

Civil Litigation Update 2019:
Ethical Issues in a Litigation Practice
Summary of Key Ethics Opinions and
Cases

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SECURING COMMUNICATION OF PROTECTED CLIENT INFORMATION

- *ABA Formal Opinion 477*
- Understand the threat (take stock of what type of data you have and the level of sensitivity);
- Understand where your data is stored (each access point is a potential issue);
- Understand and use reasonable security measures;
- Talk to your clients;
- Train all of your staff; and
- Discuss with vendors.

LAWYERS' OBLIGATIONS AFTER AN ELECTRONIC DATA BREACH OR CYBER ATTACK

- ABA FORMAL OPINION 483
- An attorney must make reasonable efforts to:
 - Monitor and Detect a breach;
 - Stop the breach and mitigate damage; and
 - Determine what occurred.
- When material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services is significantly impaired by the episode, a client must be informed.

LAWYERS' OBLIGATIONS AFTER AN ELECTRONIC DATA BREACH OR CYBER ATTACK (cont'd)

- As a matter of legal ethics, former clients may be treated differently, subject to any applicable state law governing data breach notification requirements.
- *See also Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018) (An employer has a legal duty to exercise reasonable care to safeguard its employees' sensitive personal information stored on an internet-accessible computer system.)

WAIVER OF ATTORNEY-CLIENT PRIVILEGE

- *Bousamra v. Excelsa Health, 167 A.3d 728 (Pa. Super. 2017)*
- A client who sends outside counsel's privileged email to a third party, a public relations firm, waives the attorney-client privilege.
- A Petition for Allowance of Appeal was granted as to two issues:
 - Did the Superior Court commit an error of law when holding that a client waives the work-product protection of its counsel's pre-litigation e-mail by forwarding the e-mail to its public relations consultant?

WAIVER OF ATTORNEY-CLIENT PRIVILEGE (cont'd)

- Did the Superior Court commit an error of law when holding that, to qualify as a privileged person within the attorney-client privilege, a third party must provide legal advice and have the lawyer or client control its work?
- The appellate docket is 5 WAP 2018. Oral argument was held October 24, 2018.

ATTORNEY FEE SPLITTING

- *SCF Consulting v. Barrack Rodos & Bacine, 175 A.3d 273 (Pa. 2017)* - When appellee law firm entered into a fee-sharing agreement with appellant lay entity and then allegedly refused to honor the agreement, it was error to dismiss the lay entity's breach of contract claim against the law firm.

ETHICAL OBLIGATIONS OF LAWYERS USING SOFTWARE TO TRACK EMAIL SENT TO OPPOSING COUNSEL

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2017-300*
- Attorneys may not use “web bugs” or any other secret method to track the receipt and distribution of email sent to opposing counsel relative to a particular case or matter.
- Visible methods of tracking, such as “read receipts” and “delivery receipts” are permitted.

**COMMUNICATIONS WITH A REPRESENTED PARTY BY A LAWYER
ACTING PRO SE OR BY A LAWYER WHO IS REPRESENTED BY COUNSEL**

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2017-200*
- Rule 4.2 prohibits an attorney who represents himself or herself from contacting his or her adversary if the lawyer knows that the adversary is represented by counsel.
 - It does NOT prevent the lawyer who is represented by counsel from doing so.

ETHICAL CONSIDERATIONS RELATING TO PARTICIPATION IN FIXED FEE LIMITED SCOPE LEGAL SERVICES REFERRAL PROGRAMS

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2016-200*
- A lawyer who participates in a Flat Fee Limited Scope Legal Services referral program in which the program operator collects “marketing fees” from that lawyer that vary based upon the legal fees collected by the lawyer, violates RPC 5.4(a)’s prohibition against sharing legal fees with a non-lawyer.

ETHICAL CONSIDERATIONS RELATING TO PARTICIPATION IN FIXED FEE LIMITED SCOPE LEGAL SERVICES REFERRAL PROGRAMS (cont'd)

- In addition, if the advance fees paid by the client remain in the possession of the non-lawyer program operator until the operator concludes that the requested legal services have been performed, such a program violates RPC 1.15(i), which requires advance fees to be deposited in the lawyer's Trust Account.
- An issue may also arise as to whether the program constitutes the unauthorized practice of law.

ETHICAL CONSIDERATIONS RELATING TO PARTICIPATION IN FIXED FEE LIMITED SCOPE LEGAL SERVICES REFERRAL PROGRAMS (cont'd)

- As to referrals between law firms, *see Meyer, Darragh v. Malone Middleman, P.C.*, 2018 Pa. LEXIS 1176 (Pa. 2018) (quantum meruit may be viable); 137 A.3d 1247 (no contract claim).

**SETTLEMENT AGREEMENTS CONTAINING CONFIDENTIALITY OR
NON-DISPARAGEMENT CLAUSES AND THEIR EFFECT ON LAWYER
MARKETING FOR AND REPRESENTING FUTURE CLIENTS**

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2016-300*
- Confidentiality agreements and non-disparagement agreements are not *per se* ethically prohibited, although in some instances, their use may be restricted or prohibited by substantive law.

SETTLEMENT AGREEMENTS CONTAINING CONFIDENTIALITY OR NON-DISPARAGEMENT CLAUSES AND THEIR EFFECT ON LAWYER MARKETING FOR AND REPRESENTING FUTURE CLIENTS (CONT'D)

- Lawyers must maintain a client's confidences. It is not the attorney's prerogative to release information related to representation publicly, even if it is otherwise available, and particularly not for his or her own purposes in advertising. Therefore, public release of specific identifying facts, whether or not in furtherance of personal marketing may violate the lawyer's duty of confidentiality irrespective of whether a formal confidentiality agreement or non-disparagement clause exists.

SETTLEMENT AGREEMENTS CONTAINING CONFIDENTIALITY OR NON-DISPARAGEMENT CLAUSES AND THEIR EFFECT ON LAWYER MARKETING FOR AND REPRESENTING FUTURE CLIENTS (CONT'D)

- A non-disparagement clause or confidentiality clause cannot preclude advertisement of areas of practice.
- Provisions which either explicitly interfere with or are intended to interfere with the handling of future clients' cases are prohibited by Pa.R.P.C. 5.6, and it is improper to ask for and for a lawyer to agree to such provisions

PROVIDING ADVICE TO MARIJUANA RELATED BUSINESSES

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2015-100*
- A lawyer **may** discuss and explain to the client the consequences of a proposed course of conduct and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

PROVIDING ADVICE TO MARIJUANA RELATED BUSINESSES (cont'd)

- The lawyer must also advise the client regarding related federal law and policy, because such guidance is clearly a material consideration for the client to take into account for purposes of making an informed judgment how to proceed.
- In 2015, the PBA concluded that a lawyer may not *advise* a client to engage in conduct that violates federal criminal statutes, or assist a client in such conduct, even if such conduct is authorized under applicable state law.
- RPC 1.2 was subsequently amended to state that “a lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2014-300*
- Attorneys may:
 - Advise clients about the content of their social networking websites, including the removal or addition of information.
 - Connect with clients and former clients.
 - NOT contact a represented person through social networking websites.
 - NOT use a pretextual basis for viewing otherwise private information on social networking websites.

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA (cont'd)

- Use information on social networking websites in a dispute.
- Accept client reviews but must monitor those reviews for accuracy.
- Generally comment or respond to reviews or endorsements, and may solicit such endorsements.
- Generally endorse other attorneys on social networking websites.
- Review a juror's Internet presence.
- Connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties

INADVERTENT DISCLOSURES

- *PBA Committee on Legal Ethics and Professional Responsibility Revised Formal Opinion 2007-200*
- The lawyer who knows or reasonably should know that a document was sent inadvertently by opposing parties or their lawyers must promptly notify the sender in order to permit the sender to take appropriate remedial measures.
- Whether to return the document unread or to use it is a matter of the lawyer's professional judgment.

INADVERTENT DISCLOSURES (cont'd)

- Factors to consider concerning whether an inadvertent disclosure constitutes a privilege waiver may include:
 - The reasonableness of the precautions taken to prevent inadvertent disclosure in the context of the volume of the document production;
 - The number of the inadvertent disclosures;
 - The extent of the inadvertent disclosures;
 - The measures taken to address the inadvertent disclosure and the timeliness of the measures; and
 - Whether or not justice is served by relieving the inadvertently disclosing party of its negligence.

LITIGATION MANAGEMENT GUIDELINES AND THIRD PARTY AUDITORS

- *PBA Committee on Legal Ethics and Professional Responsibility Formal Opinion 2001-200*
- Review with the client any directives or material limitations on the attorney's activities imposed by litigation management guidelines, including the requirement for advance approval by the Third Party Provider and the use of outside billing auditors.

LITIGATION MANAGEMENT GUIDELINES AND THIRD PARTY AUDITORS (cont'd)

- Where the client agrees to go forward with the representation, understanding that the attorney's billing statements may be submitted to outside auditors, the attorney must remain careful not to disclose unnecessarily the client's confidential or privileged information to such auditors.