Intellectual Property Ethics in a Changing Landscape

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Recent Ethics Decisions Involving IP Practice and Dumb Things (All Kinds of) Lawyers Do

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Failure to Supervise – Law Firm Has Duty to Supervise Associates Designated to Provide ***Pro Bono*** Representation Outside the Firm

MC v. GC, 2009 WL 1675987 (N.Y.Sup.)

The Case: In this divorce case, "Ms. Smith," a staff attorney at a major multinational law firm represented "Wife" in her divorce action on a *pro bono* basis through a non-profit organization called inMotion. Wife testified that during their initial meeting they spoke for about 15 minutes. In that meeting the Wife told Ms. Smith that she wanted to relocate to Florida to give her children a better life. Ms. Smith advised her that inMotion would not represent her on that issue. At the next meeting, Wife signed a waiver giving up her right to seek a share of the marital property; the waiver stated that if Wife decided to seek a division of marital assets or debts, inMotion and the law firm may drop her case. At a third meeting, Wife again told Ms. Smith that she wanted to relocate, and Ms. Smith advised that she could not touch the relocation issue. She could represent Wife only in an uncontested divorce and would have to withdraw if settlement negotiations broke down. Ms. Smith also told Wife that Husband was seeking custody, but would give up that claim if Wife signed a stipulation giving him custody of their son one month each summer. The stipulation provided that Wife could not relocate, but Wife testified that Ms. Smith had advised her she could revisit the relocation issue after the divorce was final. Wife signed a stipulated settlement.

Ultimately, the Court vacated the stipulation, finding that Ms. Smith made "careless and inaccurate" statements and that Wife had no meaningful representation on financial issues or custody. The court found that Ms. Smith made three significant misstatements: (1) that Ms. Smith's firm could "withdraw" from representing Wife if she sought relocation, (2) that Husband would seek custody if Wife did not sign the stipulation, and (3) that Wife would be able to seek relocation after signing the stipulation. The court found that Ms. Smith failed to inquire whether inMotion or her firm would have supported her in representing Wife in a contested divorce, or whether Wife had other alternatives for legal representation. The court also found that Ms. Smith evoked duress in persuading the Wife to sign the waiver and to not pursue relocation. While the court applauded Ms. Smith's firm for providing *pro bono* legal services through inMotion, it also cautioned that "[I]n undertaking *pro bono* representation, Ms. Smith's firm should ensure that counsel taking on *pro bono* matters receive appropriate support and supervision, so that they can provide *pro bono* clients with the same careful legal representation that they provide to paying clients."

Comment: Model Rule 5.1 of the ABA Rules of Professional Conduct, adopted in most states, requires partners and other lawyers with supervisory responsibilities (and, in New York, law firms) to supervise the work of subordinate lawyers so that the subordinates' work product meets the requirements of diligence and competence. In the current economic climate, it is not uncommon for lawyers, who have lighter than normal caseloads in their traditional areas of practice, to seek to fill their plates with work outside their usual areas of expertise. This case serves as reminder that it is important for firms to monitor what kinds of work their lawyers are engaged in, and especially in stressful times when lawyers are more inclined to "dabble," law firms should make sure that someone with the relevant expertise is exercising appropriate supervisory oversight.

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Risk Management Solution: This case makes plain that the duty to supervise *pro bono* work is no different than that which applies to paying clients' matters. Law firms are well-advised to establish practice leadership positions with respect to *pro bono* work in order to oversee both the work that the firm's lawyers undertake, and ensure that it is handled with the appropriate levels of diligence and competence.

Lawyers for the Profession®

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Conflicts of Interest — Subject Matter Conflicts — Can IP Attorneys Simultaneously Represent Two Clients That Are Prosecuting Patents for Similar Inventions?

Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 473 Mass. 336, 42 N.E.3d 199 (2015)

Risk Management Issue: What constitutes an adequate conflicts check where two clients may be pursuing intellectual property in similar inventions (sometimes referred to as a "subject matter conflict")?

The Case: The Massachusetts Supreme Court considered claims by an inventor against his attorneys for legal malpractice and breach of fiduciary duty for simultaneously representing a competing company in prosecuting a patent for a similar invention without informing him or obtaining his consent to the concurrent representation.

Plaintiff Chris Marling retained lawyers in the Boston, office of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP to represent him in obtaining a patent for a new screwless eyeglass frame. After the Firm obtained the patent, Marling learned that lawyers in the firm's Washington, D.C. office had simultaneously represented a competitor, Masunaga Optical Manufacturing Co., Ltd., in the prosecution of a patent in connection with screwless eyeglass technology.

Marling claimed that the Firm had a conflict of interest in violation of Mass. R. Prof. C. 1.7 by simultaneously representing Masunaga in obtaining a patent in the same technology area. He alleged that the Firm's failure to disclose the potential conflict resulted in "tremendous financial hardship" for Marling and that his invention was not commercially viable after learning that a competitor had a head start in the market.

A number of IP law firms filed *amicus curiae* briefs in the case. They asserted that representing two clients obtaining patents for similar inventions does not create a conflict of interest except where the claims of two patent applications are identical or obvious variants of each other. A contrary rule would effectively restrict IP firms to representing one client in each field of technology and would result in them favoring larger clients who generate more work.

The Massachusetts Supreme Court concluded that Finnegan's simultaneous representation of two competing clients in prosecuting patents in the same technology area for similar inventions was not a per se violation of Rule 1.7. Further, because the Firm successfully obtained a patent for Marling's screwless eyeglass frame, Marling failed to state a claim for relief.

The court reasoned that Marling and Masunaga were not adversaries in the traditional sense as they did not appear on opposite sides of litigation. It treated a conflict arising from representation of competitors as permissible economic adversity. Moreover, Marling did not allege that the Firm's judgment was impaired, that confidences were disclosed, or that Marling had obtained a less robust patent than had he been represented by "conflict free" counsel. Thus, Marling could identify no damages stemming from the Firm's representation.

Comment: At the conclusion of the opinion, the Massachusetts Supreme Court noted that what constitutes an adequate conflicts check is a complex question given lateral transfers, firm mergers, and the rise of giant international law firms. As *Marling* illustrates, economic adversity between two clients can be difficult to detect, particularly where a law firm has multiple offices. Although it affirmed the dismissal of Marling's action, the Court warned, "law firms run significant risks, financial and reputational, if they do not avail themselves of a robust conflict system adequate to the nature of their practice."

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Economic adversity generally does not constitute a conflict of interest that would require an attorney to obtain the affected clients' informed consent. Model Rule 1.7, Comment 6 ("[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients").

However, *Marling* establishes only the minimum conflict screening protocols for IP attorneys under Rule 1.7. Indeed, the Court emphasized that nothing in the decision should be construed to absolve law firms from the obligation to implement robust processes to detect potential conflicts. It emphasized that the misuse of client confidences or the preferential treatment of one client over another constitute serious ethical violations. Further, the decision should not be seen as a carte blanche to engage in true "subject matter conflicts," where the technology is actually identical.

Risk Management Solution: Law firms need to adopt comprehensive conflicts screening protocols that include more complete client intake information beyond the mere names of the parties, including, in intellectual property prosecution matters, sufficient detail about the actual technology or invention involved to enable firms to identify true subject matter conflicts. These procedures will help avoid possible disqualification and claims.

Strategic Decisions During Litigation Leads to Law Firm's Disqualification

In re RSR Corp., No. 13-0499, 2015 WL 7792871, at *3 (Tex. Dec. 4, 2015)

Risk Management Issue: What can law firms do to manage the risk of disqualification when they seek to consult with or engage a former employee of an opposing party?

The Case: In 2003, a mining company entered into a licensing agreement with an anode manufacturing company, under which the mining company agreed to license its anode-production information to the manufacturing company. In return, the manufacturing company promised to pay the mining company a fee for every anode sold. In 2008, the mining company sued the manufacturing company for breach of contract and misappropriation of trade secrets. Firm 1 represented the mining company. Firm 2 represented the manufacturing company.

In 2010, the manufacturing company's financial manager resigned his position. While employed, his job duties included ensuring cash flow and financing, as well as calculating the payments to the mining company under the 2003 agreement. He had access to data regarding the manufacturing company's financial statements, foreign trading and government reports. He gathered financial information in response to the mining company's audit request in 2009, and discussed the audit and litigation strategy with his employer's officers and lawyers. His employment contract stated that all information he gathered during his employment was confidential and could not be disclosed to third parties, even after his employment ended. After he left, he took with him about 15,000 to 17,000 emails, which included communications with the lawyers and officers.

Firm 1 contacted the manufacturing company's former finance manager in connection with the lawsuit. Eventually, they had several meetings, often including Firm 2. The finance manager "supplied significant information regarding [the manufacturing company], accusing [it] of underpaying [the mining company] under the 2003 agreement." The finance manager insisted that both firms pay for his time, which he charged at $1,600 per day (four times his normal salary). Ultimately, in May 2011, the finance manager formalized a consulting agreement with Firm 2, though the court found that Firm 1 "also participated in the decision to retain him." The agreement guaranteed the finance manager $1 million for a 3-year contract. However, another provision of the contract stated that Firm 2 "had no obligation to use [the finance manager's] services and would pay [him] only for work actually performed." Two months after signing the agreement, he quit consulting with both firms and signed an affidavit recanting his accusations against the manufacturing company — his former employer. The manufacturing company then moved to disqualify Firm 1.

The trial court granted the motion, holding that under the analytical framework of *In re Am. Home Products Corp.*, 985 S.W.2d 68, 76 (Tex. 1998), which involved disqualification of counsel for hiring the other side's former paralegal or legal assistant. In this scenario, two presumptions — that the paralegal/legal assistant (1) received confidential information and (2) shared it — ensure that any law firm hiring a side-switching paralegal is disqualified unless it has demonstrative screening measures in place. However, the appellate court

Extracts from New York Rules of Professional Conduct

RULE 1.1: COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

RULE 5.1: <u>RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS AND SUPERVISORY LAWYERS</u>

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a

particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Dumb Things (All Kinds of) Lawyers Do

Anthony E. Davis

Lawyers for the Profession® Practice Group

Overview

- Introduction
- Bar Registration Woes
- Failure to Supervise
- Speaking Before Thinking
- Perils of "Non-inadvertent" Production
- Cyber Disasters
- Dabbling
- The Pitfalls of Holding Client's (and Others') Money

Registration Woes

Registration Woes

- *In re Welgos*, 2017 NJ Lexis 428 (Sup. Ct. NJ 2017)
  - Senior in-house counsel at LG failed to pay annual fees from 2009 through 2014. Said his firm had always done it for him and now that he was in-house just assumed it would be done.
  - When he discovered the problem, he paid the fees, but then didn't update his address with the state, so he became ineligible again.
  - The situation came to light when an adversary filed a disciplinary complaint against him on another issue and the investigator realized he was ineligible.
  - Normally would have been an admonishment but was reprimanded because he didn't cooperate.

Registration Woes (cont'd)

- Manny is a partner in a Florida law firm based in its NY office. He has been practicing there for five years.
- With the firm's blessing, he is going to start his own firm to specialize in tax work. He wants to establish a PLLC in New York.
- Manny is admitted only in Ohio. When asked, he said that he meant to get admitted in NY, but he never had the time, and, anyway, he only does tax work.

Failure to Supervise

The Case of the Disastrous Associate

- "RollonFriday" reported:
  - Associate at a London firm prosecuted by the SRA for failing to inform the client of the case, failing to take instruction with respect to service of a claim, two settlement offers, a default judgment, and a statutory demand. Also failed to file a defence which resulted in a default judgment.
  - Was also accused of sending misleading/untrue email and letters
  - His firm finally noticed that something was not right.

"Dumping" Your Client

- *McClain v. Allstate Prop. and Cas. Ins. Co.* (D. Miss.)
- Lawyer represented Allstate for many years in defending coverage and bad faith claims. Business drying up.
- October 11 – Takes on a client suing Allstate
- October 12 – Sends letter terminating relationship with Allstate
- Court: Leaving aside he should not have taken on case in any event, this was a concurrent conflict.
- Duh!

Think Before You Speak (or Write)

- *Universal Gaming Group v. Taft Stettinius & Hollister*
  - Plaintiff UGG had been the subject of some proceedings before the Illinois Gaming Commission. They were resolved with a fine and some other conditions.
  - Partner at Taft Stettinius sent a client alert describing settlement:
    - "apparently means those individuals have found religion and will not act out of the IGB's rules and policies"
    - "Many of you have expressed significant disappointment with the aforementioned result. … we implore you not to engage in this type of behavior … continue doing the right thing …."

  UGG sued for defamation and disparagement. Lower court dismissed.

  Affirmed.

Think Before You Read

Not So Inadvertent Production

The Case(s) of the Purloined Documents

- Betsy sued her employer for discrimination. Continued to work for employer.
- Roger her lawyer advised her that she should not use firm email for anything relating to the suit and that she should not speak to anyone about it.
- Somehow Betsy had access to employer's communications with its lawyers.
- She triumphantly brought them to Roger (who read them). Roger discovered something damaging to employer.

CFO Hacker Hit with Ethics Charges

- Former employee sued company claiming harassment.
- CFO, who was also an attorney, was responsible for monitoring email accounts of former employees.
- Former employee had linked his Yahoo accounts to his work email account.
- CFO found password, logged in and searched emails. Sent them to counsel.
- Employee got a default judgment.
- Disciplinary complaint filed against CFO.

NYSBA Ethics Op. 945, Disclosure of Client Wrongdoing (11/07/2012)

"Catfishing" Think Before You Blog (and Where)

- A person assumes an on-line identity to try to get information about a case.
- Attorney blogged on a no-names basis about the case; talks about expert – also had interactive website.
- Los Angeles bar said that lawyers have duty to make sure client information is kept confidential.

L.A. Cty. Bar Ass'n. Prof'l Resp. and Ethics Comm. Op. No. 529 (Aug. 23, 2017)

Think Before You Tweet, etc.

- Chicago attorney facing sanctions for taking pictures of exhibits in an ongoing federal case and posting them on his Twitter account, along with descriptions and an analysis of the evidence. He was a spectator.
- Louisiana attorney lost case involving client's ex-husband and new husband's adoption of kids. She then took to social media to express frustration and engaged in "aggressive social media activism," which led to her loss of license.
- Georgia attorney disciplined for "venting" about a client on social media.

Fake Dating Profile Leads to Ethics Charges

- Lawyer sets up a Match.com dating profile for a lawyer he was often adverse to. Said she liked to hang out in pizza parlors, buffets and NASCAR.
- Downloaded her picture and used it.
- Signed her up as a member of Obesity Action Coalition and Pig International, had a lap band kit sent to her office.

Cyber Disasters

Care in Using the "Cloud"

- *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, (W.D. Va. 2017)
- The law firm representing an insurance company, the plaintiff in a coverage dispute, put its entire claims file on Box, Inc. The insurers and a third party investigator had access.
- The defendant's lawyers discovered this when an email in documents they received in discovery gave instructions as to how to access. Read the entire file.

Using the “Cloud” (cont’d)

- When plaintiffs realized what had happened, moved to disqualify defendant’s counsel.
- The court said that the plaintiff had waived its privilege. It was not inadvertent. And left it there for six months. No disqualification.
- But defense counsel should have notified the plaintiff when they learned of it. Court ordered defendant to pay costs of motion.
- Case to have evidentiary hearing at the district court.

Think Before You Dabble

- John was a real estate lawyer who, along with his firm, represented the Cole Company in many transactions.
- The Cole Company was purchasing certain intellectual property and had a falling out with its IP counsel. Robinson, the general counsel of Cole, came to John and asked him to help.
- John demurred, telling Robinson neither he nor anyone else at his firm had any experience in intellectual property transactions. Robinson insisted, saying, "Don't worry. I think you can do this. We just need someone to close this."

Think Before You Dabble (cont'd)

- John negotiated with the counterparties with Robinson involved as well. The deal closed.
- Six months later the Company discovered that half the patents they purchased were unenforceable. There was an investigation and Robinson was fired.
- The new general counsel sued John and his law firm for the damage caused by the unenforceability of the patents.
- The case settled quickly.

Sign in a Yoga Parlor

"When you get to the edge of the cliff – JUMP!"

Message for Your Lawyers

"When you get to the edge of the cliff – THINK!"

Loose Lips Sink Ships

. . . Mr. Cobb was overheard by a reporter for The New York Times discussing the dispute during a lunchtime conversation at a popular Washington steakhouse. Mr. Cobb was heard talking about a White House lawyer he deemed "a McGahn spy" and saying Mr. McGahn had "a couple documents locked in a safe" that he seemed to suggest he wanted access to. He also mentioned a colleague whom he blamed for "some of these earlier leaks," and who he said "tried to push Jared out," meaning Jared Kushner, the president's son-in-law and senior adviser, who has been a previous source of dispute for the legal team.

. . .

Trump Lawyers Clash Over How Much to Cooperate With Russia Inquiry
By Peter Baker and Kenneth P. Vogel
September 17, 2017
www.nytimes.com

It's Not Your Money

Rule 1.15

It's Not Your Money (cont'd)

- "Three [Bigby & Bull] partners have each been fined £10,000 by the Solicitors Disciplinary Tribunal (SDT) for breaching money laundering rules. [The partners] all of who are based in London, admitted that they had allowed the firm's client bank account to be used as a banking facility, which breached a number of regulations under the SRA Accounts Rules 2011 and the Money Laundering Regulations 2007."

It’s Not Your Money (cont’d)

- “[The individual partners] admitted that they had not heeded the Law Society’s Fraudulent Financial Arrangements warning or the Warning Notice on Money Laundering, in that they acted as escrow agent in transactions on behalf of a client that had the hallmarks of dubious financial arrangements or investment schemes."
- “[Bigby & Bull] has also been ordered to pay £50,000 by the SDT for its failure to comply with accounting rules. The firm admitted that it failed to have in place adequate procedures to deal with dormant client balances, which breached the Solicitors Accounts Rules 1998."

It’s Not Your Money (cont’d)

- Said the firm: "'We have worked constructively with our regulator, the SRA and we are confident that the circumstances which led to these breaches could not happen again. We have since reviewed and strengthened a number of aspects of our approach to risk management."

The Case of the Wayward Wire

- Suzy represents John Quick in an employment discrimination suit. The case settles and Suzy asks John for payment instructions. She receives an email from Jquock@gmail.com
- Suzy is suspicious. She calls John who says he didn't send it. She gets the correct instruction from John.
- Suzy advises the defendant's lawyer of the payment instructions. An hour later, the defendant's lawyer receives an email appearing to be from Suzy with different instructions. He transfers the funds.

The Wayward Wire (cont'd)

The email was phony and the funds disappeared.

Court says that Suzy should have known her email was compromised and have advised defense counsel.

Bile v. RREMC, LLC, 2016 U.S. Dist. LEXIS 113874 (E.D. Va. 2016)

Ornelas v. RUGC Partners Inc. (Sup. Ct., Los Angeles)

- Wage and hour case settled.
- Rust Consulting administrator sent instructions to defendants' counsel for wiring settlement funds.
- But the instructions were not from Rust and the funds disappeared.
- Rust followed up and asked where the funds were and got "responses" from the defense lawyers. Of course, they were bogus also.
- Finally, Rust managed to get an email through to the defendants.
- No evidence anyone tried to call.

Another Wire Case

- Firm represented the seller of a house.
- Received instructions from the client for receipt of the funds by check.
- Client's email was hacked and a second set of instructions said pay by wire to a company's account. (The firm had never heard of this company.)
- The firm followed the instructions.
- You guessed it!

The Case of the "Sticky Fingers"

- Cheatum & Howe had a partner, Snidely, recently arrived from another firm, who was engaged solely in trust business. He represented several beneficiaries of large estates and served as a trustee for numerous trusts. In some cases, the firm was counsel; in others, it was not, and Snidely was acting on his own.
- Cheatum & Howe's managing partner, Joe, kept getting phone calls from Roger Smith, who said he was one of the beneficiaries of a trust of which Snidely was trustee. He said that Snidely never returned telephone calls and that he had been trying to get an accounting for years.

"Sticky Fingers" (cont'd)

- The last time Roger spoke to Snidely, a year earlier, Snidely said it was "in the works". Roger just wanted to know what was happening.
- Joe, the managing partner, spoke to Snidely who said everything was under control and that he would call Roger.
- Six months go by. Roger calls again. Joe goes to Snidely's office and confronts him. Snidely blurts out that he has taken $ 300 thousand from the trust and has been trying to figure out a way to repay it.

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