

## **MATERIALS ON VIDEO FOR THE PRACTICING WITH PROFESSIONALISM PANEL DISCUSSION**

### **I. THE SMOKING GUN**

#### **A. Cast of Characters**

Barbara Davis, Senior Partner at Kramer & Bell

Samuel Wallace, President, The Sentry Co., Inc.

Jose Rodriguez, Associate at Kramer & Bell

#### **B. Summary**

The Defendant, Sentry, through its president, Samuel Wallace, withheld information from opposing counsel and his lawyer, which could be potentially damaging to his case. Mr. Wallace provided misleading information in Defendant's answers to Plaintiff's Interrogatories. He then asked his lawyer to conceal the information, from both opposing counsel and his fellow board members, in fear of losing his job. Ms. Davis represents the company. She decides to conceal the information to give Mr. Wallace time to tell the other board members himself. Eventually, Ms. Davis decides that before Plaintiff gets the damaging information that Defendant should try to settle the case.

#### **C. Questions for Discussion**

*1. What should a lawyer do to encourage the lawyer's client to be completely candid, even if the information is potentially damaging?*

*Consider:* Rule 4-1.2(d); Rule 4-1.6(a); Rule 4-1.7(a), (b) including Comment & (c); Rule 4-3.4(d); Rule 4-5.4 (d); Rule 4-8.4(a)

#### **Rule 4-1.2 Objectives And Scope Of Representation**

**(d) Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counselor assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

#### **New comment added effective May 22, 2006**

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act

contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See rule 4-1.4(a)(S).

#### **Rule 4-1.6 Confidentiality Of Information**

**(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

**(b) When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

**(c) When Lawyer May Reveal Information.** A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

**(d) Exhaustion of Appellate Remedies.** When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

**(e) Limitation on Amount of Disclosure.** When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

#### **Rule 4-1.7 Conflict Of Interest; Current Clients**

**(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer shall not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

**(b)** Notwithstanding the existence of a conflict of interest under subdivision (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 position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

**(c) Explanation to Clients.** When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

#### **Rule 4-3.4 Fairness To Opposing Party And Counsel**

A lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

#### **Rule 4-1.13 Organization As Client**

**(a) Representation of Organization.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

**(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

**(d) Identification of Client.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

#### **Rule 4-4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(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 4-1.6.

#### **Rule 4-5.4 Professional Independence Of A Lawyer**

**(d) Exercise of Independent Professional Judgment.** A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

#### **Rule 4-8.4 Misconduct**

A lawyer shall not:

(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.

2. *How should a lawyer deal with a client who has been untruthful, or at least less than totally forthcoming, with the lawyer?*

3. *What should a lawyer do when a client's untruthfulness has let the lawyer give misleading information to another party?*

*Consider:* Rule 4-3.3(c), (d); Rule 4-4.1 and Comment

#### **Rule 4-3.3 Candor Toward The Tribunal**

**(c) Evidence Believed to Be False.** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

**(d) Ex Parte Proceedings.** In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

#### **Rule 4-4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(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 4-1.6.

#### **Comment**

##### **Misrepresentation**

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can

occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.

### **Statements of fact**

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

### **Crime or fraud by client**

Under rule 4-1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) states a specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 4-1.6.

**4. *How can the lawyer create a relationship with an agent that is close enough to work in the best interests of the client, and not so close as to make the agent believe the agent is "the" client?***

**Consider:** Rule 4-1.13 and Comment

### **Rule 4-1.13 Organization As Client**

**(a) Representation of Organization.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

**(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall

proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

**(c) Resignation as Counsel for Organization.** If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

**(d) Identification of Client.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

**(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization.** A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## **Comment**

### **The entity as the client**

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations

of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

### **Relation to other rules**

The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

### **Clarifying the lawyer's role**

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal

representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

**5. *What should the lawyer do when it becomes clear that the interests of the client (Sentry) and the client's agent (Myron) are potentially in conflict?***

*Consider:* See Rule 4-1.13 (b)

#### **Rule 4-1.13 Organization As Client**

**(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

**6. *What should the lawyer do when it becomes clear that the interests of the client (Sentry) and the client's agent (Myron) are actually in conflict?***

*Consider:* See Rule 4-1.13 (d) and Florida Bar Ethics Opinion 75-19

#### **Rule 4-1.13 Organization As Client**

**(d) Identification of Client.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

## **OPINION 75-19**

**March 15, 1977**

An attorney who learns from his client that the client deliberately lied at a deposition must withdraw from the representation and must reveal the fraud to the court if the client refuses to rectify it.

**Note:** This opinion was affirmed by the Professional Ethics Committee at its meeting on June 18, 1998. The Committee affirmed that a material misrepresentation during a deposition, regardless of whether the deposition has been filed with the court, requires that the attorney take remedial measures under Rule 4-3.3.

### **Spector reference to Rule 4-1. 13(b)**

**(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

## **II. COMMUNICATION**

### **A. Cast of Characters:**

Christopher DeSon, Attorney.

Mary Simmons, Secretary for Mr. DeSon

Albert Baxter, Attorney for Attorney Consumer Assistance Program (ACAP)

Daphne Edwards, Client of Mr. DeSon

Barbara Davis, Opposing Counsel to Mr. DeSon

## **B. Summary:**

The scene opens with an attorney, Christopher DeSon, in his office scrolling through his Facebook page. Mr. DeSon's secretary, Mary Simmons, comes to the door and informs him a client, Daphne Edwards, is calling for the fourth time in a week and wants to talk about issues in the upcoming trial and deposition. Mr. DeSon avoids the call and continues to play on Facebook. Next, Ms. Simmons tells Mr. DeSon he has a call from Barbara Davis, opposing counsel, threatening to file a motion to compel if he does not respond to updated interrogatories. Mr. DeSon avoids the call again by asking his secretary to lie for him and say the interrogatories are in the mail. Mr. DeSon then receives a call from Albert Baxter of the Attorney Consumer Assistance Program (ACAP). Mr. DeSon takes the call and Mr. Baxter tells him that his client, Ms. Edwards, has filed a complaint against him. Mr. Baxter suggests that he call Ms. Edwards back or a bar complaint could be forthcoming. Mr. DeSon then calls Ms. Edwards and informs her that he will send the trial strategy and deposition questions to her. After that, Mr. DeSon calls Ms. Davis and informs her he will send the Response to Interrogatories to her. Mr. DeSon then sends out two emails with attachments and it is later learned that Mr. DeSon sent the email that was supposed to go to Ms. Davis to Ms. Edwards, and sent the email that was supposed to go to Ms. Edwards to Ms. Davis.

## **C. Questions for Discussion:**

### **1. *What contact must a lawyer maintain with the client during the representation period?***

**Consider:** Preamble: A Lawyer's Responsibilities; Rule 4-1.1; Rule 4-1.3 and Comment; Rule 4-1.4 and Comment; Rule 4-3.2 and Comment.

#### **Preamble: A Lawyer's Responsibilities**

In all Professional Functions, a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation.

#### **Rule 4-1.1 Competence**

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

#### **Rule 4-1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### **Comment**

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

#### **Rule 4-1.4 Communication**

**(a) Informing Client of Status of Representation.** A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

**(b) Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### **Comment**

Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

#### **Communicating with client**

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, subdivision (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

#### **Explaining matters**

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See rule 4-1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See rule 4-1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

#### **Rule 4-3.2 Expediting Litigation**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

#### **Comment**

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

#### ***2. What duty does a lawyer owe to opposing counsel?***

**Consider:** Preamble: A Lawyer's Responsibilities; Rule 4-3.4; Rule 4-4.2(a); The Florida Bar Ideals and Goals for Professionalism, Goals 2.5 and 2.7; additionally, look to local circuit standards of professional courtesy, many of which have been adopted by administrative order, i.e. Sixth Judicial Circuit Standards of Professional Courtesy B(6), F(17), and H(2); Seventeenth Judicial Circuit Standards of Professional Courtesy III(1) and IV(2).

**Preamble: A Lawyer's Responsibilities**

A lawyer should demonstrate respect for the legal system, and for those who serve it, including judges, *other lawyers*, and public officials.

**Rule 4-3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

(b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party;

(e) in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client, and it is reasonable to believe that the person's interests will not be adversely affected by refraining from giving such information;

(g) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter; or

(h) present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter.

**Rule 4-4.2 Communication with Person Represented by Counsel**

a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the

lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

### **The Florida Bar Ideals and Goals for Professionalism**

**Goal 2.5:** A lawyer should notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters.

**Goal 2.7:** A lawyer should promptly comply with requests to prepare orders

### **Sixth Judicial Circuit Standards of Professional Courtesy**

**Standard B(6):** [A lawyer] will cooperate with opposing counsel when conflicts and calendar changes are necessary and requested.

**Standard F(17):** [A lawyer] will avoid "gamesmanship" in answering interrogatories

**Standard H(2):** [A lawyer] will not force opposing counsel to make motions [the lawyer] does not intend to oppose unless circumstances require or client requires.

### **Seventeenth Judicial Circuit Standards of Professional Courtesy**

**Standard III(1):** Attorneys should refrain from denigrating the court, opposing counsel, parties or witnesses.

**Standard IV(2):** Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Copies of any submissions to the court (such as correspondence, memoranda of law, caselaw, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they were provided to the court. For Example, if a memorandum of law is hand delivered to the court, at the same time a copy should be hand delivered to the opposing counsel.

### ***3. What is the protocol for an attorney reporting misconduct of another attorney?***

**Consider:** Rule 4-8.3(a), (c), (d), and Comment;

#### **Rule 4-8.3 Reporting Professional Misconduct:**

**(a) Reporting Misconduct of Other Lawyers.** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

**(c) Confidences Preserved.** This rule does not require disclosure of information otherwise protected by rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program. Provided further, however, that if a lawyer's participation in an approved lawyers assistance program is part of a disciplinary sanction this limitation shall not be applicable and a report about the lawyer who is participating as part of a disciplinary sanction shall be made to the appropriate disciplinary agency.

**(d) Limited Exception for LOMAS Counsel.** A lawyer employed by or acting on behalf of the Law Office Management Assistance Service (LOMAS) shall not have an obligation to disclose knowledge of the conduct of another member of The Florida Bar that raises a substantial question as to the other lawyer's fitness to practice, if the lawyer employed by or acting on behalf of LOMAS acquired the knowledge while engaged in a LOMAS review of the other lawyer's practice. Provided further, however, that if the LOMAS review is conducted as a part of a disciplinary sanction this limitation shall not be applicable and a report shall be made to the appropriate disciplinary agency.

#### **Comment**

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of rule 4-1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of subdivisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program.

Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

### **III. MISTAKE OF EMAIL**

#### **A. Cast of Characters**

Barbara Davis, Senior Partner at Kramer & Bell

Jose Rodriguez, Associate at Kramer & Bell

#### **B. Summary**

Opposing counsel mistakenly receives an email containing privileged information consisting of a trial strategy belonging to the other party. The lawyer shares the email with her associate, who advises her that they have an obligation to return the information to the other party. The lawyer holds onto the material until she decides whether or not to send it back.

#### **C. Questions for Discussion**

*1. What obligation does a lawyer have to other parties, beyond those specified in the rules of court, procedure and ethics?*

**Consider:** Rule 4-1.3 & Comment; Rule 4-2.1 & Comment; Rule 4-3.3(a) and (b); Rule 4-4.1(a); Rule 4-4.2; Rule 4-4.3; Rule 4-6.1; Rule 8.4(a) & (b) New Rule 4-4.4(b) (effective May 22, 2006)

#### **Rule 4-1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### **Comment**

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence

does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

#### **Rule 4-2.1 Adviser**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

#### **Comment**

##### **Scope of advice**

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely

technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

### **Offering advice**

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under rule 4-1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

### **Rule 4-3.3 Candor Toward The Tribunal**

**(a) False Evidence; Duty to Disclose.** A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

or

- (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that

the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

**(b) Extent of Lawyer's Duties.** The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

#### **Rule 4-4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(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 4-1.6.

#### **Rule 4-4.2 Communication With Person Represented By Counsel**

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

#### **Rule 4-4.3 Dealing With Unrepresented Persons**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period

during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

#### **Rule 4-4.4 Respect For Rights Of Third Persons**

(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.

#### **Comment**

Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

#### **Rule 4-6.1 Pro Bono Public Service**

(a) **Professional Responsibility.** Each member of The Florida Bar in good standing, as part of that member's professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions. Neither does this professional responsibility apply to those members of the bar who are retired, inactive, or suspended, or who have been placed on the inactive list for incapacity not related to discipline.

#### **Rule 4-8.4 Misconduct**

A lawyer shall not:

(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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

## **2. What does a court consider inadvertent disclosure of attorney-client work product?**

**Consider:** Federal Rules of Evidence 502(b) and Advisory Committee Note; Florida Rule of Civil Procedure 1.285; Felman Production, Inc. v. Indus. Risk Ins., No. 3:09-0481, 2010 WL 2944777 (S.D. W. VA. July 23, 2010); Pac. Coast Steel v. Leany, 2:09-cv-02190-KJD-PAL (D. Nev. September 29, 2011)

### **FRE 502(b)**

**Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

### **Advisory Committee Note**

Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing

party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken “reasonable steps” to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

**Florida Rule of Civil Procedure 1.285: Inadvertent Disclosure of Privileged Materials**

**(a) Assertion of Privilege as to Inadvertently Disclosed Materials.** Any party, person, or entity, after in-advertent disclosure of any materials pursuant to these rules, may thereafter assert any privilege recognized by law as to those materials. This right exists without regard to whether the disclosure was made pursuant to for-mal demand or informal request. In order to assert the privilege, the party, person, or entity, shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered.

**(b) Duty of the Party Receiving Notice of an Assertion of Privilege.** A party receiving notice of an asser-tion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed. Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b).

**(c) Right to Challenge Assertion of Privilege.** Any party receiving a notice made under subdivision (a) has the right to challenge the assertion of privilege. The grounds for the challenge may include, but are not limited to, the following:

- (1) The materials in question are not privileged.
- (2) The disclosing party, person, or entity lacks standing to assert the privilege.
- (3) The disclosing party, person, or entity has failed to serve timely notice under this rule.

(4) The circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege.

Any party seeking to challenge the assertion of privilege shall do so by serving notice of its challenge on the party, person, or entity asserting the privilege. Notice of the challenge shall be served within 20 days of service of the original notice given by the disclosing party, person, or entity. The notice of the recipient's challenge shall specify the grounds for the challenge. Failure to serve timely notice of challenge is a waiver of the right to challenge.

**(d) Effect of Determination that Privilege Applies.** When an order is entered determining that materials are privileged or that the right to challenge the privilege has been waived, the court shall direct what shall be done with the materials and any copies so as to preserve all rights of appellate review. The recipient of the materials shall also give prompt notice of the court's determination to any other party, person, or entity to whom it had disclosed the materials.

**Felman Production, Inc. v. Indus. Risk Ins., No. 3:09-0481, 2010 WL 2944777 (S.D. W. VA. July 23, 2010)**

Because 30% of the documents were inadvertently disclosed and thousands of attorney-client communications were produced, plaintiff did not take reasonable steps to prevent disclosure and attorney-client privilege was waived.

**Pac. Coast Steel v. Leany, 2:09-cv-02190-KJD-PAL (D. Nev. September 29, 2011)**

Plaintiff's use of search to locate privileged documents was deemed a reasonable step to prevent disclosure; therefore attorney-client privilege was not waived.

**ABA Formal Opinion 05-437 October 1, 2005**  
**Inadvertent Disclosure of Confidential Materials:**  
**Withdrawal of Formal Opinion 92-368 (November 10, 1992)**

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise, it is hereby withdrawn.

Formal Opinion 92-368 "Inadvertent Disclosure of Confidential Materials," provided:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

**PROFESSIONAL ETHICS OF THE FLORIDA BAR**

## **OPINION 93-3 (February 1, 1994)**

An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents.

[Note: Since this opinion was adopted, the Supreme Court of Florida adopted Rule 4-4.4(b), which states that "[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. "]

**3. *What obligations does an experienced lawyer (senior partner) owe to less experienced lawyers (young associate) to teach them about, and be a model for, professionalism?***

**Consider:** Rule 4-5.1; Rule 4-5.2(a)

### **Spector reference: Preamble: A Lawyer's Responsibilities**

#### **Preamble: A Lawyer's Responsibilities**

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

#### **Rule 4-5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

**(a) Duties Concerning Adherence to Rules of Professional Conduct.** A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.

**(b) Supervisory Lawyer's Duties.** Any lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

**(c) Responsibility for Rules Violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#### **Rule 4-5.2 Responsibilities Of A Subordinate Lawyer**

**(a) Rules of Professional Conduct Apply.** A lawyer is bound by the Rules of Professional

Conduct notwithstanding that the lawyer acted at the direction of another person.

**(b) Reliance on Supervisor's Opinion.** A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

*4. Should the decision about what to do about the mistaken email be made by the client, or treated as a procedural matter, thus left up to the lawyer?*

*Consider:* Rule 4-1.2 (a) & (d) and Comment; Rule 4-1.14 (a)

**Spector Reference: Comment to Rule 4-1.2**

### **Rule 4-1.2 Objectives And Scope Of Representation**

**(a) Lawyer to Abide by Client's Decisions.** Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

**(d) Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct 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.

### **Comment**

#### **Allocation of authority between client and lawyer**

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take

such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

#### **Rule 4-1.14 Client Under A Disability**

**(a) Maintenance of Normal Relationship.** When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

*5. If the matter is put to the client, is the lawyer bound by what the client says?*

*Consider:* See Rule 4-1.2 (a)

#### **Spector reference: Rule 4-1.2 Comment**

#### **Rule 4-1.2 Objectives And Scope Of Representation**

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be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

***6. Are there things a lawyer may do which he nevertheless should not do?***

***Consider:*** Rule 4-3.4, Florida Bar Ethics Opinion 93-3

**Spector Reference: Justice Potter Stewart**

**Rule 4-3.4 Fairness To Opposing Party And Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counselor assist another person to do any such act;

(b) fabricate evidence, counselor assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party;

(e) in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client, and it is reasonable to believe that the person's interests will not be adversely affected by refraining from

giving such information;

(g) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter; or

(h) present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter.

**PROFESSIONAL ETHICS OF THE FLORIDA BAR  
OPINION 93-3 (February 1, 1994)**

An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents.

[Note: Since this opinion was adopted, the Supreme Court of Florida adopted Rule 4-4.4(b), which states that "[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."]

**Justice Potter Stewart**

"An ethical person often chooses to do more than the law requires and less than the law allows; there is a big difference between what you have a right to do and what is right to do."