2015 CLM Annual Conference
Palm Desert

# The Obligation of Attorneys to Keep up with Changes in Technology

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The session will look the obligation of attorneys, ethically and legally, to learn and know the implications of changing technology. The session will identify and describe specific risks arising from changes in technology; including the interplay of ethical rules with a focus on: competence (ABA Model Rule 1.1); confidentiality under Rule 1.6; extent of client files under Rule 1.16; advertising under 7.2. We will also cover changes to available insurance products and how the market is adapting to new risks with updated products.

**PERSPECTIVE**—50 years ago, Attorneys carried "dictaphones"

Marketing in person or through yellow pages─>marketing through blogs, social media, lead generating services

Discovery through paper ─> discovery of cell phone records, FITBIT records, Electronically Stored Information ("ESI"), gps data, etc.

Now we face security issues involving wifi in public locations, cloud/remote access, stolen/lost mobile devices that may contain identifying/client information.

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Quiz:

1. Attorney C is a solo practitioner in family law who writes a blog on family law issues that includes a hyperlink to his professional web page. The blog consists primarily of short articles on topics of potential interest to other family law practitioners and divorcing couples, such as special considerations in high-asset divorces, recent legislative developments in child and spousal support laws, and an explanation of custody law when one former spouse moves to another state. Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues, and thereby to enhance his reputation in the field and increase his business, but the blog postings do not describe Attorney C's

practice or qualifications, and contain no overt statements of Attorney C's availability for professional employment. However, several of the blog posts end with the admonition that if the reader has questions about his or her divorce, they should contact Attorney C.

Q: Does Attorney C's blog comply with Rules of Professional Conduct and California State Bar Act on advertising?

____ True
____ False

2. Attorney and Opposing Counsel ("OC") make an e-discovery agreement to conduct a joint search of Client's network using OC's chosen vendor, with a jointly agreed search term list. The joint search term list is created and submitted to the vendor with Client's permission to access.

   Subsequently, Attorney receives a copy of the data retrieved by the vendor search and puts it in his file without review. However, two weeks later, OC sends a letter to Attorney accusing Client of destroying evidence spoliation. OC threatens to motions for monetary and evidentiary sanctions. Then, Attorney attempts to open his copy of the data but finds that he can make no sense of it. Attorney finally hires an e-discovery expert ("Expert"), who after review tells Attorney it appears that potentially responsive "Electronically Stored Information" ("ESI") has been routinely deleted off of company computers as part of Client's normal document retention policy, resulting in gaps in the document production.

   Q: Does a lack of technological knowledge in handling e-discovery render an attorney ethically incompetent?

   ____ True
   ____ False

3. Continued from scenario 2, the OC also offers a "claw back" agreement that would permit Client to claw back any inadvertently produced ESI that was otherwise "protected by law."

   Attorney advises Client that there is no risk in OC's proposal regarding the claw back agreement because the claw back agreement allows Attorney to claw back anything he believe should be protected by law. With Client's approval, Attorney agrees to the terms. In fact, the OC's search term list seems neutral on the face.

   As previously agreed, the vendor performs a search on Client's network with the joint search terms. Other than advising Client to provide access to the vendor, Attorney takes no other action. Attorney still does not review the search results from the vendor.

Q: Has Attorney potentially breached the duty of confidentiality in this scenario?

____ True
____ False

4. What were Attorney's options when faced with this case involving e-discovery with ESI?
    a. Decline or withdraw representation
    b. Acquire sufficient learning and skill before performance is required
    c. Associate with or consult with technical consultants or competent counsel
    d. All of the above

5. Attorney wants to mark an email as an exhibit. The email is from sjeong@excellentlawfirm.com and to mcoy@goodtech.com. The email has Sunny Jeong, Esq.'s signature block with Excellent Law Firm's logo and office contact information. Sunny has testified in court that she is an employee of Excellent Law Firm. Matthew Coy has also testified in court that he is an employee of Good Tech, Inc.

    Q: Irrelevant to its content, was this email properly authenticated?

    ____ True
    ____ False

6. The government sought to introduce a printout of the MySpace profile page of the defendant's girlfriend. The page contained a photo of the defendant and his girlfriend embracing and the statement "Free Boozy!! Just remember snitches get stitches." The state did not ask the girlfriend about the printout when she testified, but sought (successfully) to admit it through testimony of the lead investigator. On appeal, the defendant argued that the government failed to authenticate the printout because it had not established a connection between the girlfriend and the printed page.

    Q: Has the MySpace profile page print out been authenticated?

    ____ True
    ____ False

7. Attorney was an associate of a high profile patent law firm in City A. She often ended up working weekends and holidays because of the demanding corporate clients, who constantly had patent-related questions on their new products and ideas.

Last Christmas, she went back to her home town of City B. Tired of family drama at home with siblings, she decided to work instead at a local coffee shop using the coffee shop's remote access on her work laptop. After one too many peppermint latte, she needed to urgently use the restroom. Feeling secure that she was the only customer in the coffee shop, she does not lock the computer and ran to the restroom.

However when she returned, her work laptop was stolen by a customer who had entered the coffee shop.

The laptop's remote access had automatically logged out Attorney due to inactivity for a certain period and required the thief to enter login information. If he were to successfully log in, he would have had access to confidential client information.

Q: Assuming Attorney had no privileged information saved on her laptop's local drive, has she violated the duty of confidentiality?

____ True
____ False

8. With the help of "lead generating" services online, a Florida attorney was contacted by a Nevada client, who wants to pursue litigation. Florida Attorney, knowing he is not licensed in Nevada seeks pro hac vice admission in Nevada and the Nevada court is in review of his request. Also knowing he has fully complied with Nevada's pro hac vice requirements, he decides to prepare for the litigation by reviewing documents, meeting with the client in Nevada, and interviewing potential witnesses in Nevada.

   Q: Has the attorney committed unauthorized practice of law?

   ____ True
   ____ False

9. Your law firm suffered a cyber breach. What steps should you take?
   a. Hire a lawyer
   b. Appoint an in-house decision maker to address and manage the firm's response instead of dwelling in indecision
   c. Address any other holes in the Cybersecurity Program
   d. Identify disclosure obligations under federal and state laws and professional ethics rules
   e. All of the above

10. How many of you are wearing fitness tracking devices? (Fitbit, Jawbone, Fuelband, Withings Pulse, Reign, etc.)

    Now, there is the first personal injury case where "Fitbit" data is being used in court in Calgary, Canada. Traditionally, attorneys have relied on doctors to examine an injury plaintiff to evaluate the impact of an accident. Now with popularity of wearable fitness trackers, some Canadian attorneys are reaching into the plaintiff's Fitbit data to show the effects of an accident on their client. Who exactly is the witness here? The Fitbit device? The wearer of Fitbit? Or Vivametrica, an analytics platform which uses public research to compare a person's activity data with that of the general population? What are some of the way to authenticate the data? Is there a self-incrimination implication?

    Discuss.

11. What are affordable security measures and software you can implement in your law office?
    a. Anti-Virus Software (free or "pro" version-something is better than nothing)
    b. Encryption of emails and flash drives (Tru Crypt)
    c. Online storage units (GoogleDrive, SnapDrive, Dropbox)
    d. Cloud-based time and billing
    e. All of the above

12. In 2014, costs involved with data breaches averaged:
    a. $3.5 Million
    b. $1 Trillion
    c. $1 Million
    d. $5.6 Million

13. On average, organizations take ____ days to detect a data breach?
    a. 159
    b. 60
    c. 229
    d. 7

14. Law Firms are required by ethical rules to purchase cyber Insurance.

    ____ True
    ____ False

15. Conclusion:

    How should we define "competence" in an era of evolving technology?

**ALASKA BAR ASSOCIATION**
**ETHICS OPINION 2014-3**

# CLOUD COMPUTING & THE PRACTICE OF LAW

## QUESTION PRESENTED

Is it ethically permissible for a lawyer to store files in a cloud-based system and, if so, under what circumstances?

## CONCLUSION

A lawyer may use cloud computing for file storage as long as he or she takes reasonable steps to ensure that sensitive client information remains confidential and safeguarded. With the issuance of this opinion, Alaska joins the community of bar associations concluding that cloud computing is permissible so long as reasonable steps to protect the client are taken.[1]

## INTRODUCTION

Cloud computing is the practice of using a network of remote servers to store, manage, and process data, rather than a server in a law office or a personal computer. Typically it is purchased on a subscription basis, usually for a monthly fee. The provider takes over the responsibility for keeping up with new technology and software updates, while the lawyer enjoys access to all the data stored in the cloud from any location with Internet access. The delegation of this file storage service to the provider of cloud computing, however, adds a layer of risk between the lawyer and sensitive client information. Because the lawyer's duties of confidentiality and competence are ongoing and not delegable, a lawyer must take reasonable steps to protect client information when storing data in the cloud.

## RELEVANT AUTHORITIES

Numerous provisions from the Alaska Rules of Professional Conduct are

[1] This Ethics Opinion draws heavily from a comprehensive ethics opinion on the matter issued by the New Hampshire Bar Association. *See* NH Bar Ethics Op. 2012-13/4. *See also* AL Bar Ethics Op. 2010-02; CA Bar Ethics Op. 2010-179, p.3; FL Bar Ethics Op. 06-1 (2006); IA Bar Ethics Op. 11-01 (2011), p.2; IL Bar Ethics Op. 10-01 (2009), p.3; ME Bar Ethics Op. 194 (2008); MA Bar Ethics Op. 05-04 (2005); NV Bar Ethics Op. 33 (2006); NJ Bar Ethics Op. 107 (2006); NY Bar Ethics Op. 842 (2010); NC Bar Ethics Op. 6 (2011); ND Bar Ethics Op. 99-03 (1999), p.3; OR Bar Ethics Op. 2011-188; PA Bar Ethics Op. 2011-200, p.1; VT Bar Ethics Op. 2003-03; VA Bar Ethics Op. 1818 (2005).

relevant to the analysis of whether cloud computing is ethical in the practice of law.

Rule 1.1 mandates a lawyer provide competent representation, which requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 6 requires lawyers to keep abreast of changes in the law and its practice.

Rule 1.6 addresses confidentiality of information. It requires that a "lawyer shall not reveal a client's confidence or secret[.]"[2] This provision is of paramount importance in the attorney-client relationship. The Rule further specifies that a "lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision."[3]

Rule 1.15 requires a lawyer hold property of others with the care required of a professional fiduciary. The Rule provides that "property of clients or third persons that is in a lawyer's possession," other than funds, "shall be identified as the client's or the third person's and appropriately safeguarded."[4] Additionally, Rule 1.16(d) requires that upon termination of representation a lawyer must take steps to the extent reasonably practicable to protect a client's interest, including returning papers and property and also retaining certain papers relating to the client and the representation.

Finally, Rule 5.3 addresses the lawyer's responsibilities with respect to nonlawyer assistants. Cloud computing is a form of outsourcing that falls within the parameters of Rule 5.3. A lawyer must therefore make reasonable efforts to ensure that the provider will act in a manner compatible with the lawyer's own professional responsibilities.[5]

## ANALYSIS

A lawyer engaged in cloud computing must have a basic understanding of the technology used and must keep abreast of changes in the technology.[6] A

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[2] Rule 1.6(a).
[3] Rule 1.6(c).
[4] Rule 1.15(a).
[5] Rule 5.3(a) (requiring the lawyer to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer).
[6] Commentary to Rule 1.1 (Competence) of the Model Rules of Professional Conduct was recently amended to state: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the

competent lawyer must guard against risks inherent in the practice of cloud computing. Technological changes, the regulatory framework, and privacy laws are all matters requiring the lawyer's attention.

A lawyer must take reasonable steps to ensure that the provider of cloud computing services has adequate safeguards to protect client confidences. Prior to engaging a cloud computing service, a lawyer should determine whether the provider of the services is a reputable organization. The lawyer should specifically consider whether the provider offers robust security measures. Appropriate security measures could include password protections or other verification procedures limiting access to the data, safeguards such as data backup and restoration, a firewall or encryption, periodic audits by third parties of the provider's security, and notification procedures in case of a breach.[7]

Reasonable steps must be taken to safeguard data stored in and transmitted through the cloud. What safeguards are appropriate depends upon the nature and sensitivity of the data. During the course of representation, a lawyer must take reasonable steps to ensure that the electronic data stored in the cloud are secure and available while maintaining that information on the client's behalf. If, after the representation is concluded and the decision is made not to preserve the file, then all reasonable efforts should be made to have the data deleted from the cloud as well. Otherwise, the lawyer's duty to take reasonable steps to protect the security and confidentiality of that data is ongoing. The lawyer must know at all times where sensitive client information is stored, be it in the cloud or elsewhere.

We concur with the consensus among states' ethics committees that a lawyer may use cloud computing in a manner consistent with his or her ethical duties by taking reasonable steps to protect client data. While a lawyer need not become an expert in data storage, a lawyer must remain aware of how and where data are stored and what the service agreement says. Duties of confidentiality and competence are ongoing and not delegable. A lawyer must therefore take reasonable steps to protect client information when storing data in the cloud. The requirement of competence means that even when storing data in the cloud, a lawyer must take reasonable steps to protect client information and cannot allow the storage and retrieval of data to become nebulous.

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lawyer is subject." *See* Model Rules of Professional Conduct 1.1, Comment 8 (emphasis added).

[7] Where highly sensitive data are involved, it may behoove a lawyer to inform the client of the lawyer's use of cloud computing and to obtain the client's informed consent. Note that the lawyer must notify the impacted client if the lawyer learns that the provider's security was breached and the client's confidence or secret was revealed. *See* Rule 5.3(d).

Approved by the Alaska Bar Association Ethics Committee on April 3, 2014.

Adopted by the Board of Governors on May 5, 2014.

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**THE STATE BAR OF CALIFORNIA**
**STANDING COMMITTEE ON**
**PROFESSIONAL RESPONSIBILITY AND CONDUCT**
**FORMAL OPINION INTERIM NO. 11-0004**

**ISSUES:** What are an attorney's ethical duties in the handling of discovery of electronically stored information?

**DIGEST:** An attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

**AUTHORITIES INTERPRETED:** Rules 3-100, 3-110, 3-210, 5-200, and 5-220 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068.

## STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor ("Plaintiff") in a judicial district that addresses e-discovery[2/] in its formal case management. Opposing Counsel wants e-discovery. Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys that they must reach a compromise and orders them to return in 2 hours with a joint proposal.

Opposing Counsel offers to do a joint search of Client's network, using her chosen vendor, but based upon a jointly agreed search term list. She further offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that was otherwise "protected by law" ("protected ESI").

Attorney mistakenly thinks that the clawback agreement is broader than it is, and will allow him to pull back *anything*, not just protected ESI, so long as he asserts it was "inadvertently" produced. Attorney then erroneously concludes there is *no* risk to Client in Opposing Counsel's proposal, and after so advising Client, Attorney agrees to the proposal. The Judge thereafter approves the attorneys' agreement, and incorporates it into a Case Management

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[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

[2/] Electronic Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. See, e.g., Code of Civil Procedure section 2016.020, subdivisions (d) & (e).) Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

Order, including the provision for the clawback of inadvertently produced protected ESI. The Court sets a deadline three months later for the network search to occur, and a case management conference a month after that, to monitor the status of discovery and the case.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case and then emails those notes to Opposing Counsel as Client's agreed upon search terms. Attorney then reviews Opposing Counsel's additional facially neutral proposed search terms and agrees to include them as well. A joint search term list is created, and upon Attorney's instructions to Client to provide access, the court ordered network search proceeds on Client's network, with the vendor running the search using the joint search term list. Other than instructing Client to provide the vendor access to Client's network, Attorney does not take any other action. Attorney mistakenly reasons that he will simply claw back anything he does not like, asserting "inadvertent" production under the clawback agreement.

Subsequently, Attorney receives a copy of the data retrieved by the vendor search and puts it in the file without review. The parties return to Court for the continued Case Management Conference, during which, in response to the Judge's questions, Attorney assures the Judge that he has reviewed everything and the e-discovery is in full compliance with the Court Order, and Client's discovery obligations. Two weeks after that hearing, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence/spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. Only after Attorney receives this letter does he, for the first time, attempt to open his copy of the data retrieved by the vendor search, but finds he can make no sense of it. Attorney finally hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney it appears that potentially responsive ESI has been routinely deleted off of company computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that due to the breadth of the jointly agreed search terms, it appears both privileged information, as well as highly proprietary information about Client's upcoming revolutionary product, was provided to Plaintiff in the data retrieval, even though such proprietary information was not relevant to the issues in the lawsuit.[3/] What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

## DISCUSSION

### Attorney Duties Concerning Electronically Stored Information ("ESI")

### 1. Duty of Competence

While the requirements and standards of e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" includes the learning and skill necessary for performing legal services.

Legal rules and procedures, when placed in conjunction with ever changing technology, produce professional challenges that attorneys must meet in order to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." (ABA Model Rule 1.1, Comment [8].)[4/] Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. In

[3/] This opinion is not intended to discuss what disclosure obligations Attorney may owe to Client as a result of the release of proprietary information and the allegations of spoliation.

[4/] In the absence of on-point California authority and conflicting state public policy, the ABA Model Rules may provide guidance. *City & County of San Francisco v. Cobra Solutions, Inc*. (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

an e-discovery setting, association or consultation may be with a non-lawyer technical expert, if appropriate under the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case ultimately involves e-discovery; however, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness in the matter has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute. Under this backdrop, the law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make specific provisions for electronic discovery and ESI. See, e.g., Code of Civil Procedure section 2031.010, subdivision (a) (now expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action").[5/] However, there remains little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principals based upon the California ethical rules[6/] and California's existing discovery law outside the e-discovery setting.

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues, if any, might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If it is likely that e-discovery will be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must take steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist. Rule 3-110(C). Taken together generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess e-discovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. analyze and understand a client's ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462-465.

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early in his handling of the case, and certainly prior to the initial case management conference. The fact that it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management only

[5/] In 2006, revisions were made to the Federal Rules of Civil Procedure, Rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly parallel provisions in the 2006 federal rules amendments. See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5* (March 3, 2009).

[6/] Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532].

highlighted Attorney's obligation to conduct an early initial e-discovery evaluation. At the very least, Attorney's obligation to make an e-discovery evaluation should have been obvious even to him when he became aware that Opposing Counsel intended to pursue e-discovery in this particular case.

Notwithstanding the above, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation when he took no steps to consult with an e-discovery expert prior to the initial case management conference. He agreed to Opposing Counsel's proposed e-discovery plan under a mistaken belief as to its scope, and thereafter allowed that proposal to be transformed into a Court Order, again without any expert consultation, and in the face of his lack of expertise in the area. Attorney participated in preparing joint e-discovery search terms without expert consultation, and was so inexperienced in ESI that he did not recognize the danger of overbreadth in the agreed upon search terms.

After the Court ordered a search of his Client's network, Attorney took no action other than to instruct Client to allow vendor to have access to Client's network. Attorney allowed the network search to move forward on Client's network without taking any steps to review it, relying on the parties' clawback agreement, the scope of which he misunderstood. After the search, Attorney took no action to review the gathered data until after Plaintiff's attorney asserted spoliation and threatened sanctions. Attorney then attempted to review the search results, only to discover he could make no sense of it. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage was already done.

Once Opposing Counsel insisted on e-discovery, it became certain that e-discovery would be implicated in the case, and the previously *potential* risk of a breach of the duty of competence became an *actual* risk, which should have resulted in Attorney taking immediate steps to comply with rule 3-110(C), such as consulting an e-discovery expert. Had the expert been consulted at the beginning of the case, or at the latest once Attorney realized e-discovery would absolutely occur in the case, the expert could have helped to structure the search differently, and could have controlled the agreed upon search terms to be less overbroad and less likely to turn over privileged and/or irrelevant but highly proprietary material.

Rule 3-110(A) addresses intentional, reckless, or repeated failures to perform legal services with competence. In our hypothetical, while not intentional, Attorney's failures in this instance were arguably reckless and/or at the very least repeated. Attorney has breached his duty of competence.[7/]

**2. <u>The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege</u>**

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Business and Professions Code section 6068, subdivision (e)(1). "Secrets" includes "information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Cal. State Bar Formal Opn. No. 1988-96. Both "secrets" and "confidences" are protected communications. Cal. State Bar Formal Opn. No. 1981-58. "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Rule 3-100(A).

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client which are sought in discovery. Evidence Code sections 952, 954, 955. In a civil discovery setting, while the holder of the privilege is not required to take strenuous or "Herculean efforts" to resist disclosure in order to preserve the privilege, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege in the first instance. *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law. See Federal Rules of

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[7/] This Opinion does not intend to set or to define a standard of care of lawyers with respect to any of the issues discussed herein, as standards of care can be highly dependent on the factual scenario in any given situation.

Evidence, rule 502(b).[8/] A lack of reasonable care to protect against the disclosure of privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Technology Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at *2-3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable); see also *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. 2008) 250 F.R.D. 251, 259-260, 262.

Accordingly, the reasonableness of an attorney's actions to ensure *both* that secrets and confidences, *as well as* privileged information, of a client remain confidential and that the attorney's handling of a client's information does not result in a waiver of any confidence, privilege, or protection, is a fundamental part of an attorney's duty of competence. Cal. State Bar Formal Opn. No. 2010-179.

In our hypothetical, as a result of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed, and such disclosure may be found not to have been "inadvertent" and thus, may constitute a waiver. Further, non-privileged but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Client's chief competitor, all as a result of search terms Attorney participated in creating. All of this happened completely unbeknownst to Attorney, and only came to light after Plaintiff accused Client of evidence spoliation. In the absence of Plaintiff's accusation, it is not clear when the "inadvertent" disclosure would have come to Attorney's attention, if ever.

The clawback agreement, heavily relied upon by Attorney under a mistaken understanding of its breadth, may or may not work to retrieve the information. By its terms, the clawback agreement was limited to inadvertently produced, protected ESI. Both privileged information and non-privileged confidential and proprietary information have been released to Plaintiff.

Under these facts, Client may have to litigate the issue of whether Client (through Attorney) acted diligently enough to protect its attorney-client privilege. Attorney took no acts whatsoever to review Client's network prior to allowing the network search, Attorney participated in drafting the overbroad search terms, and Attorney waited until after Client was accused of evidence spoliation to even look at the data – all of which would permit Opposing Counsel to viably argue either that (a) Client failed to exercise due care to protect the privilege in the first instance, such that the disclosure at issue was not inadvertent, and/or (b) at the very least, the Parties' clawback agreement does not apply to protect the proprietary, but non-privileged, produced information.[9/] Client may further have to litigate its rights to return of non-privileged but confidential proprietary information.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of the non-privileged/confidential proprietary information, are legal questions beyond the scope of this opinion. The salient point is that Attorney did not take reasonable steps to minimize the risks and was directly responsible for the release of

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[8/] "(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)."

[9/] While statutes, rules, and/or case law provide some limited authority for the legal clawback of certain inadvertently produce materials, those provisions may not work to mitigate the damage caused by the production in this hypothetical. Such "default" clawback provisions typically only apply to privilege and work product information, and require both that the disclosure at issue was truly inadvertent, and that the holder of the privilege took reasonable steps to prevent disclosure in the first instance. See, Federal Rules of Evidence, rule 502; see also, generally, *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818 [68 Cal.Rptr.3d 758]. As noted above, the effect of Attorney's acts on the question of "inadvertence" are at issue in our hypothetical.

Similarly, Attorney finds even less assistance from California's discovery clawback statute, which deals merely with the procedure for litigating a dispute on a claim of inadvertent production, and not with the legal issue of waiver at all. See, Code of Civil Procedure section 2031.285.

Client's confidential and privileged information to Plaintiff. Even if Client is able to retrieve all such information, Client may never be able to un-ring the bell.

While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it does require the exercise of some level of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took minimal, if any, reasonable steps to protect Client's ESI, and instead chose to release everything without prior review, relying on a clawback agreement the scope of which he mistakenly interpreted. Client's secrets are now in Plaintiff's hands and a waiver of Client's attorney-client privilege may be claimed by Plaintiff. Client has been exposed to a potential dispute as the direct result of Attorney's actions. Attorney has breached his duty of confidentiality to Client.

### 3. The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege

#### A. Duty Not to Suppress Evidence

In addition to protecting their clients' interests, attorneys, as members of the profession, have a general duty "to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch et al. v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218].

Rule 5-220 states, "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."

Thus, while the legal ramifications for failure to preserve evidence are consequences imposed by law, the duty not to suppress evidence is an ethical one imposed by the rules of professional conduct. The close relationship between the duty not to suppress evidence and the duty of candor (discussed below) mandates that an attorney pay particular attention to how these ethical duties manifest themselves in e-discovery:

> . . . [T]he risk that a client's act of spoliation may suggest that the lawyer was also somehow involved encourages lawyers to take steps to protect against the spoliation of evidence. Lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence. (Bus. & Prof. Code, § 6106 ["The commission of any act involving moral turpitude, dishonesty or corruption ... constitutes a cause for disbarment or suspension."]; *id*., § 6077 [attorneys subject to discipline for breach of Rules of Professional Conduct]; Rules Prof. Conduct, rule 5–220 ["A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."].) The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect, a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence.

*Cedars-Sinai Medical Center v. Superior Court (Bowyer)* (1998) 18 Cal.4th 1, 13 [74 Cal.Rptr.2d 248].

None of these duties are new. However, where ESI is concerned, the interface between legal and ethical duties manifests in a unique way, and strongly urges that an attorney assist the client in implementing a "litigation hold" at the outset. A litigation hold is a directive issued by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such ESI, pending further direction.[10/] See generally The Sedona Conference® WG1, *Sedona Conference® Commentary on Legal Holds: the Trigger and the Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260-270, 277-279.

The developing federal case law governing litigation holds finds that it is the client's obligation to issue an immediate and appropriate litigation hold whenever litigation becomes reasonably foreseeable. See *Hynix Semiconductor, Inc. v.*

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[10/] Of course, whether or not ESI exists or is relevant, clients and attorneys should consider issuing litigation holds to avoid destruction of relevant paper files.

*Rambus, Inc.* (C.A. Fed. Cir. 2011) 645 F.3d 1336, 1344-1345. Cases also have held that the obligation to ensure litigation holds or similar directions are timely issued falls on both the party and on outside counsel working on the matter.[11/] This Committee notes that litigation holds are legal duties, and not ethical ones. Nevertheless, the distinction between a legal duty to preserve evidence and an ethical duty not to suppress evidence can be very narrow when the failure to request immediate preservation of electronic information can result in a significant potential for its loss or mutation, as electronic data can easily be deleted or altered, either inadvertently through routine document retention policies, or even intentionally. Counsel would be prudent to consider the proper use and monitoring of litigation holds to assist him or her in complying with the duty not to suppress evidence.

In our hypothetical, Attorney did not discuss a litigation hold with Client. Attorney further failed to advise Client about the potentially significant harm to Client and Client's case that could result from the improper deletion of relevant ESI after the obligation to preserve evidence had commenced. Client's actions in deleting ESI after the litigation hold obligation was triggered could provide the basis for sanctions, either monetary, evidentiary, or terminating. Due to Attorney's inaction, Client may not have been aware of the need to preserve its ESI, and may not have knowingly caused the subsequent deletion of responsive ESI. The significant consequences Client now faces may have been avoided altogether had Client been timely advised of its ESI risks and obligations. Here, the ethical issue is not the lack of a litigation hold instruction itself. Rather, the ethical issue is the duty not to suppress evidence. Here, Attorney's failures in counseling his client relating to e-discovery has resulted in potential suppression of evidence.

### B. The Duty of Candor

Business and Professions Code section 6068 also addresses a number of ethical duties an attorney owes the court, in addition to the duties owed to the client. Significant to the facts of this opinion, an attorney owes a tribunal a duty of candor, and must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Business and Professions Code section 6068, subdivision (d); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 219-220.

The Rules of Professional Conduct establish similar requirements. "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice of false statement of facts or law; . . . and (D) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness." Rule 5-200(A), (B), and (D).

These provisions "unqualifiedly require an attorney to refrain from acts which mislead or deceive the court." *Sullins v. State Bar* (1975) 15 Cal.3d 609, 620-621 [125 Cal.Rptr. 471]. "The presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of" Business and Professions Code section 6068, subdivision (d). *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175, citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144. It also is "settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163 [162 Cal.Rptr. 458], citing *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [46 Cal.Rptr. 513]; *Sullins v. State Bar*, 15 Cal.3d 609, 622; and *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574 [131 Cal.Rptr. 379].

In our hypothetical, in response to the Judge's questions, Attorney assured the Judge that he reviewed the ESI and that it was in full compliance with the Court Order and Client's discovery obligations. He made such assurances even though he had not reviewed the data retrieved by the search, and had no reasonable basis to make such assurances. Attorney turned out to be wrong, a fact he learned after the hearing. In the subsequent sanctions

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[11/] See, e.g., *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") and *Zubulake v. UBS Warburg LLC.* (S.D.N.Y. 2003) 229 F.R.D. 422, 432 ("Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.").

motions threatened by Plaintiff, Attorney likely will be faced with the uncomfortable situation in which he will have to explain to the Judge why his earlier misrepresentation was not a willful violation of the duty of candor.

## CONCLUSION

Electronic document creation and/or storage and electronic communications have become standard practice in modern life. Attorneys who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, the duty not to suppress evidence, and/or the duty of candor to the Court, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

**THE STATE BAR OF CALIFORNIA**
**STANDING COMMITTEE ON**
**PROFESSIONAL RESPONSIBILITY AND CONDUCT**
**FORMAL OPINION INTERIM NO. 12-0006**

**ISSUES:** Under what circumstances is "blogging" by an attorney subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act regulating attorney advertising?

**DIGEST:**

1. Blogging by an attorney is subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.

2. A blog that is a part of an attorney's or law firm's professional website will be subject to the rules regulating attorney advertising to the same extent as the website of which it is a part.

3. A stand-alone blog by an attorney that does not relate to the practice of law or otherwise express the attorney's availability for professional employment will not become subject to the rules regulating attorney advertising simply because the blog contains a link to the attorney or law firm's professional website.

**AUTHORITIES INTERPRETED:** Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code sections 6157 – 6158.3.

## STATEMENT OF FACTS

Attorney A is a small firm practitioner in criminal defense law who writes a stand-alone blog entitled "Perry Mason? He's Got Nothing on Me!" The most recent post, which is typical in content and tone to virtually all the posts, begins, "I won another case last week. That makes 50 in a row, by my count. Once again, I was able to convince a jury that there was reasonable doubt that my client – who had tested positive for cocaine when pulled over by the local constabulary for erratic driving – was completely unaware of the two-kilo bag of the same substance in her trunk. They were absolutely mesmerized by my closing argument. Here's to the American justice system!" The blog does not permit readers to comment on the individual posts. The blog does not invite readers to contact Attorney A, but it does identify Attorney A as "one of California's premiere criminal defense lawyers," and his name appears as a hyperlink to his law firm's professional web page.

Attorney B is a member of a law firm focusing on trusts and estates law and litigation that maintains a firm website identifying the types of services the firm provides, the background and experience of the firm's lawyers, testimonials from firm clients, and other similar information. One page of the website, indistinguishable from the other pages in layout and features, is designated as a "blog," both on the page and in the related menus linking to it. The "blog" contains a series of articles written by Attorney B and the other lawyers of the firm on topics of potential interest to the firm's clients, such as changes in tax law, the distinctions between and advantages of wills

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

versus trusts, and similar matters. Each post concludes with the statement, "for more information, contact" the author of the particular post.

Attorney C is a solo practitioner in family law who writes a blog on family law issues that includes a hyperlink to his professional web page. The blog consists primarily of short articles on topics of potential interest to other family law practitioners and divorcing couples, such as special considerations in high-asset divorces, recent legislative developments in child and spousal support laws, and an explanation of custody law when one former spouse moves to another state. Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues, and thereby to enhance his reputation in the field and increase his business, but the blog postings do not describe Attorney C's practice or qualifications, and contain no overt statements of Attorney C's availability for professional employment. However, several of the blog posts end with the admonition that if the reader has questions about his or her divorce, they should contact Attorney C.

Attorney D maintains a blog about jazz artists, performances and recordings. The blog is not part of the website Attorney D maintains to promote his business, but that site contains a link to the blog, and the blog contains a link to that site.

## DISCUSSION

"Blogging" has become an increasingly frequent activity of attorneys. Although the various definitions of "blog"[2/] consistently describe it as a website or web page on which a writer, or group of writers, records observations, reflections, opinions, comments, and experiences that are personal in nature, the term has come to encompass essentially any website or page consisting of brief articles or comments on any variety of subjects. Blogs written by attorneys run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to overt advertisements for the attorney or her law firm.

Most attorney blogs are maintained at least in part to enhance the authoring attorney's professional reputation and visibility, with an eye to increasing the attorney's business. However, as has been made clear by both the U.S. Supeme Court (see *Bolger v. Young's Drug Products Corp*. (1983) 463 U.S. 60, 66-68 [103 S.Ct. 2875]) and the California Supreme Court (see *Kasky v. Nike* (2010) 27 Cal.4th 939, 956-962 [119 Cal.Rptr.2d 296] and *Belli v. State Bar* (1974) 10 Cal.3d 824, 831-833 [112 Cal.Rptr. 527),[3/] the fact that a blog is economically motivated does not, in and of itself, mean that it is "commercial speech" subject to regulation by the State Bar as advertising. The applicable rules and statutes provide a much narrower test.[4/]

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[2/] Dictionary.com defines "blog" as "a website containing a writer's or group of writers' own experiences, observations, opinions, etc., and often having images and links to other websites" (http://dictionary.reference.com/browse/blog?s=t); Merriam-webster.com defines the term as "a Web site that contains online personal reflections, comments, and often hyperlinks provided by the writer" (http://www.merriam-webster.com/dictionary/blog); and the online Oxford English Dictionary defines "blog" as a "personal website or web page on which an individual records opinions, links to other sites, etc. on a regular basis" (http://www.oxforddictionaries.com/us/definition/american_english/blog?searchDictCode=all).

[3/] The *Belli* court further noted that "when the bar seeks to discipline an attorney for a communication incident to protected speech, in addition to showing that the attorney intended by his communication to generate business for his law practice (*citations*), it must demonstrate that the communication or a part thereof was principally directed toward this end." The court added, however, "We do not mean to suggest, of course, that Belli and others should be permitted to use such solicitation as a subterfuge for soliciting legal business."

[4/] A fundamental issue concerning blogs by attorneys is whether they constitute: (1) core political speech; (2) commercial speech; or (3) a mix of core and commercial speech. The answer to these questions regarding any individual blog includes a Constitutional law analysis which is beyond the scope of this opinion. For purposes of analysis, this opinion assumes that a blog which is subject to the rules as a "communication" or advertisement constitutes commercial speech.

Advertising for California attorneys is primarily governed by rule 1-400, which prohibits "communications" which are false or deceptive in content or presentation, or which tend to confuse, deceive, or mislead the public. (Rule 1-400(D)(1), (2), and (3).) The rule includes a list of standards adopted by the State Bar's Board of Trustees (rule 1-400(E)) that describe types of communications – such as guarantees, warranties, or predictions regarding the result of the representation, or testimonials about or endorsements of a member without an express disclaimer – that are presumed to be in violation of the rule. Rule 1-400(F) also states that the attorney is to retain a copy or recording of any communications by written or electronic media for two years, and to make these copies or recordings available to the State Bar upon request.

The State Bar Act (§§ 6000 et seq. of the California Business and Professions Code) also includes a chapter (encompassing §§ 6157 – 6159.2) governing attorney advertising. Like rule 1-400, these sections prohibit any advertising that is false or misleading (§ 6157.1) or that contains any guaranty of outcome or promise of quick payment (§ 6157.2). Section 6158 provides that the "message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated." Sections 6158.1 and 6158.2 set forth types of communications that are presumed to violate (§ 6158.1) or be in compliance with (§ 6158.2) the provisions of this statutory article.

The analysis of whether a blog or blog post is subject to regulation under the rules and statutes begins with the question of whether a given blog constitutes a "communication" under rule 1-400(A)[5/] or an "advertisement" under Business and Professions Code section 6157. If it is a communication or advertisement, the blog is subject to the restrictions and requirements of the rule or statute.

Rule 1-400(A) defines a "communication" as "any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client." This establishes a three-part test, all three parts of which must be satisfied in order for the message or offer to qualify as a communication: (1) be made by or on behalf of a California attorney; (2) concern the attorney's availability for professional employment; and (3) be directed to a former, present, or prospective client.

All blogs maintained by an attorney, in the capacity of an attorney, meet the first and third parts of this test.[6/] Blog posts by an attorney are messages made by a member of the State Bar. Posts available to the general public, which includes all possible former, present or prospective clients, by definition, are "directed" to them. (Cal. State Bar Formal Opn. Nos. 2001-155 and 2012-186.)

Whether a blog post is a "communication" subject to regulation under rule 1-400 therefore will depend on whether it meets the second part of the test: Is the post "concerning the availability for professional employment" of the member or her firm?

This Committee considered a similar issue in some detail in California State Bar Formal Opinion No. 2012-186, which analyzed whether five short hypothetical posts on a social media website would be considered "communications" under rule 1-400. The Committee expressed that posts which contained words of offer or invitation relating to representation ("Who wants to be next?"; "Check out my web site!"; or "Call for a free

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[5/] Although rule 1-400 also regulates "solicitations" by attorneys, those provisions are not applicable to blog posts, even those which concern the availability of the writer for professional employment. A "solicitation" under the rule is defined as a "communication . . . (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Whether or not a blog post is a communication under rule 1-400, it cannot be a solicitation because it is not "delivered in person or by telephone," nor is it "directed to a specific person known to be represented by counsel" (see Cal. State Bar Formal Opn. Nos. 1995-143 and 2004-166).

[6/] As we discuss below in connection with Attorney D, attorneys blogging on non-legal issues – *i.e.*, not in their capacity as lawyers – are less likely to be found to be communicating for purposes of rule 1-400.

consultation") met the standard, while those which were informational in nature, offering free copies of an article the attorney had written, did not. We believe the same conditions apply with respect to blogs, and a blog post which contains an offer to the reader to engage the attorney, or is a step towards securing potential employment such as offering a free consultation, is a "communication" within the meaning of rule 1-400 and subject to the rule's requirements and conditions, while those which provide or offer only information or informational materials are not.

California State Bar Formal Opinion No. 2012-186 did not address the type of posts made in many blogs, which describe in detail the services offered by the authoring attorney or law firm, and contain an address and/or phone number at which the author may be contacted, but which do not include specific words of offer or invitation to engage the attorney's services. The Committee believes such posts constitute "communications" subject to rule 1-400. Even without specific words of invitation or offer, a law firm's professional website "that includes a description of Attorney A's law firm and its history and practice; the education, professional experience, and activities of the firm's attorneys," and other features relating to the practice of law indicates the firm's availability for professional employment and is a communication. (Cal. State Bar Formal Opn. No. 2001-155.)[7/] The listing of services, qualifications, background, and other attributes of the attorney or law firm, and their distribution to the public, carries with it the clear implication of availability for employment.

The Committee believes the same analysis applies to posts that detail an attorney or law firm's courtroom victories or other professional successes. First, such posts necessarily involve a description of the type and character of the legal services the attorney/law firm provides, as discussed above. Second, descriptions of case results are considered presumptively misleading under section 6158.1 of the Business and Professions Code[8/] and standard 1 of rule 1-400 regarding "guarantees, warranties, or predictions regarding the result of the representation." The Committee continues to believe that this characterization does not apply to general expressions of excitement or exultation over a single result,[9/] but advises that multiple such posts may be held to be "communications," particularly if they include more detailed information about the attorney's practice or are related to posts that do.

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[7/] Similarly, American Bar Association Committee on Ethics and Prof. Responsibility, Formal Opinion No. 10-457 states, "Lawyer websites may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile, and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements . . . . Any of this information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1," the equivalent of rule 1-400. Nowhere in the opinion does it suggest specific words of offer or invitation are required. Although rules and ethics opinions from other jurisdictions are not binding in California, they may be used for guidance by lawyers where there is no direct California authority and do not conflict with California policy. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]; *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].)

[8/] Section 6158.1 provides, "A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" is presumed to be false, misleading, or deceptive. Section 6158.3 further provides, "If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts." The section further provides, however, that use of the disclaimer may not be sufficient to rebut the presumption.

[9/] See California State Bar Formal Opinion No. 2012-186, where the Committee found that a posting of "Case finally over. Unanimous verdict! Celebrating tonight," standing alone, was not a communication. The Committee added that "Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication."

Although there are no ethics opinions or California cases directly on point, the Supreme Court of Virginia recently held in *Hunter v. Virginia State Bar ex rel. Third District Committee* (2013) 285 Va. 485 [744 S.E.2d 611] (cert. den. (2013) __ U.S. __ [133 S.Ct. 2871]), that an attorney's blog which focused almost exclusively on the attorney's successes in the field of criminal defense law, constituted advertising within the meaning of Virginia's attorney advertising rule. The Supreme Court of Virginia found that attorney Horace Hunter's focus on his skills as an attorney and his firm's seemingly unbroken record of successes "could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter," and therefore were subject to regulation. This is consistent with Comment [3] to Model Rule of Professional Conduct, Rule 7.1:

> An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

While California's rules and statutes differ from Virginia's and the Model Rules, there are many similarlities in this area. Rule 1-400(D)(2) prohibits communications which "[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public," as well as communications which "omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public." As noted above, both standard 1 of rule 1-400 and Business and Professions Code section 6158.1(a) provide that communications which contain guarantees, warranties, or predictions are presumed to be false, misleading, or deceptive.

Another factor that may play a role in determining whether a particular blog will be found to constitute attorney advertising is whether or not the blog invites comments on its individual posts (i.e., the blog is "interactive"). In *Hunter,* the majority of the Virginia Supreme Court noted that the "non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments." This was a significant factor in the court's determination that the ostensible blog constituted advertising (*Hunter v. Virginia State Bar ex rel. Third District Committe, supra,* at p. 498). The court pointed out that "blog readers are most frequently permitted to leave comments and create threads of discussion," while, "in furtherance of his commercial pursuit, Hunter invites the reader to 'contact us' the same way one seeking legal representation would contact the firm through the website."

In light of these considerations, we review the individual fact scenarios:

**Attorney A – "Perry Mason? He's Got Nothing on Me!"**

Attorney A's blog is an extreme example of a blog post that does not include specific words of invitation to retain the authoring attorney's services, but which, in the Committee's view, is a communication subject to rule 1-400. The post describes the attorney's services as a criminal defense lawyer, and makes specific representations concerning the quality of those services ("they were mesmerized by my closing argument"). The comments in the blog post about the justice system are far more self-promotional than analytical, serving only to reinforce the message that the author is capable of taking advantage of the system. This is reinforced by the lack of interactivity of the site, excluding comment and dialogue that could possibly shift the focus away from Attorney A's self-promotion.

In the Committee's view, under the facts presented, Attorney A's blog posts describing his courtroom successes presumptively would violate rule 1-400(D), prohibiting statements which present "any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public under," in conjunction with standards 1 (a "communication" which contains guarantees, warranties, or predictions regarding the result of the representation) and 2 (a "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer). They also presumptively would violate Business and Professions Code section 6158's prohibition against advertising that is false, misleading, or deceptive as a "message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" under section 6158.1.

**Attorney B - Blog Included on a Professional Website**

Professional websites maintained by attorneys and law firms concern their availability for professional employment, and are attorney advertising subject to regulation. In California State Bar Formal Opinion No. 2001-155, this Committee concluded that an attorney's professional website is a "communication" within the meaning of rule 1-400(A), as well as advertising subject to regulation under Business and Professions Code section 6157. The Committee further expressed the belief that "this conclusion is not altered by the inclusion in the web site of information and material of general public interest."[10/]

The Committee concludes that Attorney B's blog on the firm website constitutes information and material of general public interest on the law firm's parent website, and is subject to rule 1-400 to the same extent as the parent site, as well as the corresponding provisions of the Business and Professions Code.

**Attorney C – Stand-Alone Blog**

Attorney C's blog consists of short articles on such topics as "How to Make a Visitation Exchange Go Smoothly," "Collaborative Divorce in California," "How to Survive Divorce with Style and Some Cash Left," "California QDROs (Qualified Domestic Relations Orders)," and similar topics. None of the blog posts focuses on current or former cases of Attorney C's, nor describes his own family law practice. All of the posts identify Attorney C as the author, with Attorney C's name hyperlinking to his professional web page. Some of the posts conclude with the admonition that if the reader has "any questions about your divorce or custody case, you can contact me" at Attorney C's professional office phone number.

The Committee opines that, were it not for the concluding admonition to readers to contact him, Attorney C's stand-alone family law blog would not be a "communication" subject to rule 1-400. Even though Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues to his colleagues and prospective clients to enhance his reputation in the field and increase his business, the blog posts are informational in nature. They are neither offers nor messages concerning Attorney C's availability for professional employment; they do not invite readers to employ Attorney C's services, nor do they specifically describe the services that Attorney C offers. To this extent, they are not "communications" subject to the rule.

The concluding admonition in several of the blog posts in which Attorney C advises his readers to call him, if they have questions about their divorce or custody cases, are words of invitation evidencing Attorney C's availability for professional employment, and make Attorney C's blog – including those posts that do not include the admonition – subject to the provisions of rule 1-400.[11/]

**Attorney D – Non-Legal Blog Linked to Professional Web Page**

The fact that Attorney D's blog by-line is a hyperlink to Attorney D's professional website does not change the character of the associated blog unless the subject matter of the blog and the attorney's or firm's practice area are closely related. In those instances, a link to the professional or firm website would function as words of invitation

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[10/] This is consistent with the conclusion reached in American Bar Association Committee on Ethics and Prof. Responsibility, Formal Opinion No. 10-457. The ABA opinion concludes that the requirements of Rules 7.1, 8.4(c), and 4.1(a) also apply to information of a general nature contained on the website, including information provided to assist the public in understanding the law and in identifying when and how to obtain legal services. Although the opinion does not specifically refer to a website-based blog, its application of the requirement to articles, information provided in a narrative form, and FAQ's (frequently asked questions) makes the application clear.

[11/] Although an argument can be made that rule 1-400 should apply only to those blog posts in which the words of invitation appear, the Committee believes the message of availability carries over from post to post. Because of the nature of a blog as a continuous series, once the reader is specifically made aware that the blog's author is an attorney offering his services for employment, that awareness transfers to all posts read subsequently.

similar to "if you have questions, contact me." On the other hand, a link from the by-line to the attorney author's professional page will not serve to transform a blog on non-legal topics, such as jazz, or topics unrelated to the attorney's practice area, into advertising subject to rule 1-400, but instead functions as identification of the author. The Committee believes an attorney may freely write a blog consisting of movie reviews, recipes, wilderness survival tips, or any of countless non-legal subjects without being subject to rule 1-400, provided the attorney author does not actively use the blog to solicit business as an attorney.

## CONCLUSION

Attorney blogs are subject to the requirements and restrictions of rule 1-400 and the related provisions of the Business and Professions Code if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through a description of the attorney's legal practices and successes in such a manner that the attorney's availability for professional employment is evident. A blog that is a part of an attorney's or law firm's professional website is subject to the rules regulating attorney advertising to the same extent as the website of which it is a part. A non-legal blog by an attorney is not necessarily subject to the rules or statutes regulating attorney advertising because it includes a hyperlink to the attorney's professional web page.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

*[**Publisher's Note**: Internet resources cited in this opinion were last accessed by staff on December 18, 2014. Copy of these resources are on file with the State Bar's Office of Professional Competence.]*