



## Practical Tips and Ethical Considerations for Client Representation in the Digital Age

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# Ethical Obligations to Safeguard Your Client's Data



- All industries face challenges related to data security and privacy and keeping information confidential.
- Organizations may be subject to a number of laws and regulations and industry standards.
- Lawyers are faced with ethical rules that guide handling of client information – tangible and electronic.

# + Outline

- Ethical Rules
  - Competence – Rule 1.1
  - Duty of Confidentiality – Rule 1.6
  - Supervising Non-Lawyers or Subordinate Lawyers – Rule 5.3
- Ethics Decisions
- Q&A

# + Ethical Rules



- Competence – Rule 1.1
- Duty of Confidentiality – Rule 1.6
- Supervising Non-Lawyers or Subordinate Lawyers – Rule 5.3

# + Ethical Rules – Rule 1.1

- Rule 1.1, comment 8 (ii): As of March 28, 2015, lawyers must keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients to store or transmit confidential information.



# Ethical Rules – Rule 1.1 (cont'd)



- Ethics rules require lawyers to have technological competence.
  - Understand technology used to protect firm data and client data.
  - Understand electronic discovery rules in the relevant jurisdictions.
  - Use available technology to guard against foreseeable attempts to infiltrate data.
  - Investigate vendor security practices and periodically review to be sure they remain up-to-date.
  - Investigate any potential security breaches or lapses by vendor to ensure client data was not compromised.

# + Ethical Rules – Rule 1.6



## ■ Rule 1.6 Confidentiality of Information

- Rule 1.6(a): A lawyer shall not knowingly reveal confidential information (unless there is consent or authorization to do so as set forth in the Rule).
- Rule 1.6(c): A lawyer shall make **reasonable efforts** to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by the relevant Rules.



# Ethical Rules – Rule 1.6 (cont'd)



- Rule 1.6, comment 16: Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.
- Rule 1.6, comment 16: Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use).





# Ethical Rules – Rule 1.6 (cont'd)



- The ethical rules require lawyers to take reasonable steps to safeguard the confidentiality of client data.
- Just like with paper files, lawyers must work to protect the intangible, electronically stored information (ESI) in their possession.
- Lawyers should take steps to safeguard confidential information against their own inadvertent disclosures and those of others participating in the representation AND act competently to safeguard confidential information against unauthorized access by third parties.



# Ethical Rules – Rule 1.6 (cont'd)



- Lawyers should assess whether circumstances warrant special precautions. Some factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

# + Ethical Rules – Rule 5.3



## ■ Rule 5.3 Responsibility Over Non-Lawyers

- Rule 5.3(b): A lawyer is responsible for certain conduct of a non-lawyer employed or retained by or associated with the lawyer.



# Ethical Rules – Rule 5.3 (cont'd)

- Rule 5.3, comment 3: A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. One such example is using an Internet-based service to store client information. When using outside services, the lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; (f) whether the client will be supervising all or part of the nonlawyer's work. When retaining or directing a nonlawyer outside the firm, a lawyer should appropriately communicate directions to give reasonable assurance that the nonlawyer's conduct is compatible with the lawyer's professional obligations.



# Ethical Rules – Rule 5.3 (cont'd)



- How to supervise non-lawyers on technology matters.
  - Rule 1.1, cannot simply delegate or outsource competence.
- Keep in mind obligations to help ensure that internal and external non-lawyer assistants carry out their duties in a manner that is compatible with the lawyer's professional obligations.
- A lawyer is responsible for certain conduct of a non-lawyer employed/ retained by or associated with the lawyer.



# Ethical Rules – Rule 5.3 (cont'd)



- Lawyers can align themselves with experts, but Rule 1.1 makes clear that lawyers cannot simply delegate or outsource technology competence.
- Rule 5.3(b), Responsibility over Non-Lawyers (including choosing and supervising vendors): A lawyer is responsible for certain conduct of a nonlawyer employed/retained by or associated with the lawyer.
- Rule 5.3, comment 3: “A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client.”
- When retaining or directing a nonlawyer outside the firm, a lawyer should appropriately communicate directions to give reasonable assurance that the nonlawyer’s conduct is compatible with the lawyer’s professional obligations.



# Ethics – Some Key Decisions



## ■ Backups and Record Retention

- N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 940 (2012). “A lawyer may use off-site backup tapes to store confidential client information if the lawyer takes reasonable care to ensure that the storage system, and the arrangements for its use, adequately protect the confidentiality of such information.” See also N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 842 (2010) (same principles addressed in determining reasonableness and use of cloud storage); N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 1020 (2014). Authorized persons should have access to cloud storage containing confidential information.



# Ethics – Some Key Decisions



- N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 842 (2010). Addresses Rule 1.6 and reiterates that an attorney must take reasonable steps to protect confidential information. Reasonable care may include consideration of the following:
  - there is a way to ensure that the provider has enforceable obligations to preserve confidential information;
  - there is a method by which to investigate providers' security measures;
  - the provider employs technology to guard against access to data; and
  - the provider has the ability to wipe data/move it. See, N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 1020 (2014).





# Ethics – Some Key Decisions (cont'd)



- N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 1019 (2014). In providing lawyers remote access to client files, a law firm must take reasonable steps to protect information, but: “Because of the fact-specific and evolving nature of both technology and cyber risks, this Committee cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients.”
- N.Y. St. Bar Ass'n Comm. on Prof. Ethics Formal Op. 2017-5 (2017). During border searches, confidential information may be on the attorney's electronic devices, which may be searched.
- N.Y. St. Bar Ass'n Comm on Prof. Ethics Op. 749 (2001). A lawyer may not ethically use technology to surreptitiously examine and trace email and other electronic documents; e.g., placing a “bug” in an email that the lawyer sends to determine the subsequent route of the email.

# + Q&A

The logo for Beckage, featuring the word "Beckage" in a large, white, sans-serif font. Below it, the tagline "Legally Focused. Technology Driven." is written in a smaller, white, sans-serif font. The entire logo is set against a dark blue square background.

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