“How to Handle Information You Wish You Might Not Have Known”

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Overview of Presentation:
See 2018 ELI Materials pp. MM 1-32:

- Hypotheticals
- Ethics Rules
- Ethics Opinions
- Case Law
- Articles
What this session will not cover:

- What to do when Robert Mueller asks for your hard drive
- How to respond to a grand jury subpoena
- How to change lawyers when law enforcement seems to be closing in
Topic 1: The Case of the Purloined Emails
Topic 1: Questions

A. You are plaintiff’s counsel and your client provides you copies of the emails:
   • 1. Before showing them to anyone else; or
   • 2. After submitting them to the EEOC.

B. You are defense counsel and your forensics expert reports on the email heist after the EEOC charge is filed and before you hear about them from plaintiff’s counsel.
Potentially Applicable Rules:

- **Rule 1.2 (d)** — A Lawyer shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent but a lawyer may discuss the legal consequences of any propose course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
Potentially Applicable Rules:

- **Rule 1.6(b)(2)** — A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.
Potentially Applicable Rules:

• **Rule 1.8 (b)** — A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted by these rules.
Potentially Applicable Rules:

- **Rule 4.4 (a)**—A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

- **Rule 4.4(b)**—A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
Ethics Opinions (See p. MM-25)

- PHL Bar 2008-2
- PHL Bar 1999-6
- PHL Bar 1989-13
Topic 2: Surreptitious Tape Recordings
Topic 2: Questions

Your associate says:

A. “I got it from our client who recorded it from home”;

B. “Our client’s spouse recorded it from home, gave a copy to our client, and has threatened to use it in divorce proceedings”;

C. “I was at our client’s home and recorded it myself with our client’s permission.”
Potentially Applicable Rules:

- **Rule 3.4** – A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.
Potentially Applicable Rules:

Rule 4.1 – 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; or (b) fail to disclose a material fact to a third person when a disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
Potentially Applicable Rules:

Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance:

Lawyers 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 the lawyer shall be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer....
Potentially Applicable Rules:

- **Rule 8.4** – It is Misconduct to:
  - Violate rules, or assist/induce others to do so
  - Commit an act reflecting adversely on the lawyer’s honesty, trustworthiness or fitness
  - Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
Ethics Opinion (See p. MM-29)

- PHL Bar Opinion 2008-2:
  - Notify Sender per Rule 4.4(b)
  - Withdrawal per Rule 1.16 if client ignores counsel’s advice
  - Cannot violate duty of confidentiality to client per Rule 1.6(a)
Potentially Applicable Cases (pp. MM 29-30):

- In re Ryder
- Comm. V. Stenhach
- Collins v. Jones
- Montone v. Radio Shack
- Tarnoff v. Wellington Fin. Corp.
Topic 3:
“Alexa” or “Hey, Siri....”
Topic 3: Question

What, if any obligations do counsel for the parties have when they learn that Alexa was on in the room while management was making RIF decisions?
Potentially Applicable Rules:

- **Rule 1.1** - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **Comment [8]** – To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....
Ethics Opinions:

- **PA Bar Formal Opinion 2011-200**: “Competency is affected by the manner in which an attorney chooses to represent his or her client, or, as Comment [5] to Rule 1.1 states, an attorney’s “methods and procedures.” Part of a lawyer’s responsibility of competency is to **take reasonable steps to ensure that client data and information is maintained, organized and kept confidential when required**…

- Ethical duties related to competence and confidentiality are inextricably linked to **data security**.
Trending: Alexa & Privacy:

- “A Murder Case Tests Alexa’s Devotion to Your Privacy,” Gerald Sauer, Feb. 2017. An Arkansas criminal case is testing whether or not Amazon can be forced to share information collected by Alexa with the police.

- Can digital assistants be rigged-- to listen all the time?
- How to handle “consent” issues?
- What happens with the data sitting on Amazon's servers?
Articles: Alexa & Privacy (p. MM-30)

- “Most States Now Require Tech Competence for Lawyers. What Does That Mean For You?”

- “Hey, Siri and Alexa: Let’s talk privacy practices”

- **Questions of concern**: How much does the device record, if the audio stream is encrypted as it zips through the cloud, how long data is stored and who has access to the information.
Trending: Alexa & Privacy (p. MM-30)

- “These devices are microphones already installed in people’s homes, transmitting data to third parties. So reasonable privacy doesn’t exist. Under the Fourth Amendment, if you have installed a device that’s listening and is transmitting to a third party, then you’ve waived your privacy rights under the Electronic Communications Privacy Act.” Joel Reidenberg, director of the Center on Law and Information Policy at Fordham Law School.

- **Quere:** What about people who aren’t the device’s owner themselves, and who never agreed to anything, who find themselves in a room where their voices are being listened to?
Topic 4: Emails Containing Communications Between the Other Party and Counsel
Topic 4: Questions

A. You are plaintiff’s counsel and your client provides you copies of the emails:
   • 1. Before showing them to anyone else; or
   • 2. After submitting them to the EEOC.

B. You are defense counsel and your forensics expert reports on the email heist after the EEOC charge is filed and before you hear about them from plaintiff’s counsel.
Potentially Applicable Rules:

- **Rule 1.2 (a)** - …a lawyer shall abide by the client’s decisions concerning the objectives of representation, and …shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter.

- **Rule 1.3** – A lawyer shall act with reasonable diligence and promptness in representing a client.
Potentially Applicable Rules:

- **Rule 1.4 (a) (2)** - …a lawyer shall reasonably consult with the client’s about the means by which the client’s objectives are to be accomplished.

- **Rule 1.6 – Comment [2]** – Clients are encouraged to communicate fully and frankly even as to embarrassing or legally damaging subjects. Almost without exception, clients come to lawyers in order to determine their rights and what is legal and correct.
Potentially Applicable Rules:

- **Rule 4.4 (a)** — A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

- **Rule 4.4(b)** — A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
Ethics Opinions (See p. MM-26-27)

- PHL Bar 2008-2
- PA Bar Formal Opinion 11-460
- VA Bar Ethics Opinion 1141 (1988)
More Ethics Opinions

- **PA Bar Formal Opinion 2009-100** – a transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to an adverse or third party. A receiving lawyer has a duty pursuant to RPC 4.4(b) to notify the transmitting lawyer if an inadvertent metadata disclosure occurs.

Topic 5: Trade Secrets
Topic 5: Questions

• You are in-house counsel. What do you do?

• Does your answer change if your client is also sued?
Potentially Applicable Rules:

- **Rule 1.6(b)(2) – Confidentiality of Information –**
  A lawyer may reveal confidential information to prevent a client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another.

- **Rule 1.2(d) –** A lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent.
Potentially Applicable Rules:

- **Rule 1.6, Comment [9]** – A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules.

- **Rule 1.6, Comment [10]** – A lawyer has a right to respond to a legal claim or disciplinary charge alleging complicity of the lawyer in a client’s conduct....
Potentially Applicable Rules:

- **Rule 8.4** – It is Misconduct to:
  - Violate rules, or assist/induce others to do so
  - Commit an act reflecting adversely on the lawyer’s honesty, trustworthiness or fitness
  - Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
Ethics Opinions (See p. MM-31)

- PHL Bar 2008-2
- ABA Formal Opinion 06-442
- CA Bar Ethics Opinion 2013-188
- TX Bar Ethics Opinion 664 (2016)
Statutes (See p. MM-32)

- Computer Fraud and Abuse Act
- Defend Trade Secrets Act of 2016
- False Claims Act
Questions?
Ethics and Evidence:

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