
THE GAVEL
Fall 2018
Vol. 11
Iss. 1
Law
rules, regu
Professional Conduct
Ave Maria School of Law Moot Court Board Journal

THE GAVEL

Fall 2018
Vol. 11
Iss. 1

Ave Maria School of Law
Moot Court Board Journal
1025 Commons Circle
Naples, FL 34119

mc.vppublication@avemarialaw.edu
avemarialaw-moot-court.avemarialaw.edu

MOOT COURT BOARD PRESIDENT'S MESSAGE

Having been elected to serve as the President of the Moot Court Board, I am honored by the opportunity to claim the title, grateful to have been entrusted by my fellow classmates and colleagues to lead them in this coming year, and, most of all, I am humbled by the tasks that lay ahead. While I embrace the challenges before me, I am very fortunate that I will not have to face them alone. I am blessed to have an executive board of very strong, hardworking, and talented individuals. I would like to personally thank Chris Fiore (Vice President of Externals), Jacee Broadway (Vice President of Internals), Mellissa Stubbs (Vice President of Publications), Daisy Gonzalez (Vice President of Operations), and Megan Ofner (Vice President of Events) for the level of effort, time, and dedication each one of you contribute to the Moot Court Board daily. Also, I extend a special thanks to our faculty advisor, Professor Mark H. Bonner. Without your continued support for the Moot Court Board, our individual efforts to achieve success would be for naught.

As students of Ave Maria School of Law, we are consistently confronted with the challenges of professional responsibility, both in an academic setting and in the professional world. While the topic of professional responsibility is an ever-present topic of discussion in today's legal profession, it is a topic that has been at the forefront since the formation of our nation. Shortly after gaining our independence from the Crown of Great Britain, our forefathers gathered in Philadelphia at the Constitutional Convention not only to debate what laws should be created to shape our newly established nation, but what kind of men should be entrusted with power to lead it. As delegates debated what criteria should be instituted to determine the eligibility for state representative to serve in the federal legislature, Alexander Hamilton proposed that perhaps the character of the individuals who would serve in the legislature was of far greater importance. Hamilton remarked that while some "may act from more worthy motives," or "from patriotic motives… [to] step forward" and serve the public, we must not forget "[o]ne great error is that we suppose mankind more honest than they are." Hamilton continued by explaining how the "prevailing passions [of] ambition and interest" by those in a position of authority and influence would jeopardize the very goal of instituting justice; therefore, requiring our leaders, and new system of government to "avail itself of those passions in order to make them subservient to the public good."

We are very fortunate to belong to an institution that embraces the ethos that morals, integrity, and character are fundamental to the preservation of the legal profession and serve as pillars to our justice system. While other schools may be satisfied with providing the mere basics to ethical guidance, it truly is a privilege to be a part of an institution that is dedicated to the proposition that molding upstanding moral individuals from the beginning of their legal careers is necessary for the preservation of our nation's future.

I sincerely hope you will appreciate our latest edition of "*The Gavel.*" The articles in this edition will provide a more in-depth analysis about the issues of professional responsibility in the legal profession and the many challenges and conflicts we are currently confronted with today. I would like to thank our guest author and beloved Ave Maria School of Law professor, Lt. Col. (Ret) Kevin H. Govern for his contribution to our publication. Professor Govern has taught professional responsibility at Ave Maria School of Law for many years, and it is an honor to have him featured in this semester's edition.

In closing, I would like to thank the members of the Moot Court Board for your hard work, dedication, and time that you have put into each one of your articles. Your hard work is greatly appreciated, and your contribution to the advancement of the dialogue surrounding the topic of professional conduct is a value to your fellow students and to the legal profession itself.

Sincerely,

Jimmie D. Bailey III
President, Moot Court Board, Ave Maria School of Law
mcp@avemarialaw.edu

INSIDE

Kevin Govern is a Professor of Law at Ave Maria School of Law. Professor Govern began his legal career as an Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. He has also served as an Assistant Professor of Law at the United States Military Academy and has taught at California University of Pennsylvania and John Jay College. He has published widely and spoken frequently on international and comparative law, national security and homeland security, cyber security and cyber defense, military operations, and professional ethics.

Lawyers of Character and ABA Model Rule 8.4(g): Practice Under Anti–Discrimination/Harassment Ethics Rules

By Professor Kevin Govern
Professor of Law,
Ave Maria School of Law

Repercussions still reverberate throughout the legal profession from the American Bar Association's ("ABA's") 2016 adoption of a new subparagraph (g) to Model Rule of Professional Conduct 8.4 ("Rule 8.4"), which exhorts that a lawyer may not "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of" several protected legal status factors[1] "in conduct related to the practice of law."[2] The new rule's Comment 3 clarifies that "discrimination" in the rule "includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[3]

This article will briefly address the previous standard, why the ABA changed it, and four practice tips for being lawyers of character in accordance with, not in spite of, evolving standards of professional responsibility.

The Pre-2016 Rule 8.4 Standard On Professional Misconduct

While various private initiatives and state issuances existed prior to 1908, the ABA as a non-governmental, voluntary association led the promulgation of model standards of conduct culminating in professional ethics standards in the U.S.[4] The first set of standards were known as the ABA Canons of Professional Ethics as model standards through 1969, enjoying near-universal adoption (with some variations) by every state.[5]

The ABA ETHIC Search Director Peter Geraghty chronicled the Code's development, writing that:

> In 1964, at the request of then ABA President Lewis Powell, who later was appointed a U.S. Supreme Court Justice, the ABA created a special Committee on Evaluation of Professional Standards (the Wright Committee) to determine whether there should be changes to the Canons of Ethics. Their response was the creation of the Model Code of Professional Responsibility that remained in effect up through 1983.[6]

The ABA Commission on Evaluation of Professional Standards (the Kutak Commission), established in 1977, studied whether the existing ethics standards provided adequate guidance for lawyers of that era.[7] Chaired by Robert J. Kutak, the eponymous Kutak Commission drafted the 1983 Model Rules of Professional Conduct, which are the current ABA standards.[8] Undergoing many amend-

ments and revisions, including but not limited to the Ethics 2000 Commission (E2K) and the 2012 Ethics 20/20 Commission, the resulting ABA Model rules have been adopted by 49 states.[9]

The Impetus For Changing Rule 8.4

Ethics expert Suzanne Valdez tracked the genesis of a stand-alone anti-discrimination/harassment rule as going back to the mid-1990s, with distinctive similarities to the present Rule 8.4(g).[10] These efforts were unsuccessful and the only vague reference to anti-discrimination/harassment misconduct is mentioned on old Comment 3 to Model Rule 8.4(d), which stated:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were e x - ercised on a discriminatory basis does not alone establish a violation of this rule.

The most recent efforts to pass an anti-discrimination/harassment rule were tied to the ABA's official effort in 2008 to create specific goals to serve its mission, which was and is: "to serve equally our members, our profession, and the public by defending liberty, and delivering justice as the national representative of our legal profession."[11] In furtherance of this mission, the ABA created four goals. Goal 3 was: "Eliminate bias and enhance diversity."[12]

Valdez further tracked developments stemming from mid-2014 towards a new ABA Model Rule 8.4(g), via Resolution 109, launched from language taken from old Comment 3, which "[r]ule underwent five different versions before it was passed at the ABA Annual Meeting in Chicago in August 2016."[13]

Critics have derided the change, noting that "[d]espite the absence of a strong demonstrated need for a new rule, it was adopted hastily, with little opportunity for scrutiny of the substantially revised final draft,"[14] especially because the proposal "evolved through three separate versions in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."[15]

George Dent, who has claimed that Rule 8.4(g) is "blatantly unconstitutional and blatantly political," fount that "[t]he biggest change in the new rule is the extension to "conduct related to the practice of law," but almost none of the cases cited by the Committee occurred outside the practice of law."[16]

Four Practice Tips For Being Lawyers Of Character

First, no attorney practices under the ABA Model Rules; they practice under state, commonwealth, territorial, or federal ethical rules and standards.[17] Practicing attorneys must understand not only what the rules might become because of ABA Model Rules but also what the rules actually are where they are practicing, especially but not exclusively rules regarding withdrawal from representation.[18]

Second, no attorney, even under the ABA Model Rules, is obliged to represent every client, and even in the course of representation of a client, "including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[19] As for legitimate, ethical bases for not pursuing representation, consider please the language from Rule 1.16 Declining or Terminating Representation:

> Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or

> fraud; (4) *a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement.* [Emphasis added][20]

Third, an attorney who violates the law (e.g., by *illegal* harassment or discrimination) is subject to sanction for misconduct for violating the law.[21] Rule 8.4(g), and bar rule analogues, typically have a reflexive clause allowing for declining or terminating representation.

Fourth, and finally, there has already been active opposition to 8.4(g) and no state or territory has adopted a rule as broad as the ABA Model Rule. Remember that the ABA's rules are not self-executing; state and federal bars must consider such adoption before any variation of it is enforced. The Federalist Society has noted that

> Already, the Illinois State Bar Association Assembly overwhelmingly voted against adoption, and the Disciplinary Board of the Supreme Court of Pennsylvania wrote "the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities." In addition, the Montana Legislature rejected the proposed adoption, and so did the Supreme Court of South Carolina. The comment period for Nevada closed on July 5, 2017, and the comment period for Utah closed on July 28, 2017.[22]

The Vermont Supreme Court has adopted the rule, while the South Carolina Supreme Court has rejected it, and the Nevada and Utah supreme courts solicited public comments.[23] Today, twenty-four states and Washington, D.C. have such a rule, but none is as broad as the new ABA rule.[24]

Specific to Florida lawyers, Florida Rule 4-8.4(d) prohibits disparagement and humiliation in addition to discrimination, but is limited to conduct directed to litigants, jurors, witnesses, court personnel, or other lawyers:

> A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to *knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, bias on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.* [Emphasis added][25]

Attorneys should carefully choose not only their areas of practice consistent with their personal morals and career opportunities but also the public legal and ethical standards to which they will have to adhere. If an area of practice presents a moral challenge (e.g., "family law" or criminal defense), the attorney should think long and hard before entering into that area of practice. Still, attorneys are uniquely situated with both knowledge of the law and leadership skills to seek to change laws and regulations in need of change—whether as private citizen constituents, lobbyists, legislators, or chief executives.

Conclusion

A family aphorism, passed from generation to generation in German, has been: *"Es wird nichts so heiß gegessen, wie es gekocht wird."*[26] Literally this means "nothing is eaten as hot as it is cooked." Figuratively and with applicability here, rules aren't to be taken as literally as when they are written. Reflective reason and real world practice often aid in making sense of legal and regulatory changes. As noted above, the rules of the jurisdiction of practice are what apply, not model rules even if they might be the "way ahead," and attorneys have legitimate, ethical bases to accept, decline or withdraw from representation. As officers of the court, lawyers should never harass or discriminate, and competent representation includes representation consistent with the law. In any event, no state or territory has adopted a rule as broad as the ABA Model Rule. Finally, lawyers guided by faith and reason will find inspiration to make the reality of the law and legal ethics reflect the famous dictum, commonly attributed to Saint Augustine, *lex iniusta non est lex* (unjust law is not

law),[27] and to be agents for change to law and policy where they need changing.

References:

1. *See*, e.g., Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Sections 501 and 505 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990 (ADA), Title II of the Genetic Information Non-discrimination Act (GINA), and the Civil Rights Act of 1991. These laws prohibit discrimination based on race, color, sex, religion, national origin, age, disability, and genetic information, as well as reprisal for protected activity. For more on this, see Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity, Equal Employment Opportunity Commission, last accessed Sep. 19, 2018, https://www.eeoc.gov/federal/otherprotections.cfm
2. Rule 8.4, as amended, provides: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules. MODEL RULES PROF'L CONDUCT R. 8.4(g) (2016), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html
3. Comment at *Id*.
4. Peter Geraghty, History of U.S. legal ethics standards, EYE ON ETHICS, DECEMBER 2016, https://www.americanbar.org/publications/youraba/2016/december-2016/a-brief-history-of-the-development-of-legal-ethics-standards-in-.html
5. For an excellent history of the Canons of Professional Ethics, see Walter B. Jones, Canons of Professional Ethics, Their Genesis and History, 7 Notre Dame L . Rev.483 (1932) http://scholarship.law.nd.edu/ndlr/vol7/iss4
6. Geraghty, *supra* note 4.
7. Commission on Evaluation of Professional Standards – Chair's Introduction, American Bar Association, last accessed Sep. 20, 2018, https://www.americanbar.org/content/dam/aba/ administrative/professional_responsibility/chair_intro.authcheckdam.pdf
8. *Id*.
9. Geraghty, *supra* note 4.
10. Suzanne Valdez, Recent Developments in Ethics: New ABA Model Rule 8.4(g): Is this Rule Good For Kansas? Recent Developments In The Law CLE At KU Law, May 17-18, 2018, at 1, https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2018/ valdez-materials-session-1.pdf.
11. ABA Mission and Goals, last accessed Sep. 19, 2018, https://www.americanbar.org/ about_the_aba/aba-mission-goals.html, *cited with authority* in Valdez, *Id.*, at 1.
12. Goal III: Eliminate Bias And Enhance Diversity, American Bar Association, 2008, https://www.americanbar.org/groups/disabilityrights/initiatives_awards/goal_3.html.
13. Valdez, *Id.*, at 1
14. *See* Andrew F. Halaby & Brianna L. Long, New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. LEGAL PROF. 201, 211-32 (2017), and see, e.g., George W. Dent Jr., "Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political" (2017). FACULTY PUBLICATIONS. 2012.
15. Dent, *Id.*, at 3.
16. *Id.*, at 3.
17. Commission, *supra* note 7.
18. MODEL RULES PROF'L CONDUCT R. 1.15 (2016), https://www.americanbar.org/groups/ professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property.html
19. MODEL RULES PROF'L CONDUCT R. 1.2 (2016), https://www.americanbar.org/groups/ professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html
20. MODEL RULES PROF'L CONDUCT R. 1.16(b) (2016), https://www.americanbar.org/groups/ professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html
21. Title VII et. al, *supra* note 1.
22. Walter E. Dellinger and John J. Park, The Fight Over ABA Rule 8.4(f) Proceeds to the States, The Federalist Society. Jul. 13, 2017, https://fedsoc.org/commentary/blog-posts/the-fight-over-aba-rule-8-4-g-proceeds-to-the-states
23. David L. Hudson, Jr., States split on new ABA Model Rule limiting harassing or discriminatory conduct, ABA JOURNAL, October 2017, http://www.abajournal.com/magazine/article/ ethics_model_rule_harassing_conduct
24. *See*, e.g., A Misguided Proposed Ethics Rule Change, ABA Model Rule 8.4(g) and the States, Christian Legal Society, October 2017, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states. The Christian Legal Society notes that "no state, except Vermont has a rule as overly broad in scope as ABA Model Rule 8.4(g). Thirteen states have a more restricted comment rather than a black-letter rule. The remaining fourteen states have neither a comment nor a black-letter rule." *Id*.
25. Florida Rules Regulating the Florida Bar, Chapter 4, Rule 4-8.4 Misconduct, last accessed Sep. 20, 2018, https://www.leebar.org/wp-content/uploads/2015/02/6-Rule-4-8-4-Misconduct.pdf
26. Author's note: This comes from the Austro-Slovene side of my family but is a common *redewendung* (phrase) in German usage. *See*, e.g., Translation of German "Es wird nichts so heiß gegessen, wie es gekocht wird", English Language & Usage, Jun. 11, 2016, https://english.stackexchange.com/questions/ 331947/translation-of-german-es-wird-nichts-so-hei%C3%9F-gegessen-wie-es-gekocht-wird
27. Saint Augustine of Hippo, De Libero Arbitrio, I, 5, https://archive.org/stream/ ancientchristian009933mbp/ancientchristian009933mbp_djvu.txt ; see also Aquinas,

Summa Theologica, I-II, Q. 96, Art. 4, http://www.newadvent.org/ summa/2096.htm cited with authority in Martin Luther King, Letter From A Birmingham Jail, April 16, 1963, https://www.africa.upenn.edu/Articles_Gen/ Letter_Birmingham.html

Undiscovered in Florida: When Attorneys Sidestep Disclosure and Spring a Trial Trap

By Chris Fiore

Suppose you're an attorney prosecuting a criminal case in Florida. You've spent hours preparing. Discovery is now closed. The case is set for trial.

Trial day arrives. The defense seeks to introduce an exhibit into evidence. The only problem is, the exhibit was never disclosed to the prosecution prior to trial. In other words, the defense has committed a discovery violation.

Take the word of the author: this can happen to you! When you least expect it, suddenly an exhibit will materialize. Put simply, your opponent will spring a "trial trap."

But the real question is not whether a discovery violation can happen at trial, but rather what you, the attorney, can do about it. What can you do about a trial trap? And equally relevant, what are the consequences for the trapper when the trap is sprung?

In the first place, discovery violations implicate one of the Model Rules of Professional Conduct. Model Rule 3.4, Fairness Toward Opposing Party and Counsel, provides that an attorney shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." In plain English, an attorney has to follow the court's rules unless the attorney has some legitimate excuse.

As one would expect, the court has rules on discovery that attorneys are expected to follow. Florida Rule of Criminal Procedure 3.220(d) provides that a defendant who chooses to participate in discovery must make certain disclosures to the prosecution. One of these disclosures consists of "any tangible papers or objects the defendant intends to use in the hearing or trial."[1]

Recalling our trial trap example for a second, let's assume that the defendant has elected to participate in discovery. Rule 3.220(d) requires our trapper opposing counsel to disclose *any tangible papers or objects* he or she intends to use at trial. The surprise exhibit I mentioned earlier is no exception.

But what happens when the trapper says nothing? The court has discretion to pursue a wide range of remedial measures, from an order preventing the trapper from introducing the exhibit to more drastic action, such as granting a mistrial.[2] More drastic still, if a party has willfully violated the discovery rules, the court may impose sanctions, including contempt of court and assessment of costs.[3] Furthermore, a party who willfully violates the discovery rules would also run afoul of Model Rule 3.4, because such a party would have knowingly violated a rule of the tribunal.

As if these remedies were not enough, there are additional means of escape from the trapper's snare. In Florida, there is a procedure available in the event a party seeks to circumvent the discovery process.[4] In the seminal case of *Richardson v. State*, the Florida Supreme Court addressed the measures to be taken during alleged discovery violations. *Richardson* concerned the failure of the prosecution to disclose a witness list to the defense prior to trial.[5] The Florida Supreme Court held that in the event of an alleged discovery violation, the trial court was obligated to conduct an inquiry into the circumstances surrounding the violation

and the degree to which the violation was prejudicial to the defendant.[6] Courts have since deemed this inquiry a "*Richardson* hearing," and such a hearing is required to ascertain whether a discovery violation occurred.[7] Although *Richardson* dealt with nondisclosure by the prosecution, a *Richardson* hearing is also required when the defendant fails to make a disclosure.[8]

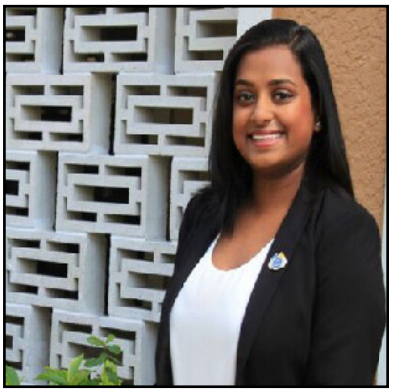
If you find yourself in a *Richardson* hearing, relief from the trial trap will hardly be automatic. The trial court must determine whether the nondisclosure was willful or inadvertent and substantial or trivial.[9] The court must also decide whether the nondisclosure had a prejudicial effect on your trial preparation.[10] Nevertheless, if the trial court does find a willful discovery violation, the trial trapper will be subject to sanctions as mandated under the rules.[11]

With all these available remedies, there is no reason for an attorney to feel powerless the next time an unprofessional trial trap is sprung. When you encounter the trial trap in practice, unleash the rules, *Richardson*, and spring a trap of your own.

References:

1. Fla. R. Crim. P. 3.220(d)(1)(B)(iii)
2. Fla. R. Crim. P. 3.220(n)(1)
3. Fla. R. Crim. P. 3.220(n)(2)
4. *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).
5. *Id.* at 773.
6. *Id.* at 776-77.
7. *Goldsmith v. State*, 182 So. 3d 824, 827 (Fla. 4th DCA 2016).
8. *Delhall v. State*, 95 So. 3d 134, 161 (Fla. 2012).
9. *Id.* at 160.
10. *Id.*
11. *See Goldsmith*, 182 So. 3d at 827.

Nelson Hearing: A Client's Right



By Anita Abraham

"You have the right to have an attorney. If you cannot afford one, one will be appointed to you by the court."[1] But what do you do if the court-appointed counsel's act or omission represents ineffective assistance? Under the Model Rules of Professional Conduct, a lawyer shall provide competent representation to a client.[2] Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[3]

In *Nelson v. State*, the appellant alleged that he only saw his court appointed counsel one time.[4] The appellant asked the trial judge, prior to the start of the trial, to dismiss his appointed counsel.[5] The trial judge complied with the request, but refused the appellant's request to appoint a successor.[6] Further, the court of appeals found that appellant's right to counsel was not adequately protected at the time he moved to discharge court-appointed counsel.[7] In honor of this case, future hearings determining whether court-appointed counsel was ineffective is called a *Nelson* Hearing.

The right of an indigent person to appointed counsel includes the right to effective representation by such counsel.[8] Effective assistance requires the attorney on the case to make a reasonable investigation into the facts of the case and to educate himself with the law pertinent to the facts.[9] In addition, effective counsel should not be under any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent client.[10]

When a defendant complains that his court appointed counsel is incompetent, a trial judge is required to make a sufficient and appropriate inquiry into the defendant's claim to determine

whether or not appointed counsel is rendering effective assistance to the defendant. However, as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint.[11] After, questioning both the defendant and the counsel, the judge determines whether the counsel's act or omission occurred, and whether it creates a "specific, serious deficiency measurable below that of professional competent counsel."[12]

If such a belief appears, the court should issue a judgment to that effect on the record and appoint a substitute attorney for the defendant.[13] Furthermore, the substitute attorney should be given enough time to prepare the defense.[14] If the court finds no reasonable basis of ineffective representation, the trial court should state this on the record. The court should also inform the defendant that if he decides to discharge his court-appointed counsel, the State will not be required to appoint a substitute.[15] If the defendant continues to demand that his court appointed counsel be dismissed, then the trial judge may—in his discretion—discharge counsel and require the defendant to continue with trial without representation by a court appointed counsel.[16]

However, a *Nelson* hearing is unnecessary when a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made.[17] Complaints over a defense counsel's trial strategy typically does not call into question his competency. Similarly, a trial court does not err in failing to conduct a *Nelson* inquiry where the defendant is unhappy with his attorney.[18] These complaints, at the root, are nothing more than a reflection of personality differences between the defendant and attorney. In such a situation, the judge should remember that an accused is not entitled to the appointment of counsel of his or her choice, and that the Sixth Amendment does not guarantee a meaningful relationship between the accused and counsel.[19] The judge's inquiry should focus on the adversarial process, not on the harmony of the attorney-client relationship.[20]

In Florida, a *Nelson* hearing is a right of the accused to get competent representation from his court appointed lawyer. Hence, make sure your court appointed counsel is abiding by the Model Rules of Professional Conduct and if they are not, you know what to do.

References:

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966)
2. Model Rules of Prof'l Conduct r. 1. (Am. Bar Ass'n 2005)
3. *Id.*
4. *Nelson v. State*, 274 So. 2d 256 (Fla. Dist. Ct. App. 1973)
5. *Id.*
6. *Id.*
7. *Id.*
8. *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967)
9. *Id.*
10. *Id.*
11. *Howell v. State*, 707 So. 2d 674, 680 (Fla. 1998).
12. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992), cert. denied, 509 U.S. 908.
13. *Nelson* at 256.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Davis v. State*, 703 So. 2d 1055, 1058-59 (Fla. 1997)
18. *Id.*
19. *Id.*
20. *Id.*

The Dangers Posed by Social Media in the Current Legal Landscape

By David Mulry

Over the past decade, social media has grown to be a crucial part of the average American's daily life. As a result—whether they want to or not—attorneys are forced to appreciate the impact of social media in their practice. The imperative of social media in the legal profession creates many ethical dilemmas which are regulated by the Model Rules of Professional Conduct, in terms of evidence collection, marketing, competence and more. Failure to understand the level and extent

of social media in our everyday lives could lead to issues like a malpractice action, a citation, or even disbarment.[1] Social media is defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)."[2] To understand the pervasiveness of social media, it is important to know the size of the major sites:

*Facebook has 1.3 billion users;
*LinkedIn has 300 million users;
*YouTube has 4 billion views a day;
*Instagram has 200 million users;
*Twitter has 500 million users.

These are in addition to an unending list of other social media sites.[3] It is important to recognize how easy it is for people to access these sites and how quickly people are to share intimate details about their lives and activities. As of 2018, approximately 77% of the roughly 328 million Americans own smartphones with the ability to access the internet from just about anywhere.[4]

This article will focus on one of the major areas of law affected by social media—personal injury cases and client's use of the major social media sites.[5] Today, people do not hesitate to post every detail about their lives. While posting pictures of last week's ski trip seem harmless, that post may prove harmful to someone in the middle of litigation claiming that they cannot leave their house or perform strenuous activity.[6] This happens so often that searches of a client's or opponent's social media accounts are becoming the baseline minimum competency and due diligence requirements to satisfy Rules 1.1 and 1.3, respectively.[7] In the current legal climate, tracking/subpoenaing social media accounts is replacing the need to hire an investigator. Using the discovery process to attain access to each of the claimant's social media accounts and the private/public messages, contacts, and photos contained therein, is enough to destroy someone's entire case.[8] Rule 1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. Rule 1.1 requires that the lawyer possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[9] Therefore, diligence and competency requirements show that an attorney could face a lawsuit for his or her failure to conduct a reasonable search of applicable social media accounts.[10]

There also exists a danger on the other side of the spectrum, which incorporates violations of Rules 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 8.4 (Misconduct). These rules govern situations where attorneys have specifically directed their clients to remove posts and pictures—otherwise discoverable material—because it would hurt their claims in a trial.[11] In the case of *Lester v. Allied Concrete Co.*, the attorney recognized that his client's social media accounts contained information damaging to his claims, instructed the client to delete the information contained therein, and withheld that information from opposing counsel when they requested it in discovery.[12] Once the court discovered this, the attorney was suspended for five years and both the attorney and his client were required to pay substantial sanctions to compensate the opposing side.[13]

As evidenced by case law, there are serious ethical implications for plaintiffs and defendants revolving entirely around the posts of a client.[14] This is just one of the many concerns created with the rise of social media—whether used by attorneys, judges, or jurors, and whether used for advertising, blog posts, electronic communications, or providing legal advice. These issues permeate the legal landscape, creating different ethical problems in conflict with the Rules.[15] In short, an attorney should remember that the seemingly unremarkable things one posts can have serious repercussions, jeopardize employment opportunities, trigger family upheaval, and challenge accepted notions of intellectual property and protected speech. Every lawyer is required to be aware of these implications and to conduct themselves and instruct their client in such a way as to navigate the murky waters and ethical pitfalls in this rapidly expanding area.

References:
1. Jennifer Ellis, Social Media for Law Firms: An Overview, https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/session11_print_all.authcheckdam.pdf; Ethan J. Wall, Navigating the Uncharted Waters of Social Media Marketing and Ethics, (June, 2012), https://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/june12/navigating-the-uncharted-waters-of-social-media-marketing-and-ethics.html.
2. Social Media, Merriam Webster (11th Ed. 2003).
3. Jennifer Ellis, Social Media for Law Firms: An Overview.
4. United States Census Bureau, U.S. and World Population Clock, (September 20, 2018), https://www.census.gov/popclock/; Pew Research Center, Mobile Fact Sheet, (February 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/.
5. Jessica Weltge and Myra McKenzie-Harris, Esq., The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology, (March 24, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/ethics/papers/myra_paper.authcheckdam.pdf; Jennifer Ellis, Social Media for Law Firms: An Overview.
6. *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (Sup. Ct.).
7. Jessica Weltge and Myra McKenzie-Harris, Esq., The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology; American Bar Association, Center for Professional Responsibilty. (2013), Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.
8. *Id.*
9. Model Rules of Prof'l Conduct r. 1.1, 1.3 (Am. Bar Ass'n 2005).
10. Jessica Weltge and Myra McKenzie-Harris, Esq., The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology.
11. Jennifer Ellis, Social Media for Law Firms: An Overview.
12. *Lester v. Allied Concrete Co.*, Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011).
13. *Id.*
14. *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650; Lester v. Allied Concrete Co., Nos. CL08-150 and CL09-223.
15. New York State Bar Association, Social Media Ethics Guidelines, (May 11, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/Social%20Media%20Ethics%20Guidelines.authcheckdam.PDF).

Discovering Richardson

By Megan Ofner

A monumental case which advanced the standard discovery practices in Florida criminal law happened in the 20th Judicial Circuit in 1971. This case was *Richardson v. State*.[1] What the *Richardson* court established was a longstanding test to determine whether a discovery violation was made by the state. The three-prong test is as follows: "1-whether the state's violation was inadvertent or willful, 2-whether the violation was trivial or substantial, and most importantly, 3-what effect, if any, did it have upon the ability of the defendant to properly prepare for trial."[2] What this test has done is provide a safeguard for a harmless error on part of the prosecution preventing a case from being dismissed due to harmless error.

The Florida Rules of Criminal Procedure provide in relevant part that "[w]ithin 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph…information and material within the state's possession or control."[3] This includes an extensive list of categories which must be disclosed to defense counsel. A prosecutor's failure to disclose a discoverable piece of possible evidence in a timely manner, or at all, may result in what is commonly known in Florida courts as a *Richardson* Hearing.

The *Richardson* test has been upheld for nearly half a century in the state of Florida with seemingly little documented criticism. Arguably, the reason for the longevity which this test has provided can be credited to the pursuit of justice. Critics of *Richardson* may assert that this standard only benefits the State so that the defendant is prejudiced. However, it has been held "[i]t is the State's burden to show that the error was harmless, the State must show in the record that the defendant was not prejudiced by the discovery violation."[4] This

follows the protocol of any criminal trial, with the burden resting on the state. Additionally, "the state's burden to show a discovery violation to be harmless is 'extraordinarily high.'"[5]

What *Richardson* has established is a test which prejudices neither the defendant or the state, but provides ample safe guards for both parties in the pursuit of justice.

References:

1. *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).
2. *Id.* at 9.
3. Fla. R. Crim. P. 3.220(b)(1)
4. *Casica v. State*, 24 So. 3d 1236, 1241 (Fla. 4th DCA 2009).
5. *Hicks v. State*, 45 So. 3d 518, 524 (Fla. 4th DCA 2010).

How The Telephone Can Be Dangerous To Confidentiality

By Mellissa Stubbs

There is a party game that children play called Telephone. A person who is "it" begins the game by whispering a secret into the ear of one person in the group. That person then whispers the secret to the next child, and so on, until everyone has heard the secret. The secret is then shared aloud. The object of the game is to have as little variation between the original and final messages as possible. Of course, what makes the game fun is the drastic, ludicrous difference between the beginning message and the end result. Whether by design or accident, the message is twisted from its original form. The lesson in Telephone is twofold: 1) once information is passed to another person in any form, there is no control over how that information is distributed; and 2) whether by design or accident, disclosed information can quickly become misinformation.

In the practice of law, not only is playing Telephone a bad idea, it can result in loss of trust, loss of business, even the loss of a license to practice. "A lawyer *shall not* reveal information relating to the representation of a client."[1] Yes, there are exceptions. A lawyer *may* reveal confidential information if he has consent or implied authorization by the client.[2] A lawyer *may*—and in some jurisdictions *must*—reveal confidential information in certain rare situations like prevention of death, securing legal advice, complying with court order, etc.[3] But chitchat over lunch, in the elevator, or during golf are not examples of what the drafters intended under the exception. There is nothing so alarming as hearing about your case from the wife of your attorney. Yes, that really happens.

Confidentiality not only aids lawyers in performing their jobs to the best of their abilities, it also protects the privacy of clients. Nowhere is the rule protecting client information as important as it is in Dependency Law. The red-headed stepchild of family law, Dependency law involves the very personal matter of families and the rights of parents to raise their children. Confidentiality is so important that sometimes attorneys are even required to keep information about their opponent confidential as well.

The State of Florida, for example, has made a statutory requirement that all records held by the Department of Children and Families concerning reports of child abandonment, abuse, or neglect are defined as "confidential" and "shall not be disclosed except as specifically authorized . . ."[4] The State of Florida then gives specific authorization during case planning conferences in the presence of individuals who may participate in the conference.[5] However, *all* individuals--attorneys and laymen alike--must maintain confidentiality.[6]

Confidentiality in Florida is taken so seriously that even some party members may not be allowed access to certain information without court intervention. For example, a stepfather may have to file a petition for mandamus compelling a judge to treat him as a party and allow him access to confidential information in a case.[7] To succeed, the stepfather has to show "a clear legal right" and an "indisputable legal duty" toward the child.[8] Temporary caregivers, too, are denied access to some

confidential information. Interestingly, while Florida Statutes expressly *include* foster parents as "participants" in dependency cases, that does not authorize them to fully access *everything* related to the case.[9]

If the State of Florida is so strict with private information about children and families, does that mean that attorneys who refuse an order to divulge client information are protected? The answer is, yes. Even when the safety and well-being of a child is in question, the Attorney ad Litem—attorney for the child—does not *have* to disclose the child's whereabouts if doing so would breach confidentiality.[10]

Attorneys in any field represent their clients best by carefully safeguarding information. But for a few exceptions, most jurisdictions prohibit revealing information without client consent—regardless of whether the client is an adult, or a child. In the area of Dependency law where private matters involving home and family are laid out for adjudication, the duty to protect sensitive information is an especially essential one. Just stay away from the Telephone.

References:

1. Model Rules of Prof'l Conduct r. 1.6(a) (Am. Bar Ass'n 2005) emphasis added.
2. Rule 1.6(a).
3. Rule 1.6(b).
4. Fla. Stat. § 39.202(1) (2018).
5. § 39.6011(b).
6. *Id.* emphasis added.
7. *See R.L.F. v. Dep't. of Children & Families*, 63 So. 3d 902 (Fla. Dist. Ct. App. 2011).
8. *Id.* at 903.
9. *See D.C. v. J.M.*, 133 So. 3d 1080, 1081 (Fla. Dist. Ct. App. 2014).
10. *See R.L.R. v. State*, 116 So.3d 570, (Fla. Dist. Ct. App. 2013).

For Whose Good? Mental Health Benefits of Pro Bono Work

By Corrinne Burns

The ABA reports that 51% of Florida lawyers participate in pro bono hours in the years that they have published data.[1] The Model Rules of Professional Conduct, 6.1, encourages lawyers to render 50 hours of pro bono service (or aspire to do so).[2] This amount of service is incredibly beneficial to non-profits and underprivileged individuals. However as the legal conversation turns to our own mental health, this pro bono requirement holds more for the lawyers than just a fulfillment of professional conduct.

ABA Law Practice Today released an article from a panel of lawyers about how they complete their pro bono service and the benefits they gain from it.[3] The panelists all cited "feel-good" benefits such as personal growth, increased firm morale, excitement, and personal satisfaction.[4] Likewise, the encouragement this panel received from their superiors about completing their pro bono hours has created a warm and engaging culture within their offices.[5] The positive results of trying pro bono cases has shaped their moral compasses and likewise helped them see the good of the profession. These are all positive, healthy outcomes from aspire to meet the standard of Rule 6.1.

Furthermore, *Psychology Today,* and many others have found that the practice of helping others is good for your mental health.[6] Psychologists across the world have found that people are happier when they are giving. Giving enhances a person's compassion, empathy, and solidarity. These studies have shown over and over that giving to others is beneficial to mental health and those who serve others live longer and healthier lives.[7] Likewise,

volunteerism increases resiliency and helps manage stress, all things that lawyers need to combat mental illness.

"Nearly half [of lawyers] have experienced depression at some point in their careers," and many abuse alcohol to cope.[8] Thankfully, in our own school and throughout the profession, much is being done to advance lawyer mental well-being. At Ave Maria School of Law, every student organization is required to participate in a service event each year. Every student benefits from the resilience, empathy, and morale that such events foster.

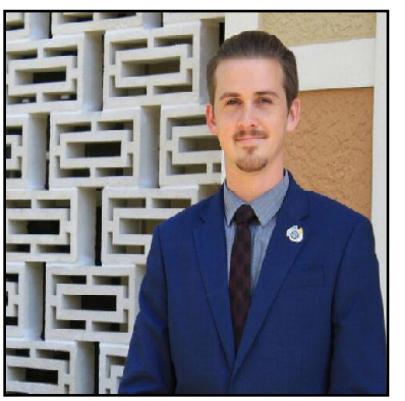
Of course, the main downside to completing pro bono work is that lawyers generally do not receive compensation, no matter how diligently they work on their cases. However, in *Alexander S. v. Boyd*, 929 F. Supp. 925 (D.S.C. 1995), lawyers who agreed to work pro bono representing several juvenile cases were awarded attorneys' fees. This judgement was a result of multiple factors including the vast amount of people that were required, the specific jurisdiction's past cases and the novelty and complexity of the issues. This is an incredibly rare happenstance and should not be relied upon by anyone completing pro bono hours. However, it is a refreshing reminder that the just will receive their reward.

While the comments to Rule 6.1 focus on the needs of the underprivileged and those of limited means, the benefits are not for those receiving the services alone.[9] The benefits extend to both the client and the attorney. As mental health awareness in the legal profession increases, so must our understanding of what can be done to ensure that we keep ourselves well. This simple requirement already in place may go miles in combating the mental health crisis amongst lawyers and law students alike. To test this theory, start attending community service events at school or in the local community. Just because we may not have taken the bar exam yet doesn't mean that we can't begin working on our professional ethics or begin building healthy habits now.

References:

1. American Bar Association, Pro Bono Reporting, § Florida (2018), https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html
2. Model Rules of Prof'l Conduct r. 6.1 (Am. Bar Ass'n 2005).
3. Gaffney, Nicholas, Pro Bono Carries Benefits Beyond Any One Case, Law Practice Today (2017), https://www.lawpracticetoday.org/article/pro-bono-benefits/
4. *Id.*
5. *Id.*
6. Plante, Thomas G., Helping Others Offers Surprising Benefits, Psychology Today, (2012), https://www.psychologytoday.com/us/blog/do-the-right-thing/201207/helping-others-offers-surprising-benefits-0
7. *Id.*
8. Connecticut Law Tribune, Online, ABA Passes Measure on Lawyer Substance Abuse and Mental Health, (2018), LexisNexis.
9. Rule 6.1

Ignorance of Internet Resources Is No Excuse



By Ian Johanni

In many ways, 21st-century technology has been kind to the legal profession. Amidst a vast array of legal tools and time savers, however, it may be easy to lose sight of the ethical questions and dilemmas that new technological abilities pose in the modern legal world. Mindful of this, in 2009 the ABA founded the Commission on Ethics 20/20 to examine how to adapt the Model Rules of Professional Conduct to address the continuing evolution of technology.[1] In 2012, the ABA approved an amendment to Rule 1.1, requiring legal professionals to stay up to date on the risk and benefits of relevant technology.[2] Since then, 31 states (Florida included) have elected to adopt some version of the amended rule. In May 2017, the ABA published Formal Opinion 477 codifying the amended standard as Model Rule 1.1, Comment 8.[3]

As the trend continues, the issues of debate con-

cerning technological competency grow daily. One issue generating considerable debate is the obligation to research information available on the internet. With the internet as a constant resource, to what extent must a competent legal professional avail themselves of internet research? Alternatively, can a lawyer attempting to serve his clients' interests by accessing information on the internet end up committing other ethical violations in the process? Where is the line between competency and carelessness?

A variety of states have been chiming in on the issue of competency and internet research over the last six years. In 2013, the Supreme Court of Iowa ruled on a disciplinary hearing case involving a lawyer, his clients, and a Nigerian inheritance internet scam.[4] The court opined that a simple "cursory internet search" would have uncovered the ruse and that a competent lawyer ought to take advantage of such simple internet research.[5] It seems courts are likely to hold legal professionals accountable for ignorance of information that is readily available through the internet. Moral of the story, "Google it!", just in case.

In a related finding, the Supreme Court of Missouri decided that a competent attorney is obligated to know jurors' litigation experiences.[6] The court pointed out that a search on Case.net would have allowed the attorney to uncover a juror's failure to disclose information during the voir dire process long before the attorney filed a motion for new trial based on the juror's non-disclosure.[7] The court instructed that, going forward, competent legal professionals are required to make "reasonable efforts," including the use of internet-tools, to uncover juror information before trial.[8] The court spoke broadly about the legal professional's obligation to avail himself of easily accessible resources on the internet that significantly impact a client's interests.[9] Moral of the story: ignorance of information available in handy online databases is no excuse.

In general, it seems that internet research is required and that competent lawyers ought to be creatively exploring online avenues with information that supports their clients' interests. But what about the personal and social environment of social media? At what point does a zealous legal professional trespass into a different ethical boundary in an effort to conduct competent and thorough research?

The answers to these questions are still being defined. According to a 2010 case in the Maryland Court of Special Appeals, social media provides access to invaluable information about individuals' character, background, habits, interests, motives, emotions, and associations.[10] The Maryland court commented on the investigatory use of social media in the legal profession, citing a law review article's assertion that investigation of relevant social media ought to be a new competency requirement for legal professionals.[11] Given the vast amount of personal information that social media contains, whether available to the public or behind the thin privacy veil of a friendship status, one can appreciate the theory behind this argument. However, when navigating the waters of social media research, discerning legal professionals must be cautious and stay up to date on local rules and restrictions.

Social media research has generated a variety of concerns coalescing around ABA Model Rules 4.1, 4.2, 8.4(a), and 8.4(c). The D.C. Bar Ethics Opinion 371, warns lawyers to be careful about social media contacts that violate Rule 4.2. [12] While publicly hosted information is fair game, legal professionals must proceed with caution when seeking out friends-only information.[13] The D.C. Opinion asserted that even a generic friend request to an opposing party who is represented by counsel is a communication under the governance of Rule 4.2 and constitutes an ethical violation.[14] Thus, a legal professional's duty to investigate an opposing party's social media information may entirely depend on whether that party allows public access to all or some of their social media accounts.

Other ethical concerns arise when legal professionals use social media to investigate witnesses. If access to a witness's social media account could reveal grounds for impeachment, how far is a competent lawyer required to go to obtain that information? Do any ethical barriers relieve a lawyer of that burden? According to an opinion from The City of Philadelphia Bar Association Professional

Guidance Committee, an attempt to gain friendship access to a witness's social media account can potentially constitute "deceptive" conduct violating Rules 8.4(a), 8.4(c), and 4.1.[15]

The Philadelphia Committee asserted that a "forthright" request for access to information hosted on a private social media account is an acceptable ethical practice.[16] However, if a legal professional attempts to gain access to private social media information via a third-party agent's friend-request without disclosing its purpose, this conduct violates Rules 8.4(a), 8.4(c) and 4.1.[17] The Committee determined that such conduct expressly violates Rules 8.4(c), because it is a deceptive practice that "omits a highly material fact," (the invitation's true purpose) and 4.1 because the request itself makes a false statement of material fact. Rule 8.4(a) is violated implicitly by violating the previous two rules.[18]

The Association of the Bar of the City of New York produced a similar standard but maintained one caveat.[19] While using a third-party does not mask intentionally deceptive behavior, the New York Court of Appeals precedent established that a mere friendship request that does not disclose purpose or intent is allowable, provided that only truthful information is used in making the request.[20]

The San Diego County Bar Association found that a friendship request to a witness without disclosure is an impermissible deception, even when the witness is an unrepresented party.[21] The New Hampshire Bar stated that, "The duties of competence and diligence are limited...by the further duties of truthfulness and fairness when dealing with others."[22]

These are a few examples of the evolving issues generated by Rule 1.1, Comment 8 and the use of the internet as a tool for research. Despite the various opinions, one fact is clear, required internet research is here to stay for the legal professional. What's the moral of this story? Legal professionals should use internet research creatively, but carefully, continually educating themselves on their local jurisdiction's opinions and expectations.

References:

1. ABA Commission on Ethics 20/20, AMERICANBAR.ORG, https://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Sep. 12, 2018, 8:55 PM).
2. ABA Comm'n on Ethics 20/20, Resolution 105A (2012).
3. Robert Ambrogi, 31 States Have Adopted Ethical Duty of Technology Competence, Law Sites, (Sep. 12, 2018, 8:55 PM), https://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html; ABA Comm'n on Ethics 20/20, Formal Op. 477 (2017).
4. *Iowa Supreme Court Attorney Disciplinary Bd. v. Wright*, 840 N.W. 2d 295, 301 (Iowa 2013).
5. *Id.*
6. *Johnson v. McCullough*, 306 S.W. 3d 551, 559 (Mo. 2010).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Griffin v. Stat*e, 995 A. 2d 791, 801-802 (Md. Ct. Spec. App. 2010), rev'd, 419 Md. 343, 19 A. 3d 415 (2011).
11. *Id.*
12. D.C. Bar Ethics Opinion 371, (November, 2016), https://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm (last visited Sep. 12, 2018, 8:55 PM).
13. *Id.*
14. *Id.*
15. The Philadelphia Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-02 (Mar. 2009).
16. *Id.*
17. *Id.*
18. *Id.*
19. The Ass'n of the Bar of the City of New York Comm. On Prof'l Ethics, Formal Op. 2010-02 (Oct. 2010).
Id.
21. San Diego County Bar Ass'n Legal Ethics Comm., Formal Op. 2011-02 (May, 2011).
22. New Hampshire Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (June, 2013).

Confidentiality in a Cyber World: What To Know

By Philumina Johanni

Thanks to the ABA's new ethical requirement of technological competency, it is a good time for lawyers and aspiring lawyers to take a reality check. Attorneys in the 21st century are accustomed to accessing software technology daily to conduct their legal practices. This includes email, e-filing, online billing and case management, document storage in the cloud, legal research and e-discovery, document automation, client-attorney video, and audio communication. Attorneys also use hardware such as phones, laptops, tablets, or any device that connects to the internet. For all of the simplicity these provide, many of us are unfamiliar with how the technology actually works.

If you are considering practicing law in Florida, it is time to learn. In 2012, the ABA modified the Model Rules of Professional Conduct to reflect society's growing dependence on technology, updating Rule 1.1, comment 8, to include a competency in technology. It provides that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[1] The Florida Supreme Court adopted this provision into its model rules, elevating this competency to an ethical standard for all lawyers admitted to the Florida bar.[2]

Pursuant to the adoption of this ABA standard, lawyers in Florida are now professionally obligated to maintain a reasonable level of cybersecurity in conducting their online practices. The inclusion of up-to-date cybersecurity as an ethical requirement arises from the natural intersection of technological competency and the guarantee of confidentiality. This intersection is articulated in Rule 1.6 where lawyers must "take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation of a client."[3] The ABA updated this comment at the same time it added the technology requirement, clearly acknowledging the relation between the two.

Accordingly, while Rule 1.1 may challenge lawyers to keep up with technology to employ it in serving clients, Rule 1.6 sagely recognizes that such usage involves inherent risks. The information that must be safeguarded from "inadvertent or unauthorized disclosure" now includes a vast abundance of data and communication transmitted and stored online. As a result, lawyers admitted to the Florida Bar, as well as 30 other states which have adopted this competency, are bound by an ethical duty to their clients to be competent in basic cybersecurity.[4] This ensures that all client matters and information transmitted or stored electronically remain confidential.

The standard submitted by the ABA for lawyers to avoid unauthorized disclosure gives no brightline test; rather, Rule 1.6 broadly suggests that lawyers take "reasonable efforts" to forestall such loss. Granting some guidance to the "reasonable efforts" standard, Formal Opinion 477 governing online attorney-client transmissions covers some facets of the prescribed fact-based analysis under Rule 1.6(c), comment [18].[5]

Factors weighed in this analysis include the sensitivity of the client's information, the likelihood of its disclosure without certain safeguards, the cost and difficulty of implementing these safeguards, and the extent to which the safeguards might adversely affect representation itself.[6]

Though Opinion 477 maintains that unencrypted email communications are still permissible under the updated standard, it requires that attorneys use reasonable, "available methods of common electronic security measures."[7] As technology like cloud storage and computing increases in consumer usage, it has become much easier to access stored data from a multitude of compatible devices, as much work is done on phones and tablets in addition to computers. As Opinion 477 notes

and common sense dictates, the likelihood of unintended disclosure and unpermitted trespass significantly increases with the addition of these access points.[8]

Unintentional disclosure naturally poses a growing dilemma to those who regularly and comfortably store unencrypted data on third party or virtual servers (e.g. iCloud), since the architecture of this storage promotes access from varying devices. Furthermore, while control of data becomes limited insofar as many lawyers do not store it on private servers, culpability for loss or interception falls on the lawyer who does not make reasonable efforts to secure it.

Opinion 477 regards the protection of cybersecurity not as a future need, but as a present requirement. "Law enforcement discusses hacking and data loss in terms of 'when,' and not 'if.'"[9] That law firms are a target for hackers comes as no surprise. Client information held by firms is often of a sensitive nature, and accessing it directly would eliminate the need for an intruder to sift through copious records to find information already neatly categorized in legal files.
Despite its reduced security, sensitive data may be stored or transferred via third parties, though relying on a third party does not necessarily exculpate lawyers from personally guaranteeing securely stored documents.[10] Attorneys ought to discuss the degree of sensitivity for confidential information with clients at the outset of representation so that there is a mutual understanding of the expectations the client has for privacy.[11]

Indeed, some clients have chosen to maintain paper and in-person communication when they suspect that surveillance or interception of confidential information is likely. For example, in *Clapper v. Amnesty International*, attorneys and human rights organizations sought Fourth Amendment protection from National Security Agency surveillance of American attorneys' confidential exchanges with foreign clients.[12] When a split Supreme Court did not enjoin this surveillance, attorneys had no choice but to travel overseas in avoidance of telephonic or electronic communication and maintain.

For many attorneys, the norm lies in simpler safeguards. While case-specific "reasonable efforts" toward cybersecurity are not spelled out in any official ethics opinion, Opinion 477R offers considerations for guidance. Attorneys ought to work to understand the nature of the threats to electronic data, how client information is transmitted, where it is stored, and how to employ reasonable electronic security measures.[13] Other intuitive safeguards include encrypting communication and data, ensuring a private or safe internet connection, using complex passwords, double authentication, and keeping your mal-ware and anti-virus programs up to date.[14]

Finally, to continually meet the ethical standard for confidentiality and technological competency, attorneys should regularly assess whether their current safeguards reflect advances in technology. For Florida attorneys, this means both staying informed about emerging technology and periodically checking local standards for what constitutes a "reasonable effort."

References:

1. Model Rules of Prof'l Conduct r. 1.1 cmt [8] (2012).
2. Robert Ambrogi, 31 States Have Adopted Ethical Duty of Technology Competence, LawSites, updated March 15, 2018 (https://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html) (accessed 9/25/18).
3. Rule 1.6 (c) (2012).
4. Robert Ambrogi, 31 States Have Adopted Ethical Duty of Technology Competence.
5. ABA Comm'n on Ethics 20/20, Formal Op. 477R (2017).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*, citing Rule 5.3 (2012).
11. *Id.*
12. *Clapper v. Amnesty Int*., 568 U.S. 398 (2013).
13. Formal Op. 477R
14. *Id.*

Aiding DREAMers

By Jennifer Sosa

Immigration law is an area of law in which much controversy has developed. Not only does immigration law directly impact those who are undocumented, it also impacts those who are documented and living in this country. There is a group of individuals who—by no choice of their own—came into the country and know only the United States as home. The individuals I am alluding to are known as DREAMers. DREAMers are undocumented immigrants who were brought to the United States as children by their families.[1] DREAMers are individuals who have followed the law to the fullest extent but remain uncertain about their future in this country.

The word "DREAMers" comes from legislation introduced in Congress and known as the DREAM Act. Although the DREAM Act has been introduced in the Senate and the House of Representatives many times, it has failed to pass. In June 15, 2015, an executive order by President Barack Obama instituted an immigration policy known as Deferred Action Against the Childhood Arrivals (DACA).[2] It provided temporary protection from deportation to undocumented immigrants who were brought into the United States as minors.[3] DREAMers are recipients of DACA.

As of September 2017, the U.S. Citizenship and Immigration Services (USCIS) reported that there were 689,800 active DREAMers.[4] Out of these, 26,417 DREAMers are in Florida. Although USCIS no longer accept new applicants, DREAMers can continue to assert the DACA's protection so long as they meet its requirements. For example, a person must be under the age of 31 as of June 15, 2012 and prove that they were under the age of 16 when they entered the United States.[5] Applicants have to prove they had lived continuously in the country from June 15, 2007 and had no lawful status as of June 15, 2012.[6] Applicants also had to satisfy the academic or military requirements.[7] Finally, applicants could not have been convicted of a criminal felony, a significant misdemeanor, or more than three misdemeanors at the time of the application.[8]

While DACA affords DREAMers protection from deportation proceedings, it is clear that not every undocumented immigrant qualifies for the policy's protection. In fact, the policy seeks to ensure that those who apply are deserving of such protection and people of good moral character. The policy denies individuals seeking the policy's protection if applicants are deemed to pose a threat to national security or public safety.[9]

There are about 30,000 DREAMers who currently impact our nation's workforce and economy. According to the Center for American Progress, if DACA were to cease, the U.S. gross domestic product would be reduced by $460.3 billion over the next 10 years, significantly impacting Medicare and Social Security contributions.[10] In Florida alone, the state would lose $1.4 billion annually.[11] With the current administration and the uncertainty behind DACA, many DREAMers do not know where they legally stand and what the future holds for them.

Obtaining legal services is difficult for most DREAMers because they are either working to provide for their family or working to pay their way through school. But, many of the DREAMers sacrifice other necessities and burden themselves financially, in their desperate attempt to find legal representation. What is even more unsettling is that some attorneys prey on applicants who are vulnerable and willing to pay up front. Some attorneys have invoiced their clients thousands of dollars in attorney fees.[12]

Many of the steps required to successfully complete a DACA application are done by the applicants, as they are the ones who have to prove the factors set forth under DACA guidelines. Their attorneys, on the other hand, fill out the applications and submit the paperwork. Arguably, the amount of work an attorney has to commit per applicant is minimal compared to other areas of law. Thus, the

amount of work an attorney invests per DACA application should reflect their fee. The Rules of Professional Conduct state that where "a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[13] Simply stated, there is no reason why an attorney should be overcharging for DACA services. In the alternative, because not much is required from the attorney to successfully complete a DACA application, attorneys should provide pro bono hours to a few of these cases per year.

DREAMers are individuals identified in Rule 6.1 of the Model Rules of Professional Conduct. The rule states, "every lawyer has a professional responsibility to provide legal services to those unable to pay."[14] Lawyers should aspire to render at least 50 hours without fee or expectation of fee to persons of limited means.[15] These young adults live in the United States with temporary lawful immigration status. A majority of them are "still students and 17 percent are pursuing an advanced degree."[16] DREAMers are not eligible for federal student aid.[17] Although DREAMers are able to work, those who wish to pursue a higher education typically use most of their income to help fund their education.[18]

Now, to be clear, I am not saying that attorneys should endlessly provide low or no-cost legal services to all DREAMers, but rather, as stated in Rule 6.1, "a lawyer should aspire to render at least (50) hours of pro bono publico legal services per year"[19] toward this disenfranchised group. Immigration lawyers in general should "aspire to render . . . pro bono publico services." But when it comes to DREAMers, who help our nation's economy, attorneys should help a vulnerable class, and to positively impact their lives.

References:

1. Catherine E. Schoichet, Susannah Cullinane and Tal Kopan, *US immigration: DACA and Dreamers Explained* (Oct. 26, 2017), https://www.cnn.com/2017/09/04/politics/daca-dreamers-immigration-program/index.html
2. Joannna Walters, *What is Daca and who are the Dreamers*? (Sept. 14, 2017), https://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers
3. *Id.*
4. Lori Robertson, *The DACA Population Numbers* (Jan. 12, 2018), https://www.factcheck.org/2018/01/daca-population-numbers/
5. Michelle Mark, *Trump's deadline for the 'Dreamers' just passed without a fix from Congress — here's everything you need to know about the program hanging in limbo* (Mar. 6, 2018), https://www.businessinsider.com/when-does-daca-end-what-happens-recipients-2017-9
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Nicole Prachal Svaklenka, Tom Jawetz, Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars* (July 21, 2017), https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/
11. Don Johnson, *Ending DACA Will Cost Florida $1.4 Billion* (Jan. 29, 2017), https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/
12. *DREAM Act, How Much Did Your Lawyer Charge You for DACA?*, DREAMACTPORTAL, http://dreamact.info/forum/archive/index.php?t-32496.html (last visited Sept. 22, 2018).
13. Model Rules of Prof'l Conduct r. 1.5(a) (2018)
14. Rule 6.1(2018)
15. *Id.*
16. Danielle Kurtzleben, *FACT CHECK: Are DACA Recipients Stealing Jobs Away From Other Americans?* (Sept. 16, 2017), https://www.npr.org/2017/09/06/548882071/fact-check-are-daca-recipients-stealing-jobs-away-from-other-americans
17. *United We Dream, A reference guide for DACA recipients* (last visited Oct. 31, 2018), http://unitedwedream.org/wp-content/uploads/2014/05/DACAStepsforFAFSA2014_Final.pdf
18. Kelsey Sheehy, *How Immigrants Without Legal Status Can Pay for College* (Aug. 15, 2014), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2014/08/15/how-immigrants-without-legal-status-can-pay-for-college
19. R. 6.1(a) (1)
20. *Id.*

R&R: Regulating Relationships

By William Gates

Defining relationships, and the legal consequences resulting from entering into certain relationships, is a service legal professionals have provided for decades. Whether involving a contract or divorce, adoption or probating an estate, clients have sought the advice of attorneys to clarify and understand their duties and rights in relation to others. When engaging in the practice of law, the attorney also creates relationships with the client, the court, and the rest of the legal community. These relationships also result in the imposition of duties governed by the Model Rules of Professional Conduct.[1] Taken separately, the average attorney is able to accurately define and meet their obligations to each party. But viewed together even a veteran professional may encounter difficulty in balancing each of these duties.

A proposed Florida Rule of Judicial Administration seeks to provide clarity to one aspect of this balance. Rule 2.570, if approved, directs judges to grant a motion for continuance based on parental leave unless substantial prejudice is shown to the opposing party.[2] The default time is three months, unless there is good cause for longer; the burden of proof as to prejudice rests on the one seeking the continuance.[3] The Florida Bar Board of Governors has voted to recommend the rule to the Florida Supreme Court. The committee notes state the importance for attorneys to be able to balance both work and family, another relationship attorneys must balance.[4]

Currently, the decision to grant such a continuance is at the discretion of the judge. Under the Rules, a practicing mother or father to be must evaluate how a continuance would affect their duty to their client under Rule 1.3,[5] to the Court under Rule 3.2,[6] and to opposing counsel under Rule 3.4.[7] A rule such as 2.570 would provide consistency and clarity not only to a lawyer considering such a continuance, but also to the Court, opposing counsel, and the clients on either side. The proposed rule provides a recommended length for the continuance, the basis for granting it, and exceptions to protect the interests of the opposing party. This knowledge decreases the stress and uncertainty of expectant parents. It also expedites procedures so courts and opposing counsel may manage their time accordingly. Finally, it allows clients to be better informed about the likely timeline and progression of their case. While it does not address all potential conflicts that may arise, it is likely to have far-reaching beneficial consequences for all. It allows for judicial efficiency, better case management, and—perhaps most importantly—it protects and strengthens the health and well-being of families.[8]

References:

1. Model Rules of Profn'l Cond r. 1.1-1.18, 3.1-3.9 (2016).
2. Proposed Parental-leave Continuance Rule, FLA. B.N., Oct. 15, 2018, at 2.3. *Id.*
4. *Id.*
5. Rule 1.3 (2016).
6. Rule 3.2 (2016).
7. Rule 3.4 (2016).
8. Rule 2.570 was previously proposed in 2017 but was dismissed on procedural grounds. In re Amendments to the Fla. Rules of Judicial Admin. - New Rule 2.570, No. SC17-1611, 2018 Fla. LEXIS 90 (Jan. 18, 2018). The Florida Bar Rules of Judicial Administration Committee voted against the Rule in the past but has been working with the Florida Bar Board of Governors and submitted majority and minority reports, along with votes and comments to the Florida Supreme Court by August 31, 2018. There is currently no deadline for the Court's review. Proposed Parental-leave Continuance Rule, FLA. B.N., Oct. 15, 2018, at 2. The case is set on the Florida Supreme Court docket as Case No. SC18-1554.

Depending on Confidentiality and Diligence

By Clark Robinson

All lawyers that graduate from law school and pass the bar exam are qualified to practice law. But what skills will set apart a good new attorney from an average one? Two characteristics that will accomplish this is are competence and diligence. Many graduating attorneys, including those with good work habits—viewed as good attorneys—may be drawn to the private sector of law. However, the public sector is in need of good, hard-working attorneys too, including the area of dependency.

Dependency law is governed by Chapter 39 of Florida Statutes. Under the purpose and intent section it states that "the purposes of this chapter are to provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development."[1] The attorneys at the Department of Children and Family Services (The Department) represent the State of Florida. As representatives of the State it is their job to protect the interests of children who are adjudicated dependent by judges.

How will a good lawyer protect the children's interest? The first way is to be a competent attorney is to become familiar and competent in the practice law in the filed in which you practice. According to the American Bar Association, competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[2] Knowledge on how dependency law is governed can be obtained by these attorneys familiarizing themselves with Statute Chapter 39. Thoroughness and preparation are things that cannot be measured; but being careless and unprepared can be obvious to other attorneys and will be obvious to judges.

The second way to protect these children's interest is for the attorney to be diligent. The ABA defines diligence as "a lawyer shall act with reasonable diligence and promptness representing a client.[3] For the attorneys at The Department, the client is the state of Florida and the interests at stake are those of the children who are adjudicated dependent. Diligence is shown by careful and persistent effort.[4]

There are multiple parts to Dependency. Dependency begins with a shelter hearing; argued in front of a judge by The Department and representatives of the parents, most often coming the Office of Regional Counsel. The attorneys for the Department argue why the children should be adjudicated dependent while the attorney for the parents argue why they should not. The second phase occurs when there is an acceptance of a case plan by the parents. After parents accept and complete their case plan, they can be reunified with their children. If the parents do not accept the case plan, or if they do not complete the tasks required under the case plan, case moves to the third phase, which is Termination of Parental Rights (TPR). When parental rights are terminated, the child can be adopted or placed in a permanent guardianship. The entire goal of dependency is to place the child in a permanent, safe home. Ideally, that is at home with their parents. However, if their parents are unable to care for them, the next best place is in the home of a guardian through either adoption or permanent guardianship. The competent and diligent attorneys at The Department want permanency and safety for the child.

An example of attorneys needing to be competent and diligent is found when parents raise motions that contradict the safe, best interests of the child. Like when the mother of a child challenges the "deemed consent" ruling entered at her TPR hearing because the mother did not appear. If an attorney from The Department is not prepared or is unfamiliar with this law, then the motion could go through. In the State of Florida "when a default judgment is entered at a termination of parental

rights hearing when a parent was not present, the default judgment can be set aside in accordance with the three-part test which requires the party seeking to vacate the default to 1) act with due diligence, 2) demonstrate excusable neglect, and 3) demonstrate the existence of a meritorious defense to the termination petition."[5] For example, in *M.P. v. Department of Children and Families*, the mother missed her TPR hearing, and her absence resulted in a deemed consent and a termination of her parental rights.[6] She had her attorney file a motion asking the court to vacate the deemed consent.[7] Her motion was denied.[8] She did not show that the third prong was met or demonstrate the existence of a meritorious defense to the termination petition. The attorneys for The Department had to be familiar with the motion, find case law that governs the motion, and present evidence showing why her motion should be denied.

Again, in all three aspects of dependency law, the attorneys for The Department must be as familiar with dependency court as possible. They must also know that the safety, rights, and interests of children are at stake and must be fought with competence and diligence. This work that lets you know you are trying to do some good while you fight for the safety of children.

References:

1. Fla. Stat. §39.001 (a).
2. Model Rules of Prof'l Conduct r. 1.2 (AM. BAR ASS'N 2005)
3. Rule 1.3 (AM. BAR ASS'N 2005)
4. Diligence, Merriam-Webster's Dictionary, (www.merriam-webster.com)
5. 25 Fla. Jur 2d Family Law §319
6. *M.P. v. Dep't of Children and Families,* 230 So.3d 512 (Fla. Dist. Ct. 2017.)
7. *Id.* at 513
8. *Id.*

Do Contingency Fees Fairly Fit Their Function?

By Chris Stipek

In accordance with the Model Rule of Professional Conduct Rule 1.5(c), a lawyer is allowed to charge a client a fee contingent on the outcome of the trial.[1] Contingency fees are most common in personal injury cases and worker's compensation.[2] These fees can be a risk for the attorney because there is no guarantee that the attorney will win the case for his client. Winning the case is the only way the attorney gets paid. The two issues I will discuss dealing with contingency are: 1) Plaintiffs aren't truly made whole when a contingency fee is implemented; and 2) The percentage of the amount earned by the attorney does not always reflect the actual work the attorney put in.

When a judgment is given, the amount reflects what is necessary make the plaintiff whole again, as if the injury didn't occur.[3] When the attorney's contingency fee is taken from the total awarded damages, then the plaintiff isn't truly made whole.[4] For example, if a Plaintiff is seriously injured in an accident where the damages amounted to $100,000, and they receive $100,000, typically at least 30% of the money goes to their attorney, leaving the Plaintiff with only $66,667. An attorney may additionally charge the client for the filing costs and discovery costs they take on as a trial approaches, further decreasing the amount the plaintiff may recover.[5]

However, for many people, a contingency fee is a saving grace, because the hourly cost for an attorney is not something they can afford. Contingency fees allow for those who cannot pay a retainer up front to seek and obtain legal help.[6] Without contingency fees these individuals would not have legal representation, would not be made whole, and

could not recover anything at all. Contingency fees are sometimes referred to as a plaintiff's "keys to the courthouse" for this very reason. [7] They help injured parties who could not otherwise obtain legal advice.[8]

Sadly, percentage of the amount earned by the attorney does not always reflect the actual work the attorney put in. For example, if an attorney begins negotiating with the opposing party early on and reaches a settlement, the attorney can walk away with a considerable amount of money for very little work. In a single phone negotiation, the prices can jump hundreds, even thousands, of dollars in a matter of seconds. These fast negotiations lead to a higher amount received by the client and the attorney. If the attorney were to bill an hourly rate, he would need to work several additional hours to equal the amount of the contingency fee that could be increased through a phone negotiation.[9] But attorneys are not tasked with seeking the fastest settlement. They are tasked with obtaining a settlement amount their client receives the most that they can.[10] As a result, clients walk away happy, and they receive a higher contingency fee.[11]

On the other hand, when an attorney charges an hourly rate they might drag out the case to get as many billable hours as possible. If a client's retainer is expended, an attorney may cease negotiations. [12] In doing this, the attorney fails to pursue a more complete value for their client because there is no longer an incentive.[13] However, the average hourly charge is close to that of a fee that is received on a contingency basis.[14] The unfair nature of contingency fees really exists only when there is a fast settlement, or an abnormally large settlement, and the attorney makes off with an inflated fee. The attorney must consider the risk of loss when accepting a contingency fee. He must be able to calculate and weigh the risks against the reward.

There should always be a way for people who need legal representation to obtain it, and contingency fees provide an opportunity for many who cannot afford an attorney at an hourly rate. To prevent abuse, current limitations placed on attorneys prevent them from charging excessive fees. These rules vary from state to state and among the various types of cases. While unfair practices by attorneys are limited, not all situations can be prevented.

References:

1. Model Rules of Prof'l Conduct r. 1.5 (2009).
2. *When You Need a Lawyer*, American Bar Association, www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html.
3. *Measure of Damages in Tort*, Thomas Reuters, uk.practicallaw.thomsonreuters.com/4-107-7398.
4. *How Are Damages Established in a Tort Claim?*, hg.org Legal Resources, www.hg.org/legal-articles/how-are-damages-established-in-a-tort-claim-30946.
5. David Goguen, *Lawyers' Fees in Your Personal Injury Case*, Nolo (30 Mar. 2017), www.alllaw.com/articles/nolo/personal-injury/lawyers-fees.html.
6. *Contingent Fees Are the Key to the Courtroom*, Consumer Attorneys of California, www.caoc.org/index.cfm?pg=feekey.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (2004).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Contingency Fees Are the Key to the Courtroom*, https://www.caoc.org/index.cfm?pg=feekey

Attorney–Client Privilege in the Wake of Michael Cohen's Plea Agreement

By Eric Leeman

Does Michael Cohen have a bigger issue with the Department of Justice or the New York State Bar? In the news recently, many lawyers, academia, and lay people have tried to analyze whether Michael Cohen will be allowed to testify to in regard to his business dealings with President Donald Trump and if so, what testimony will be allowed. Attorneys have ethical rules of

behavior which control what information defined as privileged, what information *may* be shared, and what *must* be shared. So long as Mr. Cohen's testimony stays within the scope of what he may and must share, he will uphold the rules governing attorneys.

Rules of professional conduct are controlled by state statute and case law; however, these are often an adaptation of The Model Rules of Professional Conduct, published by the American Bar Association.[1] The Rules were initially drafted as a response to the Nixon Watergate scandal.[2] These rules, along with mandatory ethics courses in law school were drafted to police the legal community and create consistency amongst the states. Since the ABA composed the Rules in 1983, all states but one have mirrored their rules after the ABA Model Rules.[3] Therefore, this article will use the verbiage from The ABA Model Rules, and its commentary, to discuss the ethical obligations Mr. Cohen has to President Trump and the New York State Bar.

Rule 1.6 regarding confidentiality of information provides for situations where an attorney, "may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary."[4] The commentary provided by the ABA includes the following, "[w]here a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense."[5] In his plea agreement, Mr. Cohen admits guilt to collaborative acts with President Trump during the Presidential campaign. The allegations arose from financial transactions made to a number of women in exchange for their story.[6] These charges "allege complicity" by Mr. Cohen to the extent that he, "offered to help deal with negative stories about [President Trump's] relationships with women by, among other things, assisting the campaign in identifying such stories so they could be purchased and their publication avoided."[7] The charging document outlines how Mr. Cohen and President Trump collaborated to violate Campaign Finance rules to facilitate these payments. The complicity of Mr. Cohen in these transactions therefore allows him the leeway to respond, but only to the extent he reasonably believes necessary for President Trump's defense.

Many conservative lawyers and journalists have argued the Mr. Cohen's plea agreement and any subsequent testimony will put him in jeopardy of violating his ethical obligations.[8] While these commenters are correct that Mr. Cohen may be in jeopardy of violating his Ethical obligations to Mr. Trump, Mr. Cohen has already admitted to violating Rule 1.2.[9] The Rule states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[10] Mr. Cohen's plea agreement is an admission of knowingly and willfully counseling and assisting President Trump in the commission of multiple campaign related crimes. The violation of Rule 1.2(d) should have a significant penalty on Mr. Cohen's ability to practice law due to the publicity of this case, and the nature of the crimes committed.

Based on the allegations against both President Trump and Mr. Cohen, the Rules allow for Mr. Cohen to disclose information to Congress and the U.S. Department of Justice, but only that which aids the defense of President Trump. However, should Mr. Cohen's testimony go beyond the scope of The Rules, he will be subject to discipline by the New York State Bar. New York's Rules of Professional Conduct only allow disclosures when, "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community."[11] I implore the New York State Bar to watch these proceedings closely and discipline Mr. Cohen swiftly for all present and future violations. The acts of Mr. Cohen have cast a dark cloud over the legal profession, and the Bar's actions can help set a precedent that these acts by an attorney are not acceptable.

References:

1. *See* Generally, Mark Hanson, 1965-1974: Watergate and the Rise of Legal Ethics, A.B.A. (Jan. 2015), http://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics.
2. *Id.*
3. Peter Geraghty, History of U.S. Legal Ethics Standards, A.B.A. (Dec. 2016), https://www.americanbar.org/publications/youraba/2016/december-2016/a-brief-history-of-the-

development-of-legal-ethics-standards-in-.html.
4. Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n 2005)
5. Rule 1.6 cmt. (Am. Bar Ass'n 2005)
6. U.S. Dep't of Justice, *Re: U.S. v. Cohen, NYT* 1, 19 (Aug. 21, 2018), https://int.nyt.com/data/documenthelper/182-cohen-plea-deal/9bc6cd47e7c48e9f9469/optimized/full.pdf#page=1?action=click&module=Top%20Stories&pgtype=HomepageYou.
7. *Id.* at 20.
8. See generally, Brooke Singman, Michael Cohen Could Face Trouble with State Bar, Future Clients, Court Over Tape Leak, Fox News (Jul. 2018), http://www.foxnews.com/politics/2018/07/26/michael-cohen-could-face-trouble-with-state-bar-future-clients-court-over-tape-leak.html
9. U.S. Dep't of Justice, Supra Note 6, at 1.
10. Rule 1.2
11. N.Y. R. Prof. Resp. 1.6.

How Will Society Perceive Your Conduct?

By Dennis L. Hughes

So, you have finally reached that magic number of 90 credit hours that you have been chasing for at least three years. And you have successfully passed your Bar exam! You did it. You can start your career as a legal attorney in the State where you took the Bar. Or maybe you even passed the MBE and can practice in one or more states. You have got to be feeling great, and maybe even a little overwhelmed. You might even be trying to decide what field of practice of Law you are going to enter. Are you going to just do Wills or Trusts? Or are you going to become a trial attorney? May I ask you to stop right now and reflect on a couple key areas, that you learned in Law School—that might have slipped your memory—before you get off on the wrong foot?

Do you really think that your Law professors just simply wanted to cram your head full of Torts, Civil Procedure, Criminal Law, Property, among other subjects, just to get you your 90 credit hours and get you out of the way? I know these professors, and they are outstanding practitioners of the Law, and they have high moral standards. They will not fill your head full of *stuff,* pat you on your back, and push you out the door. They taught you more than *stuff,* and they taught you better. While you were concerned about learning what you need to pass your courses—and the Bar—something very important might have slipped your memory. While these wonderful, learned professors only had three years to teach you all they could possibly teach you about Law, they also taught you something else just as important. From year one to year three, they taught you – Professional Conduct.

Go back in your mind to your 1L year, especially Ave Maria School of Law graduates. In Year One, they taught you a required subject entitled, Moral Foundations. You started out your first year with Aristotle, Thomas Aquinas, Socrates, among others, to teach you how to practice the law with high morals. If you don't practice Law with high morals and society sees you as a less than ethical attorney, what do you think is going to be one of the first questions society will ask? One of the first questions would be, "Where did he/she go to Law school?" or "What did they teach at that Law school?" These are unfair questions that would be directed at highly-ethical professors, teaching at a distinguished Law School. And it would be because of your lack of Professional Conduct. And you know you were taught to have higher standards and better morals. But that was just Step One, and we aren't finished.

Somewhere in your second year, no later than Fall of your third year, you were required to take two other subjects that were teaching you how to behave in the practice of Law – Professional Responsibility (PR) and Jurisprudence. Professional Responsibility taught you *what* you should and shouldn't do when it comes to your conduct in the legal profession as well as the seriousness of misconduct in all the areas concerning the practice of law. It taught you such standards as:
"A lawyer shall not unlawfully obstruct another party's access to evidence. . . destroy or conceal a document. . ;"[1]

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument . . . of existing law;"[2] and "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . ."[3]; among many others.

Jurisprudence taught you *how* you should practice law. This includes exercising Justice, Faith, Ethics, and the overall Moral Fabric inside each person. But we aren't finished. We have one more year to cover.

Last, at the end of your third year, you took another subject on the order of Social Teachings. This course drew connections between the Laws of Society and the Laws of the Church (representing a higher power). Even as you were finishing law school, you were still learning about ethics. At the beginning of this article, I asked you stop and to reflect for just a few minutes. Since then we have covered quite a bit. Let's recap: Year One – you were taught to build your foundation on good morals; Year Two – you were taught that you have a responsibility for your conduct or misconduct and if you choose good conduct, to build it on Justice, Faith and Morality; and Year Three – you were taught to keep a connection between the Laws of man and the Laws of God. And now…

Congratulations! You have graduated. You passed the Bar. Society is watching you. How will they perceive your conduct?

References:

1. Model Rules of Prof'l Conduct r. 3.4 (Am. Bar Ass'n 2005)
2 Rule 3.1
3 Rule 1.6

EDITOR-IN-CHIEF MESSAGE

This is my chance to say, "THANK YOU" to the many, many hands that helped breathe life into this edition.

The Gavel Committe is simply amazing. Managing Editor Philumina Johanni and our staff of editors (Anita Abraham, Micharon Byrd, Corrine Burns, Chris Stipek, and Dennis Hughes) were responsible for collecting submissions, answering questions, checking sources, and--of course--editing.

The photos were taken by Naomi Hatton and Kristy Kryszczak. I appreciate the time they took from their busy schedule to not only take our photos, but to edit them as well. Sixty percent of the work required for a good photograph happens in the dark room... well, on the computer.

Jimmie Bailey, our Moot President is an exceptional leader. Without hesitation he is muscle when I need muscle, support when I need support, and a sounding board when I just need to talk a problem through.

Never forgotten are our writers. Every issue we solicit for a visiting contribution; this issue Professor Kevin Govern lent his talents to us. Thank you for enriching our volume on professional responsiblity. And without our student authors, there would be little to read. Thank you for writing your articles, keeping your deadlines, and being willing to do one "last" edit.

Finally, the readers. Thank you for sharing our hard work and efforts.

Sincerely,
Mellissa D. Stubbs
VP Publications & Editor-in-Chief, *The Gavel*

CONGRATULATIONS CHAMPIONS!

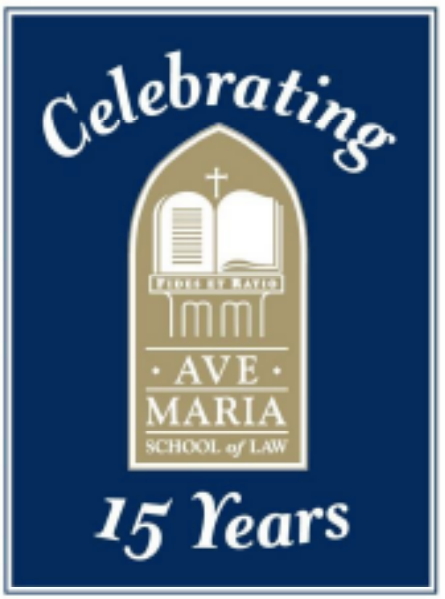
On April 21st, 2018, in Los Angeles, California, Victor Bermudez '18 and Christopher Fiore '19 beat out 20 teams from law schools across the country to win UCLA's Cyber Crimes Moot Court Competition. The two advocates finished ahead of teams from Notre Dame, UC Davis, and the University of Illinois, among others.

The Cyber Crimes Competition is an annual external moot court competition exploring cutting edge issues in the field of cyber law. This year's problem concerned the search and tracking of cell phones. The team was coached by Professor Clifford Taylor and supported by the Moot Court Board, faculty, and staff.

Thank you, everyone, for your dedicated work.

SPECIAL THANKS TO OUR FACULTY ADVISOR, **PROFESSOR MARK H. BONNER**

On behalf of the entire Moot Court Board, we would like to express our great appreciation to Professor Bonner for his overwhelming support of the Moot Court Board and his dedication to inspiring students to accept nothing less than excellence in all that they do. Professor Bonner continues to play an instrumental role continuing successes of the Moot Court Board here at Ave Maria School of Law. His leadership and guidance in preparing our students and competition teams to go forth and represent our school within our community and throughout the country in the best way possible is something we all greatly value and appreciate. Professor Bonner's knowledge and real world experiences as a litigator serves as an invaluable resource for growth, both as law students and future attorneys. Our accomplishments as a board can be accredited to Professor Bonner's hard work and commitment, and for that, we thank you.



AVE MARIA SCHOOL OF LAW

Moot Court Program

Our Moot Court Program is an important part of legal training at Ave Maria School of Law. The student-run Moot Court program hosts and supports numerous intra-collegiate and inter-collegiate trial, appellate, and alternative dispute resolution competitions each year. Law students with an interest in litigation are able to enhance their written and oral advocacy skills through Ave Maria Law's extensive Moot Court Program. Run by the Moot Court Board as an academic program, the program serves the dual role of planning and competing in competitions.

Building on the skills gained through the Research, Writing, & Advocacy (RWA) classes, students have the opportunity to participate in both internal competitions against their peers and external competitions at the state, regional, and national levels. The Moot Court Board selects external competition teams and helps the teams prepare with the help of faculty advisors. It also plans and manages the internal competitions, soliciting professors, alumni, and local attorneys and judges to serve as judges for these competitions.

Your support will directly benefit the students participating in the Moot Court Program with their activities and competitions.

Thank you very much for your support.

Donation Form

Donor or Company Name_____ Date_____

Contact Person: _____ Phone:_____

Business Address: _____

Mailing Address: _____

Email: _____

Donation Amount: _____ Is this a matching gift? _____

For Online donations please visit: www.avemarialaw.edu
Please make check payable to: Ave Maria School of Law

Mail donation to: Attn: Donna Anthus
Ave Maria School of Law Advancement and External Affairs
1025 Commons Circle, Naples, FL 34119

Phone: 239.687.5403 Fax: 239.353-1366 Email:danthus@avemarialaw.edu

Date Rec'd: _____

Your donation is tax deductible to the fullest extent of the law. Ave Maria School of Law is a 501(c) (3) organization. (E.I.N. 38-3519708)

1025 Commons Circle, Naples, Florida 34119 • (239) 687-5405 • avemarialaw.edu

Licensed by the Florida Commission for Independent Education, license number 4007. Fully accredited by the American Bar Association.
A copy of the official registration and financial information may be obtained from the division of consumer services by calling toll-free within the state. Registration does not imply endorsement, approval, or recommendation by the state. http://www.freshfromflorida.com/Divisions-Offices/Consumer-Services 1-800-435-7352.

Ave Maria School of Law

Moot Court Board

3rd Row (Left to Right): Eric Leeman, Mark Precheur, William Gates, David Mulry, John Tetterton, David Merrill, Victoria Bray, Clark Robinson, Regan Sieperda, Corrinne Burns, Theodore Forlenza, Ian Johanni, Samantha Encalada, Professor Mark H. Bonner

2nd Row (Left to Right): Diego Gil, Mark Wagner, Kaitlin Coyle, Thomas De Maio, Micharon Byrd, Giselle Guzman, Jennifer Sosa, Agapija Kostovski, Melissa Alverez, Antia Abraham, Philumina Johanni

1st Row (Left to Right): Daisy Gonzalez (VP of Operations), Megan Ofner (VP of Events), Chris Fiore (VP of External Competitions), Jimmie Bailey (President), Jacee Broadway (VP of Internal Competitions), Mellissa Stubbs (VP of Publications)

Not Pictured: Christopher Stipek, Tiara Kem, Dennis Hughes

2018 – 2019

AVE MARIA SCHOOL OF LAW
1025 Commons Circle
www.avemarialaw.edu

MOOT COURT BOARD JOURNAL
Naples, Florida 34119
avemarialaw-moot-court.avemarialaw.edu