

## **Ethics:**

**How to handle information you don't want to have and other recent issues ripped from the headlines!**

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# Scenario 1: Misappropriated Emails

- Plaintiff was given a password to his manager's computer so Plaintiff can access the manager's emails when the manager is on the road
- Plaintiff has periodically misused this password, emailing himself files and information regarding other employees and regarding his own job performance
- Plaintiff's performance reviews and salary increases have been lower than similarly situated employees and the manager's emails show a potential resentment of Plaintiff's FMLA leave usage

# Scenario 1

- You are the Plaintiff's attorney and your client provides you with copies of these misappropriated emails.
  - What do you do?
  - What if you find out their origins after submitting the Complaint to the EEOC?
- You are defense counsel and your forensics expert reports on the email heist after the EEOC charge is filed but before you hear about them from Plaintiff's counsel.

## Scenario 1: Answer

- PHL Bar Association Ethics Opinion 2008-2 - If potential civil or criminal penalties cannot be ruled out based upon the misappropriation of the emails and the client uses them/insists upon using them over Counsel's objection, then Counsel should consider withdrawing from the representation under Rule 1.6
- Rule 1.6(a)(2) – a lawyer can reveal information relating to a representation 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

## Scenario 1: Answer

- 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 proposed course of action 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.
- Rule 4.4(a) – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

## **Scenario 2: Surreptitious Tape Recordings**

- Mary (a PA resident) has sued the Company and her supervisor, Bob (a NJ resident) for sexual harassment
- You represent Mary and return to your office to find an audio tape with a note from your associate stating that the tape was created in secret and contains a conversation between Mary and Bob that will show which one of them is lying

## Scenario 2

- Before listening to the tape, you ask your associate where he got the recording. 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 house and recorded it myself with our client's permission

## Scenario 2: Answer

- Pennsylvania is a two-party consent state for the use of audio recordings, as such, no matter who recorded the conversation, it violated the Pennsylvania Wiretap Statute
- Therefore, the same PHL Ethics Opinion would apply – if the attorney can't convince the client not to use illegal recordings, then the attorney must consider withdrawing from the case

## Scenario 2: Answer

- Rule 4.1 – Truthfulness In Statements to Others. In the course of representing a client, a lawyer shall not knowingly...
  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6
- 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... or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

## Scenario 2: Also consider

- If the person who obtained the recording was a Non-lawyer Assistant, you would also have to consider Rule 5.3
- A lawyer with direct supervisory authority over a non-lawyer must make reasonable efforts to ensure that the non-lawyer's conduct complies with the Rules of Professional Responsibility
- A lawyer will be held responsible for a non-lawyer's actions 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

## **Scenario 3: Privileged Emails**

- Same facts as Scenario 1 (the misappropriated emails), except in this instance, some of the emails contain communication between the manager and the Company's counsel conducting an audit into payroll practices

## Scenario 3: Answer

- Lawyers have an ethical duty to notify the sender if they receive documents that contain privileged information
- Rule 1.3 – Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.
- 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 carryout the representation or the disclosure is permitted by paragraph (b) [which pertains to disclosing illegal activity/fraud]; (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

## Scenario 3: Answer

- Rule 4.4 – Respect for Rights of Third Persons. (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.
- The recipient must call the sender to work through the privilege issue.

## Scenario 4: Trade Secrets

- Salesman gets sued by her former employer for breaching a Confidentiality Agreement
  - New employer finds out that Salesman uploaded a series of memos on former employer's letterhead, all marked "confidential"
  - New employer and old employer are competitors
- A. If you are in-house counsel at the new employer, what would you do?
- B. Does your answer change if your client (new employer) is also sued?

## Scenario 4: A twist

- What if the Salesman produced a thumb drive that the Salesman purports to show that, although the documents are marked “confidential,” they are not
- Does the ethical obligation change?

### ANSWER:

ABA Formal Opinion 06-442 (2006) states that a lawyer is generally permitted to review and use metadata contained in email and other electronic documents, absent an indication that the metadata was sent inadvertently

DC Bar in 2007 said that a lawyer could not use metadata that was inadvertently sent

## Scenario 4: Answer

- Ethics opinions from bars across the country vary
- California Bar in 2013 said that material sent without authorization should be treated as though it was inadvertently sent (so, an obligation to alert Former employer would attach)
- Texas Bar in 2016 said that a lawyer who improperly obtains confidential information about an opposing party doesn't necessarily violate Texas ethics rules by not alerting the opponent or its counsel

## **The latest issues: Crowdfunding**

- Soliciting and accepting group funds from third parties as payment for legal services (“Crowdfunding”) has grown more popular in recent years
- Crowdfunding, however, brings up a whole host of legal issues under the RCP of which lawyers must be aware

# The latest issues: Overbilling

- Overbilling certainly isn't new, but significant discipline has been handed down recently for incidents of overbilling
- Overbilling violates RPC 1.5 and 8.4(c), which prohibit attorneys from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation”
- 9-month suspension handed down to an attorney in NY who billed a single client 175 hours in a single month in order to meet her billable hours requirements for the year (which were behind because she took two weeks off to get married)

# The latest issues: Impacts of #metoo on employment claims

- Lawyers have an RPC obligation to be up-to-date on legal developments impacting their clients (RPC 1.1 – Maintaining Competency)
- The Tax Cuts and Jobs Act of 2017 impacts:
  - No business expense deduction is permitted for any settlement payment or payment related to sexual harassment or sexual abuse (or related attorneys' fees) if the settlement or payment is subject to a non-disclosure agreement
- New rules on confidentiality agreements in several states:
  - On March 18, 2019, NJ enacted legislation which prohibits employers from requiring confidentiality/non-disclosure provisions in settlement agreements related to claims of “discrimination, retaliation, or harassment,” deeming them as “against public policy”

# Key Take Aways

- You have a duty to diligently represent your clients, which includes competency regarding electronic communications, storage devices, and the most recent legal issues
- You have a duty to maintain client confidence, but not to help clients commit fraud and/or break the law
- The rules of the road apply to your non-lawyer assistants with full force (and you are held responsible when they go rogue at your direction and/or acquiescence)
- If stumble upon privileged information in a discovery set, notify the sender right away

**THANK YOU.**

