Ethical Coffee Break no. 7 (September 2011)

NATIONAL

Lawyer's duty to warn the client that confidentiality is at risk when the lawyer knows or should have known that the client is sending communication from an unsecure device, for example an employer's computer.

In Formal Opinion 11-459, the ABA Standing Committee on Ethics and Professional Responsibility draw from the Model Rules a new duty for lawyers: the duty to warn the client of potential confidentiality concerns, if the lawyer knows or should have known that the client is emailing from a work computer or an employer's electronic device.

In particular, the Opinion explains that:

> A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

The opinion lists several cases in which the confidentiality of the lawyer-client communications can be jeopardized (often without the client being aware of): (i) when the client uses an employer's computer, smartphone, or other telecommunications device, or an employer's e-mail account to send or receive e-mails and the employer has policies reserving a right of access to employees' e-mail correspondence. In fact, based on those policies, the employer may obtain access to the communications,[1] and a third party may obtain access by issuing a subpoena to

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[1] Examples: in employment disputes or when the employer is monitoring employee e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client's work.

the employer; (ii) when the client receives or sends e-mails via a public computer (such as a library or hotel computer); (iii) when the client uses a borrowed computer; (iv) when the client uses a computer shared with other members of the family (such as a home computer) in case for example of a matrimonial dispute.

The Committee says that the relevant rules are Rule 1.6(a) (confidentiality) and Rule 1.1 (competent representation).

In particular, Comment [16] to Rule 1.6 states that a lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision," while Comment [17] states that "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." Judicial decisions stand for the proposition that clients may not be afforded a "reasonable expectation of privacy" when they use an employer's computer to send e-mails to their lawyers or receive e-mails from their lawyers.[2] While the Committee decides to "express no view on whether, and in what circumstances, an employee's communications with counsel from the employee's workplace device or system are protected by the attorney-client privilege", the Committee reminds to lawyers that it is their ethical duty to take precautions.

Which precautions?

First, "[a] lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications … In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications".

[2] *See, e.g.*, Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 663 (N.J. 2010); National Econ. Research Assocs. v. Evans, No. 04-2618-BLS2, 21 Mass.L.Rptr. 337, 2006 WL 2440008, at *5 (Mass. Super. Aug. 3, 2006); *National Econ. Research Assocs. v. Evans*, No. 04-2618-BLS2, 21 Mass.L.Rptr. 337, 2006 WL 2440008, at *5 (Mass. Super. Aug. 3, 2006)

When should this advice be given? When the lawyer knows or should have known that the client-employee will likely be using unsecured devices to communicate and there is the substantial risk that someone else will read the communication. Let's think, for example that the employee is retaining the lawyer about a possible claim against the employer.[3]

> The obligation arises once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail communications with the lawyer using a workplace computer or other business device or via the employer's e-mail account. This possibility ordinarily would be known, or reasonably should be known, at the outset of the representation. Given the nature of the representation–an employment dispute–the lawyer is on notice that the employer may search the client's electronic correspondence.

Second, as soon as the lawyer becomes aware (or should become aware) of the risk, he should take protective measures. For instance, in the situation taken by the Committee as illustration,

> [p]rotective measures would include the lawyer refraining from sending e-mails to the client's workplace, as distinct from personal, e-mail address, and cautioning the client against using a business e-mail account or using a personal e-mail account on a

[3] Considerations tending to establish an ethical duty to protect client-lawyer confidentiality by warning the client are for example, according to the Committee, the following:

> (1) that the client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that the client is employed in a position that would provide access to a workplace device or system; (3) that, given the circumstances, the employer or a third party has the ability to access the e-mail communications; and (4) that, as far as the lawyer knows, the employer's internal policy and the jurisdiction's laws do not clearly protect the privacy of the employee's personal e-mail communications via a business device or system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an employer's internal policy allows for access to the employee's e-mails sent to or from a workplace device or system.

workplace computer or device at least for substantive e-mails with counsel.

The employer-employee situation, however, is, as said, only an example.

The Committee reminds that lawyers have a more general obligation of activating themselves to protect confidentiality. The lawyer's duty is first of all, a duty to "warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access." Second, a duty to consider if "given the client's situation, there is a significant risk that third parties will have access to the communications." Third, if so, "the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client."

SOUTH CAROLINA

As in the majority of the jurisdictions, negligent spoliation of evidence is not a cause of action in South Carolina.

In *Cole Vision Corp. v. Hobbs*, No. 26988, the Supreme Court reversed the court of appeals' decision because it found that negligent spoliation is not a cause of action in South Carolina. Nor should the law be changed to recognize this cause of action because (i) public policy considerations weigh heavily against adopting the tort in the State; (ii) the damages calculation is purely speculative, and (iii) there is potential for duplicative and inconsistent litigation.

These are the facts: Steven C. Hobbs, an optometrist, sublet space from Cole Vision Corporation and Sears (collectively "Sublessor"). The sublease agreement contained indemnity provisions whereby Hobbs agreed to defend Sublessor against any and all liabilities arising from events occurring in the location as a result of Hobbs' activities. This agreement also purportedly required Sublessor to retain copies of Hobbs' patient records. Hobbs obtained professional liability insurance with NCMIC Insurance Company ("NCMIC"). Mary and John Lewis ("Lewises") sued Hobbs and Sublessor based on Hobbs' alleged malpractice in failing to properly diagnose and treat Mrs. Lewis. Sublessor brought action for declaratory relief after Hobbs and NCMIC refused to defend them in the malpractice suit. In the meantime the Lewises settled their case.

Sublessor sought, among other things, a declaration that Hobbs and NCMIC were obligated to defend and indemnify them pursuant to the sublease agreement. Hobbs counterclaimed for negligent spoliation of evidence against Sublessor based on the loss of Mrs. Lewis's patient profile sheet. Sublessor's defense was failure to state a claim. Sublessor filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, on the ground that South Carolina does not recognize a cause of action for spoliation of evidence. The circuit court granted the motion. Hobbs appealed. The Court of Appeals reversed, finding that Hobbs pled facts sufficient to constitute a general negligence cause of action (but without determining whether South Carolina recognizes a cause of action for negligent spoliation).

The Supreme Court refused to recognize the tort of spoliation of evidence. This is the reasoning. First, this is the position of the majority of the jurisdictions.[4] Second, "public policy considerations weigh heavily against adopting the tort in this State." In fact, (i) other remedies are already available with respect to first-party claims;[5] (ii) the calculation of damage is too speculative.[6]

In conclusion, the Court reversed the appellate court's decision, declining to recognize the tort of negligent spoliation of evidence.[7]

NEW YORK

New York has passed a new ethical statute that interests, among others, lawyers lobbying for their clients.

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4 [S]ome states have adopted an independent action for spoliation of evidence. … other states have refused to adopt an independent tort action, but have permitted recovery for spoliation under traditional negligence principles … [while] [m]ost states … have refused to recognize an independent spoliation tort and continue to rely on traditional non-tort remedies such as sanctions and adverse jury instructions for redress.

5 For example, striking of a party's pleadings or adverse jury instructions against a party found to have lost or destroyed relevant evidence in the case where the evidence was to be presented.

6 So for example the Texas Supreme Court (*Trevino v. Ortega*, 969 S.W.2d 950 (1998), in rejecting the tort of evidence spoliation):

> [e]ven those courts that have recognized an evidence spoliation tort note that damages are speculative. The reason that the damages inquiry is difficult is because evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation.

7 The Supreme Court did not deny however that whether Sublessor breached a contractual duty was a viable defense in the action for indemnification.

New York has passed a new statute on public governmental ethics that increases the disclosure obligations for governmental agencies and privates, like lobbyists and law firms, dealing with the New York state government (Public Integrity Reform Act of 2011, enacted August 15, 2011).[8] Lobbyists beware.

The Second Circuit's *Johnson v. Nextel Communications*: the *res ipsa loquitur* of the breach of fiduciary duty.

On September 26, 2011, the Second Circuit decided a case with such egregious profiles of unethical conduct that raises to the level of a fact pattern for law school exam in Professional Responsibility. *Johnson v. Nextel Communications, Inc.*[9]

Plaintiffs are a class of former clients of Leeds, Morelli & Brown, P.C., Long Island law firm ("LMB"). Defendants are LMB, Nextel Communications, Inc., and seven of LMB's lawyers.

Plaintiffs alleged that the firm conducted a meeting at which the Plaintiffs and some 587 individuals hired LMB to pursue employment discrimination claims against Nextel, a Delaware corporation. The retainer agreement with LMB specified a one-third contingency fee for LMB. Plaintiffs alleged that LMB never intended to bring, and never brought, any discrimination actions against Nextel. Instead, LMB intended to follow a prior LMB practice of seeking direct payments, including payments as a legal consultant, from putative defendant-employers, in this case, Nextel. On September 28, 2000, LMB and Nextel met in New York and signed an agreement titled "Dispute Resolution and Settlement Agreement" ("DRSA"). Pursuant to DRSA, Nextel would pay the firm: (1) $2 million to persuade its 587 clients to abandon ongoing legal and administrative proceedings against Nextel, waive their rights to a jury trial and punitive damages, and accept an expedited mediation/arbitration procedure; (2) another $3.5 million on a sliding scale as the clients' claims were resolved through mediation and/or binding arbitration; and (3) another $2 million to work directly for Nextel as a consultant for two years beginning when the clients' claims had been resolved.[10] Undisputed was that none of the payments were conditioned on any of the plaintiffs receiving a recovery.

After the DRSA was signed, LMB approached Plaintiffs to obtain their

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[8] Text available at www.NYSBA.org/PIRA2011.

[9] F.3d ----, 2011 WL 4436263.

[10] Because 14 of the 587 clients did not accept, the DRSA was amended in order to lower the compensation of the law firm.

signature on documents called Individual Agreements and Pledges of Good Faith. These agreements contained a statement by each Plaintiff that he or she "reviewed the [DRSA]; had the opportunity to discuss that Agreement with [LMB] or any other counsel of [his or her] choosing; and agree to comply fully with the terms of that Agreement."[11] The Pledges of Good Faith stated that, because the DRSA had to be confidential, the DRSA would be maintained by two representatives in each Plaintiff's area but that each Plaintiff could review it upon request. Notwithstanding this, LMB did not allow the Plaintiffs to review the full DRSA, but rather provided only the signature page of the DRSA, the Individual Agreements, and a document entitled "Highlights of Settlement Agreement".[12]

Plaintiffs sued both LMB and Nextel in New Jersey. The action was removed to federal court and the venue was transferred to the SDNY.[13] Defendants moved to dismiss for failure to state a cause of action. The SDNY granted the motion because Plaintiffs stated they had an opportunity to review the DRSA and consented to its terms; therefore they waived their objection to the conflict of interest. Plaintiffs appealed. The Second Circuit reversed, vacated the dismissal, and remanded.

The Second Circuit held that Plaintiffs "have alleged facts sufficient to state a claim against LMB for, *inter alia,* breach of fiduciary duty and against Nextel for aiding and abetting breach of fiduciary duty." In addition, the Second Circuit held that the conflict of interest created by the DRSA was so egregious that, as a matter of law, it was not "consentable" because (1) none of the payments to the law firm were in any way contingent on Plaintiffs receiving recoveries; and (2) it constituted an employment contract between the law firm and Nextel.

The Second Circuit reached this result with little difficulty. After having restated the elements of breach of a fiduciary: (i) the existence of a fiduciary duty;

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[11] As for the payment of legal fees, the Individual Agreements stated: "I acknowledge and understand that... Nextel has agreed to pay an amount of money to [LMB] to cover the attorneys' fees and expenses, other than expert fees, that Claimants might otherwise pay to [LMB] . . ."

[12] The Highlights Document spoke about the dropping of Plaintiffs' complaints, the confidentiality requirement, and the consultancy agreement. As for the latter, the document specifically stated that it posed a conflict of interest for LMB, which the claimant agreed to waive by signing the Individual Agreement. No mention of the amounts LMB was to be paid or the various conditions on those payments, but only a general reference to legal fees and costs.

[13] Since the engagement agreement was signed in New Jersey, there was a conflict of laws issue that we are not interesting under an ethical perspective and therefore they are omitted in our analysis.

(ii) a knowing breach of that duty; and (iii) damages resulting therefrom),[14] the Court simply held:

> The existence of a fiduciary duty between LMB and appellants is beyond dispute. It is also plain that, if there was a breach, it could not have been due to negligence but rather, given the nature of the DRSA and the complaint's allegations, had to be knowing and intentional on LMB's part.

Obviously the Plaintiffs did not consent to the conflict of interest because the consent was everything but informed. However, the Second Circuit did not have to deal with the issue whether the conflict was validly consented or not, because it found that the conflict was unconsentable as a matter of law.

> The DRSA created overriding and abiding conflicts of interest for LMB and thoroughly undermined its ability to deal fairly, honestly, and with undivided loyalty to [appellants]. …The DRSA on its face created enormous incentives on LMB's part to obtain from each and every one of its clients waivers of important rights. . . . On its face alone, the DRSA created an enormous conflict of interest between LMB and its clients.

The conflict in question, however, was nonconsentable even with informed consent. In fact, in a case like this, LMB had a duty to advise individually every Plaintiff; by signing the DRSA that remunerated the settlement "en masse", LMB already breached its fiduciary duty.[15] In addition, the DRSA's structure makes the conflict even worse:

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14 See Barrett v. Freifeld, 883 N.Y.S.2d 305, 308 (N.Y. App. Div., 2d Dep't 2009).

15 First, because LMB was not lead counsel in a class action, the class-protective provisions of Fed. R. Civ. P. 23 were not triggered . . . Therefore, LMB's clear duty … to advise each client individually as to what was in his or her best interests taking into account all of the differing circumstances of each particular claim. The DRSA was flatly antagonistic to that duty. On the face of the DRSA, its inevitable purpose was to create an irresistible incentive … for LMB to engage in an en masse solicitation of agreement to, and performance of, the DRSA's … By entering the DRSA . . . LMB violated its duty to advise and represent each client individually.

> LMB was being paid by Nextel in effect to ignore its duty to represent clients as individuals … [In addition] none of the payments to LMB was in any way contingent on claimant clients receiving a recovery …

The opinion of the Second Circuit is quite sharp on the law firm's behavior:

> [W]e express our candid opinion that the DRSA was an employment contract between Nextel and LMB designed to achieve an en masse processing and resolution of claims … [W]e believe that, under the above circumstances, the opportunity for the claimants to give informed consent was so burdened that the DRSA is not consentable for that reason as well. Certainly, given the conflicts described above, any advice from LMB to its claimant clients could not possibly be independent advice untainted by the counter-incentives of the DRSA such that the resulting consent would be valid.

Was there any way for LMB to obtain a valid consent from Plaintiffs? Yes, according to the Second Circuit, if Plaintiffs have hired an independent lawyer to analyze the DRSA and this independent lawyer had performed his role, there could have been a valid consent.[16]

The Second Circuit concluded that the elements of a breach of fiduciary duty were "therefore met."

I will not comment on these facts because … *res ipsa loquitur.*

AROUND THE COUNTRY

United States v. Lauren Stevens: Ethical issues for in-house counsel advising clients on compliance with government investigations.

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[16] The magnitude, and … complexity of LMB's conflict of interest is such that informed consent would require the hiring of an independent lawyer to review the twenty-nine page DRSA and to explain the multiple conflicts embraced by LMB … and the … consequences of abandoning ongoing legal or administrative proceedings.

In-house counsel should be aware of the personal risks that might ensue when a governmental investigation of their client is conducted. In *United States v. Lauren Stevens,*[17] a recent and widely discussed case (so widely discussed that we do not want to comment further on this),[18] the federal District Court of Maryland acquitted the in-house counsel.

The case reminds us of a quite fundamental ethical dilemma: how far can you go to represent your client? This is a dilemma that is particularly burdensome on in-house counsel. For example, Lauren Stevens was Associate General Counsel of GlaxoSmithKline while the company was under investigation by the FDA for illegally marketing a depression drug as a weight-loss aid. Stevens was indicted with one count of obstructing an official proceeding, one count of concealing and falsifying documents to influence a federal agency and four counts of making false statements to the FDA. Why so? It was alleged that Stevens (at the head of a team of in-house and external counsel responding to the FDA inquiry) knowingly failed to produce promotional and presentation materials, with the intent to obstruct an FDA proceeding. Stevens was acquitted, but she went through a criminal trial. The message from the case is quite simple: in representing a client, do not overdo; refrain from personal risk. What "to overdo" means in practice is never easy to understand. A lot depends on your personal philosophy of lawyering.[19] However, I think that every time you feel uncomfortable in doing something(?), you should at least seek independent, objective advice before proceeding. Remember also that if you get in trouble, probably your client will too. In fact, if a lawyer is indicted in connection to a case, the client – even if unaware of her actions – will also pay a price (at the very least in reputation). As the Schola Medica Salernitana used to say: "*Primum non nocere*" (First, do not harm).

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[17] 771 F.Supp.2d 556, D.Md., 2011.

[18] On the issue, see e.g. O'D Bosack & Eric J. Wilson "United States v. Lauren Stevens: A Defense Victory And An Opportunity For In-House Counsel To Reflect", available at http://www.gklaw.com/news.cfm?action=pub_detail&publication_id=1088

[19] See Nathan Crystal, Developing a Philosophy of Lawyering, 14 Notre Dame L.J. Ethics & Pol'y 75 (2000), electronically available at www.nathancrystal.com.