From Metadata to Social Media: Changing Ethics in the Digital Age

August 10, 2013

@DavidElkanich
Hinshaw & Culbertson LLP
Agenda - Today

- Update on Metadata
  - Oregon has an Opinion!

- Social Media: How are we using it?
  - Investigation: how to find what you want
  - Advertising: getting online and ... responding to the “bad review”
Ethical Concerns for Lawyers: Confidentiality and Privilege

**RPC 1.6(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 carry out the representation or the disclosure is permitted by paragraph (b).

**New ABA RPC 1.6 (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.

**Attorney-Client Privilege, OEC 503(2):** client holds the privilege on communications made for the purpose of facilitating the rendition of professional legal services to the client.
Is the Standard of Competency Evolving?

- **Oregon RPC 1.1:** Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

- **Cmt [8]: ABA RPC 1.1:** Lawyer should “maintain competence” by keeping abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education…”

- Standard of care issues in the digital world
  - Oppositional research
  - Privacy settings
  - Security
  - Do you know as much as your opponent?
**Metadata**

- **What is it? Data about data.**
  - Red-line edits/changes/comments
  - Time spent with document open
  - Original authors and editors
  - Creation, access, modification dates
  - Google search terms
  - Explorer addresses
  - And anything else with an electronic “trail”

- **Ethics concerns relate to the transmission and receipt of electronic information**
Dear Opposing Counsel,

My client offers to settle the case for $20,000. Please let me know two weeks from today whether your client accepts. If your client does not accept, I plan to file a motion for summary judgment right away.

Very Truly Yours,

Offering Lawyer
Dear Opposing Counsel,

My client offers to settle the case for $10,000-$20,000. Please let me know one or two weeks from today whether your client accepts. If your client does not accept, I plan to file a motion for summary judgment right away. Feel free to call me with any questions.

Very Truly Yours,

Offering Lawyer
Dear Opposing Counsel,

My client offers to settle the case for $10,000. Please let me know one week from today whether your client accepts. Feel free to call me with any questions.

Very Truly Yours,

Offering Lawyer
Dear Opposing Counsel,

My client, offers to settle the case for $10,000. Please let me know one week from today whether your client accepts. Feel free to call me with any questions.

Very Truly Yours,
Offering Lawyer
Metadata Questions

Sending Lawyer:
- Does a lawyer have a duty to remove or protect metadata when transmitting documents electronically?

Receiving Lawyer:
- What can/must a receiving lawyer do when the document contains readily accessible metadata?
Or Formal Ethics Opinion 2011-187: Duties on the Sending Lawyer

- RPC 1.1 & 1.6:
  - Safeguard client information
  - Maintain basic understanding of technology and risks involved

- By Using “reasonable care” – remember cmt [8] to RPC 1.1

- Sending lawyer must use R/C to:
  - Prevent inadvertent disclosure of metadata
  - Limit nature and scope of metadata revealed
  - Control the recipients
What steps can a lawyer take?

- Create non-malleable document
- Utilize scrubbing software
- Updates/software patches
- Consider and evaluate other technology
- Protective orders and claw-back agreements

Oh and . . . Don’t forget
Subject of message:

Scrub Attachment Alert!

This message has 1 attachment: [Ddoc18.doc]

1 has been identified as a Microsoft Word document that may not have been scrubbed.

This attachment may contain metadata that needs to be scrubbed.

Would you like to scrub this attachment?
- Yes, scrub this attachment without prompting:
  Scrub Level: Cooperator
  Apply MetaSealant

- Yes, customize:
  Scrub Level: Cooperator
  Apply MetaSealant
  Prompt for each

- No, do not scrub attachments

Send after scrubbing

[OK] [Cancel]

David J. Elkanich
Hinshaw & Culbertson
1000 SW Broadway, Suite 2600
Portland, Oregon 97209
office: 503-243-3243
david.elkanich@hinshawlaw.com

elkanich@gmail.com

Doc18.doc
Deeply rooted in the great Northwest and nationally recognized for outstanding work for more than 30 years, Stoll Berne is a boutique law firm best known for its expertise in complex business litigation, plaintiff class actions, intellectual property litigation, securities litigation, and real estate transactions. Reflecting its commitment to give back to the community, the firm donates one percent of its gross revenues to charity.

Partner with our new Partner for your commercial real estate needs.

It is our pleasure to announce attorney Gregory G. Lutje has joined Samuels Yoelin Kantor LLP as Partner.

With over 20 years of experience in commercial real estate law, in private practice and in-house, Mr. Lutje’s practice focuses on retail leasing, development and entitlements. He provides valuable real estate and land use law expertise to developers, landlords, retailers, office tenants and other clients.

At Samuels Yoelin Kantor LLP, we help our clients protect their families and businesses, for success and happiness in the years to come.

Helping businesses, entrepreneurs & families build their legacy since 1927.

111 S.W. 5th Avenue | Suite 3800 | Portland, OR 97204 | 503.226.2966
116 3rd Street | Suite 211 | Hood River, OR 97031 | 541.436.0777

Stoll Berne is Proud to Support the RELU Annual Summer Conference
If lawyer receives a document and knows or should have known that it was inadvertently sent, then lawyer should disclose receipt to sender under RPC 4.4(b). Examples:

- Yellow pad
- Redline edits

Oregon RPC 4.4(b): A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Stop, Drop and Roll…
What does all this mean as to Metadata?

“Given the sending lawyer’s duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in. In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.”

Use of special software to review metadata surreptitiously can be an RPC 8.4 violation

Not all jurisdictions are the same…
Other States Say….?

- Yes, you may mine for metadata:
  - Washington 2216 (2012)
  - ABA (Ethics Op. 06-442)
  - Maryland (Ethics Op. 2007-09)
  - Colorado (Ethics Op. 119)
  - Pennsylvania & D.C.

- No, you may not mine for metadata:
  - New York (Ethics Op. 742)
  - Alabama (Ethics Op. 2007-02)
  - Arizona (Ethics Op. 07-03)
  - W.Va., Florida, Maine, and New Hampshire
Opposing Counsel
Does Social Networking Matter?

- Tops Google for weekly traffic in US
- 60 million status updates happen every day
- If Facebook were a country – it would be the third largest (behind China and India and in front of the US)
300,000 people join twitter today
Sending over 100,000 tweets per minute & 144 million per day

Lady Gaga (39M) – has more followers than President (34M)
A single treat from Ms. Gaga will reach more people than:
- The Wall street journal
- USA today
- New York Times
- COMBINED
Does Social Networking Matter?

Because “they” are using it…
- 67% use any social networking platform (12/2012)
- 52% of employees socially network during the workday
- 18-24 year olds: 98% use social media

And they expect to see you online…
- 9 / 10 consumers turn to internet first
- 56% consumers use social media to search attys (6/13)
- Only 14% of consumers trust traditional ads
- BUT 90% trust recommendations via social media
And You are Beginning to Use it…

- 95% of lawyers are on LinkedIn. 84% of lawyers have a website. 38% use Facebook for professional purposes
- Level the playing field
- Use social media to build your reputation
- Create your “long copy”

- But – remember the RPCs – and . . .
- You are always a lawyer – *In re Carpenter*
Does it Work?

2012 ABA Survey: “Have you ever had a client retain your legal services directly or via referral as a result of your legal topic blogging for professional purposes?” YES:

- 39.1 % total
- 53.3 % solos
- 50 % 2-9 member firms
Dipping your toe in the water...

- Get online:
  - Websites, Twitter & Blogging
  - LinkedIn
  - Avvo
- Others – yeah, maybe but …
  - JDSupra
  - Groupon
  - Fiverr.com
  - LegalBistro
The Internet and Privacy

A HELPFUL VENN DIAGRAM
Social Media – How do you . . .

- Respond to a bad review?
  1. Take a deep breath
  2. Accept it
  3. Control the discussion – get online
  4. Ask whether it can be removed
  5. Consider responding
  6. Solicit other comments from satisfied clients
  7. Last resort – should you sue?
How Else are Lawyers Using the Internet?

- ABA Survey: 44% of lawyers

Questions to ask:
- May Lawyer review “public information”?
- May Lawyer request to view “non-public information”?
- May Lawyer use non-identifying username or alias to request “non-public information”?
Types of Information Online

- Public, Consumer Information
- Public, Personal Information
- Non-Public, Personal Information
Leading the Way in Land Development Consulting Since 1983

• Land Use Permitting
• Site Development including Civil Engineering
• Master Planning and Urban Expansion
• Due Diligence
• Entitlement
• Subdivisions, Partitions and Property Line Adjustments
• Survey for Easements, ALTA, Boundary and Land Division
• 3D Scanning for Deformation Analysis, Forensics, Insurance

Westlake Consultants, Inc
503.684.0652
www.westlakeconsultants.com
Director of Planning
Lee D. Leighton, AICP
lleighton@westlakeconsultants.com
Public, Personal Info
Non-Public, Personal Info

- Represented or Not?
- RPC 4.2
  - Actual Knowledge
  - “Represented on subject matter”
- RPC 4.3
  - Don’t imply disinterested
  - Ensure no confusion about role
  - Give no legal advice, except . . .
Alternatives to “friending”?

- Find friends and other witnesses of person?
- Discovery requests?
- Court Order to exchange passwords?
- Subpoenas?
  - See Electronic Communications Privacy Act
- Largent v. Reed – Penn 2011: no “reasonable expectation of privacy” on Facebook
Final Thought #1

PASSWORDS
Final Thought #2

- How to lose privilege in 15 sections:
  - Copying 3rd party on an email (and bcc)
  - “Reply to all”
  - Auto-fill email addresses
  - Forwarding attorney emails
  - Not confirming identity of caller/writer

Remember: The A/C privilege belongs to the client – not the lawyer.
Thank You!
David

@DavidElkanich
www.theethicalquandary.com