

ETHICS IN A DIGITAL AGE

FEDERAL PRACTICE INSTITUTE SEMINAR

October 2016

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Ethical Competence in the Digital Age

(Part Deux)¹

By Richard Y. Uchida Partner Hinckley, Allen & Snyder, LLP

It begins with a simple rule: “A lawyer shall provide competent representation to a client.” And compliance with the rule used to be so simple. Read a case or two here, send your letters and pleadings in the US mail there, answer a few phone calls here (but never on weekends and holidays), and sit through a couple of continuing legal education courses. Done with reasonable diligence, a modicum of marketing savvy, and occasional attention to the details of the business side of practicing law, and the clients and cases would come, and continue to come. To be certain, discovery and trial preparation were always time-consuming and required meticulous attention to details. But an attorney’s life was relatively simple compared to today.

With the arrival of the digital age and its pervasive influence over nearly every aspect of human life as we know it, the practice of law and the business of law have changed remarkably. In 2014, we explored some of the ethical quandaries one might encounter in protecting client confidentiality in the digital age.² This time around, we explore some other types of ethical issues which arise in the digital age.

As a precursor, recall again the comment from the American Bar Association, as it updated Model Rule 1.1 (the competency rule) to address technology:

“The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology

¹ This material and the ethics presentation are follow-ups to ethics materials from the 2014 New Hampshire Federal Practice Institute. However, one need not have attended that institute to appreciate the materials in this year’s presentation.

² See 2014 New Hampshire Federal Practice Institute, *The Ethics of Competence in the Age of Technology*.

and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.

Comment [6] (in Model Rule 1.1) already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

The ethical implications are probably apparent. In addition to the confidentiality issues explored in this Institute's 2014 program, staying abreast of technology implicates the following:

- The use of technology and social media, including websites, blogs, Twitter, Linked In and other platforms, implicates concerns over confidentiality of client information, data privacy issues, as well as advertising and solicitation. New Hampshire Rule of Professional Conduct (NHRPC) 1.6; NHRPC 7.1, 7.2 and 7.3.
- Use of websites, blogs, social media to solicit prospective clients and the information transmitted by prospective clients to law firms as part of that effort can result in disqualification or other ethical problems. NHRPC 1.18.
- Use of the internet and internet search tools to investigate parties, opposing lawyers, witnesses, jurors, judges and others has become increasingly common, leading some courts to place limits on such work. NHRPC 4.1, 4.3 and 4.4.
- Inside a firm, ensuring ethical compliance for not only all lawyers (given the tendencies, above) but all members of the firm implicates the all-important duties of supervision, training and responsibility for the conduct of those in the firm and the corresponding importance of developing a set of firm "best practices". NHRPC 5.1, 5.2 and 5.3.

The materials which follow explore a number of these areas.

HYPOTHETICAL

The Smith & Jones law firm (the “Firm”) is a venerable firm – existing since 1926. It has an array of lawyers ranging in age from 25 to 65. The Firm is undertaking a concerted effort to be present on social media. In particular, the litigation practice area is under pressure to generate more work and more clients. Rachel – a partner – is being pushed to generate more business. Adam – a mid-level associate - wants to become a thought leader in his area of practice.

Adam proposes to create a webpage on the Firm website for Rachel and him, inviting prospective clients to contact them and explain their case, and seek answers to simple legal questions. As part of their duties, they also monitor a chat room maintained by the local Chamber of Commerce for businesses who pose questions or provide comments about possible litigation matters. Upon seeing legal questions or comments, they respond with generic legal information and each takes turns calling the business to determine if they can be of assistance.

* * * * *

Rachel and Adam become involved in significant business litigation from a business they have come to represent through the chat room work. The case will be heard by a jury. Knowing the importance of using technology to glean as much as possible about the opposing party, Rachel asks her paralegal to monitor the opposing party on search engines to determine if there is chatter about the litigation. In turn, the paralegal, posing as a prospective customer, friends the opposing party on its Facebook page. He also monitors the opposing party’s principals through their Linked In pages. The opposing party is represented by the Abbott & Costello (A&C) law firm.

During the course of discovery, and in response to requests for production of documents, Adam must provide private financial and personal information regarding the employees of its client to the A & C firm. Adam is aware that data breaches have occurred at that firm on three previous occasions. Is there a duty on the part of Adam, Rachel and the Firm to ensure the security of data at the A & C firm before data is sent?

In an early effort to settle the litigation, Rachel sends a demand letter seeking \$3.5 million to settle the case. After strategizing with the client, she intentionally embeds metadata in the form of a comment designed to appear as a question to her client in a draft, noting “Let’s seek \$3.5 million. We know they’ll counter and I acknowledge your bottom line is \$2.531 million to settle the matter.” In reality, she and the client have agreed they would gladly accept \$1.75 million. She e-mails an electronic version of the letter to opposing counsel. Three days later, she receives a call from counsel noting “there is no way my client will pay \$3.5 million, but I am willing to seek authority at \$2.531 million if you can get it done.”

You are a partner in the Firm’s trust and probate practice group, and part of the Firm’s management committee. You are asked to analyze the ethical issues related to Adam and Rachel’s work to date. What saith you?

□ □ □ □ □

APPLICABLE NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.1 Competence

- (a) A lawyer shall provide competent representation to a client.
- (b) Legal competence requires at a minimum:
 - (1) specific knowledge about the fields of law in which the lawyer practices;
 - (2) performance of the techniques of practice with skill;
 - (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
 - (4) proper preparation; and
 - (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.
- (c) In the performance of client service, a lawyer shall at a minimum:
 - (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

Rule 1.6 Confidentiality Of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) (Intentionally omitted)

Rule 1.18 Duties To Prospective Client

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person

[Remainder of rule intentionally omitted.]

Rule 4.2. Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give

legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4 Respect For Rights Of Third Persons

- (a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay, or burden a third person.
- (b) A lawyer who receives material relating to the representation of the lawyer's client and who knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers

- (a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Ethics Committee Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of "each" for "a" in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

Rule 5.2. Responsibilities of a Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Ethics Committee Comment

The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of “each” for “a” in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Without limiting the generality of the foregoing, a communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.2 Advertising

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) – (3) (Intentionally omitted.)
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.3 Solicitation of Clients

- (a) A lawyer shall not initiate, by in-person, live voice, recorded or other real-time means, contact with a prospective client for the purpose of obtaining professional employment, unless the person contacted:
 - (1) is a lawyer;
 - (2) has a family, close personal, or prior professional relationship with the lawyer;
 - (3) is an employee, agent, or representative of a business, non-profit or governmental organization not known to be in need of legal services in a particular matter, and the lawyer seeks to provide services on behalf of the organization; or
 - (4) is an individual who regularly requires legal services in a commercial context and is not known to be in need of legal services in a particular matter.
- (b) A lawyer shall not communicate or knowingly permit any communication to a prospective client for the purpose of obtaining professional employment if:

- (1) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer;
 - (2) the communication involves coercion, duress or harassment; or
 - (3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the word "Advertising" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in subsection (a).
- (d) (Intentionally omitted)

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) (Intentionally omitted)
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

[Remainder of rule intentionally omitted.]

What Do You Do If You See Something You Weren't Supposed To See? More Pitfalls of Practice in the Digital Age

By:

**David M. Rothstein Deputy Director, New Hampshire Public Defender Chair, Professional
Conduct Committee**

Introduction

We love email. We love electronic discovery (sort of). That is, until we hit the wrong button, or we forget to black something out, and we send information that should have been confidential to our esteemed opponent.

These hypotheticals, while grounded in a criminal case, could come up in any area of practice. There is not much law out there yet, so we look forward to relying on our collective wisdom to chart the best course in a less-than-ideal situation.

Hypothetical

You represent Defendant, who is charged in federal district court with conspiracy to distribute a large quantity of heroin. Discovery materials come in batches. Many of the materials include redactions. The government is permitted to claim a privilege with regard to the identity of a confidential informant (“CI”), so the CI’s name and identifying information is commonly excised from reports. You are anxiously awaiting a copy of the search warrant affidavit that led to the seizure of a large quantity of heroin that the government has linked to your client.

Five defendants are under indictment. Defendant is at the top of the distribution chain. You expect that the government will make deals with other defendants to testify against your client. The sentence Defendant faces upon conviction is extremely long.

In addition to the known co-conspirators, the case involves unindicted co-conspirators and confidential informants. Defendant has told you about one person who he thinks was a key informant. The person went by the name “Rico.” Defendant had been dealing with Rico for a period of time, but became suspicious of him when he overheard him talking on his cell phone to someone about a deal that Defendant told Rico he planned to do the next day at a rest area on Route 89. After that, Defendant called the person he was supposed to deal with and cancelled. Defendant was arrested two days later. You wonder if it was the possibility that Rico’s cover was compromised that caused the authorities to arrest Defendant when they did.

The day after your discussion with Defendant about Rico, you receive another batch of discovery. Included is the application for the search warrant that you have been waiting for. The affidavit includes information provided by a confidential informant. The affiant describes the CI

as “CI-17,” but states that the CI will be “hereinafter referred to as “[REDACTED].” That same black blotch appears everywhere in the affidavit except for one spot, which reads as follows:

“Rico then advised me that [REDACTED] believed Defendant was on to [REDACTED].”

What obligation, if any, do you have with respect to this disclosure?

The case progresses. You receive an email which, upon further inspection, is from one AUSA to another. The email says, “Rico just had a lousy proffer. #casefallingapart” The receiving AUSA’s name is “Dan Roth” and your name is “David Rothstein,” so you can infer that the sender inadvertently hit an extra “dr” when he sent it, i.e., the sender certainly did not mean to send it to you.

What obligation, if any, do you have with respect to this email?

TEXT OF RELEVANT RULES

New Hampshire Rule of Professional Conduct 4.4(b) & 2004 ABA Model Code Comment [2]

Rule 4.4. Respect for Rights of Third Persons

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

* * *

Ethics Committee Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

The term "materials" includes, without limitation, electronic data.

As to ABA Comments [2] and [3], see Ethics opinion 2008-9/4 discussing duties relating to "metadata"; www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.

* * *

ABA Comment to the Model Rules

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required

to take additional steps, such as returning the document or electronically stored information is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document” or electronically stored information includes in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “Metadata” that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Federal Rule of Evidence 502(b)

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;*
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).*

Federal Rule of Civil Procedure 26(b)(5)(B)

(b) Discovery Scope and Limits.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.(A) Information Withheld.

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and*
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.*

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

CASES

Soc’y of Prof’l Eng’g Employees v. Sprint Aerosystems, 2015 US Dist. LEXIS 70279 (D. Kan. 2015)

United States v. Kubini, 304 F.R.D. 208 (W.D. Pa. 2015)

Wise v. Washington County, 2013 US Dist. LEXIS 128731 (W.D. Pa. 2013)

Chesemore v. Alliance Holdings Inc., 276 F.R.D. 506 (W.D. Wis. 2011)

Burt Hill v. Hassan, 2010 US Dist. LEXIS 7492 (W.D. Pa. 2010)

Kandel v. Brother Int’l Corp., 683 F.Supp.2d 1076 (C.D. Cal. 2009)

Rhoads Industries v. Bldg. Materials Corp. of America, 245 F.R.D. 216 (E.D. Pa. 2008)

SECONDARY SOURCES

ABA Formal Opinion 06-0440 (May 13, 2006).

Annotated Model Rules of Professional Conduct, “Subsection (b): Receipt of Documents Sent by Mistake,” at 432-34 (7th Ed. 2011).

John W. Allen, “The Recipient’s Dilemma: Inadvertent Disclosure of Privileged Information,” 41 The Brief 40 (Winter 2012).

Amanda Showalter, “What’s Yours is Mine: Inadvertent Disclosure of Electronically Stored Privileged Information in Divorce Litigation,” 23 Journal of the American Academy of Matrimonial Law 177 (2010).

David N. Hofstein & Scott J.G. Finger, “The Dangers of Electronic Communication: Ethical Obligations Regarding Inadvertent Disclosures and Metadata,” 33 Family Advocate 22 (Fall 2010).

Joseph L. Paller, Jr., “Gentlemen Do Not Read Each Other’s Mail: A Lawyer’s Duties Upon Inadvertent Receipt of Inadvertently Disclosed Confidential Information,” 21 The Labor Lawyer 247 (Winter/Spring 2006).

New Hampshire Ethics Opinions and Articles on Digital Technology¹

Electronic Communication

Social Media Contact with Witnesses in the Course of Litigation

New Hampshire Bar Assn., Ethics Comm., 2012-13/5 (2012)

A lawyer may view a witness's public social media page, such as an unrestricted Facebook page or Twitter feed. However, if a lawyer seeks to view a witness's private account, for example by "friending" on Facebook or "following" on Twitter, then the request must identify the lawyer and inform the witness of the lawyer's involvement in the relevant case. A lawyer must also consider whether the witness is represented by counsel in the matter.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.1(b) and (c): Competence
 - Rule 1.3: Diligence
 - Rule 3.4: Fairness to Opposing Party and Counsel
 - Rule 4.1(a): Truthfulness in Statements to Others
 - Rule 4.2: Communications with Others Represented by Counsel
 - Rule 4.3: Dealing with the Unrepresented Person
 - Rule 4.4: Respect for the Rights of Third Persons
 - Rule 5.3: Responsibilities Regarding Non-lawyer Assistants
 - Rule 8.4(a): Unethical Conduct Through an Agent

Many other state bars have similarly concluded that lawyers must identify themselves when using social media to communicate with witnesses.

Obligation to Provide Electronic Material

New Hampshire Bar Assn., Ethics Comm., 2005-06/3 (2005)

A client's file includes both paper and electronic forms of communications, documents, and other client records. These materials may include e-mails and electronic versions of documents filed on behalf of a client. These files belong to the client and, upon request, a lawyer must release such electronic files to the client. Lawyers must also notify clients of any file destruction policies with regard to both electronic and paper files.

¹Gabrielle A. Rosenblum, a student at Northeastern University School of Law, prepared these materials in the Spring of 2016 while serving as an intern in the Chambers of United States District Judge Landya B. McCafferty.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.15: Safekeeping Property
 - Rule 1.16(d): Protecting Client's Interest after Termination of Representation
- See also Averill v. Cox, 145 N.H. 328 (2000) (holding that a client's file belongs to the client and that, upon request, an attorney must provide the client with the file).

Client File Retention

New Hampshire Bar Assn., Ethics Comm., 2015-16/5 (2016)

Lawyers need not retain client files indefinitely. Rather, the retention period for a client's file depends on the specific circumstances of the representation. Lawyers should consider the circumstances of each case, including whether materials are still necessary for a possible assertion or defense in the client's matter, and whether materials are relevant to matters that may arise. Lawyers must retain client files for a period sufficient to avoid prejudice to the client's interests. Electronic retention of files is usually acceptable, but lawyers should carefully consider whether original documents are necessary in a particular instance (i.e. an original copy of a will or settlement agreement). A lawyer should discuss retention of client files with the client and memorialize the understanding in the engagement letter, and she should address whether the client file will include emails, text messages, and voicemails. Retiring attorneys remain responsible for client files and must provide for their retention or disposal.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.6(a): Confidentiality of Information
 - Rule 1.15: Safekeeping Property
 - Rule 1.16(d): Declining or Terminating Representation
 - N.H. Supreme Court Rule 50
 - N.H. Supreme Court Rule 50(2)(B)

Using Text Messages to Communicate with Clients

Ethics Corner: The Ethics of Texting: Preserving Client Files, New Hampshire Bar News, December 16, 2015

When using text messaging to communicate with clients, lawyers should be aware of issues regarding recordkeeping and preservation of client communications. Lawyers may consider using a third-party application to back up all text messages or summarize communications for the client's file. Additionally, at the outset of the representation lawyers may consider limiting the manner in which they will communicate with clients.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.1: Competence
 - Rule 1.15: Safekeeping Property

Metadata

Disclosure, Review, and Use of Metadata in Electronic Materials

New Hampshire Bar Assn., Ethics Comm., 2008-09/4 (2012)

Electronic documents may contain “metadata,” or information about the history of the electronic file. Some of this metadata may include confidential information. A lawyer sending electronic materials has a duty to take reasonable care to avoid improper disclosure of confidential information contained in metadata. Lawyers receiving electronic materials have an obligation not to search for, review, or use metadata containing confidential information. If an electronic document is inadvertently sent, a receiving lawyer should take the necessary steps pursuant to Rule 4.4(b) to avoid learning confidential information.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.1: Competence
 - Rule 1.6(a): Confidentiality of Information
 - Rule 4.4(b): Respect for Rights of Third Persons
 - Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers
 - Rule 5.3: Responsibilities Regarding Non-lawyer Assistants

State bars have reached different conclusions on the ethical issue of searching metadata. The ABA has compiled an overview of state ethics opinions on point. See Metadata Ethics Opinions Around the U.S., American Bar Association, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html (last visited May 18, 2016).

Maine

Me. Prof'l Ethics Comm'n, Op. No. 196 (2008)

A sending lawyer must take reasonable measures to avoid sending confidential information. A receiving lawyer may not act to uncover metadata.

Vermont

Vt. Bar Ass'n Prof'l Ethics Responsibility Section, Ethics Op. 2009-1 (2009)

A sending lawyer must take reasonable care to avoid sending confidential information. A receiving lawyer is not ethically prohibited from searching metadata. Receiving lawyers are obligated to notify sending lawyers if they receive “documents that they know or reasonably should know were inadvertently disclosed.” However, the opinion leaves open the question of whether inadvertently disclosed confidential information in metadata constitutes a waiver of its privileged status.

Cloud Computing

The Use of Cloud Computing in the Practice of Law

New Hampshire Bar Assn., Ethics Comm., 2012-13/4 (2012)

Lawyers may use cloud computing storage services, such as Google Docs and DropBox, but must take reasonable steps to maintain the confidentiality of client information.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.0(e): Informed Consent
 - Rule 1.1: Competence
 - Rule 1.6: Confidentiality of Information
 - Rule 1.15: Safekeeping Property
 - Rule 2.1: Advisor
 - Rule 5.3: Responsibilities Regarding Non-lawyer Assistants

Cloud Storage – Outsourcing to Non-Lawyer Assistant

Ethics Corner: Lawyers & Cloud Computing: Be Careful Up There, New Hampshire Bar News, August 23, 2013

A lawyer using a cloud storage service must be aware of how that service stores and safeguards information and what the storage provider's service agreement includes. A lawyer must consider whether such cloud storage is impliedly authorized by the lawyer's representation of a particular client or whether that client's informed consent is required.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.1: Competence
 - Rule 1.6: Confidentiality of Information
 - Rule 1.15: Safekeeping
 - 1.16: Declining or Terminating Representation
 - Rule 5.3: Responsibilities Regarding Non-lawyer Assistants

State bars have reached differing conclusions regarding the ethics of using cloud computing. The ABA has compiled an overview of state ethics opinions on point. See [Cloud Ethics Opinions Around the U.S.](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html), American Bar Association, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited May 18, 2016).

Maine

Me. Prof'l Ethics Comm'n, Op. No. 207 (2013)

The use of cloud computing is permitted, as long as a lawyer implements safeguards to ensure that the service is compatible with professional obligations. Several recommendations for lawyers using cloud computing are mentioned in the opinion, including backing up data and installing a network firewall, encrypting confidential data,

reviewing the terms of service and confidentiality policies as they relate to a lawyer's professional responsibilities, and reviewing relevant technology and security policies.

Massachusetts

Mass. Bar Ass'n Ethics Opinion 2012-3 (2012)

If exercised with reasonable care, the use of cloud computing is permitted. The opinion includes several recommendations for lawyers using cloud computing (e.g., examining the provider's terms and policies regarding confidentiality, security, and storage). A lawyer must follow any express instructions from a client regarding the storage of client information on the internet. A lawyer should first obtain a client's express consent before using the internet to transmit or store sensitive information.

Vermont

Vt. Bar Ass'n Prof'l Ethics Responsibility Section, Ethics Op. 2010-6 (2009)

The use of cloud computing is permitted where a lawyer takes reasonable precautions to protect the security of confidential information. The opinion describes several recommendations for lawyers using cloud computing, including reviewing the vendor's security system and terms of use, exercising caution depending on the nature and sensitivity of the information being stored, and reviewing the accessibility of the stored information. The opinion also advises lawyers to consider giving notice to the client about the storage method, having someone with technical capabilities evaluate the storage system, and staying up-to-date on any developments with the relevant technology.

Online Presence

Providing Discounted Legal Services Through “Group Coupon” or “Daily Deal” Services

New Hampshire Bar Assn., Ethics Comm., 2013-14/8 (2012)

This decision is worth reading in its entirety – as it describes the different types of coupon deals currently being used, and the different ethical concerns and risks associated with each. In its conclusion, the New Hampshire Bar Association’s Ethics Committee states: “As observed by the Indiana Bar Association in its opinion, offering legal services through a group coupon deal is ‘fraught with peril.’ The Committee agrees, but believes that a lawyer may offer a coupon deal through a group coupon service, if the lawyer carefully reviews the policies and practices of a group coupon service, and ensures that the offer can be made consistent with the applicable ethical obligations, as discussed [in this opinion]. The Committee believes that it is unlikely that a prepaid deal can be structured in such a way as to permit it to comply with a lawyer’s ethical obligations, in particular, the obligations under Rule 1.15(a).”

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.1: Competence
 - Rule 1.5: Fees
 - Rule 1.7: Conflicts of Interest
 - Rule 1.9: Conflict of Interest: Former Client
 - Rule 1.15: Safekeeping Property
 - Rule 1.16: Declining or Terminating Representation
 - Rule 1.18: Duties to Prospective Client
 - Rule 5.4: Professional Independence of a Lawyer
 - Rule 7.1: Communications Concerning a Lawyer’s Services
 - Rule 7.2: Advertising

Listing Skills and Expertise on LinkedIn

Ethics Corner: Listing ‘Skills and Expertise’ on LinkedIn, New Hampshire Bar News, June 21, 2013

A lawyer may list or describe her areas of practice under the LinkedIn “Skills and Expertise” section, but should not identify herself as a specialist. A lawyer must also be sure that she does not create unjustified expectations based on misleading statements in her LinkedIn profile. Additionally, lawyers should be aware that LinkedIn may change its section headings (e.g., the “Skills and Experience” section used to be “Specialties”), which could be problematic depending on the lawyer’s particular statements and representations.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 7.1: Communications Concerning a Lawyer’s Services
 - Rule 7.4: Communications of Fields of Practice

Responding to Online Comments and Reviews

Ethics Corner: Can Lawyers Respond to False Accusations Online, New Hampshire Bar News, February 19, 2014

Where a former client posts inaccurate information about a lawyer's representation online, that lawyer should exercise "extreme caution" before deciding to respond. Should the lawyer choose to respond, she must be aware of continuing confidentiality obligations. The Committee concluded that, under the set of facts in the hypothetical inquiry, the Rules did not permit the inquiring lawyer to respond to the online post as the lawyer proposed.

- Relevant New Hampshire Rules of Professional Conduct:
 - Rule 1.6(b)(3): Confidentiality of Information
 - Rule 1.9(c)(2): Duties to Former Clients

Selected Articles of Interest

Steven J. Venezia, The Interaction of Social Media and the Law and How to Survive the Social Media Revolution, 52 N.H.B.J. 24 (Winter 2012).

Michelle K. Chu, The Use of Non-Confidential and Limited Confidential Information Obtained by Metadata Mining Outside the Context of Discovery Should Be Ethically Permissible, 16 U. Pitt. J. Tech. L. Pol'y 6 (2015).

Daniel McKellick, Massachusetts Attorneys in the Cloud—How Massachusetts Regulations and A Classification System Can Provide More Than A Wisp of Guidance Through the Fog of Ethical Cloud Computing, 37 W. New Eng. L. Rev. 175 (2015).