorney has prepared, or assisted in the preparation of this document" or [identifying the lawyer who] "[p]repared, or assisted in the preparation of, this document." (emphasis omitted)).

Thus, Virginia lawyers looking just at ethics opinions might feel free to assist a purportedly pro se litigant in ghostwriting pleadings. But such lawyers could run afoul of courts' continuing (and even increasing) condemnation of the practice.

2. Discovery

Lawyers might use artificial intelligence to prepare or assist in preparing discovery of adversaries or third parties – such as interrogatories, document requests, or even deposition questions.

An interesting 2000 legal ethics opinion highlights bars' arguably old-fashioned approach to such non-human involvement.

> The inquirer has asked this Committee to analyze the ethical implications for an attorney utilizing a recently-developed software program which purports to instantaneously analyze speech patterns to determine the veracity of the speaker. The technology firm that developed the software has asked the inquirer to use it in the inquirer's law practice "to determine its validity in real life situations."

The Philadelphia Bar held that using the software during a deposition violated several rules.

> A person testifying at a deposition expects that testimony offered on the record will be transcribed and may be used thereafter at trial or in some other context. However, neither the deponent nor an attorney attending the deposition has reason to anticipate that the deponent's speech patterns will be calibrated and analyzed on a basis such as propounded for the described software. Using the software surreptitiously at the deposition, without the consent of the deponent and counsel present at the deposition, therefore may be deemed to violate Rule 4.1 (Truthfulness in Statements to Others), Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

Philadelphia LEO 2000-1 (2/2000).

The Philadelphia Bar took a different approach to audiotapes obtained through lawful means and analyzed using the software.

> In contrast, we see no ethical violation in using the software to analyze a lawfully-obtained, lawfully-created tape recording or videotape originally prepared for some other

> purpose, as long as: (1) it does not violate any restriction placed on the recording or videotape by law or otherwise, (2) the creation of the recording or videotape involved no deception. In other words, if the inquirer comes into possession of a lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape. We distinguish that scenario, however, from a situation in which the inquirer knows before making a tape that the inquirer intends to use the software to analyze it, yet fails to disclose that intention to the speaker.

Id.

Many lawyers would probably think that this activity would pass muster under the ethics rules, but the Philadelphia bar's hostile reaction should prompt lawyers to check the applicable rules and how the bars have interpreted them. This is especially important in any pre-litigation informal discovery -- because under the ABA Model Rule 8.5 approach, the applicable ethics rules might be supplied by the state where the conduct occurred rather than by the state where the litigation ultimately will ensue.

AI-generated discovery might run afoul of several ethics rules that lawyers must keep in mind.

For instance, AI might generate communications with a represented person in violation of Rule 4.2's ex parte communication prohibition. In the extreme, AI intruding into an adversary's or third person's personal realm might violate Ruel 4.4(a)'s prohibition on using "methods of obtaining evidence that violate the legal rights of such a [third] person."

3. Privilege Review

One use of artificial intelligence that will undeniably raise ethics issues involves privilege reviews during litigation document productions.

Most courts agree that litigants can use "predictive coding" when searching for relevant documents. That type of automated searching analysis might implicate UPL and ethics issues, but not as bluntly as applying an automated process to determine if the evidentiary attorney-client privilege product doctrine applies to documents.

This issue starkly arose when contract privilege reviewers sued two well-known law firms for overtime, claiming that they were not actually practicing law during their privilege review job.

In 2015, the Southern District of New York dismissed such a case against Quinn Emanuel.

- Henig v. Quinn Emanuel Urquhart & Sullivan, LLP, 151 F. Supp. 3d 460, 465, 469-70 (S.D.N.Y. 2015) (dismissing an FSLA case against Quinn Emanuel in which a privilege-reviewing lawyer sought overtime pay; rejecting the lawyer's argument that he was not practicing law; pointing to Quinn Emanuel's training mentioning the legal judgment required for privilege review; "One line in the Presentation explicitly states that '[p]rivilege can be tricky and there are a lot of gray areas.'" (emphasis added; internal citation omitted); "Plaintiff's tagging history and his other descriptions of his role on the Document Review Project, however, confirm that his job involved more than the largely mindless task that would result from following the verbal instructions to the letter. . . . Plaintiff's tagging on these documents, along with his comments on the potentially privileged nature of others, reveal that he understood the process by which he was meant to review documents could -- and did -- require him to exercise legal judgment.").

Quinn Emanuel was undoubtedly relieved by the outcome. But upon reflection, it is remarkable that the only sentence fragment the court could point to as evidencing legal advice was such a generic phase.

Skadden Arps was not so lucky in a similar suit against that firm. In 2015, the Second Circuit vacated the district court's dismissal of the case -- and remanded.

- Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 F. App'x 37, 39, 41, 42, 44, 25 (2nd Cir. 2015) (finding that a document reviewer was not providing legal advice, and therefore could pursue an FLSA lawsuit seeking overtime pay; "David Lola, on behalf of himself and all others similarly situated, appeals from the September 16, 2014 opinion and order of the United States District Court for the Southern District of New York (Sullivan, J.) dismissing his putative collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ('FLSA'), arising out of Lola's work as a contract attorney in North Carolina. We agree with the district court's conclusion that: (1) state, not federal, law informs FLSA's definition of 'practice of law'; and (2) North Carolina, as the place where Lola worked and lived, has the greatest interest in this litigation, and thus we look to North Carolina law to determine if Lola was practicing law within the meaning of FLSA. However, we disagree with the district court's conclusion, on a motion to dismiss, that by undertaking the document review Lola allegedly was hired to conduct, Lola was necessarily 'practicing law' within the meaning of North Carolina law. We find that accepting the allegations as pleaded, Lola adequately alleged in his complaint that his document review was devoid of legal judgment such that he was not engaged in the practice of law, and remand for further proceedings."; "Lola urges us to fashion a new federal standard defining the 'practice of law' within the meaning of Section 541.304. We decline to do so because we agree with the district court that the definition of 'practice of law' is 'primarily a matter of state concern.'" (citation omitted); "Regulating the 'practice of law' is traditionally a state endeavor. No federal scheme exists for issuing law licenses."; "We thus find no error with the district court's conclusion that we should look to state law in defining the 'practice of law.'"; "The district court erred in concluding that engaging in document review per se constitutes practicing law in North Carolina. The ethics opinion does not delve into precisely what type of document review falls within the practice of law, but does note that while 'reviewing documents' may be within the practice of law, '[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of a client.' N.C. State Bar Ethics Committee, 2007 Formal Ethics Op. 12. The ethics opinion strongly suggests that inherent in the definition of 'practice of law' in North Carolina is the exercise of at least a modicum of independent legal judgment."; "[M]any other states also consider the exercise of some legal judgment an essential element of the practice of law."; "The gravamen of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever -- he alleges that he used criteria developed by others to simply sort documents into different

categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided. The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law. We therefore vacate the judgment of the district court and remand for further proceedings consistent with this opinion.").

Not surprisingly, Skadden Arps quickly settled the case.

- Y. Peter Kang, Skadden, Temp Attys Agree To Settle OT Dispute, Law360, Dec. 15, 2015 ("A group of temporary attorneys accusing Skadden Arps Slate Meagher & Flom LLP of not properly paying overtime wages asked a New York federal judge Tuesday to approve a deal in which a co-defendant staffing company agreed to pay $75,000 to resolve the putative collective action."; "In a letter sent to U.S. District Judge Richard J. Sullivan ahead of a Dec. 21 fairness hearing, counsel for lead plaintiff David Lola, an attorney who did contract work reviewing documents for Skadden in North Carolina, and two opt-in plaintiffs asked the judge to approve the deal on the basis that it was fair and reasonable."; "Under terms of the settlement, Lola and the others will receive $75,000 -- which will be paid entirely by co-defendant Tower Legal Staffing Inc. -- which is the maximum amount of compensatory damages based on payroll records and about one-third of the liquidated damages the temporary attorneys had sought, according to the letter. Plaintiffs' counsel did not specify the amount of attorneys' fees to be requested, but said it would be less than $45,000."; "If approved, the settlement would end a suit filed by Lola in 2013 and revived by the Second Circuit in July. The appellate court determined that document review work doesn't necessarily amount to practicing law, and therefore Lola was not exempt under the Fair Labor Standards Act as a licensed attorney."; "The suit also survived Skadden's dismissal bid when Judge Sullivan rejected in September the megafirm's argument that it wasn't a joint employer with Tower."; "Lola contended that even though he is an attorney, he was not exempt from federal overtime pay requirements because he wasn't really practicing law when he did 15 months of document review work for Skadden in North Carolina."; "The 'mechanical' document review work he performed was not the practice of law because it didn't require any legal knowledge, skill or training, the suit says. The FLSA requires that workers be paid time and a half for time worked beyond 40 hours a week, but those practicing law and other professionals are exempt.").

As always in circumstances like this, some bars cannot conceal their turf-protecting impulses.

In 2012, a remarkable D.C. unauthorized practice of law opinion explained that a D.C.-licensed lawyer had to oversee the final selection of contract privilege reviewers.

- District of Columbia UPL Op. 21-12 (1/12/12) (providing guidance to "discovery service companies" operating in Washington, D.C.; explaining the background; "In recent years, companies seeking to assist legal services organizations with document review have dramatically expanded the scope of their services. For example, some companies offer not only attorneys to staff document review projects, but also offer the physical space where the document review will take place, computers for conducting the review, and servers for hosting the documents to be reviewed. These companies also offer a host of related services, from e-discovery consulting to database management to the eventual production of documents in litigation."; "At the same time, discovery service companies have begun to describe their services in increasingly broad language. They use terms like 'one-stop shopping,' 'comprehensive review and project management,' and 'fully managed document review.'"; "In addition, some companies have sought to distinguish their services by promoting the legal expertise or qualifications of their staff. These statements do not appear to refer to the expertise of attorneys that the company seeks to place for document review projects. Instead, these companies tout the expertise of persons who work for the discovery services company itself. Some companies have described these individuals as 'seasoned litigators,' and have promoted particular 'practice areas' such as intellectual property, patent litigation, class action lawsuits, and mergers and acquisitions."; "[A] statement that a given company 'design[s], develop[s], and manage[s] the entire review process' could mean that the company is selecting attorneys to work on a project and supervising the exercise of their legal judgment. If the company does so in the District of Columbia, it would be engaging in the practice of law under Rule 49 . . . ." (alterations in original); "[T]he extent that discovery services use a District of Columbia address, or advertise themselves as available to assist with discovery projects in the District, Rule 49's holding out prohibition does apply."; "[T]he final selection of attorneys to staff a document review project must be made by a member of the D.C. Bar with an attorney-client relationship with the client, the attorney's legal work must be directed or supervised by a D.C. Bar member who represents the client, and the discovery services company may not otherwise violate Rule 49 or attempt to supervise the document review attorney."; "[D]iscovery services companies that are not otherwise authorized to practice law in the District of Columbia may not provide legal advice to their clients, nor may they hold out themselves or any attorneys on their staff as authorized to practice law in the District of Columbia."; "Broad statements that a company can manage the entire document review or discovery process -- by providing 'soup-to-nuts' or 'end-to-end' solutions, e.g. -- have a serious potential to mislead."; "[I]n order to avoid creating the impression that the company or its staff is authorized to

> practice law in the District of Columbia, statements regarding the legal experience of the companies' staff must be accompanied by a prominent disclaimer that the company is not authorized to practice law or provide legal services in the District of Columbia, and that the company's staff members cannot represent outside clients or provide legal advice."; "While a D.C. Bar member may individually be authorized to practice law in the District, a company providing such an attorney's legal services would necessarily run afoul of the restrictions placed on attorney referral articulated in the Committee's Opinion 6-99.") (emphasis added).

Six months later, the D.C. Bar then went further, holding that lawyers working for a company which supplies contract privilege reviewers might be assisting in the unauthorized practice of law if they ignore the earlier UPL opinion.

- District of Columbia LEO 362 (6/2012) ("If discovery service organizations follow the guidelines set forth in the UPL Committee Opinion 21–12 and do not practice law, the activities of such organizations and the lawyers who work for them are consistent with the restrictions on non–lawyer ownership stated in Rule 5.4(b). However, the combination of the practice of law in the District of Columbia and passive non–lawyer ownership is not consistent with Rule 5.4(b). The non–compliance with the limitations on entities owned in part by non–lawyers should be particularly evident to those lawyers who create, own, and manage such organizations in conjunction with passive investors, but also may be evident to those lawyers who work at such organizations or the lawyers who engage such organizations. Lawyers in any of these circumstances should understand how Rule 5.4(b)'s requirements, and Opinion 21–12's definition of the practice of law may affect their ability to own, manage, work for, or retain such an entity. Finally, a lawyer who partially owns a discovery service vendor with passive non–lawyer ownership engaged in the practice of law in the District of Columbia assists in the unauthorized practice of law in violation of Rule 5.5(b). Lawyers who knowingly work for or retain such an entity may also violate Rule 5.5(b).").

It is difficult to imagine a more blatant display of lawyers trying to assure their monopoly role in the privilege review process. Selecting contract privilege reviewers does not seem to involve any legal advice. And as explained above, the Second Circuit has held that the contract privilege reviewers ultimately hired to perform their task are not even practicing law. One might wonder about the Second Circuit conclusion, but

saying that lawyers must be involved in hiring non-lawyer staff (not just supervising them after they are hired) seems a dramatic bridge too far.

4. Jury Selection

Non-lawyers and lawyers might rely on artificial intelligence in selecting jurors. At least for the lawyers, such a process might implicate ethics rules.

Several bars have addressed the ethical propriety and appropriate guidelines for lawyers' research into jurors' social media.

The first two bars to have examined this issue indicated that lawyers generally could undertake such research, coupling that assurance with a dire warning of serious misconduct -- but without giving any guidance to lawyers about whether their social media research would amount to the serious misconduct described in the opinions.

- New York County Law. Ass'n LEO 743 (5/18/11) (explaining that a lawyer can investigate jurors by using their publicly-available social network information, although such a search might an improper "communication" if the juror knows that the lawyer has searched; "It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but not 'friend,' email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentation or engage in deceit, directly or indirectly, in reviewing juror social networking sites."; "[U]nder some circumstances a juror may become aware of a lawyer's visit to the juror's website. If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." (footnote omitted)).

- New York City LEO 2012-2 (2012) ("Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of

an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.").

These legal ethics opinions highlight the frequent difficulty that lawyers face when using new technologies. The opinions mention almost in passing that jurors may become aware of a lawyer's visit to the juror's website -- which would then constitute an impermissible communication and presumably an ethics violation. Yet few if any lawyers would have a clue whether a juror could learn that a lawyer has visited the juror's website.

In 2014, the ABA also approved such research, but rejected the earlier New York ethics opinions' conclusion that lawyers would violate the ethics rules if jurors knew that they were being researched.

- ABA LEO 466 (4/24/14) (explaining that although the line between "properly investigating jurors and improperly communicating with them" is "increasingly blurred," lawyers may (and in some states must) engage in a "passive review" of jurors' electronic social media (which is similar to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions"); concluding that an electronically sent electronic source media ("ESM") feature notifying a juror that a lawyer has conducted such a search is not a prohibited "communication" to the juror (instead it "is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street"); noting in contrast that lawyers may not send an "access request" to a juror, because that would be a prohibited communication ("akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past"); explaining that trial judges can "dispel any juror misperception that a lawyer is acting improperly" when conducting such a search by discussing with jurors "the likely practice of trial lawyers reviewing jurors' ESM."; advising that lawyers learning through a search of jurors' ESM that a juror has engaged in "criminal or fraudulent conduct related to the proceeding" must take remedial action, including reporting the misconduct to the court; explaining that the Ethics 2000 Commission apparently intended to expand the disclosure duty to such a person's "improper conduct," but Model Rule 3.3(b) is still limited to "criminal or fraudulent" conduct; concluding that lawyers' disclosure duty upon learning of a

> juror's misconduct such as improper communications during jury service "will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes.").

The ABA's understandable approach seems to have settled that issue.

But some commentators have warned that biases embedded in human-generated AI algorithms might violate ABA Model Rules 8.4(g)'s prohibition on discrimination and harassment.

5. Adverse Law

Artificial intelligence (such as ChatGPT) has generated phony caselaw citations and even holdings. Lawyers not confirming such AI-created caselaw thus risk making false statements of law to a tribunal.

ABA Model Rule 3.3(a)(1) prohibits a lawyer from "knowingly . . . mak[ing] a false statement of fact or law to a tribunal." Presumably, a lawyer's sloppy reliance on such a false AI-generated case citation would not be "knowingly." Of course, courts may use their inherent power to sanction lawyers who negligently cite non-existent cases.

ABA Model Rule also includes a prohibition that is more likely to apply: "knowingly . . . fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." (emphasis added).

Thus, under ABA Model Rule 3.3(a)(1) lawyers may never make a knowingly false statement of law to a tribunal – even if it is an immaterial false statement. But lawyers who later find that their previous statement to the tribunal was false when they made it need only correct their earlier statements of "material fact or law" (emphases added). Thus, a lawyer must promptly correct any AI-generated false citations. Interestingly, some states' ethics rules (including Virginia's) do not contain this duty to correct any earlier false statements of law.

AI may also uncover unfavorable law that lawyers might have missed. This raises several ethics issues.

Disclosing Directly Adverse Published Law

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes,

weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.[1]

ABA. The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

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[1] Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo ex rel. Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's Cnty., 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. Cnty. of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

> Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?
>
> . . . .
>
> We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics]

Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

> The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

> We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.
>
> Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point . . . . A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.
>
> Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a

> proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)[2] (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The 1983 ABA Model Rules apparently presume that legal research and the resulting knowledge of adverse decisions are not subject to lawyers' confidentiality duty.

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[2] ABA Model Code of Prof'l Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

However, that presumption stands on shaky ground. Under ABA Model Rule 1.6(a), lawyers may not "reveal information relating to the representation of a client" unless some exception applies. Legal research clearly uncovers "information relating to the representation of a client." The ABA Model Rules comment describing the broad scope of lawyers' confidentiality duty explains that

> [t]he confidentiality rule, for example, appies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

ABA Model Rule 1.6 cmt. [3] (emphasis added). That description seems to cover legal research.

However, that Comment's next sentence explains that lawyers may not disclose "such information" -- "except as authorized or required by the Rules of Professional Conduct or other law." Id. (emphasis added). That Comment (as well as common sense) means that lawyers' separate duty to disclose adverse authority trumps any confidentiality duty.

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

> [D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." Id. He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case. Id.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

> [T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."
>
> . . . .
>
> While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement. The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

> In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to

> be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

> A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

> "Legal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

> Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

> Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

States Ethics Rules. Most states follow the ABA Model Rules approach.

Only one state appears to have explicitly indicated what the ABA Model Rules and most states presume -- that legal research does not fall within lawyers' confidentiality duty.

> "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

New York Rule 1.6(a) (emphasis added).

Although most states follow the ABA Model Rules approach, some take a different approach. For instance, New York does not require disclosure of "legal authority in the controlling jurisdiction" that is adverse to the client, but instead requires disclosure of an apparently narrower range of adverse authority.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

New York Rule 3.3(a)(2) (emphasis added). Although New York's Comments do not explain the distinction between this approach and the ABA Model Rules' approach, it seems to be different. For instance, law from another state circuit or district might fall

within the ABA Model Rules' definition of "legal authority in the controlling jurisdiction" (the state) -- but not the "controlling legal authority." In some states, various circuit courts at the trial or the appellate level take differing approaches to issues such as the required imminence of litigation required to claim work product protection. So in that setting, the ABA Model Rules would require lawyers to disclose a sister court's adverse authority, while the New York formulation would not.

Another state uses a different formulation that seems to match the New York approach rather than the ABA Model Rules approach.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Yet another jurisdiction takes a unique approach which is not obvious on its face.

> A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.

D.C. Rule 3.3(a)(3) (emphasis added). The reference to "legal authority in the controlling jurisdiction" follows the ABA Model Rules formulation, and presumably includes law that does not control in the case -- as does the language of other jurisdictions mentioned above. However, the unique phrase "known to the lawyer to be dispositive of a question at issue" would seem to exclude from lawyers' disclosure duty adverse authority that does not control in the case. In other words, legal authority that

does not control in the case but is instead from a sister court (for example) would not be "dispositive of a question at issue" in the case.

Case Law. Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, Case No. 99-1707, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

> The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

> The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the

> judge sitting on the case.". . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.
>
> Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.
>
> . . .
>
> In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.

. . .

This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

> At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water [Scioto Cnty. Reg'l Water Dist. No. 1 Auth. V. Scioto Water, 103 F,3d 38 (6th Cir. 1996)] decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

Disclosing Directly Adverse Unpublished Case Law

The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Restatement (Third) of Law Governing Lawyers §111 Reporter's Note cmt. d (2000) (emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

> Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions, the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution

> and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 189-90 (2006/2007) (emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.

> In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 39 (2005).

One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

> Into the early 1980s, federal courts of appeals were publishing nearly 90% of their opinions. However, by the mid-1980s, the publication rates for federal court of appeals decisions changed dramatically. By 1985, almost 60% of all federal court of appeals decisions were unpublished. Today [2007], more than 80% of all federal court of appeals decisions are unpublished.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 192-93 (2006/2007) (emphases added; footnotes omitted).

As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

> [i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

> [T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such and opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

> These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after Anastasoff. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

> (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
>
> (2) Permit citation to relevant unpublished opinions.

See Letter from Robert D. Evans, Director, ABA Govtl. Affairs Office, to Howard Coble, Chairman, Subcomm. on Courts, Internet & Intellectual Prop., U.S. House of Representatives (July 12, 2002).

The Anastasoff opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course, this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

> States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).
>
> States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).
>
> States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).
>
> States (25 as of that time) prohibiting citation of any unpublished opinion.
>
> States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach.

As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

> No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical

> duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).

This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

> No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

> The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.

Dione C. Greene, The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule", 81 Ind. L.J. 1503, 1503-04 (Fall 2005) (footnotes omitted).

New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

> From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions (92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

Aaron S. Bayer, Unpublished Appellate Decisions Are Still Commonplace, The National Law Journal, Aug. 24, 2009.

State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

> [A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

> Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it

> will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis.

Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

> For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?
>
> Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Some decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

> Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.

Brundage v. Estate of Carambio, 951 A.2d 947, 956-57 (N.J. 2008) (emphasis added). In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

> [I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.

> Lifschitz v. George, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 28, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "'only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts.'" (internal citation omitted); upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

6. Judges' Use of AI

Judges presumably may rely on AI such as ChatGPT to create draft opinions, subject to their confidentiality duties. Those drafts are similar to clerk-related drafts.

But judges using artificial intelligence to supplement (or perhaps even to substitute for) judicially-overseen factual fundings might face judicial ethics issues.

The ABA Model Judicial Code severely restricts judges' personal factual investigations.

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

ABA Model Code of Judicial Conduct, Rule 2.9(C) (2007). Not surprisingly, this prohibition explicitly extends to electronic sources (such as the Internet). ABA Model Code of Judicial Conduct, Rule 2.9 cmt. [6] (2007) ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

The ABA Model Judicial Code even finds it necessary to include a limited permission for judges to consult with court staff and officials. ABA Model Code of Judicial Conduct, Rule 2.9(A)(3) (2007) ("A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.").

In appellate courts, the line between factual investigation and background reading seems to blur. Although there is no reason to think that the ABA Model Code of Judicial Conduct applies any differently to appellate judges than it does to trial judges,

appellate courts routinely examine such extraneous material that has not been tested through cross-examination.

To be sure, there is an important difference between a judge conducting her own research and the judge relying on material presented by one of the parties to an appeal (or an amicus). Still, it is interesting to consider the role of material presented on appeal that has not survived the crucible of cross-examination at trial.

Many academic writers urge courts to accept such extrajudicial sources of information, as a way to advance basic social justice. For instance, in her article Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs, 34 U.S.F. L. Rev. 197 (2000), Temple University School of Law Professor Ellie Margolis defended use of such materials.

> As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. . . . Lawyers are missing a golden opportunity for advocacy by allowing judges alone to research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to be supportive of the judge's conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers not only can, but should use non-legal information in support of arguments in appellate briefs.
>
> . . . .
>
> . . . In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important, and the appellate lawyer should present policy arguments as effectively as possible to the court. Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them.

Id. at 202-03 & 210-11 (emphases added; footnotes omitted).

Most commentators point to the case of Muller v. Oregon, 208 U.S. 412 (1908) as initiating this process of judicial reliance on extrajudicial sources. In that case, the Supreme Court upheld the constitutionality of an Oregon law limiting to ten hours the amount of time that women may work in certain establishments.

The state of Oregon was represented in that case by Louis Brandeis, who filed what became known as a "Brandeis Brief" in support of the Oregon statute. Brandeis's brief consisted of a two-sentence introduction, a few transition sentences, a one-sentence conclusion, and 113 pages of statutory citations and (primarily) social science study reports and academic treatises about how women cannot tolerate long work hours. For example, the Brandeis Brief contained the following passages:

> Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.

Brandeis Brief at 18 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

The various social science study reports quoted in the Brandeis Brief have some remarkable conclusions and language.

> "You see men have undoubtedly a greater degree of physical capacity than women have. Men are capable of greater effort in various ways than women."[3]
>
> . . .
>
> "Woman is badly constructed for the purposes of standing eight or ten hours upon her feet."[4]
>
> . . .
>
> "It has been declared a matter of public concern that no group of its women workers should be allowed to unfit themselves by excessive hours of work, by standing, or other physical strain, for the burden of motherhood, which each of them should be able to assume."[5]
>
> . . .
>
> "'The children of such mothers -- according to the unanimous testimony of nurses, physicians, and others who were interrogated on this important subject -- are mostly pale and weakly; when these in turn, as usually happens, must enter upon factory work immediately upon leaving school, to contribute to the support of the family, it is impossible for a sound, sturdy, enduring race to develop.'"[6]

Based on all of this social science, the Brandeis Brief ends with the following conclusion:

> We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in

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[3] Brandies Brief at 19 (quoting Report of Committee on Early Closing of Shops Bill, British House of Lords, 1901) (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

[4] Id. (quoting Report of the Maine Bureau of Industrial and Labor Statistics, 1888).

[5] Id. at 49-50 (quoting Legislative Control of Women's Work, by S.P. Breckinridge, Journal of Political Economy, p. 107, vol. XIV, 1906) (emphases added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

[6] Id. at 58 (quoting The Working Hours of Female Factory Hands. From Reports of the Factory Inspectors, Collated by the Imperial Home Office, p. 113, Berlin, 1905) (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

> twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.

Brandeis Brief at 113 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief11.pdf.

Incidentally, an article published approximately 100 years after Brandeis filed his brief pointed out that Brandeis's dramatic conclusion stated exactly the opposite of what he intended to argue. Clyde Spillenger, Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon, 22 Const. Comment. 5 (Spring 2005).

In its decision upholding Oregon's statute, the United States Supreme Court explicitly relied on Brandeis's Brief -- emphasizing women's physical weakness and their importance in bearing and raising children. Emphasizing "the difference between the sexes," the Supreme Court quoted from one of the sources that Brandeis had included in his brief.

> "The reasons for the reduction of the working day to ten hours -- (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home -- are all so important and so far reaching that the need for such reduction need hardly be discussed."

Muller v. Oregon, 208 U.S. at 419 n.1. The court took "judicial cognizance of all matters of general knowledge" -- including the following:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating

> this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man.
>
> . . .
>
> [S]he is not an equal competitor with her brother.
>
> . . .
>
> It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.
>
> . . .
>
> [S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the well-being of the race -- justify legislation to protect her from the greed as well as the passion of man.
>
> . . .
>
> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 421, 422, 422-23 (emphases added).

The United States Supreme Court continues to debate reliance on such extrajudicial sources.

In Roper v. Simmons, 543 U.S. 551 (2005), for instance, the Supreme Court found unconstitutional states' execution of anyone under 18 years old, however horrible

their crime. Justice Kennedy's majority relied heavily on social science sources (presented for the first time to the court, and therefore not subjected to cross-examination) indicating that people under 18 are not fully capable of making rational decisions, and therefore should never be subject to execution.

Justice Scalia's dissent severely criticized the majority's reliance on such studies.

> Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.

Id. at 616-17 (emphasis added) (Scalia, J., dissenting). Justice Scalia said that by selecting favorable extrajudicial and untested social science articles means that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Id. (emphasis added).

Justice Scalia provided a concrete example.

> We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [another case], the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

Id. at 617-18 (emphases added; citation omitted) (Scalia, J., dissenting).

The Supreme Court (and other appellate courts) nevertheless continues to rely on extrajudicial sources that have never been subjected to cross-examination.

- United States v. Lawson, 677 F.3d 629, 639-40, 650, 650 n.28 (4th Cir. 2012) ("We observe that we are not the first federal court to be troubled by Wikipedia's lack of reliability. See Bing Shun Li v. Holder, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing 'disapproval of the [immigration judge's] reliance on Wikipedia and [warning] against any improper reliance on it or similarly reliable internet sources in the future' (footnote omitted); Badasa v. Mukasey, 540 F.3d 909, 910-11 (8th Cir. 2008) (criticizing immigration judge's use of Wikipedia and observing that an entry 'could be in the middle of a large edit or it could have been recently vandalized'). . . ."; "We note, however, that this Court has cited Wikipedia as a resource in three cases.").

Somewhat surprisingly, in 2010 the Second Circuit found nothing improper in then-District Judge Denny Chin's internet investigation of the availability of yellow hats for sale.

- United States v. Bari, 599 F.3d 176, 179, 180, 181 (2d Cir. 2010) (holding that then District Judge Denny Chin had not acted improperly in performing a Google search to confirm his understanding that there are many types of yellow hats for sale, so that a criminal defendant's possession of a particular kind of yellow hat was an important piece of evidence pointing to the criminal defendant's guilt; "[W]e now consider whether the District Court committed reversible error when it conducted an independent Internet search to confirm its intuition that there are many types of yellow rain hats for sale."; "Common sense leads one to suppose that there is not only one type of yellow rain hat for sale. Instead, one would imagine that there are many types of yellow rain hats, with one sufficient to suit nearly any taste in brim-width or shade. The District Court's independent Internet search served only to confirm this common sense supposition." (emphasis added); "Bari argues in his reply brief that 'Judge Chin undertook his internet search precisely because the fact at issue . . . was an open question whose answer was not obvious.' . . . We do not find this argument persuasive. As broadband speeds increase and Internet search engines improve, the cost of confirming one's intuitions decreases. Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search." (emphases

added); "As the cost of confirming one's intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a 'matter[] of common knowledge.'").

Interestingly, Judge Chin was then in the process of joining the Second Circuit.

Ironically, some have noted United States Supreme Court Justices' use of Google in their opinions.

- Robert Barnes, Should Supreme Court Justices Google?, Wash. Post, July 8, 2012 ("Justice Antonin Scalia's angry dissent from the Supreme Court's decision to strike down parts of Arizona's tough anti-illegal-immigrant law outraged liberals even more than his biting words normally do."; "As part of his argument, that the decision imposed on the sovereignty of the states, Scalia reached outside the briefs and the oral arguments to mention President Obama's recent decision to allow some illegal immigrants who were brought here as children to remain in the country."; "'That Arizona contradicts federal law by enforcing applications of federal immigration law that the president declines to enforce boggles the mind,' Scalia said in reading part of his dissent from the bench."; "If the framers had proposed that all immigration decisions will be made by the federal government and 'enforced only to the extent the president deems appropriate,' Scalia thundered, 'the delegates to the Grand Convention would have rushed to the exits from Independence Hall.'"; "For our purposes, let's leave aside Scalia's excoriation from the left and defense from the right and focus on a different lesson: Supreme Court justices Google just like the rest of us."; "Well known is the story of Justice Harry Blackmun hunkering down in the medical library of the Mayo Clinic to research abortion procedures before he wrote the 1973 majority opinion in Roe v. Wade."; "[Allison Orr] Larsen, a former clerk to retired Justice David Souter, studied 15 years of Supreme Court decisions for her paper. She found more than 100 examples of asserted facts from authorities never mentioned in any of the briefs in the case. And in the 120 cases from 2000 to 2010 rated the most salient — judged largely by whether they appeared on the front pages of newspapers — nearly 60 percent of them contained facts researched in-house."; "A 2011 decision in which the court found a California law forbidding the sale of violent video games to minors violated the First Amendment provided a good example. Justice Stephen G. Breyer in a dissent provided 13 pages of studies on the topic of psychological harm from playing violent video games."; "Justice Clarence Thomas cited 59 sources to support his view that the Founding Fathers believed that parents had absolute control over their children's development; 57 of them were not in the briefs

submitted in the case."; "In Graham v. Florida, for instance, the court invalidated life-without-parole sentences for juveniles who commit non-homicide offenses. Justice Anthony M. Kennedy relied on a letter from the Bureau of Prisons (BOP), solicited at his request by the Supreme Court library, about the number of such prisoners."; "After the decision, the government submitted a letter to the court saying the bureau had been wrong: None of the six inmates listed in the BOP's letter was actually serving a life sentence for a crime committed as a juvenile."; "'Do I think that factual information would have changed Justice Kennedy's mind?' Larsen asked. 'Probably not.'"; "But she says the practice undermines the adversary process."; "Asked whether she had engaged in in-house fact-finding as a clerk to Souter, she laughed and declined to comment. But she added: 'I will tell you Justice Souter didn't own a computer.'").

In 2017, the ABA offered advice about judges' permissible and impermissible use of extra-judicial factual research.

- ABA LEO 478 (12/8/17) (Judges may independently research background information and may "judicially notice" facts under court rules, but may not independently investigate material facts involved in their adjudicative function. "The key inquiry here is whether the information to be gathered is of factual consequence in determining the case. If it is, it must be subject to testing through the adversary process." "[E]ven general subject-area research is not permissible . . . if the judge is acquiring information to make an adjudicative decision of material fact." Judges may not investigate through online research (or otherwise) information about jurors or parties, but may investigate lawyers -- unless the investigation "is done to affect the judge's weighing or considering adjudicative facts.").

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