Technology and Ethics for Resilient RPPTL In Florida: Yes, I Now Get It

A Panel Presentation

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Technology and Ethics
In the Practice of Law
With a Special Emphasis on Real Property, Probate and Trust Law Practitioners

The subject of technology in the practice of law is experiencing rapid change. Existing services and products are evolving to adapt to market place demands. Similarly, new services and products are released to fill voids.

The ethical issues arising from the use (or non-use) of technology in the practice of law are also evolving. The rules that made good sense before certain technological advances are difficult to enforce and may be no longer applicable.

In order for these materials to be timely and relevant, or at least as timely and relevant as possible, we are not writing a traditional outline. Nor are we going to burden the reader with reviews of specific software. Rather, we providing resources that we believe are timely and remain relevant. Of course, that may all change the moment we "publish."

These resources will, to the extent feasible, follow our formal outline, the substance of which will be interspersed in these materials.

The Legal Profession is Changing.

- Legal industry is in the midst of a once-in-a-generation disruption
- Demand for legal work is changing
- Pricing pressure from clients
- Competitive forces of commoditization
- Emergence of lower-priced, high-powered, non-traditional service providers
- Globalization
- Technology

Technology & the Law
We are not alone

RAVEL

LawGives

lawkick

LAWTRADES

axiom
law redefined

Contractually

NOLO
LAW for ALL

MODRIA

PactSafe

ROCKETLAWYER

legalzoom

upcounsel
WE'RE HIRING!

LAWFULLY

legalhero

snapterms

docracy

1. Data and Security

Data protection
Security protocols
Ethical issues

Data protection
Client privacy
Ethical issues

No big deal, unless
Hacked, like ransom in bit coin
Or exposed to others

Current Drivers of Change

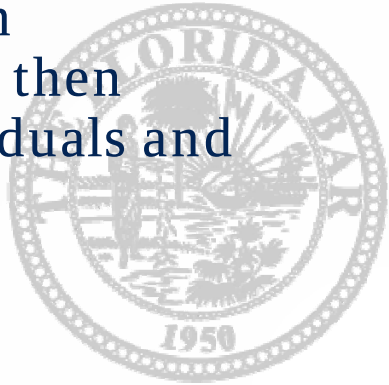
Issues

- Data Security and Client Confidentiality

- Smaller Firms May Risk Losing Clients Over Cybersecurity Fears
- As employee training and user behavior tracking lags, organizations increasingly worry about the dangers of their employee's accidental and negligent actions

The Florida Legislature passed the Florida Information Protection Act of 2014 (FIPA) Fla. Stat. 501.171

- The FIPA will replace Florida's existing data breach notification law. It has a reactive component (what companies must do after a breach) and a proactive component (what companies must do to protect personally identifiable information they control regardless of whether they ever suffer a breach).
- Covered entities must notify Florida's Department of Legal Affairs of any breach that affects more than 500 people.
- If a third-party agent suffers a breach, it must notify the covered entity within 10 days following the determination of the breach or reason to believe the breach occurred. Upon receiving notice of the breach, the covered entity must then comply with the requirements to notify affected individuals and the Attorney General.



Cloud Computing

- Legal Cloud Computing Association (LCCA) is an organization whose purpose is to facilitate adoption of cloud computing technology within the legal profession, consistent with the highest standards of professionalism and ethical and legal obligations. The organization's goal is to promote standards and guidelines for cloud computing that are responsive to the needs of the legal profession and to enable lawyers to become aware of the benefits of computing resources through the development and distribution of educational and informational resources.

Cloud Computing Due Diligence

- Where is my data physically stored?
- What physical location security measures are in place where my data is physically stored?
- Who owns the server where my data is stored?
- Is my data backed up?
- Is my data encrypted?
- Who has the encryption keys?
- What 3rd party access is permitted?
- How do I get my data if I terminate my contract?

RULE REGULATING THE FLORIDA BAR

RULE 4-1.1 COMPETENCE

4 RULES OF PROFESSIONAL CONDUCT

4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.1 COMPETENCE

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

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.

[Revised: 05/22/2006]

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477 **May 11, 2017**

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for e-mail communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c)

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1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the Internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers' face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology</u>, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[7]

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4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

7. *Id.* at 43.

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client 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 subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

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8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2013). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

14. See item 3 below.

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider

whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived, and the lawyer must determine whether it is prudent to warn a client of the dangers associated with such a method of communication.[18]

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16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

17. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011) (discussing the duty to protect the confidentiality of e-mail communications with one's client); Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. some state bar ethics opinions have explored the circumstances under which e-mail communications should be afforded special security protections, *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that 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 in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being

- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and
- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [18] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

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21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2017). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

MAY 12, 2017

ABA Issues Major Ruling on Ethics of Email and Electronic Communications

by Robert Ambrogi

The American Bar Association's **Standing Committee on Ethics and Professional Responsibility** has issued a major new opinion providing guidance on the steps lawyers should take to protect client confidentiality in electronic communications.

The new opinion, **Formal Opinion 477** (embedded copy below), updates Formal Opinion 99-413, issued in 1999, to reflect changes in the digital landscape as well as 2012 changes to the ABA's Model Rules of Professional Conduct, particularly the addition of the duty of technology competence in Model Rule 1.1 and changes to Rule 1.6 regarding client confidences.

Most notably, the opinion says that some circumstances warrant lawyers using "particularly strong protective measures" such as encryption. In the 1999 opinion, the committee concluded that unencrypted email was acceptable because lawyers have a reasonable expectation of privacy in all forms of email communications.

In this new opinion, the committee declined to draw a bright line as to when encryption is required or as to the other security measures lawyers should take. Instead, the committee recommended that lawyers undergo a "fact-based analysis" that includes evaluating factors such as:

- The sensitivity of the information.
- The likelihood of disclosure if additional safeguards are not employed.
- The cost of employing additional safeguards.
- The difficulty of implementing the safeguards.
- The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

In some cases that will require encryption, the committee said, while for matters of "normal or low sensitivity," standard security measures will suffice.

> In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures. Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.
>
> However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the [above] factors to determine what effort is reasonable.

While the opinion urged lawyers to take reasonable steps to protect client communications, it said that it was beyond its scope to specify the steps for any given set of facts. Instead, the opinion listed seven considerations that should guide lawyers:

1. Understand the Nature of the Threat.

This includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. "Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft."

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information, so that the lawyer can better manage the risk of inadvertent or unauthorized disclosure of client-related information.

3. Understand and Use Reasonable Electronic Security Measures.

Because access to client communications can occur in different forms, ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process, a lawyer's reasonable efforts include analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions. Further, a lawyer should understand and use electronic security measures such as VPNs or other secure internet portals, use unique complex passwords that are changed periodically, implement firewalls, use anti-malware/anti-spyware/anti-virus software, and apply all necessary security patches.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

The opinion urges that, at the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for client communications. For sensitive communications, a lawyer should use encryption and should consider the use of password protection for any attachments. "Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails." The opinion further notes that a client's lack of technological sophistication or lack of available technology "may require alternative non-electronic forms of communication altogether." Finally, the opinion notes that extra caution is required when a client uses computers subject to the access or control of a third party (such as a work computer).

5. Label Client Confidential Information.

Lawyers should mark privileged and confidential client communications as such in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. “This can also consist of something as simple as appending a message or “disclaimer” to client emails, where such a disclaimer is accurate and appropriate for the communication.”

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Lawyers are ethically obligated to supervise their employees and subordinates to ensure compliance with ethical rules, and that obligation extends to electronic communications, the opinion says. For this reason, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients, as well as on reasonable measures for access to and storage of those communications.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

The opinion reaffirms the principle that lawyers must perform due diligence when selecting an outside vendor. Factors to consider include:

- Reference checks and vendor credentials.
- Vendor’s security policies and protocols.
- Vendor’s hiring practices.
- The use of confidentiality agreements.
- Vendor’s conflicts check system to screen for adversity.
- The availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

If the lawyer lacks the competence to evaluate the vendor, the lawyer may perform the evaluation by associating with another lawyer or expert, or may educate him or herself.

The opinion also says that, when retaining a nonlawyer from outside the firm, the lawyer has further obligations to ensure that the nonlawyer’s services are provided in a manner that is compatible with the lawyer’s professional obligations.

Duty to Communicate

In addition to the seven factors summarized above, the opinion emphasizes that a lawyer has a duty to communicate with a client about the nature and method of electronic communications.

> When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved. The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client.

Changes to Model Rules

The opinion relies heavily on two 2012 changes to the Model Rules. I've written frequently here about the duty of technology competence and I've been maintaining a tally of the **states that have adopted the duty**. This opinion expressly refers to that duty as one of the reasons for issuing an update to its 1999 opinion on email communications.

It also references the 2012 change to Rule 1.6 on confidentiality, which added a new duty in paragraph (c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The committee concludes its opinion with this summary:

> A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

This is an extremely important opinion that every lawyer should stop and read today.

For your convenience, the opinion is embedded below.

Posted in: General
Tagged: legal ethics

Blake Duncan • a month ago

In this day in age, privacy is a thing of the past. Different forms of electronic communication have led to many different circumstances involving exploitation. I'm currently enrolled in an ethics and communication course at Drury University and we're learning the fundamentals of this type of ethical and unethical behavior. Social media has led to many problems over the previous years and as technology advances, the privacy and safety of each individual is diminishing. I really like how the article goes into detail about certain evaluation factors to consider when dealing with electronic communication problems. The authors of Ethics in Human Communication (2008) state that "the ethical demand of veracity, or truthfulness, is crucial. Through communication we not only transmit established knowledge, but we also

crucial. Through communication we not only transmit established knowledge, but we also create or construct knowledge" (Johannesen pg. 44). As the article states, electronic communication through certain mobile applications or via unsecured networks may lack the basic expectation of privacy afforded to email communications. This is so important to consider when lawyers are working on their specific cases. Hillary Clinton is a good example of what happens when you don't constantly analyze your email records or protect your online communication. Once it's out there in the enormous network of online messages, there's really no taking it back. People need to be more cautious and smart when it comes to what they're saying through electronic communication platforms, whether it's lawyers, presidents, etc. "Hiding the truth, falsifying evidence, or using faulty reasoning are among the tactics condemned as unethical" (Johannesen pg. 44).

Blake Duncan

Drury University

Johannesen, R. L., Valde, K. S., & Whedbee, K. E. (2008). Ethics in human communication (6th ed.). Long Grove, IL: Waveland Press.

Gary Singer • 2 months ago

I have to concur with Mr. O'Connell's comments below. We have been trying to implement encryption for a couple of years and have hit major resistance from recipients, from people demanding that we just email it "the normal way" to ignoring anything we sent encrypted. We have also dealt with several major law firms that seem to have an automated policy to quarantine and not deliver encrypted emails to their recipients, causing us to get a receipt that the email was delivered but not delivering the emails to the actual recipients within that firm. We have had more than one client threaten to find another law firm that does not make communication "so difficult". We have tried several major providers with similar results. I won't even go down the road of trying to get people to use a secure portal! We will keep trying to use encrypted communication since it is the "right" and responsible thing to do, but until recipients start accepting it, it will not get any sort of widespread traction. Personally, I think that the solution is not to make the individual email users use add-on services, but rather for the major email providers fix the way that email works. If the big technology companies, such as Microsoft, Google, Apple, Comcast, etc., got together and said "This is the new SAFE email standard going forward" all other providers would quickly jump on the bandwagon. Until something like that happens, the small minority of us that are actually trying to protect our clients private information are fighting a losing battle.

Jake Kiser ➚ Gary Singer • 23 days ago

Hi Gary,

Thanks for sharing your perspective. It's valuable to hear how people are living this out on the ground, as I have the perspective of someone from the cybersecurity industry trying to design solutions for people like you. I may have some good news for you! You rightfully say that companies like Microsoft and other big players need to get on board a standard protocol. This is happening through a group called the FIDO Alliance (http://fidoalliance.org). This standard is quickly becoming more popular -- you can currently log into your Gmail, Salesforce, Facebook, and many other places

using various means of authentication (USB, Bluetooth, biometrics, etc.)

Do you think such a standard would still be met with resistance from your clients, if it was more useful across the web, and not just a one-off?

Thanks,
Jake

Reply • Share ›

Gary Singer ➚ Jake Kiser • 22 days ago

Jake, that is good news! I think that if the standard was universal, my clients would be fine with it. Most people (mostly) want to do the safe and correct thing, but are confused and frustrated by the difficulty of it all. We all want things bright and shiny and are mad that our cars don't fly yet. The underlying problem is that we have ALL been promised things that the tech companies have yet to deliver. I love me my tech toys, but my iphone still crashes (not nearly as much as MS Outlook), and in 2017 EVERYONE I know is still worried about cyber-crime. Just like in society, this is really a choice between freedom and security. The underlying problem is that most people's lawyers are not important enough in their lives to warrant logging into a secure system. And now, even if they were willing to do so, it would probably be a phishing scam anyway.... With some universal security in place, we (the lawyers) would be just a small part of the same solution and so our clients would accept it. For example, if the solution is 2FA and you also needed the same dongle to communicate with your attorney that you needed to check on your prescription with Walgreens and you Amazon order, everyone would be happy to do it.

Reply • Share ›

Jake Kiser ➚ Gary Singer • 20 days ago

Thanks, Gary. I think your comments are spot on. Universal is a significant reach :) but we hope to get there! At the current moment, the same FIDO dongle could log you into many different websites and applications, but certainly not all. The good news would be that you would not need a different physical key for all the different sites -- the same one would do. So as long as you have your car keys with you, you're all set. I really appreciate your insights into individual behavior -- thanks for sharing.

If you're interested, we're rolling out a beta test of this new product. I'd be happy to chat with you and see if you'd like to participate, seeing as you're interested in the topic. My email is jkiser@gmail.com. (Forum moderates - please feel free to delete / edit this comment if it's not in good taste with the site to exchange personal emails).

Thanks!
Jake

Reply • Share ›

Bob Ambrogi Mod → Gary Singer • 2 months ago

Interesting, but not surprising, that clients and other firms become the obstacles to using encryption. One workaround is to encrypt only the attachment and keep the body of the email generic -- something like, "Please review the attached." I written before about a service such as Citrix Sharefile that makes it easy to encrypt attachments while leaving the message itself unencrypted.

The ABA's opinion seems to suggest that if the client doesn't want to use encryption and gives you informed consent to communicate without encryption, then you're OK.

^ v • Reply • Share ›

David John O'Connell • 2 months ago

After having experienced major difficulties in attempting to implement encrypted email for client matters, I do not look forward to a second attempt. The market for encryption has not caught up to the need, for one very simple reason: the user cannot enforce compliance by recipients, either to use the necessary protocols to decrypt the mails, or to use the same system to reply. Frequently the addressee simply ignores the incoming encrypted mail, and claims not to have received anything, or deletes it as suspected SPAM. Worse, the addressee, either client, opposing counsel, or simply bypasses the protocols altogether, sending mails with confidential materials included in the clear. I have tried Azure Blue, Hushmail, and a Microsoft Exchange implementation in which a simple addition to the subject line encrypts the mail. Each has its difficulties and advantages, but the problem is how to get the other guy to protect himself or his client by using the simple process that is offered.

I have been on the other end of this equation, usually in dealing with health care providers administration about financial matters, and strangely not with physicians or staff in discussions of my health. Those organizations force use of clunky third-party service like ZipMail, with which I admit my own resistance. But, as those administrators are impossible to contact by telephone, and will completely ignore you unless you comply with their communication rules, one grinds one's teeth in the steps to comply.

Will this become the new seat belt? Intrusive, clunky, for your own good, but still a pain in the butt.

^ v • Reply • Share ›

Jeffrey Franklin • 2 months ago

Excellent summary of ABA Formal Opinion 477. Thank you.

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2. Minimization and Confidentiality

Rules, rules everywhere
Minimize, when not needed
Confidential, note as such

Policing these rules
Lawyers, judges, Florida Bar
Clerks participate

RULE 2.425. MINIMIZATION OF THE FILING OF SENSITIVE INFORMATION

(a) Limitation for Court Filings. Unless authorized by subdivision (b), statute, another rule of court, or the court orders otherwise, designated sensitive information filed with the court must be limited to the following format:

(1) The initials of a person known to be a minor;

(2) The year of birth of a person's birth date;

(3) No portion of any

(A) social security number,

(B) bank account number,

(C) credit card account number,

(D) charge account number, or

(E) debit account number;

(4) The last four digits of any

(A) taxpayer identification number (TIN),

(B) employee identification number,

(C) driver's license number,

(D) passport number,

(E) telephone number,

(F) financial account number, except as set forth in subdivision (a)(3),

(G) brokerage account number,

(H) insurance policy account number,

(I) loan account number,

(J) customer account number, or

(K) patient or health care number;

(5) A truncated version of any

(A) email address,

(B) computer user name,

(C) password, or

(D) personal identification number (PIN); and

(6) A truncated version of any other sensitive information as provided by court order.

(b) Exceptions. Subdivision (a) does not apply to the following:

(1) An account number which identifies the property alleged to be the subject of a proceeding;

(2) The record of an administrative or agency proceeding;

(3) The record in appellate or review proceedings;

(4) The birth date of a minor whenever the birth date is necessary for the court to establish or maintain subject matter jurisdiction;

(5) The name of a minor in any order relating to parental responsibility, time-sharing, or child support;

(6) The name of a minor in any document or order affecting the minor's ownership of real property;

(7) The birth date of a party in a writ of attachment or notice to payor;

(8) In traffic and criminal proceedings

(A) a pro se filing;

(B) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(C) an arrest or search warrant or any information in support thereof;

(D) a charging document and an affidavit or other documents filed in support of any charging document, including any driving records;

(E) a statement of particulars;

(F) discovery material introduced into evidence or otherwise filed with the court;

(G) all information necessary for the proper issuance and execution of a subpoena duces tecum;

(H) information needed to contact witnesses who will support the defendant's claim of newly discovered evidence under Florida Rule of Criminal Procedure 3.851; and

(I) information needed to complete a sentencing scoresheet;

(9) Information used by the clerk for case maintenance purposes or the courts for case management purposes; and

(10) Information which is relevant and material to an issue before the court.

(c) Remedies. Upon motion by a party or interested person or sua sponte by the court, the court may order remedies, sanctions or both for a violation of subdivision (a). Following notice and an opportunity to respond, the court may impose sanctions if such filing was not made in good faith.

(d) Motions Not Restricted. This rule does not restrict a party's right to move for protective order, to move to file documents under seal, or to request a determination of the confidentiality of records.

(e) Application. This rule does not affect the application of constitutional provisions, statutes, or rules of court regarding confidential information or access to public information.

RULE 2.420. PUBLIC ACCESS TO AND PROTECTION OF JUDICIAL BRANCH RECORDS

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to and the protection of the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below. Access to all electronic and other court records shall be governed by the Standards for Access to Electronic Court Records and Access Security Matrix, as adopted by the supreme court in Administrative Order AOSC14-19 or the then-current Standards for Access. Remote access to electronic court records shall be permitted in counties where the supreme court's conditions for release of such records are met.

(b) Definitions.

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

(A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and

(B) "administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.

(3) "Custodian." The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility for the care, safekeeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee.

(4) "Confidential," as applied to information contained within a record of the judicial branch, means that such information is exempt from the public right of access under article I, section 24(a) of the Florida Constitution and may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term "exempt" means that such information is confidential. Confidential information includes information that is confidential under this rule or under a court order entered pursuant to this rule. To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential.

(5) "Affected non-party" means any non-party identified by name in a court record that contains confidential information pertaining to that non-party.

(6) "Filer" means any person who files a document in court records, except "filer" does not include the clerk of court or designee of the clerk, a

judge, magistrate, hearing officer, or designee of a judge, magistrate or hearing officer.

(c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:

(1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;

(2) Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

(3) (A) Complaints alleging misconduct against judges until probable cause is established;

(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made within a reasonable period of time;

(4) Periodic evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom;

(5) Only the names and qualifications of persons applying to serve or serving as unpaid volunteers to assist the court, at the court's request and direction, shall be accessible to the public. All other information contained in the applications by and evaluations of persons applying to serve or serving as unpaid

volunteers shall be confidential unless made public by court order based upon a showing of materiality in a pending court proceeding or upon a showing of good cause;

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

(ii) protect trade secrets;

(iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;

(v) avoid substantial injury to innocent third parties;

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A); and

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A).

(10) The names and any identifying information of judges mentioned in an advisory opinion of the Judicial Ethics Advisory Committee.

(d) Procedures for Determining Confidentiality of Court Records.

(1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential:

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule; and

(B) except as provided by court order, information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution as specifically stated in any of the following statutes or as they may be amended or renumbered:

(i) Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. §§ 39.0132(3), 39.0132(4)(a), Fla. Stat.

(ii) Adoption records. § 63.162, Fla. Stat.

(iii) Social Security, bank account, charge, debit, and credit card numbers. § 119.0714(1)(i)–(j), (2)(a)–(e), Fla. Stat. (Unless redaction is requested pursuant to § 119.0714(2), Fla. Stat., this information is exempt only as of January 1, 2012.)

(iv) HIV test results and the identity of any person upon whom an HIV test has been performed. § 381.004(2)(e), Fla. Stat.

(v) Records, including test results, held by the Department of Health or its authorized representatives relating to sexually transmissible diseases. § 384.29, Fla. Stat.

(vi) Birth records and portions of death and fetal death records. §§ 382.008(6), 382.025(1), Fla. Stat.

(vii) Information that can be used to identify a minor petitioning for a waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat.

(viii) Clinical records under the Baker Act. § 394.4615(7), Fla. Stat.

(ix) Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals. § 397.501(7), Fla. Stat.

(x) Clinical records of criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

(xi) Estate inventories and accountings. § 733.604(1), Fla. Stat.

(xii) The victim's address in a domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

(xiii) Protected information regarding victims of child abuse or sexual offenses. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.

(xiv) Gestational surrogacy records. § 742.16(9), Fla. Stat.

(xv) Guardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.

(xvi) Grand jury records. §§ 905.17, 905.28(1), Fla. Stat.

(xvii) Records acquired by courts and law enforcement regarding family services for children. § 984.06(3)–(4), Fla. Stat.

(xviii) Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat.

(xix) Records disclosing the identity of persons subject to tuberculosis proceedings and records held by the Department of Health or its authorized representatives relating to known or suspected cases of tuberculosis or exposure to tuberculosis. §§ 392.545, 392.65, Fla. Stat.

(xx) Complete presentence investigation reports. Fla. R. Crim. P. 3.712.

(xxi) Forensic behavioral health evaluations under Chapter 916. § 916.1065, Fla. Stat.

(xxii) Eligibility screening, substance abuse screening, behavioral health evaluations, and treatment status reports for defendants referred to or considered for referral to a drug court program. § 397.334(10)(a), Fla. Stat.

(2) The filer of any document containing confidential information described in subdivision (d)(1)(B) shall, at the time of filing, file with the clerk a "Notice of Confidential Information within Court Filing" in order to indicate that confidential information described in subdivision (d)(1)(B) of this rule is included within the document being filed and also indicate that either the entire document is confidential or identify the precise location of the confidential information within the document being filed. If an entire court file is maintained as confidential, the filer of a document in such a file is not required to file the notice form. A form Notice of Confidential Information within Court Filing accompanies this rule.

(A) If any document in a court file contains confidential information as described in subdivision (d)(1)(B), the filer, a party, or any affected non-party may file the Notice of Confidential Information within Court Filing if the document was not initially filed with a Notice of Confidential Information within Court Filing and the confidential information is not maintained as confidential by the clerk. The Notice of Confidential Information within Court Filing filed pursuant to this subdivision must also state the title and type of document, date of filing (if known), date of document, docket entry number, indicate that either the entire document is confidential or identify the precise location of the confidential information within the document, and provide any other information the clerk may require to locate the confidential information.

(B) The clerk of court shall review filings identified as containing confidential information to determine whether the purported confidential information is facially subject to confidentiality under subdivision (d)(1)(B). If the clerk determines that filed information is not subject to confidentiality under subdivision (d)(1)(B), the clerk shall notify the filer of the Notice of Confidential Information within Court Filing in writing within 5 days of filing the notice and thereafter shall maintain the information as confidential for 10 days from the date such notification by the clerk is served. The information shall not be held as confidential for more than that 10 day period, unless a motion has been filed pursuant to subdivision (d)(3).

(3) The filer of a document with the court shall ascertain whether any information contained within the document may be confidential under subdivision (c) of this rule notwithstanding that such information is not itemized at subdivision (d)(1) of this rule. If the filer believes in good faith that information is confidential but is not described in subdivision (d)(1) of this rule, the filer shall request that the information be maintained as confidential by filing a "Motion to Determine Confidentiality of Court Records" under the procedures set forth in subdivision (e), (f), or (g), unless

(A) the filer is the only individual whose confidential information is included in the document to be filed or is the attorney representing all such individuals; and

(B) a knowing waiver of the confidential status of that information is intended by the filer. Any interested person may request that information within a court file be maintained as confidential by filing a motion as provided in subdivision (e), (f), or (g).

(4) If a notice of confidential information is filed pursuant to subdivision (d)(2), or a motion is filed pursuant to subdivision (e)(1) or (g)(1) seeking to determine that information contained in court records is confidential, or pursuant to subdivision (e)(5) or (g)(5) seeking to vacate an order that has determined that information in a court record is confidential or seeking to unseal information designated as confidential by the clerk of court, then the person filing the notice or motion shall give notice of such filing to any affected non-party. Notice pursuant to this provision must:

(A) be filed with the court;

(B) identify the case by docket number;

(C) describe the confidential information with as much specificity as possible without revealing the confidential information, including specifying the precise location of the information within the court record; and

(D) include:

(i) in the case of a motion to determine confidentiality of court records, a statement that if the motion is denied then the subject material will not be treated as confidential by the clerk; and

(ii) in the case of a motion to unseal confidential records or a motion to vacate an order deeming records confidential, a statement that if the motion is granted, the subject material will no longer be treated as confidential by the clerk.

Any notice described herein must be served pursuant to subdivision (k), if applicable, together with the motion that gave rise to the notice in accordance with subdivision (e)(5) or (g)(5).

(5) Except when the entire court file is maintained as confidential, if a judge, magistrate, or hearing officer files any document containing confidential information, the confidential information within the document must be identified as "confidential" and the title of the document must include the word "confidential." The clerk must maintain the confidentiality of the indentified confidential information. A copy of the document edited to omit the confidential information shall be provided to the clerk for filing and recording purposes.

(e) Request to Determine Confidentiality of Trial Court Records in Noncriminal Cases.

(1) A request to determine the confidentiality of trial court records in noncriminal cases under subdivision (c) must be made in the form of a written motion captioned "Motion to Determine Confidentiality of Court Records." A motion made under this subdivision must:

(A) identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information subject to the confidentiality determination;

(B) specify the bases for determining that such court records are confidential without revealing confidential information; and

(C) set forth the specific legal authority and any applicable legal standards for determining such court records to be confidential without revealing confidential information.

Any written motion made under this subdivision must include a signed certification by the party or the attorney for the party making the request that the motion is made in good faith and is supported by a sound factual and legal basis. Information that is subject to such a motion must be treated as confidential by the clerk pending the court's ruling on the motion. A response to a written motion filed under this subdivision may be served within 10 days of service of the motion. Notwithstanding any of the foregoing, the court may not determine that the case number, docket number, or other number used by the clerk's office to identify the case file is confidential.

(2) Except when a motion filed under subdivision (e)(1) represents that all parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing before ruling on the motion. Whether or not any motion filed under subdivision (e)(1) is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c). Any person may request expedited consideration of and ruling on the motion. The movant shall be responsible for ensuring that a complete record of any hearing held pursuant to this subdivision is created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. The court may in its discretion require prior public notice of the hearing on such a motion in accordance with the procedure for providing public notice of court orders set forth in subdivision (e)(4) or by providing such other public notice as the court deems appropriate. The court must issue a ruling on the motion within 30 days of the hearing.

(3) Any order granting in whole or in part a motion filed under subdivision (e) must state the following with as much specificity as possible without revealing the confidential information:

(A) The type of case in which the order is being entered;

(B) The particular grounds under subdivision (c) for determining the information is confidential;

(C) Whether any party's name determined to be confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;

(D) Whether the progress docket or similar records generated to document activity in the case are determined to be confidential;

(E) The particular information that is determined to be confidential;

(F) Identification of persons who are permitted to view the confidential information;

(G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth in subdivision (c); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c); and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (e)(4).

(4) Except as provided by law or court rule, notice must be given of any written order granting in whole or in part a motion made under subdivision (e)(1) as follows:

(A) within 10 days following the entry of the order, the clerk of court must post a copy of the order on the clerk's website and in a prominent public location in the courthouse; and

(B) the order must remain posted in both locations for no less than 30 days. This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (e) or requests that the court order the unsealing of records designated as confidential under subdivision (d), the request must be made by a written motion, filed in that court, that states with as much specificity as possible the bases for the motion. The motion must set forth the specific legal

authority and any applicable legal standards supporting the motion. The movant must serve all parties and all affected non-parties with a copy of the motion. Except when a motion filed under this subdivision represents that all parties and affected non-parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing on the motion. Regardless of whether any motion filed under this subdivision is agreed to by the parties and affected non-parties, the court may in its discretion hold a hearing on such motion. Any person may request expedited consideration of and ruling on the motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c). The court must issue a ruling on the motion within 30 days of the hearing. The movant shall be responsible for ensuring that a complete record of any hearing held under this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).

(f) Request to Determine Confidentiality of Court Records in Criminal Cases.

(1) Subdivisions (e) and (h) shall apply to any motion by the state, a defendant, or an affected non-party to determine the confidentiality of trial court records in criminal cases under subdivision (c), except as provided in subdivision (f)(3). As to any motion filed in the trial court under subdivision (f)(3), the following procedure shall apply:

(A) Unless the motion represents that the State, defendant(s), and all affected non-parties subject to the motion agree to all of the relief requested, the court must hold a hearing on the motion filed under this subdivision within 15 days of the filing of the motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A).

(B) The court shall issue a written ruling on a motion filed under this subdivision within 10 days of the hearing on a contested motion or within 10 days of the filing of an agreed motion.

(2) Subdivision (g) shall apply to any motion to determine the confidentiality of appellate court records under subdivision (c), except as provided in subdivision (f)(3). As to any motion filed in the appellate court under subdivision (f)(3), the following procedure shall apply:

(A) The motion may be made with respect to a record that was presented or presentable to a lower tribunal, but no determination concerning confidentiality was made by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(B) A response to a motion filed under this subdivision may be served within 10 days of service of the motion.

(C) The court shall issue a written ruling on a motion filed under this subdivision within 10 days of the filing of a response on a contested motion or within 10 days of the filing of an uncontested motion.

(3) Any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)(A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned "Motion to Determine Confidentiality of Court Records." Any motion made pursuant to this subdivision must be treated as confidential and indicated on the docket by generic title only, pending a ruling on the motion or further order of the court. As to any motion made under this subdivision, the following procedure shall apply:

(A) Information that is the subject of such motion must be treated as confidential by the clerk pending the court's ruling on the motion. Filings containing the information must be indicated on the docket in a manner that does not reveal the confidential nature of the information.

(B) The provisions of subdivisions (e)(3)(A)–(G), (g)(7), (h), and (j), shall apply to motions made under this subdivision. The provisions of subdivisions (e)(1), (e)(2), (e)(3)(H), (e)(4), and (e)(5) shall not apply to motions made under this subdivision.

(C) No order entered under this subdivision may authorize or approve the sealing of court records for any period longer than is necessary to achieve the objective of the motion, and in no event longer than 120 days.

Extensions of an order issued hereunder may be granted for 60–day periods, but each such extension may be ordered only upon the filing of another motion in accordance with the procedures set forth under this subdivision. In the event of an appeal or review of a matter in which an order is entered under this subdivision, the lower tribunal shall retain jurisdiction to consider motions to extend orders issued hereunder during the course of the appeal or review proceeding.

(D) The clerk of the court shall not publish any order of the court issued hereunder in accordance with subdivision (e)(4) or (g)(4) unless directed by the court. The docket shall indicate only the entry of the order.

(4) This subdivision does not authorize the falsification of court records or progress dockets.

(g) Request to Determine Confidentiality of Appellate Court Records in Noncriminal Cases.

(1) Subdivision (e)(1) shall apply to any motion filed in the appellate court to determine the confidentiality of appellate court records in noncriminal cases under subdivision (c). Such a motion may be made with respect to a record that was presented or presentable to a lower tribunal, but no determination concerning confidentiality was made by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(2) A response to a motion filed under subdivision (g)(1) may be served within 10 days of service of the motion. The court shall issue a written ruling on a written motion filed under this subdivision within 30 days of the filing of a response on a contested motion or within 30 days of the filing of an uncontested written motion.

(3) Any order granting in whole or in part a motion filed under subdivision (g)(1) must be in compliance with the guidelines set forth in subdivisions (e)(3)(A)–(H). Any order requiring the sealing of an appellate court record operates to also make those same records confidential in the lower tribunal during the pendency of the appellate proceeding.

(4) Except as provided by law, within 10 days following the entry of an order granting a motion under subdivision (g)(1), the clerk of the appellate court must post a copy of the order on the clerk's website and must provide a copy of the order to the clerk of the lower tribunal, with directions that the clerk of the

lower tribunal shall seal the records identified in the order. The order must remain posted by the clerk of the appellate court for no less than 30 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (g)(3), or requests that the court order the unsealing of records designated as confidential under subdivision (d), the request must be made by a written motion, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting the motion. The movant must serve all parties and all affected non-parties with a copy of the motion. A response to a motion may be served within 10 days of service of the motion.

(6) The party seeking to have an appellate record sealed under this subdivision has the responsibility to ensure that the clerk of the lower tribunal is alerted to the issuance of the order sealing the records and to ensure that the clerk takes appropriate steps to seal the records in the lower tribunal.

(7) Upon conclusion of the appellate proceeding, the lower tribunal may, upon appropriate motion showing changed circumstances, revisit the appellate court's order directing that the records be sealed.

(8) Records of a lower tribunal determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where information has been determined to be confidential under this rule, the clerk of the lower tribunal shall so indicate in the index transmitted to the appellate court. If the information was determined to be confidential in an order, the clerk's index must identify such order by date or docket number. This subdivision does not preclude review by an appellate court, under Florida Rule of Appellate Procedure 9.100(d), or affect the standard of review by an appellate court, of an order by a lower tribunal determining that a court record is confidential.

(h) Oral Motions to Determine Confidentiality of Trial Court Records.

(1) Notwithstanding the written notice requirements of subdivision (d)(2) and written motion requirements of subdivisions (d)(3), (e)(1), and (f), the movant may make an oral motion to determine the confidentiality of trial court records under subdivision (c), provided:

(A) except for oral motions under subdivision (f)(3), the oral motion otherwise complies with subdivision (e)(1);

(B) all parties and affected non-parties are present or properly noticed or the movant otherwise demonstrates reasonable efforts made to obtain the attendance or any absent party or affected non-party;

(C) the movant shows good cause why the movant was unable to timely comply with the written notice requirements as set forth in subdivision (d)(2) or the written motion requirement as set forth in subdivision (d)(3), (e)(1), or (f), as applicable;

(D) the oral motion is reduced to written form in compliance with subdivision (d), (e)(1), or (f), as applicable, and is filed within 5 days following the date of making the oral motion;

(E) except for oral motions under subdivisions (f)(3), the provisions of subdivision (e)(2) shall apply to the oral motion, procedure and hearing;

(F) the provisions of subdivision (f)(1)(A) and (B) and (f)(3) shall apply to any oral motion under subdivision (f)(3); and

(G) oral motions are not applicable to subdivision (f)(2) or (g) or extensions of orders under subdivision (f)(3)(C).

(2) The court may deny any oral motion made pursuant to subdivision (h)(1) if the court finds that that movant had the ability to timely comply with the written notice requirements in subdivision (d) or the written motion requirements of (d)(3), (e)(1), or (f), as applicable, or the movant failed to provide adequate notice to the parties and affected non-parties of the confidentiality issues to be presented to the court.

(3) Until the court renders a decision regarding the confidentiality issues raised in any oral motion, all references to purported confidential information as set forth in the oral motion shall occur in a manner that does not allow public access to such information.

(4) If the court grants in whole or in part any oral motion to determine confidentiality, the court shall issue a written order that does not reveal the confidential information and complies with the applicable subdivision of this rule as follows:

(A) For any oral motion under subdivision (e) or (f)(1), except subdivisions (f)(1)(A) and (B), the written order must be issued within 30 days of the hearing and must comply with subdivision (e)(3).

(B) For any oral motion under subdivision (f)(3), the written order must be issued within 10 days of the hearing on a contested motion or filing of an agreed motion and must comply with subdivision (f)(3).

(i) Sanctions. After notice and an opportunity to respond, and upon determining that a motion, filing, or other activity described below was not made in good faith and was not supported by a sound legal or factual basis, the court may impose sanctions against any party or non-party and/or their attorney, if that party or non-party and/or their attorney, in violation of the applicable provisions of this rule:

(1) seeks confidential status for non-confidential information by filing a notice under subdivision (d)(2);

(2) seeks confidential status for non-confidential information by making any oral or written motion under subdivision (d)(3), (e), (f), (g), or (h);

(3) seeks access to confidential information under subdivision (j) or otherwise;

(4) fails to file a Notice of Confidential Information within Court Filing in compliance with subdivision (d)(2);

(5) makes public or attempts to make public by motion or otherwise information that should be maintained as confidential under subdivision (c), (d), (e), (f), (g) or (h); or

(6) otherwise makes or attempts to make confidential information part of a non-confidential court record.

Nothing in this subdivision is intended to limit the authority of a court to enforce any court order entered pursuant to this rule.

(j) Procedure for Obtaining Access to Confidential Court Records.

(1) The clerk of the court must allow access to confidential court records to persons authorized by law, or any person authorized by court order.

(2) A court order allowing access to confidential court records may be obtained by filing a written motion which must:

(A) identify the particular court record(s) or a portion of the court record(s) to which the movant seeks to obtain access with as much specificity as possible without revealing the confidential information;

(B) specify the bases for obtaining access to such court records;

(C) set forth the specific legal authority for obtaining access to such court records; and

(D) contain a certification that the motion is made in good faith and is supported by a sound factual and legal basis.

(3) The movant must serve a copy of the written motion to obtain access to confidential court records on all parties and reasonably ascertainable affected non-parties and the court must hold a hearing on the written motion within a reasonable period of time.

(4) Any order granting access to confidential court records must:

(A) describe the confidential information with as much specificity as possible without revealing the confidential information, including specifying the precise location of the information within the court records;

(B) identify the persons who are permitted to view the confidential information in the court records;

(C) identify any person who is permitted to obtain copies of the confidential court records; and

(D) state the time limits imposed on such access, if any, and any other applicable terms or limitations to such access.

(5) The filer of confidential court records, that filer's attorney of record, or that filer's agent as authorized by that filer in writing may obtain access to such confidential records pursuant to this subdivision.

(6) Unless otherwise provided, an order granting access to confidential court records under this subdivision shall not alter the confidential status of the record.

(k) Procedure for Service on Victims and Affected Non-parties and When Addresses Are Confidential.

(1) In criminal cases, when the defendant is required to serve any notice or motion described in this rule on an alleged victim of a crime, service shall be on the state attorney, who shall send or forward the notice or motion to the alleged victim.

(2) Except as set forth in subdivision (k)(1), when serving any notice or motion described in this rule on any affected non-party whose name or address is not confidential, the filer or movant shall use reasonable efforts to locate the affected non-party and may serve such affected non-party by any method set forth in Florida Rule of Judicial Administration 2.516.

(3) Except as set forth in subdivision (k)(1), when serving any notice or motion described in this rule and the name or address of any party or affected non-party is confidential, the filer or movant must state prominently in the caption of the notice or motion "Confidential Party or Confidential Affected Non-Party — Court Service Requested." When a notice or motion so designated is filed, the court shall be responsible for providing a copy of the notice or motion to the party or affected non-party, by any method permitted in Florida Rule of Judicial Administration 2.516, in such a way as to not reveal the confidential information.

***(l)* Denial of Access Request for Administrative Records.** Expedited review of denials of access to administrative records of the judicial branch shall be provided through an action for mandamus or other appropriate relief, in the following manner:

(1) When a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.

(m) Procedure for Public Access to Judicial Branch Records. Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) Requests for access to judicial branch records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be solely responsible for providing access to the records of the custodian's entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure. The custodian shall determine the form in which the record is provided. If the request is denied, the custodian shall state in writing the basis for the denial.

(3) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in section 119.07, Florida Statutes.

Committee Note

1995 Amendment. This rule was adopted to conform to the 1992 addition of article I, section 24, to the Florida Constitution. Amendments to this rule were adopted in response to the 1994 recommendations of the Study Committee on Confidentiality of Records of the Judicial Branch.

Subdivision (b) has been added by amendment and provides a definition of "judicial records" that is consistent with the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. The word "exhibits" used in this definition of judicial records is intended to refer only to documentary evidence and does not refer to tangible items of evidence such as firearms, narcotics, etc. Judicial records within this definition include all judicial records and data regardless of the form in which they are kept. Reformatting of information may be necessary to protect copyrighted material. *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

The definition of "judicial records" also includes official business information transmitted via an electronic mail (e-mail) system. The judicial branch is presently experimenting with this new technology. For example, e-mail is currently being used by the judicial branch to transmit between judges and staff multiple matters in the courts including direct communications between judges and staff and other judges, proposed drafts of opinions and orders, memoranda concerning pending cases, proposed jury instructions, and even votes on proposed opinions. All of this type of information is exempt from public disclosure under rules 2.051(c)(1) and (c)(2) [renumbered as 2.420(c)(1) and (c)(2) in 2006]. With few exceptions, these examples of e-mail transmissions are sent and received between judicial officials and employees within a particular court's jurisdiction. This type of e-mail is by its very nature almost always exempt from public record disclosure pursuant to rule 2.051(c). In addition, official business e-mail transmissions sent to or received by judicial officials or employees using dial-in equipment, as well as the use of on-line outside research facilities such as Westlaw, would also be exempt e-mail under rule 2.051(c). On the other hand, we recognize that not all e-mail sent and received within a particular court's jurisdiction will fall into an exception under rule 2.051(c). The fact that a non-exempt e-mail message made or received in connection with official court business is transmitted intra-court does not relieve judicial officials or employees from the obligation of properly

having a record made of such messages so they will be available to the public similar to any other written communications. It appears that official business e-mail that is sent or received by persons outside a particular court's jurisdiction is largely non-exempt and is subject to recording in some form as a public record. Each court should develop a means to properly make a record of non-exempt official business e-mail by either electronically storing the mail or by making a hard copy. It is important to note that, although official business communicated by e-mail transmissions is a matter of public record under the rule, the exemptions provided in rule 2.051(c) exempt many of these judge/staff transmissions from the public record. E-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record. Each court should also publish an e-mail address for public access. The individual e-mail addresses of judicial officials and staff are exempt under rule 2.051(c)(2) to protect the compelling interests of maintaining the uninterrupted use of the computer for research, word-processing, preparation of opinions, and communication during trials, and to ensure computer security.

Subdivision (c)(3) was amended by creating subparts (a) and (b) to distinguish between the provisions governing the confidentiality of complaints against judges and complaints against other individuals or entities licensed or regulated by the Supreme Court.

Subdivision (c)(5) was amended to make public the qualifications of persons applying to serve or serving the court as unpaid volunteers such as guardians ad litem, mediators, and arbitrators and to make public the applications and evaluations of such persons upon a showing of materiality in a pending court proceeding or upon a showing of good cause.

Subdivision (c)(9) has also been amended. Subdivision (c)(9) was adopted to incorporate the holdings of judicial decisions establishing that confidentiality may be required to protect the rights of defendants, litigants, or third parties; to further the administration of justice; or to otherwise promote a compelling governmental interest. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla.1988); *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla.1982). Such confidentiality may be implemented by court rule, as well as by judicial decision, where necessary for the effective administration of justice. *See, e.g.*, Fla.R.Crim.P. 3.470, (Sealed Verdict); Fla.R.Crim.P. 3.712, (Presentence Investigation Reports); Fla.R.Civ.P. 1.280(c), (Protective Orders).

Subdivision (c)(9)(D) requires that, except where otherwise provided by law or rule of court, reasonable notice shall be given to the public of any order closing a court record. This subdivision is not applicable to court proceedings. Unlike the closure of court proceedings, which has been held to require notice and hearing prior to closure, *see Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla.1982), the closure of court records has not required prior notice. Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding. Providing reasonable notice to the public of the entry of a closure order and an opportunity to be heard on the closure issue adequately protects the competing interests of confidentiality and public access to judicial records. *See Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462 (Fla. 1st DCA 1987), *approved*, *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla.1988); *State ex rel. Tallahassee Democrat v. Cooksey*, 371 So. 2d 207 (Fla. 1st DCA 1979). Subdivision (c)(9)(D), however, does not preclude the giving of prior notice of closure of a court record, and the court may elect to give prior notice in appropriate cases.

2002 Court Commentary

The custodian is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request. Op. Atty. Gen. Fla. 80-57 (1980); *Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991); *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982).

The writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing.

It is anticipated that each judicial branch entity will have policies and procedures for responding to public records requests.

The 1995 commentary notes that the definition of "judicial records" added at that time is consistent with

the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. Despite the commentary, these definitions are not the same. The definitions added in 2002 are intended to clarify that records of the judicial branch include court records as defined in rule 2.075(a)(1) and administrative records. The definition of records of the judicial branch is consistent with the definition of "public records" in chapter 119, Florida Statutes.

2005 Court Commentary

Under courts' inherent authority, appellate courts may appoint a special magistrate to serve as commissioner for the court to make findings of fact and oversee discovery in review proceedings under subdivision (d) of this rule. Cf. *State ex rel. Davis v. City of Avon Park*, 158 So. 159 (Fla. 1934) (recognizing appellate courts' inherent authority to do all things reasonably necessary for administration of justice within the scope of courts' jurisdiction, including the appointment of a commissioner to make findings of fact); *Wessells v. State*, 737 So. 2d 1103 (Fla. 1st DCA 1998) (relinquishing jurisdiction to circuit court for appointment of a special master to serve as commissioner for court to make findings of fact).

2007 Court Commentary

New subdivision (d) applies only to motions that seek to make court records in noncriminal cases confidential in accordance with subdivision (c)(9).

2007 Committee Commentary

Subdivision (d)(2) is intended to permit a party to make use of any court-provided recording device or system that is available generally for litigants' use, but is not intended to require the court system to make such devices available where they are not already in use and is not intended to eliminate any cost for use of such system that is generally borne by a party requesting use of such system.

APPENDIX TO RULE 2.420

IN THE .....(NAME OF COURT)....., FLORIDA
CASE NO.: .....

_____

Plaintiff/Petitioner,

v.

_____

Defendant/Respondent.
_____/

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), I hereby certify:

( )(1) I am filing herewith a document containing confidential information as described in Rule 2.420(d)(1)(B) and that:

(a) The title/type of document is _____,
and :

(b)( ) the entire document is confidential, or

( ) the confidential information within the document is precisely located at :

_____.
OR

( )(2) A document was previously filed in this case that contains confidential information as described in Rule 2.420(d)(1)(B), but a Notice of Confidential Information within Court Filing was not filed with the document and the confidential information was not maintained as confidential by the clerk of the court. I hereby notify the clerk that this confidential information is located as follows:

(a) Title/type of document: _____;
(b) Date of filing (if known): _____;
(c) Date of document: _____;
(d) Docket entry number: _____;
(e) ( ) Entire document is confidential, or
( ) Precise location of confidential information in document:

_____.

_____
Filer's Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by (e-mail) (delivery) (mail) (fax) on: (All parties and Affected Non-Parties. Note: If the name or address of a Party or Affected Non-Party is confidential DO NOT include such

information in this Certificate of Service. Instead, serve the State Attorney or request Court Service. See Rule 2.420(k)) _____, on _____, 20 _____.

_____

Name .....
Address .....
Phone .....
Florida Bar No. (if applicable).....
E-mail address .....

Note: The clerk of court shall review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality under subdivision (d)(1)(B). The clerk shall notify the filer in writing within 5 days if the clerk determines that the information is NOT subject to confidentiality, and the records shall not be held as confidential for more than 10 days, unless a motion is filed pursuant to subdivision (d)(3) of the Rule. Fla. R. Jud. Admin. 2.420(d)(2).

RULE 2.425. MINIMIZATION OF THE FILING OF SENSITIVE INFORMATION

(a) Limitation for Court Filings. Unless authorized by subdivision (b), statute, another rule of court, or the court orders otherwise, designated sensitive information filed with the court must be limited to the following format:

(1) The initials of a person known to be a minor;

(2) The year of birth of a person's birth date;

(3) No portion of any

(A) social security number,

(B) bank account number,

(C) credit card account number,

(D) charge account number, or

Technology and the Florida Court System

Presented at

2017 Litigation and Trust Law Symposium

for the

Real Property, Probate and Trust Law Section

of the

The Florida Bar

on

March 3, 2017

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Technology and the Florida Court System

Laird A. Lile

1. Overview

a. Why you want to be here: meeting new CLE requirements

b. Data about Data: Metadata

c. Viewing Portal: Comprehensive Case Information System (CCIS) 3.0

d. Getting it Right: Embedding Hyperlinks and Filing Exhibits and Size Limits

e. Getting off versus Getting out: Removal from e-portal versus withdrawal as counsel

f. E-Portal

g. Getting documents to the clerk for the court file: E-filing Requirements

h. Getting documents to lawyers and parties: E-Service Requirements

i. Keeping information private versus keeping information out of filings: Confidentiality versus Minimization

j. Different Rules for Some Courts in Florida: District Court of Appeal

k. Someone else to do the work: Third Party Providers

l. Help from The Florida Bar: Resource for Technology

m. The Future

2. Why you want to be here: meeting new CLE requirements[1]

a. Changes to Rule 6-10.3 (Minimum CLE Standards):
   i. Increase requirements from 30 to 33 over a three year period
   ii. Including three hours in an approved technology program

b. Changes to the comments to Rule 4-1.1 (Competence):
   i. Require an understanding of the benefits and risks associated with the use of technology, as an element of overall competence in the practice of law; and
   ii. Requires safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.
   iii. Allows association of a non-lawyer technology advisor.

c. Effective as of January 1, 2017.

d. Practice tip: Don't be glib about lack of competence with technology.

[1] Supreme Court Opinion 16-574.

3. Data about Data: Metadata[2]

a. Metadata is the background information saved in a document or that travels with a document, such as formatting styles, dates of creation and modification, and edits.

b. Attorneys are responsible for safeguarding the confidentiality of all communications sent by electronic means, including removing metadata that may be included in the electronic communications.
    i. "Scrubbing"

c. Attorneys who receive an electronic communication from another attorney not to try to obtain metadata relating to the representation of the sender's client that the receiving attorney knows or should know is not intended for the receiving attorney.
    i. "Mining"

d. Attorneys who receive information from metadata that is known or should be known not to have been intended for the recipient must promptly notify the sending attorney.

e. Resources regarding removing metadata
    i. Lawyers are responsible for stripping metadata from all e-filed documents[3]
    ii. Florida Courts E-Filing Portal – Removing Metadata from Word doc[4]

f. Avoid the creation of metadata in the first place?
    i. Possible but not always complete or successful.
    ii. Turning off Track Changes in Word will not prevent metadata from showing up.

g. Sanctions for the inadvertent disclosure of confidential information, which could arise from failure to scrub metadata from a document.
    i. See FRJA 2.420(i).

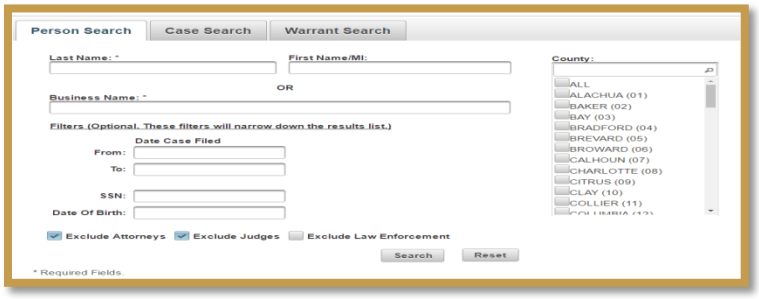
4. Viewing Portal: Comprehensive Case Information System (CCIS) 3.0

a. Clerks have been building a centralized database of all court records.
    i. Access to all judicial records from clerks' case management systems.
    ii. Single point of viewing, just like we have the single point of filing.

[2] Professional Ethics Opinion 06-2, The Florida Bar, issued September 15, 2006
[3] Lawyers are responsible for stripping metadata from e-filed documents, Gary Blankenship, The Florida Bar News, issued June 15, 2015
[4] E-Portal Help video at: https://www.youtube.com/watch?v=3xPnLhdyuZQ

b. Screen shots of system

i. Person search across all cases in all counties



ii. Statewide Case Search

c. Initial focus is for clerk's users which are governmental agencies, including state attorneys, public defenders, executive branch offices (departments of corrections, revenue, children and family services, state, etc.)

d. Real time updates

e. What about the practicing private attorney?

i. Clerks' association wants to grant access.

ii. Technology will be available by mid-2017.

5. Getting it Right: Embedding Hyperlinks and Filing Exhibits and Size Limits[5]

a. Technical standards moved from rules of court to Standards for Electronic Access to the Courts.

i. Version 16.0, August 2016

b. Hyperlinks in filings.

i. Hyperlinks within the same document are permitted.

ii. Hyperlinks external if reasonably believed to be trustworthy and stable over long periods of time are permitted.

iii. Hyperlinks should not refer to external documents or information sources likely to change.

iv. Standard 3.1.12.1

[5] Florida Supreme Court Standards for Electronic Access to the Courts, Adopted 2009 and Modified August 2016

c. Exhibits accompanying a document shall be separately attached and denominated with a title referencing the document to which it relates.
    i. Each exhibit shall conform to the filing size limitation.
        1. If an exhibit exceeds the size limit, each portion shall be separately described (e.g., Exhibit A, Part 1 of 5, Part 2 of 5, etc.).
    ii. Each documentary exhibit marked for identification or admitted into evidence at trial shall be treated in accordance with FRJA 2.525(d)(4) or (6), and then converted by the clerk and stored electronically in accordance with rule 2.525(a).
    iii. Standard 3.1.12.2
    iv. Practical considerations: Exhibits versus Attachments

d. Size Limits
    i. Single submission (regardless of number of documents): 50 megabytes
    ii. Standard 3.1.1

6. Getting off versus Getting Out: Removal from e-portal versus withdrawal as counsel

a. Getting off a service list on the e-portal is not the same as getting out as counsel of record on a case.

b. Getting Off: an attorney can remove herself from the service list through the "manage my e-Service screen."
    i. An audit trail shows when someone has removed themselves from the service list.
    ii. An e-mail notification will be sent to all eService list recipients when an attorney has removed themselves.

c. Getting Out: an attorney must follow FRJA 2.505(f) in order to be properly removed from a case, by one of three ways:
    i. Withdrawal of attorney by order of the court;
    ii. Substitution of attorney by order of the court;
    iii. Termination of proceeding automatically without order of the court.

7. E-Portal

a. www.MyFLCourtAccess.com

b. Training videos and manuals
    i. https://www.myflcourtaccess.com/authority/trainingvideos.html
    ii. https://www.myflcourtaccess.com/authority/trainingmanuals.html

8. Getting documents to the clerk for the court file: E-filing Requirements

a. Attorneys required to e-file.
   i. "Effective Thursday, September 1, 2016, the Clerk's office will no longer accept paper filings from attorneys pursuant to United Bank v. Estate of Edward G. Frazee, 4D15-826; 2016 Fla. App. LEXIS 10780 (Fla. 4th DCA 2016). In this case it was held that 'since filing is only accomplished through electronic submission (in the absence of a Rule 2.525 exception), a document is not actually 'filed' when improperly submitted to the clerk in paper…' id at 6."[6]

   ii. "A stiff warning was issued to those who do not follow e-filing filing procedures, whether the casual lawyer, or the more deliberate out-of-state lawyers who litigate in Florida. A little recognized Fourth District Court of Appeal decision, United Bank v. Estate of Frazee, 41 Fla. L. Weekly D1612 (Fla. 4th DCA July 13, 2016), drew a bold and deliberate line separating the historical, or perhaps ancient, age of paper from the modern electronic age. Bottom Line: Florida Bar members who do not electronically file court papers, and filing properly means doing it properly, will find themselves with no filing. There is no 'do over' or second chance even if a filing deadline barring a claim has run! Need e-filing assistance, see below and The Florida Supreme Court Standards for Electronic Access to the Courts which can be downloaded from the Bar's website. Why now? The Court remarked that three years has passed since e-filing became mandatory for Florida lawyers. Lawyers have had the time to learn the system and comply. A small but significant number of lawyers have not followed the rules. For those who persist following their own filing concepts, as they say, the gig is up!"[7]

b. All documents filed in any court shall be filed by electronic transmission in accordance with FRJA 2.525.

c. Document types that the e-portal supports:
   i. Word, WordPerfect, PDF, and PDF/A
   ii. Practice Tip: PDF

d. Formatting requirements for e-filed documents. FRJA 2.520
   i. All documents must be filed in a format capable of being electronically searched.
   ii. All documents filed must have one-inch margins on all sides for date and time stamps.
      1. The 3x3 and 1x3 top right hand corner rule is only for documents to be recorded in the public records.

[6]New DCA Ruling: Clerk's Office No Longer to Accept Paper Filings From Attorneys
https://www.mypalmbeachclerk.com/news/8-10-16-clerk-no-longer-to-accept-paper-filings-from-attorneys.aspx

[7] New Decision: E-Filing and Rejected Filings (United Bank v. Estate of Frazee), Real Property, Probate, & Trust Law Section of the Florida Bar, 2016
http://www.rpptl.org/index.php?option=com_content&view=article&id=797:new-decision-e-filing-and-rejected-filings-united-bank-v-estate-of-frazee&catid=8:news&Itemid=204

e. The Clerk reviews all e-filings.
    i. Any document that is unable to be processed by the clerk is placed in the abandoned filing queue.
    ii. Corrected filings served through e-portal.

9. Getting documents to lawyers and parties: E-Service Requirement

a. Attorneys required to e-serve.
    i. Strict compliance with e-service of pleadings is required.
    ii. Matte v. Caplan, 140 So. 3d 686 (2014)

b. Attorneys must generally serve all documents by e-mail in accordance with FRJA 2.516.
    i. Service can be accomplished two ways:
        1. E-Portal: The Portal serves documents filed through the Portal.
            a. Responsibility to select correct recipients.
        2. E-Mail: E-mail separate from the e-portal can also be used for serving.
            a. Compliance with specific requirements, such as beginning the subject line of the e-mail with "SERVICE OF COURT DOCUMENTS" followed by the case number.

c. Serving when not filing?
    i. A motion seeking sanctions under F.S. § 57.105(4) initially requires serving without filing.

10. Keeping information private versus keeping information out of filings: Confidentiality versus Minimization

a. Confidentiality: Keeping information private, not available to public

b. Minimization: Keeping information out of filings, not needed by parties

c. Confidential Information

    i. The purpose of FRJA 2.420 is to facilitate public access to judicial branch records and to protect confidential information from disclosure to the public.
        1. See In Re Amend. Fla. Rules Jud. Admin., 2.420, 153 So. 3d 896 (2014).

    ii. Attorneys are responsible for protecting confidential information contained in filings, to keep from the public.
        1. Confidential information is information contained within a record of the judicial branch that is exempt from the public access right under article I, section 24(a) of the Florida Constitution, and which may only be released to persons designated by law, statute, or court order.
            a. See FRJA 2.420(b)(4).
        2. Confidential information is in the filing and available to other parties and the court, but not available to the public.
        3. FRJA 2.420(c)-(d) describes information that is confidential and exempt. Attorneys are obligated under subdivision (c) even if it does not fall within the enumerated list of confidential information in subdivision (d).

iii. Enumerated Confidential Information
    1. Filer must file with the clerk a "Notice of Confidential Information within Court Filing" to indicate that confidential information is included within the document being filed or to indicate that the entire document is confidential.
        a. See FRJA 2.420(d)(2).
    2. A form for the Notice of Confidential Information within Court Filing is provided in Appendix to Rule 2.420.
    3. This form notifies the clerk to keep the information confidential.

iv. Other Confidential Information
    1. An attorney, who in good faith believes that confidential information is contained in a filing, but the information is not described under subdivision (d), can make a Motion to Determine Confidentiality of Court Records.

v. Attorneys can be sanctioned for:
    1. Failing to protect confidential information;
    2. Seeking confidential status for information that is non-confidential.

vi. FRJA 2.420(d)(1)(b)(i)-(xxii) contains a list of information that shall be maintained as confidential. The following includes some of the information that must be contained as confidential for purposes of estate and trust practitioners:
    1. Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment;
    2. Social security, bank account, charge, debit, and credit card numbers;
    3. Birth records and portions of death and fetal death records.
    4. Estate inventories and accountings.
    5. Guardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases.

d. Minimization of Sensitive Information

i. Sensitive Information is excluded from the filing, and not available even to other parties or counsel.
    1. See FRJA 2.425.

ii. Generally, sensitive information filed with the court must be limited to the following format:
    1. The initials of a person known to be a minor;
    2. The year of birth of a person's birth date;
    3. No portion of any:
        a. Social security number;
        b. Bank account number;
        c. Credit card account number;
        d. Charge account number;
        e. Debit account number.

4. The last four digits of any:
    a. Taxpayer identification number (TIN);
    b. Employee identification number;
    c. Drivers license number;
    d. Passport number;
    e. Telephone number;
    f. Financial account number;
    g. Brokerage account number;
    h. Insurance policy account number;
    i. Loan account number;
    j. Customer account number;
    k. Patient or health care number.
5. A truncated version of any:
    a. E-mail address;
    b. Computer user name;
    c. Password;
    d. Personal identification number (PIN).
6. A truncated version of any other sensitive information as provided by court order.

iii. FRJA 2.425(b) sets forth the exceptions to the items listed in FRJA 2.425(a)

iv. Exceptions to the minimization requirements include information that is relevant to the proceeding, such as:
    1. An account number which identifies the property alleged to be the subject of a proceeding;
    2. The birth date of a minor whenever the birth date is necessary for the court to establish or maintain subject matter jurisdiction;
    3. The name of a minor in any document or order affecting the minor's ownership of real property;
    4. Information used by the clerk for case maintenance purposes or the courts for case management purposes; and
    5. Information which is relevant and material to an issue before the court.

v. Pursuant to FRJA 2.425(c) the court can order remedies, sanctions, or both for violation of FRJA 2.425, sua sponte and after motion by a party or interest person.

11. Different Rules for Some Courts in Florida: District Court of Appeal

a. eDCA: First, Third, Fourth, and Fifth District Courts of Appeal

b. ePortal: Florida Supreme Court, Second District Court of Appeal, and all Circuit Courts

12. Someone else to do the work: Third Party Providers

a. Services available to do e-filing and e-serving in Florida courts

b. Confidentiality rules still apply

13. Help from The Florida Bar: Resource for Technology

a. The Practice Resource Institute (PRI) provides advice, assistance and support to members of the Florida Bar.
    i. http://pri.floridabar.org/

b. PRI helps attorneys avoid malpractice claims, helps prevent client conflicts, and helps integrate new technology into their law practices.

c. Practice management advisors can be consulted via online chat, telephone help line, or e-mail.

d. PRI hosts free online seminars focusing on law office management and publishes news articles which are available on the PRI website.
    i. Some past seminars include:
        1. E-Filing: Professional Ethics of the Florida Bar
        2. How To Go Paperless. It's Not As Hard As You Think
        3. Electronic Discovery in Florida State Court

14. The Future

a. DIY wills
    i. Willing.com

b. DIY court filings
    i. https://test.myflcourtaccess.com/Courts/UIPages/LaunchInterview.aspx?iid=19

15. Conclusion

Appendix

1. Supreme Court Opinion 16-574.

2. Professional Ethics Opinion 06-2, The Florida Bar, issued September 15, 2006

3. Lawyers are Responsible for Stripping Metadata from all e-filed documents, Gary Blankenship The Florida Bar News, issued June 15, 2015

4. New DCA Ruling: Clerk's Office No Longer To Accept Paper Filings From Attorneys, Clerk and Comptroller Palm Beach County, issued October 13, 2016

5. Florida Supreme Court Standards for Electronic Access to the Courts, Adopted 2009 and Modified August 2016

6. FRJA 2.505(f)

7. FRJA 2.525

8. FRJA 2.520

9. Matte v. Caplan, 140 So. 3d 686 (2014)

10. FRJA 2.516

11. FRJA 2.420

12. In Re Amend. Fla. Rules Jud. Admin., 2.420, 153 So. 3d 896 (2014)

13. FRJA 2.425

Supreme Court of Florida

No. SC16-574

IN RE: AMENDMENTS TO RULES REGULATING THE FLORIDA BAR 4-1.1 AND 6-10.3.

[September 29, 2016]

PER CURIAM.

This matter is before the Court on the petition of The Florida Bar (Bar) proposing amendments to the Rules Regulating the Florida Bar (Bar Rules). See R. Regulating Fla. Bar 1-12.1. We have jurisdiction. See art. V, § 15, Fla. Const.

The Bar's petition in this case proposes amendments to two Bar Rules: 4-1.1 (Competence) and 6-10.3 (Minimum Continuing Legal Education Standards). The proposals were approved by the Board of Governors, and formal notice of the proposed amendments was published in The Florida Bar News. The notice directed interested persons to file their comments directly with the Court. The Court did not receive any comments.

After considering the Bar's petition, we adopt these straightforward amendments as proposed. The comment to rule 4-1.1 (Competence) is amended to

add language providing that competent representation may involve a lawyer's association with, or retention of, a non-lawyer advisor with established technological competence in the relevant field. Competent representation may also entail safeguarding confidential information related to the representation, including electronic transmissions and communications. Additionally, we add language to the comment providing that, in order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology.

In rule 6-10.3 (Minimum Continuing Legal Education Standards), subdivision (a) (Applicability) is amended to clarify when Bar members must apply and receive approval for an exemption from the continuing legal education requirements (pursuant to subdivision (c) (Exemptions)), and when the exemption is automatic. We amend subdivision (b) (Minimum Hourly Continuing Legal Education Requirements) to change the required number of continuing legal education credit hours over a three-year period from 30 to 33, with three hours in an approved technology program. We also amend subdivision (b) to delete language requiring that courses offering credit in professionalism be approved by the Center for Professionalism. The Bar's petition indicates these courses will now be approved by the Department of Legal Specialization and Education. Subdivision (g) (Skills Training Preadmission) is amended to change the

requirement for completing an approved basic skills or entry level training program presented by a governmental entity from within eight months prior to Bar admission, to twelve months. Finally, we have made a number of non-substantive or grammatical amendments throughout rule 6-10.3 to clarify the wording.

Accordingly, the Rules Regulating the Florida Bar are amended as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The comments are offered for explanation only and are not adopted as an official part of the rules. The amendments shall become effective on January 1, 2017, at 12:01 a.m.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Rules Regulating the Florida Bar

John F. Harkness, Jr., Executive Director, William J. Schifino, Jr., President, Ramón A. Abadin, Past-President, Michael Jerome Higer, President-elect Designate, John Mitchell Stewart, Chair, Vision 2016 Technology Subcommittee, Lori S. Holcomb, Director, Division of Ethics and Consumer Protection, and Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, Tallahassee, Florida,

for Petitioner

APPENDIX

RULE 4-1.1 COMPETENCE

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

COMMENT

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or

consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 6-10.3 MINIMUM CONTINUING LEGAL EDUCATION STANDARDS

(a) Applicability. Every member except those exempt under ~~rule 6-10.3(c)(4) and (5) shall~~subdivision (c) of this rule must comply and report compliance with the continuing legal education requirement. Members must apply for and receive approval by the bar of an exemption from compliance and reporting of continuing legal education under subdivisions (c)(1) through (c)(3) of this rule. Members described in subdivisions (c)(4) through (c)(6) of this rule are

automatically exempt from compliance and reporting of continuing legal education.

(b) Minimum Hourly Continuing Legal Education Requirements. Each member ~~shall~~must complete a minimum of ~~30~~33 credit hours of approved continuing legal education activity every 3 years. Five of the ~~30~~33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs and 3 of the 33 credit hours must be in approved technology programs~~. Courses offering credit in professionalism must be approved by the center for professionalism. These 5 hours~~, which are ~~to be~~ included in, ~~and~~ not in addition to, the regular ~~30-hour~~33 credit hour requirement. If a member completes more than ~~30~~33 credit hours during any reporting cycle, the excess credits cannot be carried over to the next reporting cycle.

(c) Exemptions. Eligibility for an exemption, in accordance with policies adopted under this rule, is available for~~;~~:

(1) – (4) [No Change]

(5) justices of the Supreme Court of Florida and judges of the district courts of appeal, circuit courts, and county courts, and ~~such~~ other judicial officers and employees as ~~may be~~ designated by the Supreme Court of Florida; and,

(6) [No Change].

(d) Course Approval. Course approval ~~shall be~~is set forth in policies adopted pursuant to this rule. Special policies ~~shall~~will be adopted for courses sponsored by governmental agencies for employee attorneys that ~~shall~~ exempt ~~such~~these courses from any course approval fee and may exempt ~~such~~these courses from other requirements as determined by the board of legal specialization and education.

(e) Accreditation of Hours. Accreditation standards ~~shall be~~are set forth in the policies adopted under this rule. ~~If a~~Any course ~~is~~ presented~~,~~ ~~or~~ sponsored ~~by~~ or ~~has received credit approval from~~approved for credit by an organized integrated or voluntary state bar ~~(whether integrated or voluntary), such course shall be~~is deemed an approved course for purposes of this rule if the course meets the criteria for accreditation established by policies adopted under this rule.

(f) Full-time Government Employees. Credit hours ~~shall~~will be given full-time government employees for courses presented by governmental agencies. Application for credit approval may be submitted by the full-time government attorney before or after attendance, without charge.

(g) Skills Training Preadmission. The board of legal specialization and education may approve for CLER credit a basic skills or entry level training program developed and presented by a governmental entity. ~~If approved, credit~~Credit earned through attendance at ~~such~~an approved course developed and presented by a governmental entity is applicable under subdivision (b) of this rule~~,~~ if taken within ~~8~~12 months prior to admission to The Florida Bar~~, shall be applicable under rule 6-10.3(b)~~.

Appendix 2

The Florida Bar
www.floridabar.org

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2
September 15, 2006

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC: 4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)
Opinions: 93-3, New York Opinion 749, New York Opinion 782
Case: *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005)
Misc: David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as "information describing the history, tracking, or management of an electronic document." *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at http://www.thesedonaconference.org. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed. Further references regarding metadata and eliminating metadata from documents may be found on Microsoft's user support websites at http://support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/. *See also*, Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001* http://techrepublic.com.com/5100-1035_11-5034376.html. The court's discussion of metadata in *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

(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.

The Comment to Rule 4-1.6 further provides:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

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.

The comment to rule 4-4.4 provides additional guidance:

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.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

(1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

(2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006. The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states, The New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously "mine" documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

(3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must "promptly notify the sender." *Id.*

The foregoing obligations may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

[Revised: 08-24-2011]

Appendix 3

The Florida Bar News

June 15, 2015

News HOME

Lawyers are responsible for stripping metadata from all e-filed documents

By Gary Blankenship
Senior Editor

You're representing a client in a divorce. As part of the routine process, the client emails you a required financial disclosure. It has bank account numbers, credit card numbers, the client's Social Security number, and other sensitive financial information.

You take the electronic document and in accordance with R. Jud. Admin. 2.420 and 2.425 you electronically edit it, removing account numbers and other information to protect the client. Then you send the financial disclosure through the statewide portal that handles electronic filing for the Florida court system, including, if necessary, the form in Rule 2.420 alerting the receiving clerk for any additional sensitive information that must be redacted from the public court file.

A short time later, your client's bank accounts are raided by thieves, his or her credit cards are used for a plethora of unauthorized purchases, and he or she is victimized by someone using the Social Security number. All because the fraudsters got the relevant information from a public document in the court file — the document you filed.

That's because a record of all the changes you made to the document, while invisible on the face of the document, were retained in its "metadata," or background information, which can be uncovered by any moderately knowledgeable computer user, who, because most Florida court records are going online over the summer, can be anywhere in the world.

Metadata is invisible information retained as a document is drafted, edited, and refined. It includes such helpful information as formatting standards for the document and bookmarks and it also includes every change made to the document and perhaps who made the change and when it was made.

The issue is more critical than ever for lawyers because clerks, who are not responsible for stripping metadata from a filed document, are making documents available online in accordance with Supreme Court requirements.

The problem is so serious that the Florida Courts Technology Commission, at its May 14 meeting, voted to recommend a metadata warning be posted on the court system's e-filing portal. And Florida's county clerks of court are so concerned that confidential information may wind up in the public record, either from metadata or lawyers inadvertently including it in a normal filing, they are asking lawyers to indemnify them for any information that accidentally makes into the public record (see story, here).

Since this involves rapidly changing technology that includes several moving parts — including the way clerks store electronic documents, the way lawyers prepare them, and even access for low- and moderate-income people — it's difficult to grasp the metadata problems. Lawyers may have an inadvertent protection because of the way some clerks store electronic documents, but that could change without notice and that protection could be gone.

There's even a tech irony: Many if not most lawyers are filing incorrectly formatted documents, which for the moment protects them from metadata difficulties.

Aside from the portal warning, the FCTC has already proposed that the technical requirement that the e-filing portal be able to strip metadata from filed documents be dropped from the Supreme Court's administrative order on electronic filing because it's technically unworkable.

That technical standard said the courts' e-filing system should ensure that "all metadata related to creator, editor and contributor must be stripped from the [electronically filed] document."

At the FCTC's ePortal Subcommittee meeting on May 13, FCTC Chair Judge Lisa Munyon noted that Supreme Court Justice Ricky Polston, who is the court's liaison to the commission, is worried about the metadata issue and whether lawyers fully understand the significance of the issue.

"Justice Polston was concerned about those who are not in the know about metadata that no one is going to protect you from yourself. No one is going to strip your metadata," she said.

Munyon added than many lawyers erroneously think that turning off the "Track Changes" function in their Word document processing program will solve the metadata problem.

The subcommittee recommended, and the full FCTC approved, recommending to the Florida Court E-Filing Authority, which manages the statewide e-filing portal, that it include a warning on the page where filers designate the type of document they are filing. That notice will read: "Warning: Removal of document metadata is the responsibility of the filer. Any document metadata remaining may become part of the public record."

The warning also will link to a portal authority YouTube training video that explains what metadata is and how to remove it from an electronic document before filing. That video is available on the video page under the FAQs tab on the portal, or at https://www.youtube.com/watch?v=3xPnLhdyuZQ

Second Circuit Judge George Reynolds, chair of the FCTC's e-Portal Subcommittee, gave one example of unintentional metadata. He said when many people need a new document they don't start from scratch but pull up an existing document with the correct formatting, delete the text, and begin writing. What they may not realize is if the metadata isn't removed, that entire original document can be seen by someone who knows how to access metadata, he said.

FCTC member John Stewart, a member of the Bar Board of Governors, gave another example. He noted lawyers frequently use forms for routine functions, such as interrogatories, stripping out unnecessary parts, and adding sections as needed. Without removing metadata, every change ever made to that form can be revealed, he said.

FCTC member Mary Cay Blanks, clerk for the Third District Court of Appeal, said that opinion drafts done in Word were routinely exchanged between judges and court staff and the court realized that historical information and changes had to be removed before the document was released.

"All kinds of information was in that document, who the judge was, who the secretary was; everything is in there," she said. "We realized we had to strip all of that information, which, now we do."

Blanks added that electronically converting a Word document to a PDF does not remove all of the metadata.

Commission members said lawyers are getting some metadata protection by the way some clerks are electronically storing e-filed documents. Those clerks are converting the received documents, which come in either as Word or PDF documents, in the TIFF format. That is basically an optical format, which means only the visible type is retained and all metadata is lost.

That format conversion is expected to change, however, and the FCTC, in another part of its meeting, discussed a uniform document style for storing electronic court records, which is expected to be some form of the widely used PDF.

Another accidental protection is when lawyers do not correctly format the documents they file, although they are accepted by the portal and clerks. Melvin Cox, who oversees the portal operations for the e-filing authority, noted that rules and technical standards required that all documents filed through the portal be in seachable Word or PDF formats. Only 37 percent of filers comply with that requirement, he said.

Instead, Cox said what most lawyers do is prepare the document in Word and then, apparently uncomfortable with the electronic signature encouraged by procedural rules, they print out the document so they can "wet sign" it in ink. Then they scan the finished document and convert it to a PDF before e-filing. However, he noted that PDF is an optical image and is not the text searchable PDF as required by rules. This procedure also creates a much larger data file resulting in storage capacity problems for clerks. It does, however, leave behind all metadata.

Several FCTC members said the key to fixing the filing and metadata problems is better education for lawyers. Stewart, who also chairs the Technology Committee of the Bar's Vision 2016 project, said that committee is proposing a 20 percent increase in CLE hours for lawyers, from 30 to 36 hours every three years, with all the extra training being devoted to technology issues. (See story on page 1.)

"Lawyers are notoriously behind the learning curve when it comes to technological competence," he said.

While the FCTC did approve the warning, member Kent Spuhler, director of Florida Legal Services, Inc., cautioned it could dissuade pro se users **from** using the e-filing portal. While relatively few pro se litigants now use the portal, he noted that current efforts to improve access to justice initiatives will include technology-assisted ways **for** low- and moderate-income families and individuals to handle their own legal matters when they cannot afford an attorney. That will, he said, necessarily involve filing through the portal.

Few pro se litigants, Spuhler said, will understand **metadata** and saying in the warning they have a "responsibility" **for metadata** may discourage them **from** pursuing a legal action.

"Something that is officially saying their access to court is contingent on something they will have no understanding of is a problem," Spuhler said. "We don't want to chill someone getting their issue before the court."

[Revised: 01-17-2017]

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Appendix 4

Public Notice

NEW DCA RULING: CLERK'S OFFICE NO LONGER TO ACCEPT PAPER FILINGS FROM ATTORNEYS

E-Filing Training Sessions

In preparation for paper filings no longer being accepted, attorneys and staff are invited to attend a free **E-Filing training session** at the Main Courthouse in downtown West Palm Beach.

Effective **Thursday, September 1, 2016**, the Clerk's office will no longer accept paper filings from **attorneys** pursuant to **United Bank v. Estate of Edward G. Frazee**, 4D15-826; 2016 Fla. App. LEXIS 10780 (Fla. 4th DCA 2016). In this case it was held that "since filing is only accomplished through electronic submission (in the absence of a Rule 2.525 exception), a document is not actually 'filed' when improperly submitted to the clerk in paper…" *id* at 6.

In 2013, E-filing of court documents became mandatory for attorneys. Beginning September 1, the Clerk's office will reject paper filings unless said meets one of the following criteria:

Florida Rules of Judicial Administration 2.525.(d)

(3) Filing by attorneys excused from email service in accordance with rule 2.516(b)

(4) Submitting evidentiary exhibits or filing non-documentary material

(5) Filing involves documents in excess of the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to Court. For such filings, documents may be transmitted using an electronic storage medium, which may include a CO-ROM, flash drive, or similar storage medium

(6) Filings made in open court, as permitted by the court

(7) If paper filing is permitted by any approved statewide or local ECF procedures

(8) If any court determines that justice so requires.

Documents which require the attorney to attach prepaid postage (Notice of Action)
Original documents (mortgages, notes, wills and death certificates)
Informations and indictments cannot be E-filed

For more information about E-Filing, visit **www.mypalmbeachclerk.com/efiling**.

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Florida Supreme Court Standards for Electronic Access to the Courts

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Adopted June 2009
Adopted modifications August 2016

Version 16.0

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1.0. PORTAL TECHNOLOGY STANDARDS

The Florida Court's E-Filing Portal ("Portal") is governed by the Florida Courts E-Filing Authority. The Portal provides a single statewide point of access for filing court records and interfaces with other existing statewide information systems.

2.0 PORTAL FUNCTIONALITY

2.1. E-Portal Minimal Functionality

1. Single statewide login.
2. Process for non-attorneys and for self-represented users to access the system.
3. Uniform authentication method.
4. Single point of access for filing and service.
5. Consolidated electronic notification.
6. Process for local validation.
7. Automated interface with other e-filing systems.
8. Utilize the current XML ECF Standards.
9. Accommodate bi-directional transmissions to and from courts.
10. Integrate with other established statewide systems.
11. Accept electronic forms of payment.
12. All court based e-filing processes will use Internet-based open standards.

3.0 ELECTRONIC TRANSMISSION AND FILING OF DOCUMENTS

With the establishment of the Florida Courts E-Filing Portal, the Florida Courts have a single state-wide e-filing system. On June 21, 2012, the Supreme Court issued opinions approving recommendations to require e-filing by attorneys and e-service, through a phased in implementation. The Portal is also being expanded to accept filings from non-attorneys.

3.1. E-Filing Standards

3.1.1. Size of Filing

A single submission, whether consisting of a single document or multiple documents, shall not exceed 50 megabytes (50 MB) in size.

3.1.2. Document Format

Any information that will become part of, or is related to, a court case file, and which is being transmitted electronically to the clerk of court must be described in a format that can be rendered with high fidelity to originals and is searchable, tagged and complies with accessibility requirements in Chapter 282.601-606.

Appellate Court document formats will be adopted to improve the readability of the document image, improve the redaction process by providing standard fonts and font sizes, and provide consistency of appearance for images. Appellate court standards include Times New Roman font size 14 or Courier New font size 12.

3.1.3. Document Rendering

The clerk shall be able to render document images in searchable PDF format for viewer interfaces where the judicial viewer does not already provide searchable documents.

3.1.4 Archiving

Electronic shall be archived in a manner that allows for presenting the information in the future without degradation, loss of content, or issues with software compatibility relative to the proper rendering of electronic documents.

3.1.5. File Name Standards

The following special characters are not allowed in a file name:

- Quotation mark (")
- Number sign (#)
- Percent (%)
- Ampersand (&)
- Asterisk (*)
- Colon (:)
- Angle brackets (less than, greater than) (< >)
- Question mark (?)
- Backslash (\)
- Slash (/)
- Braces (left and right) ({ })
- Pipe (|)
- Tilde (~)

File names may not end with any of the following strings:

- .files
- _files
- -Dateien
- _fichiers
- _bestanden
- _file
- _archivos
- -filer

- _tiedostot
- _pliki
- _soubory
- _elemei
- _ficheiros
- _arquivos
- _dosyalar
- _datoteke
- _fitxers
- _failid
- _fails
- _bylos
- _fajlovi
- _fitxategiak

In addition, file names cannot exceed 110 bytes in length, including spaces. Spaces must be counted as three (3) bytes each.

This required information will be submitted in a uniform e-filing envelope, in compliance with current rules of procedure. The Florida Courts Technology Commission (FCTC) has established, and shall update as necessary, the requirements for the e-filing envelopes for each division and court type. The e-filing envelope will be maintained on the e-filing system of each court. These requirements can be found at http://www.flcourts.org/resources-and-services/court-technology/efiling/.

The e-filing envelope shall be designed to collect the data elements in .XML format that support the filing, indexing, docketing, calendaring, accounting, reporting, document development, case management and other necessary functions of the court.

In an effort to reduce redundant data entry, emphasis is placed on providing the ability to extract text from the electronic submission. For this process, word processing, .PDF or .XML file formats created by text based processors are required. Facsimile transmissions will not be allowed because they do not allow for automatic extraction of data.

3.1.6. Time Stamp

Date and time stamp formats must include a single line detailing the name of the court or Portal and shall not include clerk seals. Date stamps must be 8 numerical digits separated by slashes with 2 digits for the month, 2 digits for the date, and 4 digits for the year. Time stamps must be formatted in 12 hour time frames with a.m. or p.m. included. The font size and type must comply with The Americans with Disabilities Act requirements.

The Portal's official file stamp date and time shall be affixed in the upper left hand corner. The Florida Supreme Court and District Courts of Appeal stamps shall be on the left margin readable horizontally. Any administrative agency stamp shall be in the right

margin and readable horizontally. The clerk's stamp for circuit and county courts shall be in the bottom of the document.

3.1.7. Electronic Notification of Receipt

All submissions must generate an acknowledgment message that is transmitted to the filer to indicate that the portal has received the document.

At a minimum the acknowledgment must include the date and time the submission was received which is the official filing date/time.

3.1.8. Security

The Portal shall provide initial screening and protection against unauthorized network intrusions, viruses, and attacks for all filings. The Portal shall be isolated from other court networks or applications. Software and security devices such as antivirus software, firewalls, access control lists, filters and monitoring software must be used by the Portal to provide this initial protection to court networks.

Computers that receive and accept filings from the Portal must be protected against unauthorized network intrusion, viruses, and attacks. These computers interface with the local CMS to accept e-filings. Software and security devices such as antivirus software, firewalls, access control lists, filters, and monitoring software must be used to protect the local court systems.

3.1.9. Filing Process and Payment

The Portal shall support both an interactive filing process and a batch (non-interactive) process. The Portal shall support electronic payment methods.

3.1.10. Transmission Envelope

Any electronic document or information submitted through the Portal with an initial filing or any subsequent case action must be transmitted using a data structure that provides universal access to the court file. A submission, whether consisting of a single document or multiple documents, shall not exceed 50 megabytes (50 MB) in size.

The Portal shall be capable of providing a validation of the submission to detect any discrepancies (e.g., incomplete data or unacceptable document type) or other problems (e.g., viruses) prior to being received by the Portal. Where possible, the filer will be notified immediately if the Portal detects discrepancies or other problems with the submission, based on technical issues. The validation rules will be specific to the type of submission (for example: new case initiation as opposed to filings in an existing case).

3.1.11. Court Control of Court Documents - Data Storage

The official copy of court data must be physically located in Florida and in the custody of the clerks of court. Copies of data may be stored within or outside the State of Florida for the purposes of disaster recovery of business continuity.

3.1.12. Requirements for Individual Filers

3.1.12.1 Embedded Hyperlink

Hyperlinks embedded within a filing should refer only to information within the same document, or to external documents or information sources that are reasonably believed to be trustworthy and stable over long periods of time. Hyperlinks should not be used to refer to external documents or information sources likely to change.

3.1.12.2 Exhibits

Each exhibit accompanying a document shall be separately attached and denominated with a title referencing the document to which it relates. Each exhibit shall conform to the filing size limitation in Section 3.1.1. To the extent an exhibit exceeds the size limitation each portion shall be separately described as being a portion of the whole exhibit (e.g., Exhibit A, Part 1 of 5, Part 2 of 5, etc.).

Each documentary exhibit marked for identification or admitted into evidence at trial shall be treated in accordance with Florida Rule of Judicial Administration 2.525(d)(4) or (6), and then converted by the clerk and stored electronically in accordance with rule 2.525(a).

3.1.12.3 Confidentiality and Sensitive Information

The Portal shall provide the following warning before documents are submitted through the Portal, "WARNING: As an attorney or self-represented filer, you are responsible to protect confidential information under Florida Rules of Judicial Administration 2.420 and 2.425. Before you file, please ensure that you have complied with these rules, including the need to complete a Notice of Confidential Information form or motion required under Rule 2.420 regarding confidential information. Your failure to comply with these rules may subject you to sanctions."

3.1.12.4 Emergency Filing

The Portal must provide a mechanism to indicate that a filing is an emergency.

3.1.13 Adding a Party

The Portal shall facilitate the addition of parties after the initial pleading is filed.

3.1.14. Docket Numbering

- At a minimum, the local clerk CMS would assign and store a sequence number for each docket entry that contains a document on each case. The sequence number would be unique only within each case. For example, each case will start with 1, 2, 3, etc. and increment by 1.
- The sequence number would be displayed on each document/docket display screen in the local clerk CMS and any associated access systems (websites, etc.)
- Each assigned document/docket sequence number would need to remain static for each case once assigned. If documents/dockets are inserted, then the sequence

numbers would not necessarily align with the dates for the documents/docket. As long as they are unique within each case this would be allowed.

- The sequence number may be implemented on a "go-forward" basis if necessary; sequence numbers are not required for historical documents/dockets.
- The sequence numbers are only assigned and stored in the local clerk CMS. The sequence numbers would not be included in the interface between the Portal and the local clerk CMS and would not be provided to the filer as part of the e-filing notification process.
- This requirement does not apply to legacy CMS applications which have a known end date.

3.2. TECHNICAL FAILURE

Leading paragraph was deleted at the FCTC October 17, 2013 meeting.

3.2.1. Determination of failure and effect on due date (this section was deleted at the FCTC October 17, 2013 meeting)

3.2.2. Procedure Where Notice of Electronic Filing Not Received (this section was deleted at the FCTC October 17, 2013 meeting)

3.2.3. Retransmission of Electronic Filing

If, within 24 hours after filing information electronically, the filer discovers that the version of the document available for viewing through the Electronic Case Filing System is incomplete, garbled or otherwise does not depict the document as transmitted, the filer shall notify the Clerk of Court immediately and retransmit the filing if necessary.

3.2.4. System Availability and Recovery Planning

Computer systems that are used for e-filings must protect electronically filed documents against system and security failures during periods of system availability. Additionally, contingencies for system failures and disaster recovery mechanisms must be established. Scheduled downtime for maintenance and updates should be planned, and a notification shall be provided to filers in advance of the outage. Planned outages shall occur outside normal business hours as determined by the Chief Judicial Administrative Officer of the Court. E-filing systems shall comply with the security and backup policies created by the Florida Courts Technology Commission.

Plan 1: Contingency Plan

Timeframe: Immediate - during normal working hours.

Scope: Localized system failures while court is still open and operational. This plan will also be put into operation while COOP and Disaster Plans are under way.

Operational Levels: Levels of operation will be temporarily limited and may be conducted in electronic or manual processes. Since court will still be open, this plan must address how documents will be received while the system is down.

Objectives:

- Allow the court to continue with minimum delays by providing a temporary alternate solution for access to court files.
- Conduct tests to verify the restoration process.
- Have local and local off site backup of the operating system, application software, and user data available for immediate recovery operations.
- Identify areas where redundancy is required to reduce downtime, and provide for hot standby equipment that can be utilized in the event the Contingency Plan is activated.

Plan 2: Business Continuity/Disaster Recovery

Timeframe: Disaster dependent, varies.

Scope: Declared disasters either local or regional that impact the geographic area.

Operational Levels: Temporarily unavailable or limited until facilities are deemed functional or alternate facilities can be established. Mission Essential Functions defined the Supreme Court's COOP for the affected area must be addressed in the designated priorities and timeframes.

Objectives:

- Allow court operations to recover in the existing location or alternate facility
- Provide cooperative efforts with impacted entities to establish access to court files and allow for the continuance of court proceedings
- Provide in the Contingency Plan a temporary method to meet or exceed Mission Essential Functions identified in the Supreme Court's COOP.
- Provide another tier level of recoverability by having a backup copy of the operating system, application software, and user data in a protected environment outside of the local area not subject to the same risks as the primary location for purposes of recovery according to standards approved by the FCTC.
- This plan may provide another out-of-state tier for data backup provided that the non-local in-state tier is established.

3.3. ADA AND TECHNOLOGY COMPLIANCE

All Court technology must comply with the Americans With Disabilities Act ("ADA").

3.4. ELECTRONIC PROCESSES - JUDICIAL

The integrity of and efficient delivery of information to the judiciary are primary goals. Any electronic processes that involve the judiciary must be approved by the judiciary prior to implementation.

3.4.1. Delivery of Electronic Case Files

An electronic case file being provided to the court should meet or exceed the capabilities and ease of use provided by a paper case file. Electronic documents shall be available to court officers and personnel in a manner that provides timely and easy access, and shall not have a negative operational impact on the court. The court shall have the opportunity to review and approve any changes to the current business process before the system may be implemented.

Any system that intends to deliver electronic files instead of paper files in part or in total that impacts the judiciary, that involves electronic workflow, functionality, and electronic document management service must be approved by the judiciary before the paper files may be discontinued. The Clerk of Court must be able to deliver paper case files upon request until the electronic case file delivery system is fully accepted by the judiciary. The electronic file created by the Clerk of Court shall be made available and delivered to the judiciary in a manner that provides improved workflow and document management service to the judiciary and court staff. At a minimum, the system must have search capability to find cases, have the ability to incorporate digital signatures, the ability to attach notes to cases, and be able to print specific portions or all pages of a document. The system must have logging capabilities for events such as failures, outages, correction of case file numbers, deletion of documents, and rejections due to incorrect filing or unusable documents due to poor quality images. Documents in an electronic file shall be available for viewing by the court immediately upon acceptance and validation by the clerk of court.

The court must validate that the electronic case file is accurate, reliable, timely, and provides needed reporting information, and is otherwise acceptable as part of its review and acceptance process.

3.5. ELECTRONIC SIGNATURES

3.5.1. Signatures of Registered Users

A submission by a registered user is not required to bear the electronic image of the handwritten signature or an encrypted signature of the filer. Electronic signatures may be used in place of a

handwritten signature unless otherwise prohibited by law. The information contained in the signature block shall meet the following required elements defined in Rule 2.515(a) and (b), Florida Rules of Judicial Administration. Electronic signature formats of s/, /s or /s/ are acceptable. Additional information is optional.

Attorney Example
s/ John Doe
Bar Number 12345
123 South Street
City, FL 12345
Telephone: (123) 123-4567

ProSe Example
s/ Jane Doe
123 North Street
City, FL 12345
Telephone: (123) 123-4567

3.5.2. Multiple Attorneys of Record Signatures

When a filing requires the signatures of two or more attorneys of record:

The filing attorney shall initially confirm that the content of the document is acceptable to all attorneys required to sign the document and shall obtain the signatures of all attorneys on the document. For this purpose, physical, facsimile, or electronic signatures are permitted.

The filing attorney then shall file the document electronically, indicating the signatories, (*e.g.*, "s/ Jane Doe," "/s John Smith," "/s/ Jane Doe Smith," etc.) for each attorney's signature.

3.5.3. Original Documents or Handwritten Signatures

Original documents, such as death certificates, or those that contain original signatures such as affidavits, deeds, mortgages and wills must be filed manually until further standards have been adopted.

3.5.4. Judge Signature

Judges are authorized to electronically sign all orders and judgments. If digitized signatures of judges are stored, they are to be placed at a minimum 256 bit encryption and protected by user authentication.

3.5.4.1. Security

An electronic signature of a judge shall be accompanied by a date, time stamp, and the case number. The date, time stamp, and case number shall appear as a watermark through the signature to prevent copying the signature to another document. The date, time stamp, and case number shall also appear below the signature and not be obscured by the signature. When possible or required, the case number should be included also.

Applications hat store digitized signatures must store signatures in compliance with FIPS 140-2.

3.5.4.2. Functionality

The ability to affix a judicial signature on documents must include functionality that would improve the process. This functionality at a minimum should include the following:

1. The ability to prioritize documents for signature.
2. Allow multiple documents to be reviewed and signed in a batch in addition to individually.
3. The judge must have the ability to review and edit, reject, sign and file documents.
4. Have a standard signature block size on the document.
5. Allow forwarding of queued documents to another judge for signature if the primary judge is unavailable.
6. After documents are signed or rejected, they should be removed from the queue.
7. Have the ability to electronically file the signed documents into the case management system to be electronically distributed to all appropriate parties.

3.5.5 Clerk Signature

Unless otherwise required by law, Clerks and Deputy Clerks are authorized to electronically sign any documents that require the signature of the clerk, subject to the same security requirements that apply to a judge signature under standard 3.5.4.1.

3.6 ELECTRONIC NOTARIZATION

Electronic notarization is authorized as provided in Florida Statute 117.021.

PART V. PRACTICE OF LAW

A. ATTORNEYS

RULE 2.505. ATTORNEYS

(a) Scope and Purpose. All persons in good standing as members of The Florida Bar shall be permitted to practice in Florida. Attorneys of other states who are not members of The Florida Bar in good standing shall not engage in the practice of law in Florida except to the extent permitted by rule 2.510.

(b) Persons Employed by the Court. Except as provided in this subdivision, no full-time employee of the court shall practice as an attorney in any court or before any agency of government while continuing in that position. Any attorney designated by the chief justice or chief judge may represent the court, any court employee in the employee's official capacity, or any judge in the judge's official capacity, in any proceeding in which the court, employee, or judge is an interested party. An attorney formerly employed by a court shall not represent anyone in connection with a matter in which the attorney participated personally and substantially while employed by the court, unless all parties to the proceeding consent after disclosure.

(c) Attorney Not to Be Surety. No attorneys or other officers of court shall enter themselves or be taken as bail or surety in any proceeding in court.

(d) Stipulations. No private agreement or consent between parties or their attorneys concerning the practice or procedure in an action shall be of any force unless the evidence of it is in writing, subscribed by the party or the party's attorney against whom it is alleged. Parol agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings, and agreements made at depositions that are incorporated in the transcript need not be signed when signing of the deposition is waived. This rule shall not apply to settlements or other substantive agreements.

(e) Appearance of Attorney. An attorney may appear in a proceeding in any of the following ways:

(1) By serving and filing, on behalf of a party, the party's first pleading or paper in the proceeding.

(2) By substitution of counsel, but only by order of court and with

written consent of the client, filed with the court. The court may condition substitution upon payment of, or security for, the substituted attorney's fees and expenses, or upon such other terms as may be just.

(3) By filing with the court and serving upon all parties a notice of appearance as counsel for a party that has already appeared in a proceeding pro se or as co-counsel for a party that has already appeared in a proceeding by non-withdrawing counsel.

(f) Termination of Appearance of Attorney. The appearance of an attorney for a party in a proceeding shall terminate only in one of the following ways:

(1) **Withdrawal of Attorney.** By order of court, where the proceeding is continuing, upon motion and hearing, on notice to all parties and the client, such motion setting forth the reasons for withdrawal and the client's last known address, telephone number, including area code, and email address.

(2) **Substitution of Attorney.** By order of court, under the procedure set forth in subdivision (e)(2) of this rule.

(3) **Termination of Proceeding.** Automatically, without order of court, upon the termination of a proceeding, whether by final order of dismissal, by final adjudication, or otherwise, and following the expiration of any applicable time for appeal, where no appeal is taken.

(4) **Filing of Notice of Completion.** For limited representation proceedings under Florida Family Law Rule of Procedure 12.040, automatically, by the filing of a notice of completion titled "Termination of Limited Appearance" pursuant to rule 12.040(c).

(g) Law Student Participation. Eligible law students shall be permitted to participate as provided under the conditions of chapter 11 of the Rules Regulating The Florida Bar as amended from time to time.

(h) Attorney as Agent of Client. In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client, and any notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client.

Court Commentary

1997 Amendment. Originally, the rule provided that the follow-up filing had to occur within ten days. In

the 1997 amendment to the rule, that requirement was modified to provide that the follow-up filing must occur "immediately" after a document is electronically filed. The "immediately thereafter" language is consistent with language used in the rules of procedure where, in a somewhat analogous situation, the filing of a document may occur after service. *See, e.g.*, Florida Rule of Civil Procedure 1.080(d) ("All original papers shall be filed with the court either before service or *immediately thereafter*.") (emphasis added). "Immediately thereafter" has been interpreted to mean "filed with reasonable promptness." *Miami Transit Co. v. Ford*, 155 So. 2d 360 (Fla. 1963).

The use of the words "other person" in this rule is not meant to allow a nonlawyer to sign and file pleadings or other papers on behalf of another. Such conduct would constitute the unauthorized practice of law.

2003 Amendment. Rule Regulating the Florida Bar 4-1.12(c), which addresses the imputed disqualification of a law firm, should be looked to in conjunction with the rule 2.060(b) [renumbered as 2.505(b) in 2006] restriction on representation by a former judicial staff attorney or law clerk.

RULE 2.525. ELECTRONIC FILING

(a) Definition. "Electronic transmission of documents" means the sending of information by electronic signals to, by or from a court or clerk, which when received can be transformed and stored or transmitted on paper, microfilm, magnetic storage device, optical imaging system, CD-ROM, flash drive, other electronic data storage system, server, case maintenance system ("CM"), electronic court filing ("ECF") system, statewide or local electronic portal ("e-portal"), or other electronic record keeping system authorized by the supreme court in a format sufficient to communicate the information on the original document in a readable format. Electronic transmission of documents includes electronic mail ("e-mail") and any internet-based transmission procedure, and may include procedures allowing for documents to be signed or verified by electronic means.

(b) Application. Only the electronic filing credentials of an attorney who has signed a document may be used to file that document by electronic transmission. Any court or clerk may accept the electronic transmission of documents for filing and may send documents by electronic transmission after the clerk, together with input from the chief judge of the circuit, has obtained approval of procedures, programs, and standards for electronic filing from the supreme court ("ECF Procedures"). All ECF Procedures must comply with the then-current e-filing standards, as promulgated by the supreme court in Administrative Order No. AOSC09-30, or subsequent administrative order.

(c) Documents Affected.

(1) All documents that are court records, as defined in rule 2.430(a)(1), must be filed by electronic transmission provided that:

(A) the clerk has the ability to accept and retain such documents;

(B) the clerk or the chief judge of the circuit has requested permission to accept documents filed by electronic transmission; and

(C) the supreme court has entered an order granting permission to the clerk to accept documents filed by electronic transmission.

(2) The official court file is a set of electronic documents stored in a computer system maintained by the clerk, together with any supplemental non-electronic documents and materials authorized by this rule. It consists of:

(A) Documents filed by electronic transmission under this rule;

(B) documents filed in paper form under subdivision (d) that have been converted to electronic form by the clerk;

(C) documents filed in paper form before the effective date of this rule that have been converted to electronic form by the clerk;

(D) documents filed in paper form before the effective date of this rule or under subdivision (d) , unless such documents are converted into electronic form by the clerk;

(E) electronic documents filed pursuant to subdivision (d)(5); and

(F) materials and documents filed pursuant to any rule, statute or court order that either cannot be converted into electronic form or are required to be maintained in paper form.

(3) The documents in the official court file are deemed originals for all purposes except as otherwise provided by statute or rule.

(4) Any document in paper form submitted under subdivision (d) is filed when it is received by the clerk or court and the clerk shall immediately thereafter convert any filed paper document to an electronic document. "Convert to an electronic document" means optically capturing an image of a paper document and using character recognition software to recover as much of the document's text as practicable and then indexing and storing the document in the official court file.

(5) Any storage medium submitted under subdivision (d)(5) is filed when received by the clerk or court and the clerk shall immediately thereafter transfer the electronic documents from the storage device to the official court file.

(6) If the filer of any paper document authorized under subdivision (d) provides a self-addressed, postage-paid envelope for return of the paper document after it is converted to electronic form by the clerk, the clerk shall place the paper document in the envelope and deposit it in the mail. Except when a paper document is required to be maintained, the clerk may recycle any filed paper document that is not to be returned to the filer.

(7) The clerk may convert any paper document filed before the

effective date of this rule to an electronic document. Unless the clerk is required to maintain the paper document, if the paper document has been converted to an electronic document by the clerk, the paper document is no longer part of the official court file and may be removed and recycled.

(d) Exceptions. Paper documents and other submissions may be manually submitted to the clerk or court:

(1) when the clerk does not have the ability to accept and retain documents by electronic filing or has not had ECF Procedures approved by the supreme court;

(2) for filing by any self-represented party or any self-represented nonparty unless specific ECF Procedures provide a means to file documents electronically. However, any self-represented nonparty that is a governmental or public agency and any other agency, partnership, corporation, or business entity acting on behalf of any governmental or public agency may file documents by electronic transmission if such entity has the capability of filing document electronically;

(3) for filing by attorneys excused from e-mail service in accordance with rule 2.516(b);

(4) when submitting evidentiary exhibits or filing non-documentary materials;

(5) when the filing involves documents in excess of the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court. For such filings, documents may be transmitted using an electronic storage medium that the clerk has the ability to accept, which may include a CD-ROM, flash drive, or similar storage medium;

(6) when filed in open court, as permitted by the court;

(7) when paper filing is permitted by any approved statewide or local ECF procedures; and

(8) if any court determines that justice so requires.

(e) Service.

(1) Electronic transmission may be used by a court or clerk for the

service of all orders of whatever nature, pursuant to rule 2.516(h), and for the service of any documents pursuant to any ECF Procedures, provided the clerk, together with input from the chief judge of the circuit, has obtained approval from the supreme court of ECF Procedures containing the specific procedures and program to be used in transmitting the orders and documents. All other requirements for the service of such orders must be met.

(2) Any document electronically transmitted to a court or clerk must also be served on all parties and interested persons in accordance with the applicable rules of court.

(f) Administration.

(1) Any clerk who, after obtaining supreme court approval, accepts for filing documents that have been electronically transmitted must:

(A) provide electronic or telephonic access to its equipment, whether through an e-portal or otherwise, during regular business hours, and all other times as practically feasible;

(B) accept electronic transmission of the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court; and

(C) accept filings in excess of the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court by electronic storage device or system, which may include a CD-ROM, flash drive, or similar storage system.

(2) All attorneys, parties, or other persons using this rule to file documents are required to make arrangements with the court or clerk for the payment of any charges authorized by general law or the supreme court before filing any document by electronic transmission.

(3) The filing date for an electronically transmitted document is the date and time that such filing is acknowledged by an electronic stamp or otherwise, pursuant to any procedure set forth in any ECF Procedures approved by the supreme court, or the date the last page of such filing is received by the court or clerk.

(4) Any court or clerk may extend the hours of access or increase the page or size limitations set forth in this subdivision.

(g) Accessibility. All documents transmitted in any electronic form under this rule must comply with the accessibility requirements of Florida Rule of Judicial Administration 2.526.

Court Commentary

1997 Amendment. Originally, the rule provided that the follow-up filing had to occur within ten days. In the 1997 amendment to the rule, that requirement was modified to provide that the follow-up filing must occur "immediately" after a document is electronically filed. The "immediately thereafter" language is consistent with language used in the rules of procedure where, in a somewhat analogous situation, the filing of a document may occur after service. *See, e.g.*, Florida Rule of Civil Procedure 1.080(d) ("All original papers shall be filed with the court either before service or *immediately thereafter*.") (emphasis added). "Immediately thereafter" has been interpreted to mean "filed with reasonable promptness." *Miami Transit Co. v. Ford*, 155 So.2d 360 (Fla.1963).

The use of the words "other person" in this rule is not meant to allow a nonlawyer to sign and file pleadings or other papers on behalf of another. Such conduct would constitute the unauthorized practice of law.

RULE 2.520. DOCUMENTS

(a) Electronic Filing Mandatory. All documents filed in any court shall be filed by electronic transmission in accordance with rule 2.525. "Documents" means pleadings, motions, petitions, memoranda, briefs, notices, exhibits, declarations, affidavits, orders, judgments, decrees, writs, opinions, and any paper or writing submitted to a court.

(b) Type and Size. Documents subject to the exceptions set forth in rule 2.525(d) shall be legibly typewritten or printed, on only one side of letter sized (81/2 by 11 inch) white recycled paper with one inch margins and consecutively numbered pages. For purposes of this rule, paper is recycled if it contains a minimum content of 50 percent waste paper. Reduction of legal-size (8 1/2 by 14 inches) documents to letter size (8 1/2 by 11 inches) is prohibited. All documents filed by electronic transmission shall comply with rule 2.526 and be filed in a format capable of being electronically searched and printed in a format consistent with the provisions of this rule.

(c) Exhibits. Any exhibit or attachment to any document may be filed in its original size.

(d) Recording Space and Space for Date and Time Stamps.

(1) On all documents prepared and filed by the court or by any party to a proceeding which are to be recorded in the public records of any county, including but not limited to final money judgments and notices of lis pendens, a 3-inch by 3-inch space at the top right-hand corner on the first page and a 1-inch by 3-inch space at the top right-hand corner on each subsequent page shall be left blank and reserved for use by the clerk of court.

(2) On all documents filed with the court, a 1-inch margin on all sides must be left blank for date and time stamps.

(A) Format. Date and time stamp formats must include a single line detailing the name of the court or Portal and shall not include clerk seals. Date stamps must be 8 numerical digits separated by slashes with 2 digits for the month, 2 digits for the date, and 4 digits for the year. Time stamps must be formatted in 12 hour time frames with a.m. or p.m. included. The font size and type must meet the Americans with Disabilities Act requirements.

(B) Location. The Portal stamp shall be on the top left of the

document. The Florida Supreme Court and district courts of appeal stamps shall be on the left margin horizontally. Any administrative agency stamp shall be on the right margin horizontally. The clerk's stamp for circuit and county courts shall be on the bottom of the document.

(C) Paper Filings. When a document is filed in paper as authorized by rule, the clerk may stamp the paper document in ink with the date and time of filing instead of, or in addition to, placing the electronic stamp as described in subdivision (B). The ink stamp on a paper document must be legible on the electronic version of the document, and must neither obscure the content or other date stamp, not occupy space otherwise reserved by subdivision (B).

(e) Exceptions to Recording Space. Any documents created by persons or entities over which the filing party has no control, including but not limited to wills, codicils, trusts, or other testamentary documents; documents prepared or executed by any public officer; documents prepared, executed, acknowledged, or proved outside of the State of Florida; or documents created by State or Federal government agencies, may be filed without the space required by this rule.

(f) Noncompliance. No clerk of court shall refuse to file any document because of noncompliance with this rule. However, upon request of the clerk of court, noncomplying documents shall be resubmitted in accordance with this rule.

Court Commentary

1989 Adoption. Rule 2.055 [renumbered as 2.520 in 2006] is new. This rule aligns Florida's court system with the federal court system and the court systems of the majority of our sister states by requiring in subdivision (a) that all pleadings, motions, petitions, briefs, notices, orders, judgments, decrees, opinions, or other papers filed with any Florida court be submitted on paper measuring 8 1/2 by 11 inches. Subdivision (e) provides a 1-year transition period from the effective date of January 1, 1990, to January 1, 1991, during which time filings that traditionally have been accepted on legal-size paper will be accepted on either legal- or letter-size paper. The 1-year transition period was provided to allow for the depletion of inventories of legal-size paper and forms. The 1-year transition period was not intended to affect compliance with Florida Rule of Appellate Procedure 9.210(a)(1), which requires that typewritten appellate briefs be filed on paper measuring 8 1/2 by 11 inches. Nor was it intended that the requirement of Florida Rule of Appellate Procedure 9.210(a)(1) that printed briefs measure 6 by 9 inches be affected by the requirements of subdivision (a).

Subdivision (b), which recognizes an exception for exhibits or attachments, is intended to apply to documents such as wills and traffic citations which traditionally have not been generated on letter-size paper.

Subdivision (c) was adopted to ensure that a 1 1/2 inch square at the top right-hand corner of all filings is reserved for use by the clerk of court. Subdivision (d) was adopted to ensure that all papers and documents submitted for filing will be considered filed on the date of submission regardless of paper size. Subdivision (d) also ensures that after the 1-year transition period of subdivision (e), filings that are not in compliance with the rule are resubmitted on paper measuring 8 1/2 by 11 inches.

This rule is not intended to apply to those instruments and documents presented to the clerk of the circuit court for recording in the Official Records under section 28.222, Florida Statutes (1987). It is also not intended to apply to matters submitted to the clerk of the circuit court in the capacity as ex officio clerk of the board of county commissioners pursuant to article VIII, section (1)(d), Florida Constitution.

1996 Amendment. Subdivision (c) was amended to make the blank space requirements for use by the clerk of the court consistent with section 695.26, Florida Statutes (1995). Subdivision (e) was eliminated because the transition period for letter-size and recycled paper was no longer necessary.

Appendix 9

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Douglas v. Zachry Industrial, Inc., M.D.Fla., November 5, 2015

140 So.3d 686
District Court of Appeal of Florida,
Fourth District.

Michael MATTE, Appellant,
v.
Stacey CAPLAN, Quepasa Corporation, and Meetme, Inc., Appellees.

No. 4D13–1903.
|
June 11, 2014.

Synopsis

Background: Movant filed motion for attorney fees as sanction against plaintiff for bringing an alleged frivolous tortious interference claim. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Janis Brustares Keyser, J., denied motion due to movant's failure to strictly comply with electronic service requirements with respect to his safe harbor notice to opposing counsel. Movant appealed.

Holding: The District Court of Appeal, Warner, J., held that strict compliance with e-mail service requirements was necessary to effectuate proper service of safe harbor sanctions notice against opposing counsel.

Affirmed.

West Headnotes (1)

[1] Attorney and Client
Liability for costs;sanctions

Movant's failure to strictly comply with e-mail service requirements with respect to his safe harbor notice to opposing counsel, having failed to include, in capital letters, "SERVICE OF COURT DOCUMENT" in the e-mail's subject line and to use the designated word processing software for his attached document, precluded movant from pursuing sanctions against opposing counsel for bringing an alleged frivolous tortious interference action against him. West's F.S.A. § 57.105; West's F.S.A. R.Jud.Admin.Rule 2.516.

3 Cases that cite this headnote

Attorneys and Law Firms

***687** Bryan J. Yarnell and Irwin R. Gilbert of Gilbert Yarnell, Palm Beach Gardens, for appellant.

Cathleen Scott and Lindsey Wagner of Cathleen Scott & Associates, P.A., Jupiter, for appellee Stacey Caplan.

Opinion

WARNER, J.

Believing that the complaint filed against him was improper, the appellant sought attorney's fees pursuant to section 57.105, Florida Statutes (2013). In accordance with the procedure set forth in section 57.105(4), appellant served a motion to dismiss on appellee/plaintiff's counsel twenty-one days prior to filing his motion to dismiss the complaint and motion for attorney's fees. Appellee did not dismiss the complaint until after that time. Nevertheless, at the hearing on the attorney's fees motion, appellee objected to the section 57.105 sanction, because appellant had failed to serve the motion in accordance with Florida Rule of Judicial Administration 2.516. The trial court denied the motion for fees. We agree that strict compliance with the rules is required and affirm.

Appellee filed a complaint against Quepasa Corporation, MeetMe, Inc., and appellant, in which she alleged appellant had tortiously interfered with an advantageous business relationship. Shortly after service of the complaint on appellant, on February 22, 2013, appellant's counsel e-mailed appellee's counsel a copy of a motion for sanctions under section 57.105, Florida Statutes. The subject line of the e-mail stated: "6277 Caplan, Stacey vs. Quepasa Corporation, Inc.: Defendants' Motion for 57.105 Sanctions.doc." The body of the e-mail stated: "See attached motion." Attached was a Word document entitled "Defendants' Motion for 57.105 Sanctions.doc."

Over twenty-one days later, appellant filed a motion to dismiss the complaint's claims against him. Two days later, he filed a motion for sanctions under section 57.105, Florida Statutes, against appellee and her counsel. The motion's certificate of service stated it had been served on appellee's counsel via e-mail on February 22, 2013. Appellee filed an amended complaint that removed appellant as a defendant. The court thereafter denied appellant's motion to dismiss as moot, but reserved jurisdiction to hear appellant's motion for sanctions. Appellee responded ***688** to the sanctions motion, arguing that the motion was never properly served on her.

At the hearing, appellee argued that the motion for sanctions was not enforceable because appellant's February 22nd e-mail did not comply with the requirements for service by e-mail in Florida Rule of Judicial Administration 2.516. Specifically, the e-mail did not: (1) provide a PDF of the motion or a link to the motion on a website maintained by the clerk; (2) contain, in the subject line in all capital letters, the words "SERVICE OF COURT DOCUMENT," followed by the case number; (3) contain, in the body of the e-mail, the case number, name of the initial party of each side, title of each document served with that e-mail, and the sender's name and telephone number. Appellee argued these defects were fatal, because section 57.105 is strictly construed as in derogation of the common law.

Appellant responded that only substantial compliance, rather than strict compliance, with Rule 2.516 was required. He argued that the strict interpretation of section 57.105 did not extend to Rule 2.516. At the hearing, appellee's counsel testified that she had received the e-mail and read the attached Word document. Because the service had resulted in actual notice, appellant argued it was sufficient under the rule.

The trial court restricted its consideration to this procedural issue and not the merits of the motion. It denied the motion, thus agreeing with appellee's argument that the failure to strictly observe the service rules precluded consideration of the motion. This appeal ensued.

Section 57.105, Florida Statutes (2013), allows an assessment of attorney's fees against an opposing party and opposing counsel who file frivolous claims. The statute contains a "safe harbor" provision to avoid sanctions: "A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." § 57.105(4), Fla. Stat. (2013); *see, e.g., Lago v. Kame By Design, LLC,* 120 So.3d 73, 75 (Fla. 4th DCA 2013) (referring to this subsection as the "safe harbor" provision).

With the advent of electronic filing and the use of e-mail for service, the Rules of Civil Procedure and Judicial Administration have been amended to provide the requirements for e-mail service, which is mandatory between attorneys. Florida Rule of Civil Procedure 1.080(a) provides, "Every pleading subsequent to the initial pleading ... and every other document filed in the action **must** be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516." (Emphasis added). Rule 2.516(b)(1) provides, "All documents required or permitted to be served on another party **must** be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides." (Emphasis added.) Rule 2.516(b)(1)(E) specifies the format for e-mail service:

> (E) Format of E-mail for Service. Service of a document by e-mail is made by an e-mail sent to all addresses designated by the attorney or party with either (a) a copy of the document in PDF format attached or (b) a link to the document on a website maintained by a clerk.
>
> (i) All documents served by e-mail **must** be sent by an e-mail message containing a subject line beginning with the words "SERVICE OF COURT DOCUMENT" in all capital letters, followed by the case number of the proceeding in which the documents are being served.
>
> ***689** (ii) The body of the e-mail **must** identify the court in which the proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that e-mail, and the name and telephone number of the person required to serve the document.
>
> (iii) Any document served by e-mail may be signed by any of the "/s/", "/s", or "s/" formats.
>
> (iv) Any e-mail which, together with its attached documents, exceeds five megabytes (5MB) in size,

> must be divided and sent as separate e-mails, no one of which may exceed 5MB in size and each of which must be sequentially numbered in the subject line.

(Emphasis added).

In the present case, it is undisputed that e-mail service of appellant's motion under section 57.105 did not strictly comply with Rule 2.516. Specifically: (1) the e-mail attached the motion in Word format instead of a PDF or link; (2) the subject line failed to state "SERVICE OF COURT DOCUMENT" and contained a number that does not correlate with the circuit court case number; and (3) the body of the e-mail failed to contain any of the required information listed in subsection (ii), but simply said, "See attached motion." Appellant nevertheless argues that service was sufficient under the safe harbor provision of section 57.105(4) because he "substantially complied" with the rule and this resulted in actual notice to appellee, based on testimony of appellee's counsel that she read the document.

As section 57.105 authorizes an award of attorney's fees in derogation of common law, it must be strictly construed. *See Montgomery v. Larmoyeux,* 14 So.3d 1067, 1072 (Fla. 4th DCA 2009). Thus, even where a letter contained all of the information required by section 57.105(4), including a demand for attorney's fees if the offending complaint was not withdrawn, the Third District held that this actual notice through a letter did not comport with the statutory requirement that a motion be served twenty-one days prior to it being filed with the court, reversing a section 57.105 award. *See Anchor Towing, Inc. v. Fla. Dep't of Transp.,* 10 So.3d 670, 672 (Fla. 3d DCA 2009). In finding section 57.105 should be strictly construed as in derogation of the common law, *Montgomery* cited cases construing proposals for settlement under Florida Rule of Civil Procedure 1.442, allowing for attorney's fees, which is also strictly construed and requires strict compliance with the provisions of the rule. *See Montgomery,* at 1072–73 (citing *Cano v. Hyundai Motor Am., Inc.,* 8 So.3d 408 (Fla. 4th DCA 2009) (holding that "[s]ection 768.79 and rule 1.442 are strictly construed because they are 'in derogation of the common law rule that each party pay their own fees' ") (quoting *Brower–Eger v. Noon,* 994 So.2d 1239, 1241 (Fla. 4th DCA 2008)).

Here, section 57.105 requires service of the motion on the plaintiff twenty-one days prior to filing with the court. "Service" is defined and regulated in Rule 2.516. The e-mail service requirements, which were implemented in 2012, use mandatory language stating that service "must" be made in the manner described. Fla. R. Jud. Admin. 2.516(b)(1)(E)(i)-(iv); *In re Amendments to Fla. Rules of Jud. Admin. et al.,* 102 So.3d 505, 515–17 (Fla.2012). The rule requires that the e-mail subject line contain the words SERVICE OF COURT DOCUMENT, all in capitals and followed by the case number. This is important, because anyone with an e-mail account knows that users frequently receive many e-mails about many different topics. The capitalized notification advising that the e-mail relates to a court document is critical to assure that the recipient opens the e- ***690** mail and reviews the document promptly. Further, while it may seem insubstantial that a Word version of the motion was attached rather than the PDF, a Word version is modifiable whereas the PDF is not. Sending a PDF avoids controversy regarding the content of the document. The PDF version of a document is what is required to be filed with the court.

Appellant argues that because the appellee had actual notice of the motion and its contents, he substantially complied with the statute. In *Anchor,* however, the letter received by the plaintiff put the plaintiff on actual notice of the issues and the fact that a motion would be filed seeking section 57.105 attorney's fees, yet the Third District still held that strict compliance with the statute was necessary. We conclude that actual notice does not allow a party to evade strict compliance with the rule.

Litigants should not be left guessing at what a court will deem is "substantial compliance" with the rules and statutes for the imposition of attorney's fees as a sanction. Just as is the case with Rule 1.442 regarding proposals for settlement, a bright line rule requiring service in conformity with the mandatory provisions of the rule provides certainty to both parties as to whether attorney's fees may be assessed if the court finds that the action or defense is frivolous. We hold that strict compliance with Florida Rule of Judicial Administration 2.516 regarding e-mail service of pleadings is required before a court may assess attorney's fees pursuant to section 57.105, Florida Statutes.

Affirmed.

LEVINE, J., and TUTER, JACK, Associate Judge, concur.

All Citations

140 So.3d 686, 39 Fla. L. Weekly D1237

RULE 2.516. SERVICE OF PLEADINGS AND DOCUMENTS

(a) Service; When Required. Unless the court otherwise orders, or a statute or supreme court administrative order specifies a different means of service, every pleading subsequent to the initial pleading and every other document filed in any court proceeding, except applications for witness subpoenas and documents served by formal notice or required to be served in the manner provided for service of formal notice, must be served in accordance with this rule on each party. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.

(b) Service; How Made. When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party is ordered by the court.

(1) Service by Electronic Mail ("e-mail"). All documents required or permitted to be served on another party must be served by e-mail, unless the parties otherwise stipulate or this rule otherwise provides. A filer of an electronic document has complied with this subdivision if the Florida Courts e-filing Portal ("Portal") or other authorized electronic filing system with a supreme court approved electronic service system ("e-Service system") served the document by e-mail or provided a link by e-mail to the document on a website maintained by a clerk ("e-Service"). The filer of an electronic document must verify that the Portal or other e-Service system uses the names and e-mail addresses provided by the parties pursuant to subdivision (b)(1)(A).

(A) Service on Attorneys. Upon appearing in a proceeding, an attorney must designate a primary e-mail address and may designate no more than two secondary e-mail addresses and is responsible for the accuracy of and changes to that attorney's own e-mail addresses maintained by the Portal or other e-Service system. Thereafter, service must be directed to all designated e-mail addresses in that proceeding. Every document filed or served by an attorney thereafter must include the primary e-mail address of that attorney and any secondary e-mail addresses. If an attorney does not designate any e-mail address

for service, documents may be served on that attorney at the e-mail address on record with The Florida Bar.

(B) Exception to E-mail Service on Attorneys. Upon motion by an attorney demonstrating that the attorney has no e-mail account and lacks access to the Internet at the attorney's office, the court may excuse the attorney from the requirements of e-mail service. Service on and by an attorney excused by the court from e-mail service must be by the means provided in subdivision (b)(2) of this rule.

(C) Service on and by Parties Not Represented by an Attorney. Any party not represented by an attorney may serve a designation of a primary e-mail address and also may designate no more than two secondary e-mail addresses to which service must be directed in that proceeding by the means provided in subdivision (b)(1) of this rule. If a party not represented by an attorney does not designate an e-mail address for service in a proceeding, service on and by that party must be by the means provided in subdivision (b)(2) of this rule.

(D) Time of Service. Service by e-mail is complete on the date it is sent.

(i) If, however, the e-mail is sent by the Portal or other e-Service system, service is complete on the date the served document is electronically filed.

(ii) If the person required to serve a document learns that the e-mail was not received by an intended recipient, the person must immediately resend the document to that intended recipient by e-mail, or by a means authorized by subdivision (b)(2) of this rule.

(iii) E-mail service, including e-Service, is treated as service by mail for the computation of time.

(E) Format of E-mail for Service. Service of a document by e-mail is made by an e-mail sent to all addresses designated by the attorney or party with either (a) a copy of the document in PDF format attached or (b) a link to the document on a website maintained by a clerk.

(i) All documents served by e-mail must be sent by an e-mail message containing a subject line beginning with the words "SERVICE OF

COURT DOCUMENT" in all capital letters, followed by the case number of the proceeding in which the documents are being served.

(ii) The body of the e-mail must identify the court in which the proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that e-mail, and the name and telephone number of the person required to serve the document.

(iii) Any document served by e-mail may be signed by any of the "/s/," "/s," or "s/" formats.

(iv) Any e-mail which, together with its attached documents, exceeds the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court, must be divided and sent as separate e-mails, no one of which may exceed the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court and each of which must be sequentially numbered in the subject line.

(2) Service by Other Means. In addition to, and not in lieu of, service by e-mail, service may also be made upon attorneys by any of the means specified in this subdivision. If a document is served by more than one method of service, the computation of time for any response to the served document shall be based on the method of service that provides the shortest response time. Service on and by all parties who are not represented by an attorney and who do not designate an e-mail address, and on and by all attorneys excused from e-mail service, must be made by delivering a copy of the document or by mailing it to the party or attorney at their last known address or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing. Delivery of a copy within this rule is complete upon:

(A) handing it to the attorney or to the party,

(B) leaving it at the attorney's or party's office with a clerk or other person in charge thereof,

(C) if there is no one in charge, leaving it in a conspicuous place therein,

(D) if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing such person of the contents, or

(E) transmitting it by facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted. When service is made by facsimile, a copy must also be served by any other method permitted by this rule. Facsimile service occurs when transmission is complete.

(F) Service by delivery shall be deemed complete on the date of delivery.

(c) Service; Numerous Defendants. In actions when the parties are unusually numerous, the court may regulate the service contemplated by these rules on motion or on its own initiative in such manner as may be found to be just and reasonable.

(d) Filing. All documents must be filed with the court either before service or immediately thereafter, unless otherwise provided for by general law or other rules. If the original of any bond or other document required to be an original is not placed in the court file or deposited with the clerk, a certified copy must be so placed by the clerk.

(e) Filing Defined. The filing of documents with the court as required by these rules must be made by filing them with the clerk in accordance with rule 2.525, except that the judge may permit documents to be filed with the judge, in which event the judge must note the filing date before him or her on the documents and transmit them to the clerk. The date of filing is that shown on the face of the document by the judge's notation or the clerk's time stamp, whichever is earlier.

(f) Certificate of Service. When any attorney certifies in substance:

"I certify that the foregoing document has been furnished to (here insert name or names, addresses used for service, and mailing addresses) by (e-mail) (delivery) (mail) (fax) on ..... (date) …..

_____

Attorney"

the certificate is taken as prima facie proof of such service in compliance with this rule.

(g) Service by Clerk. When the clerk is required to serve notices and other documents, the clerk may do so by e-mail as provided in subdivision (b)(1) or by any other method permitted under subdivision (b)(2). Service by a clerk is not required to be by e-mail.

(h) Service of Orders.

(1) A copy of all orders or judgments must be transmitted by the court or under its direction to all parties at the time of entry of the order or judgment. No service need be made on parties against whom a default has been entered except orders setting an action for trial and final judgments that must be prepared and served as provided in subdivision (h)(2). The court may require that orders or judgments be prepared by a party, may require the party to furnish the court with stamped, addressed envelopes for service of the order or judgment, and may require that proposed orders and judgments be furnished to all parties before entry by the court of the order or judgment. The court may serve any order or judgment by e-mail to all attorneys who have not been excused from e-mail service and to all parties not represented by an attorney who have designated an e-mail address for service.

(2) When a final judgment is entered against a party in default, the court must mail a conformed copy of it to the party. The party in whose favor the judgment is entered must furnish the court with a copy of the judgment, unless it is prepared by the court, with the address of the party to be served. If the address is unknown, the copy need not be furnished.

(3) This subdivision is directory and a failure to comply with it does not affect the order or judgment, its finality, or any proceedings arising in the action.

RULE 2.420. PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below.

(b) Definitions.

(1) "Records of the judicial branch" are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

(A) "court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and

(B) "administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.

(3) "Custodian." The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee.

(4) "Confidential," as applied to information contained within a record of the judicial branch, means that such information is exempt from the public right of access under article I, section 24(a) of the Florida Constitution and may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term "exempt" means that such information is confidential. Confidential information includes information that is confidential under this rule or under a court order entered pursuant to this rule. To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential.

(5) “Affected non-party” means any non-party identified by name in a court record that contains confidential information pertaining to that non-party.

(6) “Filer” means any person who files a document in court records, except “filer” does not include the clerk of court or designee of the clerk, a judge, magistrate, hearing officer, or designee of a judge, magistrate or hearing officer.

(c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:

(1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court’s judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;

(2) Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. The degree, duration, and manner of confidentiality imposed shall be no broader than necessary to protect the compelling governmental interest involved, and a finding shall be made that no less restrictive measures are available to protect this interest. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

(3) (A) Complaints alleging misconduct against judges until probable cause is established;

(B) Complaints alleging misconduct against other entities or individuals licensed or regulated by the courts, until a finding of probable cause or no probable cause is established, unless otherwise provided. Such finding should be made within the time limit set by law or rule. If no time limit is set, the finding should be made within a reasonable period of time;

(4) Periodic evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom;

(5) Only the names and qualifications of persons applying to serve or serving as unpaid volunteers to assist the court, at the court’s request and direction, shall be accessible to the public. All other information contained in the applications by and evaluations of persons applying to serve or serving as unpaid volunteers shall be confidential unless made public by court order based upon a showing of materiality in a pending court proceeding or upon a showing of good cause;

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

(ii) protect trade secrets;

(iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;

(v) avoid substantial injury to innocent third parties;

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A); and

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A).

(10) The names and any identifying information of judges mentioned in an advisory opinion of the Judicial Ethics Advisory Committee.

(d) Procedures for Determining Confidentiality of Court Records.

(1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential:

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule; and

(B) except as provided by court order, information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution as specifically stated in any of the following statutes or as they may be amended or renumbered:

(i) Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment. §§ 39.0132(3), 39.0132(4)(a), Fla. Stat.

(ii) Adoption records. § 63.162, Fla. Stat.

(iii) Social Security, bank account, charge, debit, and credit card numbers. § 119.0714(1)(i)–(j), (2)(a)-(e), Fla. Stat. (Unless redaction is requested pursuant to § 119.0714(2), Fla. Stat., this information is exempt only as of January 1, 2012.)

(iv) HIV test results and the identity of any person upon whom an HIV test has been performed. § 381.004(3)(e), Fla. Stat.

(v) Records, including test results, held by the Department of Health or its authorized representatives relating to sexually transmissible diseases. § 384.29, Fla. Stat.

(vi) Birth records and portions of death and fetal death records. §§ 382.008(6), 382.025(1), Fla. Stat.

(vii) Information that can be used to identify a minor petitioning for a waiver of parental notice when seeking to terminate pregnancy. § 390.01116, Fla. Stat.

(viii) Clinical records under the Baker Act. § 394.4615(7), Fla. Stat.

(ix) Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals. § 397.501(7), Fla. Stat.

(x) Clinical records of criminal defendants found incompetent to proceed or acquitted by reason of insanity. § 916.107(8), Fla. Stat.

(xi) Estate inventories and accountings. § 733.604(1), Fla. Stat.

(xii) The victim's address in a domestic violence action on petitioner's request. § 741.30(3)(b), Fla. Stat.

(xiii) Protected information regarding victims of child abuse or sexual offenses. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat.

(xiv) Gestational surrogacy records. § 742.16(9), Fla. Stat.

(xv) Guardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases. §§ 744.1076, 744.3701, Fla. Stat.

(xvi) Grand jury records. §§ 905.17, 905.28(1), Fla. Stat.

(xvii) Records acquired by courts and law enforcement regarding family services for children. § 984.06(3)-(4), Fla. Stat.

(xviii) Juvenile delinquency records. §§ 985.04(1), 985.045(2), Fla. Stat.

(xix) Records disclosing the identity of persons subject to tuberculosis proceedings and records held by the Department of Health or its authorized representatives relating to known or suspected cases of tuberculosis or exposure to tuberculosis. §§ 392.545, 392.65, Fla. Stat.

(xx) Complete presentence investigation reports. Fla. R. Crim. P. 3.712.

(2) The filer of any document containing confidential information described in subdivision (d)(1)(B) shall, at the time of filing, file with the clerk a "Notice of Confidential Information within Court Filing" in order to indicate that confidential information described in subdivision (d)(1)(B) of this rule is included within the document being filed and also indicate that either the entire document is confidential or identify the precise location of the confidential information within the document being filed. If an entire court file is maintained as confidential, the filer of a document in such a file is not required to file the notice form. A form Notice of Confidential Information within Court Filing accompanies this rule.

(1) If any document in a court file contains confidential information as described in subdivision (d)(1)(B), the filer, a party, or any affected non-party may file the Notice of Confidential Information within Court Filing if the document was not initially filed with a Notice of Confidential Information within Court Filing and the confidential information is not maintained as confidential by the clerk. The Notice of Confidential Information within Court Filing filed pursuant to this subdivision must also state the title and type of document, date of filing (if known), date of document, docket entry number, indicate that either the entire document is confidential or identify the precise location of the confidential information within the document, and provide any other information the clerk may require to locate the confidential information.

(2) The clerk of court shall review filings identified as containing confidential information to determine whether the purported confidential information is facially subject to confidentiality under subdivision (d)(1)(B). If the clerk determines that filed information is not subject to confidentiality under subdivision (d)(1)(B), the clerk shall notify the filer of the Notice of Confidential Information within Court Filing in writing within 5 days of filing the notice and thereafter shall maintain the information as confidential for 10 days from the date such

notification by the clerk is served. The information shall not be held as confidential for more than that 10 day period, unless a motion has been filed pursuant to subdivision (d)(3).

(3) The filer of a document with the court shall ascertain whether any information contained within the document may be confidential under subdivision (c) of this rule notwithstanding that such information is not itemized at subdivision (d)(1) of this rule. If the filer believes in good faith that information is confidential but is not described in subdivision (d)(1) of this rule, the filer shall request that the information be maintained as confidential by filing a "Motion to Determine Confidentiality of Court Records" under the procedures set forth in subdivision (e), (f), or (g), unless

(A) the filer is the only individual whose confidential information is included in the document to be filed or is the attorney representing all such individuals; and

(B) a knowing waiver of the confidential status of that information is intended by the filer. Any interested person may request that information within a court file be maintained as confidential by filing a motion as provided in subdivision (e), (f), or (g).

(4) If a notice of confidential information is filed pursuant to subdivision (d)(2), or a motion is filed pursuant to subdivision (e)(1) or (g)(1) seeking to determine that information contained in court records is confidential, or pursuant to subdivision (e)(5) or (g)(5) seeking to vacate an order that has determined that information in a court record is confidential or seeking to unseal information designated as confidential by the clerk of court, then the person filing the notice or motion shall give notice of such filing to any affected non-party. Notice pursuant to this provision must:

(A) be filed with the court;

(B) identify the case by docket number;

(C) describe the confidential information with as much specificity as possible without revealing the confidential information, including specifying the precise location of the information within the court record; and

(D) include:

(i) in the case of a motion to determine confidentiality of court records, a statement that if the motion is denied then the subject material will not be treated as confidential by the clerk; and

(ii) in the case of a motion to unseal confidential records or a motion to vacate an order deeming records confidential, a statement that if the motion is granted, the subject material will no longer be treated as confidential by the clerk.

Any notice described herein must be served pursuant to subdivision (k), if applicable, together with the motion that gave rise to the notice in accordance with subdivision (e)(5) or (g)(5).

(5) Except when the entire court file is maintained as confidential, if a judge, magistrate, or hearing officer files any document containing confidential information, the confidential information within the document must be identified as "confidential" and the title of the document must include the word "confidential." The clerk must maintain the confidentiality of the indentified confidential information. A copy of the document edited to omit the confidential information shall be provided to the clerk for filing and recording purposes.

(e) Request to Determine Confidentiality of Trial Court Records in Noncriminal Cases.

(1) A request to determine the confidentiality of trial court records in noncriminal cases under subdivision (c) must be made in the form of a written motion captioned "Motion to Determine Confidentiality of Court Records." A motion made under this subdivision must:

(A) identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information subject to the confidentiality determination;

(B) specify the bases for determining that such court records are confidential without revealing confidential information; and

(C) set forth the specific legal authority and any applicable legal standards for determining such court records to be confidential without revealing confidential information. Any written motion made under this subdivision must include a signed certification by the party or the attorney for the party making the request that the motion is made in good faith and is supported by a sound factual and legal basis. Information that is subject to such a motion must be treated as confidential by the clerk pending the court's ruling on the motion. A response to a written motion filed under this subdivision may be served within 10 days of service of the motion. Notwithstanding any of the foregoing, the court may not determine that the case number, docket number, or other number used by the clerk's office to identify the case file is confidential.

(2) Except when a motion filed under subdivision (e)(1) represents that all parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing before ruling on the motion. Whether or not any motion filed under subdivision (e)(1) is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c). Any person may request expedited consideration of and ruling on the motion. The movant shall be responsible for ensuring that a complete record of any hearing held pursuant to this subdivision is created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. The court may in its discretion require prior public notice of the hearing on such a motion in accordance with the procedure for providing public notice of court orders set forth in

subdivision (e)(4) or by providing such other public notice as the court deems appropriate. The court must issue a ruling on the motion within 30 days of the hearing.

(3) Any order granting in whole or in part a motion filed under subdivision (e) must state the following with as much specificity as possible without revealing the confidential information:

(A) The type of case in which the order is being entered;

(B) The particular grounds under subdivision (c) for determining the information is confidential;

(C) Whether any party's name determined to be confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;

(D) Whether the progress docket or similar records generated to document activity in the case are determined to be confidential;

(E) The particular information that is determined to be confidential;

(F) Identification of persons who are permitted to view the confidential information;

(G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth in subdivision (c); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c); and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (e)(4).

(4) Except as provided by law or court rule, notice must be given of any written order granting in whole or in part a motion made under subdivision (e)(1) as follows:

(A) within 10 days following the entry of the order, the clerk of court must post a copy of the order on the clerk's website and in a prominent public location in the courthouse; and

(B) the order must remain posted in both locations for no less than 30 days. This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (e) or requests that the court order the unsealing of records designated as confidential under subdivision (d), the request must be made by a written motion, filed in that court, that states with as much specificity as possible the bases for the motion. The motion must set forth the specific legal authority and any applicable legal standards supporting the motion. The movant must serve all parties and all affected non-parties with a copy of the motion. Except when a

motion filed under this subdivision represents that all parties and affected non-parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing on the motion. Regardless of whether any motion filed under this subdivision is agreed to by the parties and affected non-parties, the court may in its discretion hold a hearing on such motion. Any person may request expedited consideration of and ruling on the motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c). The court must issue a ruling on the motion within 30 days of the hearing. The movant shall be responsible for ensuring that a complete record of any hearing held under this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. This subdivision shall not apply to orders determining that court records are confidential under subdivision (c)(7) or (c)(8).

(f) Request to Determine Confidentiality of Court Records in Criminal Cases.

(1) Subdivisions (e) and (h) shall apply to any motion by the state, a defendant, or an affected non-party to determine the confidentiality of trial court records in criminal cases under subdivision (c), except as provided in subdivision (f)(3). As to any motion filed in the trial court under subdivision (f)(3), the following procedure shall apply:

(A) Unless the motion represents that the State, defendant(s), and all affected non-parties subject to the motion agree to all of the relief requested, the court must hold a hearing on the motion filed under this subdivision within 15 days of the filing of the motion. Any hearing held under this subdivision must be an open proceeding, except that any person may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A).

(B) The court shall issue a written ruling on a motion filed under this subdivision within 10 days of the hearing on a contested motion or within 10 days of the filing of an agreed motion.

(2) Subdivision (g) shall apply to any motion to determine the confidentiality of appellate court records under subdivision (c), except as provided in subdivision (f)(3). As to any motion filed in the appellate court under subdivision (f)(3), the following procedure shall apply:

(A) The motion may be made with respect to a record that was presented or presentable to a lower tribunal, but no determination concerning confidentiality was made by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(B) A response to a motion filed under this subdivision may be served within 10 days of service of the motion.

(C) The court shall issue a written ruling on a motion filed under this subdivision within 10 days of the filing of a response on a contested motion or within 10 days of the filing of an uncontested motion.

(3) Any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)(A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned "Motion to Determine Confidentiality of Court Records." Any motion made pursuant to this subdivision must be treated as confidential and indicated on the docket by generic title only, pending a ruling on the motion or further order of the court. As to any motion made under this subdivision, the following procedure shall apply:

(A) Information that is the subject of such motion must be treated as confidential by the clerk pending the court's ruling on the motion. Filings containing the information must be indicated on the docket in a manner that does not reveal the confidential nature of the information.

(B) The provisions of subdivisions (e)(3)(A)–(G), (g)(7), (h), and (j), shall apply to motions made under this subdivision. The provisions of subdivisions (e)(1), (e)(2), (e)(3)(H), (e)(4), and (e)(5) shall not apply to motions made under this subdivision.

(C) No order entered under this subdivision may authorize or approve the sealing of court records for any period longer than is necessary to achieve the objective of the motion, and in no event longer than 120 days. Extensions of an order issued hereunder may be granted for 60-day periods, but each such extension may be ordered only upon the filing of another motion in accordance with the procedures set forth under this subdivision. In the event of an appeal or review of a matter in which an order is entered under this subdivision, the lower tribunal shall retain jurisdiction to consider motions to extend orders issued hereunder during the course of the appeal or review proceeding.

(D) The clerk of the court shall not publish any order of the court issued hereunder in accordance with subdivision (e)(4) or (g)(4) unless directed by the court. The docket shall indicate only the entry of the order.

(4) This subdivision does not authorize the falsification of court records or progress dockets.

(g) Request to Determine Confidentiality of Appellate Court Records in Noncriminal Cases.

(1) Subdivision (e)(1) shall apply to any motion filed in the appellate court to determine the confidentiality of appellate court records in noncriminal cases under subdivision (c). Such a motion may be made with respect to a record that was presented or presentable to a lower tribunal, but no determination concerning confidentiality was made by the lower tribunal, or a record presented to an appellate court in an original proceeding.

(2) A response to a motion filed under subdivision (g)(1) may be served within 10 days of service of the motion. The court shall issue a written ruling on a written motion filed

under this subdivision within 30 days of the filing of a response on a contested motion or within 30 days of the filing of an uncontested written motion.

(3) Any order granting in whole or in part a motion filed under subdivision (g)(1) must be in compliance with the guidelines set forth in subdivisions (e)(3)(A)-(H). Any order requiring the sealing of an appellate court record operates to also make those same records confidential in the lower tribunal during the pendency of the appellate proceeding.

(4) Except as provided by law, within 10 days following the entry of an order granting a motion under subdivision (g)(1), the clerk of the appellate court must post a copy of the order on the clerk's website and must provide a copy of the order to the clerk of the lower tribunal, with directions that the clerk of the lower tribunal shall seal the records identified in the order. The order must remain posted by the clerk of the appellate court for no less than 30 days.

(5) If a nonparty requests that the court vacate all or part of an order issued under subdivision (g)(3), or requests that the court order the unsealing of records designated as confidential under subdivision (d), the request must be made by a written motion, filed in that court, that states with as much specificity as possible the bases for the request. The motion must set forth the specific legal authority and any applicable legal standards supporting the motion. The movant must serve all parties and all affected non-parties with a copy of the motion. A response to a motion may be served within 10 days of service of the motion.

(6) The party seeking to have an appellate record sealed under this subdivision has the responsibility to ensure that the clerk of the lower tribunal is alerted to the issuance of the order sealing the records and to ensure that the clerk takes appropriate steps to seal the records in the lower tribunal.

(7) Upon conclusion of the appellate proceeding, the lower tribunal may, upon appropriate motion showing changed circumstances, revisit the appellate court's order directing that the records be sealed.

(8) Records of a lower tribunal determined to be confidential by that tribunal must be treated as confidential during any review proceedings. In any case where information has been determined to be confidential under this rule, the clerk of the lower tribunal shall so indicate in the index transmitted to the appellate court. If the information was determined to be confidential in an order, the clerk's index must identify such order by date or docket number. This subdivision does not preclude review by an appellate court, under Florida Rule of Appellate Procedure 9.100(d), or affect the standard of review by an appellate court, of an order by a lower tribunal determining that a court record is confidential.

(h) Oral Motions to Determine Confidentiality of Trial Court Records.

(1) Notwithstanding the written notice requirements of subdivision (d)(2) and written motion requirements of subdivisions (d)(3), (e)(1), and (f), the movant may make an oral motion to determine the confidentiality of trial court records under subdivision (c), provided:

(A) except for oral motions under subdivision (f)(3), the oral motion otherwise complies with subdivision (e)(1);

(B) all parties and affected non-parties are present or properly noticed or the movant otherwise demonstrates reasonable efforts made to obtain the attendance or any absent party or affected non-party;

(C) the movant shows good cause why the movant was unable to timely comply with the written notice requirements as set forth in subdivision (d)(2) or the written motion requirement as set forth in subdivision (d)(3), (e)(1), or (f), as applicable;

(D) the oral motion is reduced to written form in compliance with subdivision (d), (e)(1), or (f), as applicable, and is filed within 5 days following the date of making the oral motion;

(E) except for oral motions under subdivisions (f)(3), the provisions of subdivision (e)(2) shall apply to the oral motion, procedure and hearing;

(F) the provisions of subdivision (f)(1)(A) and (B) and (f)(3) shall apply to any oral motion under subdivision (f)(3); and

(G) oral motions are not applicable to subdivision (f)(2) or (g) or extensions of orders under subdivision (f)(3)(C).

(2) The court may deny any oral motion made pursuant to subdivision (h)(1) if the court finds that that movant had the ability to timely comply with the written notice requirements in subdivision (d) or the written motion requirements of (d)(3), (e)(1), or (f), as applicable, or the movant failed to provide adequate notice to the parties and affected non-parties of the confidentiality issues to be presented to the court.

(3) Until the court renders a decision regarding the confidentiality issues raised in any oral motion, all references to purported confidential information as set forth in the oral motion shall occur in a manner that does not allow public access to such information.

(4) If the court grants in whole or in part any oral motion to determine confidentiality, the court shall issue a written order that does not reveal the confidential information and complies with the applicable subdivision of this rule as follows:

(A) For any oral motion under subdivision (e) or (f)(1), except subdivisions (f)(1)(A) and (B), the written order must be issued within 30 days of the hearing and must comply with subdivision (e)(3).

(B) For any oral motion under subdivision (f)(3), the written order must be issued within 10 days of the hearing on a contested motion or filing of an agreed motion and must comply with subdivision (f)(3).

(i) Sanctions. After notice and an opportunity to respond, and upon determining that a motion, filing, or other activity described below was not made in good faith and was not supported by a sound legal or factual basis, the court may impose sanctions against any party or non-party and/or their attorney, if that party or non-party and/or their attorney, in violation of the applicable provisions of this rule:

(1) seeks confidential status for non-confidential information by filing a notice under subdivision (d)(2);

(2) seeks confidential status for non-confidential information by making any oral or written motion under subdivision (d)(3), (e), (f), (g), or (h);

(3) seeks access to confidential information under subdivision (j) or otherwise;

(4) fails to file a Notice of Confidential Information within Court Filing in compliance with subdivision (d)(2);

(5) makes public or attempts to make public by motion or otherwise information that should be maintained as confidential under subdivision (c), (d), (e), (f), (g) or (h); or

(6) otherwise makes or attempts to make confidential information part of a non-confidential court record.

Nothing in this subdivision is intended to limit the authority of a court to enforce any court order entered pursuant to this rule.

(j) Procedure for Obtaining Access to Confidential Court Records.

(1) The clerk of the court must allow access to confidential court records to persons authorized by law, or any person authorized by court order.

(2) A court order allowing access to confidential court records may be obtained by filing a written motion which must:

(A) identify the particular court record(s) or a portion of the court record(s) to which the movant seeks to obtain access with as much specificity as possible without revealing the confidential information;

(B) specify the bases for obtaining access to such court records;

(C) set forth the specific legal authority for obtaining access to such court records; and

(D) contain a certification that the motion is made in good faith and is supported by a sound factual and legal basis.

(3) The movant must serve a copy of the written motion to obtain access to confidential court records on all parties and reasonably ascertainable affected non-parties and the court must hold a hearing on the written motion within a reasonable period of time.

(4) Any order granting access to confidential court records must:

(A) describe the confidential information with as much specificity as possible without revealing the confidential information, including specifying the precise location of the information within the court records;

(B) identify the persons who are permitted to view the confidential information in the court records;

(C) identify any person who is permitted to obtain copies of the confidential court records; and

(D) state the time limits imposed on such access, if any, and any other applicable terms or limitations to such access.

(5) The filer of confidential court records, that filer's attorney of record, or that filer's agent as authorized by that filer in writing may obtain access to such confidential records pursuant to this subdivision.

(6) Unless otherwise provided, an order granting access to confidential court records under this subdivision shall not alter the confidential status of the record.

(k) Procedure for Service on Victims and Affected Non-parties and When Addresses Are Confidential.

(1) In criminal cases, when the defendant is required to serve any notice or motion described in this rule on an alleged victim of a crime, service shall be on the state attorney, who shall send or forward the notice or motion to the alleged victim.

(2) Except as set forth in subdivision (k)(1), when serving any notice or motion described in this rule on any affected non-party whose name or address is not confidential, the filer or movant shall use reasonable efforts to locate the affected non-party and may serve such affected non-party by any method set forth in Florida Rule of Judicial Administration 2.516.

(3) Except as set forth in subdivision (k)(1), when serving any notice or motion described in this rule and the name or address of any party or affected non-party is confidential, the filer or movant must state prominently in the caption of the notice or motion "Confidential Party or Confidential Affected Non-Party — Court Service Requested." When a notice or motion so designated is filed, the court shall be responsible for providing a copy of the notice or motion to the party or affected non-party, by any method permitted in Florida Rule of Judicial Administration 2.516, in such a way as to not reveal the confidential information

(l) Denial of Access Request for Administrative Records. Expedited review of denials of access to administrative records of the judicial branch shall be provided through an action for mandamus or other appropriate relief, in the following manner:

(1) When a judge who has denied a request for access to records is the custodian, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access. Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs.

(m)Procedure for Public Access to Judicial Branch Records. Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) Requests for access to judicial branch records shall be in writing and shall be directed to the custodian. The request shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed.

(2) The custodian shall be solely responsible for providing access to the records of the custodian's entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure. The custodian shall determine the form in which the record is provided. If the request is denied, the custodian shall state in writing the basis for the denial.

(3) Fees for copies of records in all entities in the judicial branch of government, except for copies of court records, shall be the same as those provided in section 119.07, Florida Statutes.

Committee Note

1995 Amendment. This rule was adopted to conform to the 1992 addition of article I, section 24, to the Florida Constitution. Amendments to this rule were adopted in response to the 1994 recommendations of the Study Committee on Confidentiality of Records of the Judicial Branch.

Subdivision (b) has been added by amendment and provides a definition of "judicial records" that is consistent with the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. The word "exhibits" used in this definition of judicial records is intended to refer only to documentary evidence and does not refer to tangible items of evidence such as firearms, narcotics, etc. Judicial records within this definition include all judicial records and data regardless of the form in which they are kept. Reformatting of information may be necessary to protect copyrighted material. *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

The definition of "judicial records" also includes official business information transmitted via an electronic mail (e-mail) system. The judicial branch is presently experimenting with this new technology. For example, e-mail is currently being used by the judicial branch to transmit between judges and staff multiple matters in the courts including direct communications between judges and staff and other judges, proposed drafts of opinions and orders, memoranda concerning pending cases, proposed jury instructions, and even votes on proposed opinions. All of this type of information is exempt from public disclosure under rules 2.051(c)(1) and (c)(2) [renumbered as 2.420(c)(1) and (c)(2) in 2006]. With few exceptions, these examples of e mail transmissions are sent and received between

judicial officials and employees within a particular court's jurisdiction. This type of e-mail is by its very nature almost always exempt from public record disclosure pursuant to rule 2.051(c). In addition, official business e-mail transmissions sent to or received by judicial officials or employees using dial-in equipment, as well as the use of on-line outside research facilities such as Westlaw, would also be exempt e-mail under rule 2.051(c). On the other hand, we recognize that not all e-mail sent and received within a particular court's jurisdiction will fall into an exception under rule 2.051(c). The fact that a non-exempt e-mail message made or received in connection with official court business is transmitted intra-court does not relieve judicial officials or employees from the obligation of properly having a record made of such messages so they will be available to the public similar to any other written communications. It appears that official business e-mail that is sent or received by persons outside a particular court's jurisdiction is largely non-exempt and is subject to recording in some form as a public record. Each court should develop a means to properly make a record of non-exempt official business e-mail by either electronically storing the mail or by making a hard copy. It is important to note that, although official business communicated by e-mail transmissions is a matter of public record under the rule, the exemptions provided in rule 2.051(c) exempt many of these judge/staff transmissions from the public record. E-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record. Each court should also publish an e-mail address for public access. The individual e-mail addresses of judicial officials and staff are exempt under rule 2.051(c)(2) to protect the compelling interests of maintaining the uninterrupted use of the computer for research, word-processing, preparation of opinions, and communication during trials, and to ensure computer security.

Subdivision (c)(3) was amended by creating subparts (a) and (b) to distinguish between the provisions governing the confidentiality of complaints against judges and complaints against other individuals or entities licensed or regulated by the Supreme Court.

Subdivision (c)(5) was amended to make public the qualifications of persons applying to serve or serving the court as unpaid volunteers such as guardians ad litem, mediators, and arbitrators and to make public the applications and evaluations of such persons upon a showing of materiality in a pending court proceeding or upon a showing of good cause.

Subdivision (c)(9) has also been amended. Subdivision (c)(9) was adopted to incorporate the holdings of judicial decisions establishing that confidentiality may be required to protect the rights of defendants, litigants, or third parties; to further the administration of justice; or to otherwise promote a compelling governmental interest. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla.1982). Such confidentiality may be implemented by court rule, as well as by judicial decision, where necessary for the effective administration of justice. *See, e.g.*, Fla.R.Crim.P. 3.470, (Sealed Verdict); Fla.R.Crim.P. 3.712, (Presentence Investigation Reports); Fla.R.Civ.P. 1.280(c), (Protective Orders).

Subdivision (c)(9)(D) requires that, except where otherwise provided by law or rule of court, reasonable notice shall be given to the public of any order closing a court record. This subdivision is not applicable to court proceedings. Unlike the closure of court proceedings, which has been held to require notice and hearing prior to closure, *see Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla.1982), the closure of court records has not required prior notice. Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding. Providing reasonable notice to the public of the entry of a closure order and an opportunity to be heard on the closure issue adequately protects the competing interests of confidentiality and public access to judicial records. *See Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So.2d 462 (Fla. 1st DCA 1987), approved, *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla.1988); *State ex rel. Tallahassee Democrat v. Cooksey*, 371 So.2d 207 (Fla. 1st DCA 1979). Subdivision (c)(9)(D), however, does not preclude the giving of prior notice of closure of a court record, and the court may elect to give prior notice in appropriate cases.

2002 Court Commentary

The custodian is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request. Op. Atty. Gen. Fla. 80-57 (1980); *Wootton v. Cook*, 590 So.2d 1039 (Fla. 1st DCA 1991); *Seigle v. Barry*, 422 So.2d 63 (Fla. 4th DCA 1982).

The writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing.

It is anticipated that each judicial branch entity will have policies and procedures for responding to public records requests.

The 1995 commentary notes that the definition of "judicial records" added at that time is consistent with the definition of "court records" contained in rule 2.075(a)(1) [renumbered as 2.430(a)(1) in 2006] and the definition of "public records" contained in chapter 119, Florida Statutes. Despite the commentary, these definitions are not the same. The definitions added in 2002 are intended to clarify that records of the judicial branch include court records as defined in rule 2.075(a)(1) and administrative records. The definition of records of the judicial branch is consistent with the definition of "public records" in chapter 119, Florida Statutes.

2005 Court Commentary

Under courts' inherent authority, appellate courts may appoint a special magistrate to serve as commissioner for the court to make findings of fact and oversee discovery in review proceedings under subdivision (d) of this rule. Cf. *State ex rel. Davis v. City of Avon Park*, 158 So. 159 (Fla. 1934) (recognizing appellate courts' inherent authority to do all things reasonably necessary for administration of justice within the scope of courts' jurisdiction, including the appointment of a commissioner to make findings of fact); *Wessells v. State*, 737 So. 2d 1103 (Fla. 1st DCA 1998) (relinquishing jurisdiction to circuit court for appointment of a special master to serve as commissioner for court to make findings of fact).

2007 Court Commentary

New subdivision (d) applies only to motions that seek to make court records in noncriminal cases confidential in accordance with subdivision (c)(9).

2007 Committee Commentary

Subdivision (d)(2) is intended to permit a party to make use of any court-provided recording device or system that is available generally for litigants' use, but is not intended to require the court system to make such devices available where they are not already in use and is not intended to eliminate any cost for use of such system that is generally borne by a party requesting use of such system.

APPENDIX TO RULE 2.420

IN THE (NAME OF COURT)….., FLORIDA

CASE NO.: _____

_____
Plaintiff/Petitioner,

v.

_____
Defendant/Respondent. /

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), I hereby certify:

( )(1) I am filing herewith a document containing confidential information as described in Rule 2.420(d)(1)(B) and that:

(a) The title/type of document is _____, and :

(b)( ) the entire document is confidential, or

( ) the confidential information within the document is precisely located at : _____.

OR

( )(2) A document was previously filed in this case that contains confidential information as described in Rule 2.420(d)(1)(B), but a Notice of Confidential Information within Court Filing was not filed with the document and the confidential information was not maintained as confidential by the clerk of the court. I her[e]by notify the clerk that this confidential information is located as follows:

(a) Title/type of document: _____;
(b) Date of filing (if known): _____;
(c) Date of document: _____;
(d) Docket entry number: _____;
(e) ( ) Entire document is confidential, or
( ) Precise location of confidential information in document: _____
_____

_____
Filer's Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by (e-mail) (delivery) (mail) (fax) on: (All parties and Affected Non-Parties. Note: If the name or address of a Party or Affected Non-Party is confidential DO NOT include such information in this Certificate of Service. Instead, serve the State Attorney or request Court Service. See Rule 2.420(k)) _____, on _____ , 20 .

_____
Name ……..
Address ……..
Phone ……..
Florida Bar No. (if applicable)…….
E-mail address …….

Note: The clerk of court shall review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality under (d)(1)(B). The clerk shall notify the filer in writing within 5 days if the clerk determines that the information is NOT subject to confidentiality, and the records shall not be held as confidential for more than 10 days, unless a motion is filed pursuant to subdivision (d)(3) of the Rule. Fla. R Jud. Admin 2.420(d)(2).

Appendix 12

153 So.3d 896 (Mem)

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Florida.

In re AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.420.

No. SC14–569.
|
Dec. 18, 2014.

Original Proceedings—Florida Rules of Judicial Administration.

Attorneys and Law Firms

Murray Bruce Silverstein, Chair, Rules of Judicial Administration Committee, Greenberg Traurig, P.A., Tampa, FL; Judge Jon Berkley Morgan, Past Chair, Rules of Judicial Administration Committee, Kissimmee, FL; Judge Lisa T. Munyon, Chair, Florida Courts Technology Commission, Orlando, FL; Susan Dawson, Staff Liaison, Office of the States Court Administrator, Tallahassee, FL; John F. Harkness, Jr., Executive Director, and Krys Godwin, Bar Staff Liaison, The Florida Bar, Tallahassee, FL, for Petitioner.

Barbara Anne Petersen, President, First Amendment Foundation, Tallahassee, FL; Carol Jean LoCicero and Rachel Elise Fugate of Thomas & LoCicero PL, Tampa, FL and Dana Jane McElroy of Thomas & LoCicero PL, Fort Lauderdale, FL, on behalf of Florida Media Organizations, Responding with comments.

PER CURIAM.

The Court has for consideration amendments to Florida Rule of Judicial Administration 2.420 (Public Access to Judicial Branch Records) proposed by the Florida Courts Technology Commission (Commission or FCTC),[1] with input from The Florida Bar's Rules of Judicial Administration ***897** Committee (RJA Committee). The more significant amendments conform the rule with *In re Standards for Access to Electronic Court Records,* Fla. Admin. Order No. AOSC14–19 (amended May 23, 2014), which provides for access to electronic court records in accordance with the Standards for Access to Electronic Court Records and the Access Security Matrix adopted by the Court. We have jurisdiction[2] and amend rule 2.420 as proposed, with minor modifications. The amendments to rule 2.420 we adopt here are one of the final steps in the Court's ongoing effort to provide responsible public access to electronic court records.

BACKGROUND

For the past ten years, much effort has been put into developing the safeguards, policies, and infrastructure needed before the Court could authorize public access to nonconfidential electronic court records. First, in *In re Committee on Privacy and Court Records,* Fla. Admin. Order No. AOSC04–04 (Feb. 12, 2004), due to concerns about public access to sensitive and confidential information in court records, the Court imposed a limited moratorium on the release of court records in electronic form. The Court imposed the moratorium as a means to protect sensitive and confidential information from inappropriate or improper disclosure until sufficient safeguards could be established. That administrative order also established and charged the Committee on Privacy and Court Records (Privacy Committee) with recommending to the Court comprehensive policies and rules governing electronic access to court records, as well as the necessary safeguards to be put in place before the Court could authorize electronic access. *See* Fla. Admin. Order No. AOSC04–04 at 4–6. Then, in a series of administrative orders issued after the Privacy Committee made its recommendations, the Court modified the restrictions on the electronic release of court records by adopting and later revising the interim policy on electronic release of court records. *See In re Revised Interim Policy on Elec. Release of Court Records,* Fla. Admin. Order No. AOSC07–49 (Sept. 7, 2007) (approving revised interim policy governing electronic release of court records); *In re Interim Policy on Elec. Release of Court Records,* Fla. Admin. Order No. AOSC06–21 (June 30, 2006) (approving interim policy governing electronic release of court records); *In re Implementation of Report and Recommendations of the Comm. on Privacy and Court Records,* Fla. Admin. Order No. AOSC06–20 (June 30, 2006) (recognizing that a modified limited moratorium on the electronic release of court records must continue until permanent procedures are approved).

The amendments to rule 2.420 proposed by the Commission in this case further the judicial branch's goal of providing electronic access to nonconfidential court records when appropriate safeguards are in place.[3] The amendments implement Recommendation Twelve of the recommendations made by the Privacy Committee in its August 15, 2005, report. *See* Committee on Privacy and Court Records, *Privacy, Access and Court Records: the Report and Recommendations of the Committee on Privacy and Court Records* 58 (2005) (Privacy Committee Report). Privacy Committee Recommendation Twelve, which was approved by the Court along with ***898** most of the Privacy Committee's other recommendations,[4] urged the Court to revise rule 2.420 to "allow remote access to court records in electronic form to the general public in jurisdictions where [certain] conditions are met." Privacy Committee Report at 58. One of the conditions that had to be met before the rule could be amended was the development by the Commission, in cooperation with the clerks of court, of uniform technical and substantive standards governing the electronic release of court records, to be adopted by the Court. *See* Fla. Admin. Order No. AOSC06–20 at 10.

As part of this ongoing effort, the Court has adopted the necessary safeguards recommended by the Privacy Committee, including rule amendments that provide procedures to assist in the identification and protection of confidential information in court records[5] and rule amendments that reduce the amount of unnecessary sensitive information filed with the courts.[6] The Court also adopted standards and rules to implement e-filing in the trial and appellate courts through the Florida Courts e-Filing Portal (Portal),[7] e-mail service of pleadings and documents between parties,[8] and finally electronic service through the Portal,[9] moving the courts to an electronic, mostly paperless environment.

In Florida Administrative Order No. AOSC14–19, with the necessary prerequisites in place to allow public access to the electronic documents filed with the courts, the Court recently adopted the Standards ***899** for Access to Electronic Court Records and the Access Security Matrix (standards and access security matrix) to govern access to electronic court records. The standards and access security matrix "provide a carefully structured mechanism to facilitate appropriate, differentiated levels of access to court records to members of the general public and user groups with specialized credentials, and judges and court and clerk's office staff, based upon governing statutes and court rules." Fla. Admin. Order No. AOSC14–19 at 4.[10]

Consistent with Administrative Order No. AOSC14–19, the Commission proposes amending rule 2.420 to provide that access to electronic and other court records shall be governed by the standards and access security matrix adopted in that administrative order and remote access to electronic court records shall be permitted in counties where the conditions for the electronic release of such records are met. The Commission also proposes other minor changes to the rule that were suggested by the RJA Committee.

The RJA Committee voted 18–2 in favor of the proposed rule amendments, as filed with the Court. The Florida Bar Board of Governors approved the proposals by vote of 21–15. The Court published the proposed amendments for comment and three comments were filed. The RJA Committee filed a comment supporting the proposals. Various broadcast and print media entities (Media) and the First Amendment Foundation (Foundation) filed comments raising concerns about the implementation of electronic access to court records. The Commission filed a response pointing out that the issues raised in those comments are beyond the scope of the straightforward proposals at issue here, which simply conform the rule to the administrative order,[11] and urging the Court to amend rule 2.420 as proposed.

After considering the proposed amendments and comments filed, we adopt the Commission's proposals, with minor modifications explained below.

AMENDMENTS

First and most significantly, we amend subdivision (a) (Scope and Purpose) of rule 2.420, as proposed, to require that "[a]ccess to all electronic and other court records shall be governed by the Standards for Access to Electronic Court Records and Access Security Matrix, as adopted by the supreme court in Administrative Order AOSC14–19 or the then-current Standards for Access." As amended, subdivision (a) also provides that "[r]emote access to electronic court records shall be permitted in counties

where the supreme court's conditions for release of such records are met."

Because the focus of rule 2.420 is public access to judicial branch records, we modify the Commission's proposed amendment to the title of rule 2.420, so the title will now read "Public Access to and *Protection of* Judicial Branch Records." We also modify the proposed amendment to the first sentence of subdivision (a), consistent ***900** with the amendment to the title, to provide that rule 2.420 "shall govern public access to and *the protection of* the records of the judicial branch of government."

Finally, at the suggestion of the RJA Committee, subdivision (b)(3) (Definitions; Custodian) is reworded slightly to clarify the definition of "Custodian," and a typographical error is corrected in the "notice of confidential information within court filing" form.

We take this opportunity to thank the Commission for its invaluable assistance in achieving the important, long-standing goal of providing the public with access to nonconfidential electronic court records.

Accordingly, we amend Florida Rule of Judicial Administration 2.420 as reflected in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective immediately upon the release of this opinion.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

APPENDIX

RULE 2.420. PUBLIC ACCESS TO AND PROTECTION OF JUDICIAL BRANCH RECORDS

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to and the protection ofthe records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below. Access to all electronic and other court records shall be governed by the Standards for Access to Electronic Court Records and Access Security Matrix, as adopted by the supreme court in Administrative Order AOSC14–19 or the then-current Standards for Access. Remote access to electronic court records shall be permitted in counties where the supreme court's conditions for release of such records are met.

(b) Definitions.

(1)–(2) [No Change]

(3) "Custodian." The custodian of all administrative records of any court is the chief justice or chief judge of that court, except that each judge is the custodian of all records that are solely within the possession and control of that judge. As to all other records, the custodian is the official charged with the responsibility ~~of maintaining the office having~~ for the care, safekeeping, and supervision of such records. All references to "custodian" mean the custodian or the custodian's designee.

(4)–(6) [No Change]

(**c**)–(**m**) [No Change]

Committee Note

[No Change]

2002 Court Commentary

[No Change]

2005 Court Commentary

[No Change]

2007 Court Commentary

[No Change]

2007 Committee Commentary

[No Change]

IN THE. .....(NAME OF COURT)....,

FLORIDA

CASE NO.: _____

***901** _____

Plaintiff/Petitioner,

v.

_____

Defendant/Respondent.

_____/

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), I hereby certify:

( )(1) I am filing herewith a document containing confidential information as described in Rule 2.420(d)(1)(B) and that:

(a) The title/type of document is _____,

and:
(b)( ) the entire document is confidential, or

( ) the confidential information within the document is precisely located at:

_____.

OR
( )(2) A document was previously filed in this case that contains confidential information as described in Rule 2.420(d)(1)(B), but a Notice of Confidential Information within Court Filing was not filed with the document and the confidential information was not maintained as confidential by the clerk of the court. I ~~herby~~ hereby notify the clerk that this confidential information is located as follows:

(a) Title/type of document:_____;

(b) Date of filing (if known):_____;

(c) Date of document:_____;

(d) Docket entry number:_____;

(e) ( ) Entire document is confidential, or
( ) Precise location of confidential information in document: _____.

_____

Filer's Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by (e-mail) (delivery) (mail) (fax) on: (All parties and Affected Non–Parties. Note: If the name or address of a Party or Affected Non–Party is confidential DO NOT include such information in this Certificate of Service. Instead, serve the State Attorney or request Court Service. See Rule 2.420(k)) _____, on _____, 20____.

Name .....

Address .....

Phone .....

Florida Bar No. (if applicable).....

E-mail address .....

All Citations

153 So.3d 896 (Mem), 39 Fla. L. Weekly S772

Footnotes

1 *See* Fla. R. Jud. Admin. 2.236(b)(13) (charging Commission with responsibility to "recommend ... rule changes or additions relating to court technology and the receipt, maintenance, management, use, securing, and distribution of court records by electronic means").

2 *See* art. V, § 2(a), Fla. Const.

3 *See* Fla. Admin. Order No. AOSC06–20 at 1 (recognizing that providing electronic access to nonconfidential court records when appropriate conditions are met is a goal of the judicial branch).

4 *See* Fla. Admin. Order No. AOSC06–20.

5 The Court amended rule 2.420 to require filers to identify confidential information in their pleadings, and to narrow the scope of statutory exemptions applicable to court records to a list of twenty exemptions that the clerk of court must automatically treat as confidential. *See In re Amends. to Fla. Rule of Jud. Admin. 2.420,* 124 So.3d 819 (Fla.2013) (clarifying and refining rule 2.420 procedures); *In re Amends. to Fla. Rule of Jud. Admin. 2.420,* 68 So.3d 228 (Fla.2011) (adding twentieth category of automatically confidential information); *In re Amends. to Fla. Rule of Jud. Admin. 2.420 & Fla. Rules of App. Pro.,* 31 So.3d 756 (Fla.2010) (recognizing that refinement of rule governing confidential court records was a necessary step in providing the public electronic access to court records).

6 The Court adopted rule 2.425 to minimize the presence of sensitive information in court records. *See In re Implementation of Comm. on Privacy & Court Records Recommendations–Amends. to Fla. Rules of Civ. Pro., Fla. Rules of Jud. Admin.; Fla. Rules of Crim. Pro.; Fla. Probate Rules; Fla. Small Claims Rules; Fla. Rules of App. Pro., & Fla. Fam. Law Rules of Pro.,* 78 So.3d 1045 (Fla.2011) (recognizing that reducing the amount of extraneous personal information in court records is another necessary step in the Court's ongoing effort to provide the public with electronic access to nonconfidential court records).

7 *See In re Amends. to Fla. Rules of Civ. Pro., Fla. Rules of Jud. Admin., Fla. Rules of Crim. Pro., Fla. Probate Rules, Fla. Small Claims Rules, Fla. Rules of Juv. Pro., Fla. Rules of App. Pro., & Fla. Family Law Rules of Pro.–Elec. Filing,* 102 So.3d 451 (Fla.2012) (adopting rules to provide for mandatory electronic filing of documents through the Portal); *In re Statewide Standards for Elec. Access to the Courts,* Fla. Admin. Order No. AOSC09–30 (July 1, 2009) (updating standards for electronic filing).

8 *See In re Amends. to Fla. Rule of Jud. Admin. 2.516,* 112 So.3d 1173 (Fla.2013) (amending e-mail service rule); *In re Amends. to Fla. Rules of Jud. Admin., Fla. Rules of Civ. Pro., Fla. Rules of Crim. Pro., Fla. Probate Rules, Fla. Rules of Traffic Court, Fla. Small Claims Rules, Fla. Rules of Juv. Pro., Fla. Rules of App. Pro., & Fla. Family Law Rules of Pro.–E–Mail Service Rule,* 102 So.3d 505 (Fla.2012) (adopting e-mail service rule).

9 *See In re Amends. to Fla. Rules of Jud. Admin.,* 126 So.3d 222 (Fla.2013) (amending rules to provide for electronic service through the Portal).

10 In Florida Administrative Order No. AOSC14–19 at 5, the Court also approved a statewide certification process to assess compliance with the standards and access security matrix. Under the certification process, each clerk will participate in a ninety-day pilot program to demonstrate compliance with the standards and matrix and will request approval by the FCTC and the Court to provide online access to electronic court records.

11 Because the concerns raised in the Media's and the Foundation's comments are not a proper subject for this rules proceeding, those comments are not addressed in this opinion. However, the Court is referring those comments to the FCTC for consideration and recommendation.

FLORIDA RULES OF JUDICIAL ADMINISTRATION

RULE 2.425 MINIMIZATION OF THE FILING OF SENSITIVE INFORMATION

(a) Limitations for Court Filings. Unless authorized by subdivision (b), statute, another rule of court, or the court orders otherwise, designated sensitive information filed with the court must be limited to the following format:
(1) The initials of a person known to be a minor;

(2) The year of birth of a person's birth date;

(3) No portion of any
(A)) social security number,
(B) bank account number,
(C) credit card account number,
(D)) charge account number, or
(E)) debit account number;

(4) The last four digits of any
(A)) taxpayer identification number (TIN),
(B) employee identification number,
(C) driver's license number,
(D)) passport number,
(E)) telephone number,
(F) financial account number, except as set forth in subdivision (a)(3), 39
(G)) brokerage account number,
(H)) insurance policy account number,
(I) loan account number,
(J) customer account number, or
(K)) patient or health care number;

(5)) A truncated version of any
(A) email address,
(B) computer user name,
(C) password, or
(D)) personal identification number (PIN); and

(6)) A truncated version of any other sensitive information as provided by court order.

(b) Exceptions. Subdivision (a) does not apply to the following:

(1) An account number which identifies the property alleged to be the subject of a proceeding;

(2) The record of an administrative or agency proceeding;

(3) The record in appellate or review proceedings;

(4) The birth date of a minor whenever the birth date is necessary for the court to establish or maintain subject matter jurisdiction;

(5) The name of a minor in any order relating to parental responsibility, time-sharing, or child support;

(6) The name of a minor in any document or order affecting the minor's ownership of real property; 40

(7) The birth date of a party in a writ of attachment or notice to payor;

(8) Traffic and criminal proceedings;

(9) Information used by the clerk for case maintenance purposes or the courts for case management purposes; and

(10) formation which is relevant and material to an issue before the court.

(c) Remedies. Upon motion by a party or interested person or sua sponte by the court, the court may order remedies, sanctions or both for a violation of subdivision (a). Following notice and an opportunity to respond, the court may impose sanctions if such filing was not made in good faith.

(d) Motions Not Restricted. This rule does not restrict a party's right to move for protective order, to move to file documents under seal, or to request a determination of the confidentiality of records.

(e) Application. This rule does not affect the application of constitutional provisions, statutes, or rules of court regarding confidential information or access to public information.

3. Document Review

AI or lawyer
Document automation
AI for lawyers

Not just for lawyers
RPPTL lawyers
Coming to you soon

The New York Times | https://nyti.ms/2nbhsoE

TECHNOLOGY

A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.

By STEVE LOHR MARCH 19, 2017

Impressive advances in artificial intelligence technology tailored for legal work have led some lawyers to worry that their profession may be Silicon Valley's next victim.

But recent research and even the people working on the software meant to automate legal work say the adoption of A.I. in law firms will be a slow, task-by-task process. In other words, like it or not, a robot is not about to replace your lawyer. At least, not anytime soon.

"There is this popular view that if you can automate one piece of the work, the rest of the job is toast," said Frank Levy, a labor economist at the Massachusetts Institute of Technology. "That's just not true, or only rarely the case."

An artificial intelligence technique called natural language processing has proved useful in scanning and predicting what documents will be relevant to a case, for example. Yet other lawyers' tasks, like advising clients, writing legal briefs, negotiating and appearing in court, seem beyond the reach of computerization, for a while.

"Where the technology is going to be in three to five years is the really interesting question," said Ben Allgrove, a partner at Baker McKenzie, a firm with 4,600 lawyers. "And the honest answer is we don't know."

Dana Remus, a professor at the University of North Carolina School of Law, and Mr. Levy studied the automation threat to the work of lawyers at large law firms.

Their paper concluded that putting all new legal technology in place immediately would result in an estimated 13 percent decline in lawyers' hours.

A more realistic adoption rate would cut hours worked by lawyers by 2.5 percent annually over five years, the paper said. The research also suggests that basic document review has already been outsourced or [illegible]e law firms, with only 4 percent of lawyers' time now spent on that task.

Their gradualist conclusion is echoed in broader research on jobs and technology. In January, the McKinsey Global Institute found that while nearly half of all tasks could be automated with current technology, only 5 percent of jobs could be entirely automated. Applying its definition of current technology — widely available or at least being tested in a lab — McKinsey estimates that 23 percent of a lawyer's job can be automated.

Technology will unbundle aspects of legal work over the next decade or two rather than the next year or two, legal experts say. Highly paid lawyers will spend their time on work on the upper rungs of the legal task ladder. Other legal services will be performed by nonlawyers — the legal equivalent of nurse practitioners — or by technology.

Corporate clients often are no longer willing to pay high hourly rates to law firms for junior lawyers to do routine work. Those tasks are already being automated and outsourced, both by the firms themselves and by outside suppliers like Axiom, Thomson Reuters, Elevate and the Big Four accounting firms.

So the law firm partner of the future will be the leader of a team, "and more than one of the players will be a machine," said Michael Mills, a lawyer and chief strategy officer of a legal technology start-up called Neota Logic.

Surprising Spread

The pace of technology improvement is notoriously unpredictable. For years, labor economists said routine work like a factory job could be reduced to a set of rules that could be computerized. They assumed that professionals, like lawyers, were safe because their work was wrapped in language.

But advances in artificial intelligence overturned that assumption. Technology unlocked the routine task of sifting through documents, looking for relevant passages.

So major law firms, sensing the long-term risk, are undertaking initiatives to understand the emerging technology and adapt and exploit it.

Dentons, a global law firm with more than 7,000 lawyers, established an innovation and venture arm, Nextlaw Labs, in 2015. Besides monitoring the latest technology, the unit has invested in seven legal technology start-ups.

"Our industry is being disrupted, and we should do some of that ourselves, not just be a victim of it," John Fernandez, chief innovation officer of Dentons, said.

Last month, Baker McKenzie set up an innovation committee of senior partners to track emerging legal technology and set strategy. Artificial intelligence has stirred great interest, but law firms today are using it mainly in "search-and-find type tasks" in electronic discovery, due diligence and contract review, Mr. Allgrove said.

More than 280 legal technology start-ups have raised $757 million since 2012, according to the research firm CB Insights.

At many of these start-ups, the progress is encouraging but measured, and each has typically focused on a specific area of law, like bankruptcy or patents, or on a certain legal task, like contract review. Their software learns over time, but only after it has been painstakingly trained by human experts.

When Alexander Hudek, a computer scientist whose résumé includes heavyweight research like working on the human genome project, turned to automating the review of legal contracts in 2011, he figured that he would tweak standard algorithms and that it would be a four-month job.

Instead, it took two and a half years to refine the software so it could readily identify concepts such as noncompete contract clauses and change-of-control, said Mr. Hudek, chief technology officer of Kira Systems.

The Kira program sharply winnows the number of documents read by people, but human scrutiny is still required.

Yet the efficiency gains can be striking. Kira's clients report reducing the lawyer time required for contract review by 20 percent to 60 percent, said Noah Waisberg, chief executive of Kira.

In Miami, Luis Salazar, a partner in a five-lawyer firm, began using software from the start-up Ross Intelligence in November in his bankruptcy practice. Ask for the case most similar to the one you have and the Ross program, which taps some of IBM's Watson artificial intelligence technology, reads through thousands of cases and delivers a ranked list of the most relevant ones, Mr. Salazar said.

Skeptical at first, he tested Ross against himself. After 10 hours of searching online legal databases, he found a case whose facts nearly mirrored the one he was working on. Ross found that case almost instantly.

Mr. Salazar has been particularly impressed by a legal memo service that Ross is developing. Type in a legal question and Ross replies a day later with a few paragraphs summarizing the answer and a two-page explanatory memo.

The results, he said, are indistinguishable from a memo written by a lawyer. "That blew me away," Mr. Salazar said. "It's kind of scary. If it gets better, a lot of people could lose their jobs."

Not yet. The system is pretty good at identifying the gist of questions and cases, but Ross is not much of a writer, said Jimoh Ovbiagele, the chief technology officer of Ross. Humans take the rough draft that Ross produces and create the final memos, which is why it takes a day.

The start-up's engineers are trying to fully automate the memo-writing process, but Mr. Ovbiagele said, "We are a long way from there at this point."

The Good Old Days

James Yoon, a lawyer in Palo Alto, Calif., recalls 1999 as the peak of the old way of lawyering. A big patent case then, he said, might have needed the labor of three

partners, five associates and four paralegals.

Today, a comparable case would take one partner, two associates and one paralegal.

Two obvious factors have led to that downsizing: tightened legal spending and digital technologies that automated some tasks, like document searches, said Mr. Yoon, a partner at Wilson Sonsini Goodrich & Rosati.

Mr. Yoon uses software tools like Lex Machina and Ravel Law to guide litigation strategy in his patent cases. These programs pore through court decisions and filing data to make profiles and predictions about judges and lawyers.

What are the chances a certain motion will be approved by a particular judge, based on all his or her past rulings? Does the opposing counsel go to trial often or usually settle cases?

Mr. Yoon compares what he does to the way baseball and football analysts assess the tendencies of players and coaches on other teams.

The clever software, he said, is "changing how decisions are made, and it's changing the profession."

But its impact on employment would seem to be far less than, say, electronic discovery. The data-driven analysis technology is assisting human work rather than replacing it. Indeed, the work that consumes most of Mr. Yoon's time involves strategy, creativity, judgment and empathy — and those efforts cannot yet be automated.

Mr. Yoon, who is 49, stands as proof. In 1999, his billing rate was $400 an hour. Today, he bills at $1,100 an hour.

"For the time being, experience like mine is something people are willing to pay for," Mr. Yoon said. "What clients don't want to pay for is any routine work."

But, he added, "the trouble is that technology makes more and more work routine."

Follow Steve Lohr on Twitter @SteveLohr

A version of this article appears in print on March 20, 2017, on Page B1 of the New York edition with the headline: I, Robot, Esq.? Not Just Yet.

July 14, 2017

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THE
NATIONAL LAW REVIEW

Artificial Intelligence – A Game Changer in the Legal Industry?

Jim A. Cranston

LawVision Group LLC

Wednesday, April 12, 2017

A.I. changes everything for law firms. Today's technology allows for contract review at a speed with which a lawyer simply cannot compete. The result is a faster and more accurate work product. Law firm clients get better results for less money.

Does AI mean that lawyers will go the way of the dinosaur? Hardly. What will change though, and sooner rather than later, is historically mundane and administrative legal work will be assigned to a computer, not an associate or paralegal.

In a recent CNBC article titled "*Lawyers could be the next profession to be replaced by computers*" author Dan Mangan stated "The legal profession — tradition-bound and labor-heavy — is on the cusp of a transformation in which artificial-intelligence platforms dramatically affect how legal work gets done." Automation won't replace the need for lawyers, it just re-allocates the work higher on the value chain. What seems inevitable is a shift from low level legal administration to high level technology development and management.

According to Andrew Arruda, CEO of Ross Intelligence "I think we will see a rise of more jobs in the legal market . . . the firms where ROSS is at, we see more work being done, more clients being able to be served, and therefore not a decrease in staff, but an increase in productivity and output."

Considering that firms of all sizes are jumping on the AI bandwagon, one can assume that the legal industry will look very different in 5 – 10 years. Perhaps we can ask Watson, ROSS or even HAL for a preview of what's to come.

TRENDING LEGAL ANALYSIS

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THE
NATIONAL LAW REVIEW

https://blogs.wsj.com/cio/2015/03/25/lets-automate-all-the-lawyers/

CIO JOURNAL.

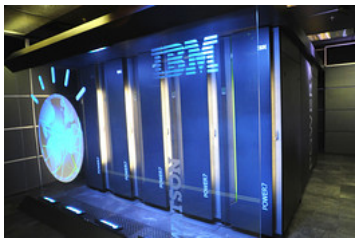
Let's Automate All the Lawyers?

By Thomas H. Davenport
Mar 25, 2015 12:18 pm ET

Shakespeare once wrote, "The first thing we do, let's kill all the lawyers." But a more likely future is automation. The legal profession has been one of the least aggressive adopters of technology in the past, and in many ways the field resembles the law as practiced a 100 years ago. But it's on the verge of a major transformation involving automation and the use of technology to make intelligent legal decisions. The legal profession, already suffering from an excess of supply over demand, could be decimated unless lawyers embrace smart machines much more than in the past.

The law is a profession based on rules, procedures, evidence, and precedent. It turns out that intelligent technologies are increasingly able to codify these decision criteria into automated and semi-automated systems. Rules and procedures have long been at the core of artificial intelligence. Judgment can be captured through statistical analysis and algorithms. Precedent is encoded in documents that can increasingly be read and analyzed by machine.

The bellwether application for this assault on the profession has been "e-discovery," a process used in litigation and government investigations in which documents in electronic form—either paper documents or documents originally in electronic formats like e-mails—are analyzed for their relevance to legal proceedings. E-discovery first led to expensive law firm associates reading online documents, then to much cheaper "contract document review" lawyers. Now the reading and analysis are being done by computer. "Predictive coding" algorithms can make an assessment—often quite accurate—of the likelihood that a document will be relevant to a case. Human lawyers end up needing to read far fewer documents as a result.



SHELL IBM's Watson supercomputer

There are a variety of other intelligent systems that can take over other chunks of legal work. One system extracts key provisions from contracts. Another decides how likely your intellectual property case is to succeed. Others predict judicial decisions, recommend tax strategies, resolve matrimonial property disputes, and recommend sentences for capital crimes. No one system does it all, of course, but together they are chipping away at what humans have done in the courtroom and law office. Robert Weber, IBM's outgoing general counsel, recently stated that the company's Watson "cognitive computing" system could take over a substantial portion of the work done for IBM by external lawyers.

Despite the slow pace of legal technology adoption (other than in e-discovery, which has caught on rapidly), these smart systems are likely to mean that many legal tasks will not be performed by *homo sapiens* with law degrees. If you went to a low-ranked law school, for example, contract document review was one of the few options open to you for employment, and while there are still such jobs, they're being chipped away by predictive coding.

The alternative, as I have argued here in other columns, is for lawyers to augment the work of smart legal technologies rather than be automated by them. Smart lawyers should learn what these technologies can do and use them to augment their own work. In e-discovery, for example, I was told by Adam Bendell, an attorney and the chief innovation officer and e-discovery expert at FTI Consulting, that there's a great

opportunity for senior attorneys to use predictive coding insights in planning their trial strategies. Instead, they're largely using the technology to save money.

Some people have already succeeded in playing the augmentation game. I interviewed two successful lawyers in different positions relative to smart legal technologies. One, Alex Hafez, was a contract document reviewer for several years. He'd previously been an intellectual property lawyer at a mainstream firm on the partnership track, but was derailed by the financial crisis. The contract work kept the wolf away from the door, but he found it less than stimulating. More importantly, he worried that his job would eventually be automated out of existence.

So Hafez set out to remake himself as an e-discovery expert, undertaking a series of educational activities:

- He gave up audiobook novels and switched to podcasts about e-discovery;
- He read *eDiscovery for Dummies* (yes, there is such a tome);
- He forked over $3000 to attend the weeklong "Georgetown eDiscovery Training Academy" (while also giving up $2000 in weekly earnings);
- He took a two-day program to qualify as an administrator of an e-discovery software vendor's program, which he found "boring" but "incredibly informative;"
- He hired a resume consultant to spiff up his on-paper credentials, and signed on with an eDiscovery recruiting service.

This story does have a happy ending. Mr. Hafez got a permanent job as a Senior eDiscovery Project Manager for a large vendor in the field. His story suggests that augmentation is a viable prospect for anyone willing to put in the time and effort to master a new, automation-driven field. The needed knowledge is out there; it just takes considerable initiative to master it.

Even lawyers who are in mainstream law firms will eventually need to address these technologies. One who has already done so is Ralph Losey, a senior partner at Jackson Lewis P.C, a large national labor and employment law firm. Mr. Losey became a lawyer in 1980, when computerized legal research was just beginning. He immediately gravitated toward it—he's a computer hobbyist—and could help his case teams find any law or document it needed. Mr. Losey eventually abandoned commercial litigation for a full-time e-discovery focus as a senior litigator. In addition to serving clients and his firm on these topics, he also writes a blog, has taught e-discovery at a law school (where such courses are still relatively rare), and is widely viewed as a leader in the e-discovery field.

Mssrs. Bendell, Hafez and Losey provide conclusive evidence that augmentation of intelligent legal technology is absolutely possible and that it leads to successful careers. They're in the vanguard of a transition that many lawyers will have to make if they want to keep their jobs. They're winning the "race against the machine" by running alongside it.

Thomas H. Davenport is a Distinguished Professor at Babson College, a Research Fellow at the MIT Center for Digital Business, Director of Research at the International Institute for Analytics, and a Senior Advisor to Deloitte Analytics.

AUGMENTATION AUTOMATION EDISCOVERY LAW

Current Drivers of Change

- Artificial Intelligence: Robots and Machine Learning

- ROSS: Contract Review; Legal Research
- Ravel: Judge Analytics("The bottom line is that Ravel has invented new ways for lawyers to seek a competitive advantage by discovering patterns and outliers in judges' opinions as well as insights into who and what influences them.")
- Modria: Automated online resolutions for business
- Predictive Outcomes

The Artificial Lawyer Year in Review: The New Era of Legal AI Begins

19th December 2016 artificiallawyer News 7

2016 will be remembered as the year when legal AI and advanced automation went from being a subject for conference discussions about 'the future' and became something very real in the eyes of the market, and perhaps most importantly something that law firms were actually using for client work.

Norbert Wiener, whose early work on cybernetics helped set the scene for AI pioneers such as Marvin Minsky

AI and advanced automation, at

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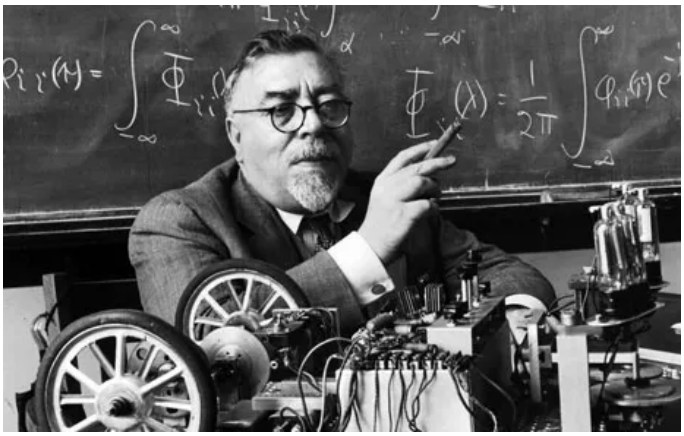


least as theories, have been around since the 1950s and such pioneers as **Marvin Minsky** and **Norbert Wiener** were some of the leading lights in these fields back then. But, the fact that AI has a long and historical backstory doesn't diminish the fact that at the start of this year the idea of large numbers of law firms actually making use of legal AI systems, as opposed to just talking about the subject, was not really 'a thing' yet.

But, wow, what a difference a year makes. Looking back on 2016, as the year draws to a close, it feels like we have entered a new era. So, what has happened?

Prologue

First it needs to be remembered that although it might sometimes feel like legal AI sprung into existence fully formed in 2016, like most new technologies some of the companies now hitting the headlines had been working on AI technology for several years.

Jan Van Hoecke, co-founder and CTO, RAVN

For example, UK-based **RAVN Systems**, which is one of the best-known legal AI companies, launched in 2010 and has done years of pioneering work developing their own cognitive engine using machine learning and natural language processing (NLP).

While Toronto-based **Kira Systems**, probably the other most famous AI company in the legal document analysis space, has also been around since 2010 and also spent years iterating and improving the system that is on offer today.

And, if we want to get really accurate about the significance of 2016, we actually have to roll back to the year before where the first catalytic events took place, at least in terms of the market taking note, which in turn helped to set up this year's torrent of activity.

In September 2015 UK law firm **BLP** announced a collaboration with RAVN to work on the extraction of unstructured data from leases.

At the time, **Matthew Whalley**, Head of Legal Risk Consultancy at BLP **stated**: 'The robot [sic] has fast become a key member of the team.'

'Team morale and productivity has benefited hugely, and I expect us to create a cadre of contract robots throughout the firm. If the reaction to

our first application is any indication, **we will be leading the implementation of AI in the Law for some time to come**.'

The co-founders of ROSS Intelligence, (Left to Right) Andrew Arruda, Jimoh Ovbiagele and Pargles Dall'Oglio

On the other side of the Atlantic another legal AI company was stealing the headlines. **ROSS Intelligence**, an AI company focused on legal research applications, (at least for the moment), had already in 2015 begun to capture people's imaginations about a new dawn for the legal industry.

A wave of news stories across the planet was closely linked to US law firm **BakerHostetler** signing up ROSS for use in its bankruptcy practice, which seemed to many as a landmark moment in that a major law firm was now putting to work an AI system, not just toying with the idea.

California-based ROSS soon won a huge amount of publicity and was described as 'the world's first artificially intelligent lawyer'. On May 16, 2015, **The Washington Post** announced: 'Meet 'Ross,' the newly hired legal robot'

The paper said: '**A future where ROSS, or similar robot [sic] lawyers, is used across the country might not be too far away**.'

Clearly something had changed. But, what would happen next? The answer came a year later.

The Break Out Year

What then happened this year, 2016, was unsettling to some even if it had been flagged up for more than a decade. For a long time, some might say since the late 1990s, a small group of pioneers had helped to develop the thinking around the use of automation and computing in the law, such as **Richard Susskind**, and had been preparing people for the arrival of technology such as AI.

Many legal sector commentators and academics had grown used to regular debates such as 'will AI mean the end of lawyers?', 'will legal AI systems arrive by 2030?' or 'will clients want their lawyers to use AI?'

Talking about it was very comfortable. But, all that seemed suddenly… how can one put it? It all seemed *academic* now. Legal AI was here now and it was real. Moreover, not only were law firms adopting it, the clients were paying for its services. The new era of legal AI had well and truly begun.

What started as a trickle of news about legal AI soon became a flood, something that **Artificial Lawyer** can testify to.

Initially it was not certain there would be enough news in such a niche field to sustain a site dedicated to legal AI and cutting edge legal tech.

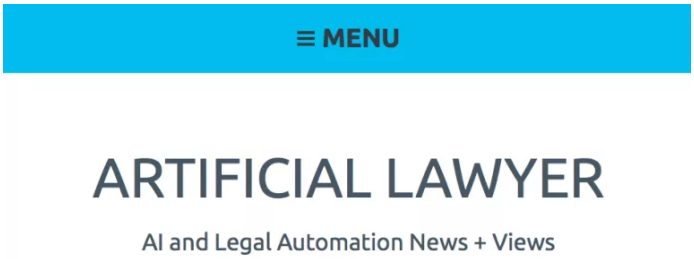
When **Artificial Lawyer** launched in the middle of June this year, (yep, just six months ago), it was not even certain there would be sufficient readers to make it worthwhile.

Within a couple of months the site was receiving multiple thousands of unique visitors and keeping up with events was becoming a full time job. This reflected in turn a wider interest in legal AI across the market that truly blossomed in 2016. For example, type in the words 'artificial lawyer' into **Google** and you get 7.84 million results.

And that raises another question: could a site like this have existed before? One can seriously doubt whether a website called Artificial Lawyer in, for example 2006, would have received the same level of interest, or had that much to write about.

In 2006, the site would have been almost entirely theoretical. It would have been sparsely populated with comments from a few talking heads, talking again and again about the same theoretical issues. In short, it would not have been of much interest. **News is about actual events, not just theory**. And there was no legal AI news back then.

Roll forward 10 years and everything has changed. Some might say changed too much. Others may say: 'Yes, it's changed, but a lot of it is hype.'



My view is that neither too much has changed (in fact, it's only just started to change), nor is this hype. It is very real and having an impact, but it is still small for now. Hype is about the latest version of the flying car that will never go into production, or marketing spiel about smart watches changing the world, even though few people have really ever used them for more than fitness tracking.

Moreover, the many new legal tech companies that are now emerging, both those operating inside the AI spectrum and several in other areas, are transforming the way we think about the production of legal work. They are changing client relationships and the internal dynamics of law firms. And though I don't see the end of lawyers, we will probably see a big reduction in the need for paralegals in the years to come.

This is happening because this wave of legal AI and automation companies really do provide something that works and really do make a difference to lawyers and clients.

Highlights of the Year

Rather than give you a blow by blow account of every story that seems interesting (which to me is all of them…), here are some key themes

that have emerged from 2016 that encapsulate the changes taking place.

Noah Waisberg, co-founder and CEO, Kira

Client Wins – what differentiates 2016 from the previous years is that there have been several legal AI companies gaining not just one or two client wins, but a raft of long-term licence agreements for their latest technology.

While ROSS has gone from strength to strength in the field of AI legal research, adding **Womble Carlyle** and **Bryan Cave** as clients among others, it has been document analysis where the greatest volume of deals has taken place. Kira has, at least based on public data, been the most successful legal AI company in 2016 in the analysis sector, collecting deals with a raft of firms, including: **McCann FitzGerald** in Ireland, **Fenwick** in the US, **Osler** in Canada and **Freshfields**, **Clifford Chance** and **Addleshaw Goddard** in the UK, and **DLA Piper** as well. It has also struck a deal with **Deloitte**.

RAVN also did well, signing up US firm **Reed Smith** and worked with global firm **Dentons** to develop a Brexit analysis tool, it's also being used by UK telecoms giant, **BT**, among other developments and also building upon its deal with **BLP**. Several other law firms are also now piloting RAVN's cognitive engine.

Other AI companies such as **LEVERTON**, which has also signed up Clifford Chance, won significant clients, such a global property adviser

JLL. The German company, which is largely focused on real estate matters, also formed a partnership with data giant **SAP**, to help in the development of its 'data core' concept.

The newly launched **Luminance** has secured **Slaughter and May** and is also piloting with several firms around the world.

Cian O'Sullivan, CEO and co-founder, Beagle

Beagle won **VW** as a client, did a joint venture deal with Australian law firm, **Corrs**, to market the AI document analysis system in the Asia Pacific and won other significant clients in the financial sector. Beagle also received investment from **Dentons' Nextlaw Labs** (see more below).

US-based **Legal Robot** is working with **GE**. **Diligen** is working with a global law firm, but cannot name it yet.

While, **Seal**, another document/contract analysis system has now got a client base of corporates that dwarfs most other AI companies. Its clients include: **Microsoft, Bosch, Dropbox, Experian, PayPal, Vodafone, DocuSign** and even **HP,** though these were not all won this year.

And the list goes on of legal AI companies and their growing client lists. So, the next time a jaded IT director or tech consultant who doesn't feel that excited about the new wave of legal technology that is superceding their experience says to you: 'Yeah, well, it's all hype. No one is really using legal AI…' then you'll have some ammunition to respond with.

New Legal AI Company Launches – as noted, although it can feel like all the legal AI companies were spontaneously created between mid-2015 to mid-2016, many have been going for some years. That said, there are some that are quite new and have only reached public attention in 2016, these include: Canada's **Diligen**, the UK's **Cognitiv+** and Luminance. While America's **Legal Robot** only launched last year and the UK's **Thought River** also got going in 2015.

Laura van Wyngaarden, COO, Diligen

It's probably fair to say that the majority of legal AI companies are at present based in the US, Canada or the UK, with a couple of others in Germany and Israel. In the latter case, **LawGeex** has been a true pioneer in terms of contract analysis and assistance.

That said, these are early days. It's a big legal market out there and these happy few are just at the start of something very big. France, in particular, is producing some great new legal tech companies with big ambitions, it will no doubt soon start to generate several legal tech companies on the AI spectrum as well. Meanwhile the Netherlands and Belgium also have a passion for legal tech innovation. In fact, it's worth noting that RAVN has just opened an office in Amsterdam. So, everything to play for in terms of non-Anglophone/Civil Law growth in legal AI.

Smart Contracts – There's more to life than AI and smart contracts are potentially going to play a big part in the more automated and autonomous parts of the future legal world. The idea of smart contracts has been tied to blockchain technology, but that is a bit of a red herring. While **Barclays** and others, along with law firms such as **Norton Rose**, have been exploring on-chain smart contracts, **perhaps the most interesting work is actually off-chain**. In this area, two start-up companies that deserve special mention are **Clause.io** and **Legalese.com**.

Clause is developing self-executing, dynamic contracts that respond to real world external changes via IoT technology. Meanwhile Singapore-based Legalese

is pioneering the development of a 'computable' legal language that combines legal terms with the clarity and self-executing ability of computer code. **Stephen Wolfram**, of **Wolfram Alpha** fame, has also arrived at this party and is also exploring computable legal language. It will be fascinating to see how this area evolves, in part because it will be closely connected to the development of legal AI systems.

Investment and Accelerators – There has been an outpouring of investment into legal AI and 'new wave' legal tech from a variety of sources. There has also been a growing interest in creating incubators and accelerators to help foster new legal AI and other advanced legal tech companies.

A special mention has to go to **Dentons**' tech innovation platform, **Nextlaw Labs**, which has blazed a trail in terms of identifying cutting edge legal tech companies and supporting them. This support is a mix of financial investment, tutoring from tech experts, the ability to pilot their software inside Dentons and generally to be part of a legal tech ecosystem that is dedicated to fostering new talent while also being very pragmatic and focused on solving real world 'pain points'.

Dan Jansen, CEO, Nextlaw Labs

Another special mention goes to **Seedcamp**, a London-based early stage investor that has backed several advanced legal tech companies, and on occasion alongside Nextlaw Labs. A couple of their recent investments include, Clause.io, mentioned above, as well as **Libryo**, which helps people to understand their legal obligations.

There has also been investments from angel investors, including from the perhaps quite aptly named, **Tony Angel**, the former boss of **Linklaters**. And we have seen other investors come into the market, from **Winton Capital**, which has an accelerator programme, to **Invoke Capital**, the fund owned by **Mike Lynch** and which owns a big chunk of Luminance.

In Australia we have seen a legal tech accelerator set up by the law firm **Mills Oakley** and in the US, legal publishing giant and now significant legal tech vendor, **LexisNexis** has launched its own accelerator in Menlo Park, California.

How the times are changing…

#A2J – Legal AI for Good – While all this new legal tech is doing something useful, there is also a new wave of hackathons and 'law for good' innovators who are using new streams of technology to help increase access to justice.

There are several such initiatives at work, but perhaps one of the most important ones is **LawBot**, which was started at **Cambridge University** by a group of undergraduates. Its aim is to provide useful information to victims of crime. It is not yet operating on the AI spectrum, but could quite rapidly evolve in that way. The sky is the limit with this type of application. #A2J will never be the same again.

And, in the same field, a special mention also has to go to Stanford University student, Joshua Browder, who stole the headlines earlier this year with his **DoNotPay** chat bot app to reverse parking fines for people.

ILTA Insight event in London

Legal AI and Automation Events – There has also been a surge of interest in, and in the quality, of events about legal AI. Because of all the changes above we now have the opportunity to hear about real use cases and from a raft of great new legal tech start-ups.

Some of the best events in 2016, at least in the UK, included: **ILTA's Insight** event in London, which had a great session on practical applications of AI technology (see picture above of a panel on real use cases of AI and automation inside law firms that featured Freshfields and Linklaters, as well as RAVN and **Wavelength.Law**); **Legal Geek's** annual event, which provided a great forum to meet and catch up with everyone in the industry; and an event organised by **Cosmonauts** at **Workshare** that had several new legal tech speakers including **Zeev**

Fisher from **Pekama**. There are certainly even more interesting events next year and Artificial Lawyer will be involved in some of them.

And so much more is happening…we've got to also mention the important developmental work being carried out by great legal tech pioneers such as **Autto.io**, which is developing ground-breaking process automation systems; as well as **VizLegal,** which is reinventing the world of legal research. And there are probably a dozen more companies out there worth mentioning….but space is limiting.

One can see that there is just so much that is happening in the legal AI and advanced legal tech world. In fact, many of the new companies are not focused on AI, but on other forms of automation, such as bot-driven contract negotiation, which **Synergist** is pioneering. Or, like **WeClaim** in France, which is also starting to pioneer the idea of semi-automated litigation.

Then there are those start-ups such as **Intraspexion** that are using machine learning to help predict and prevent future litigation from happening. While legal expert system company **Neota Logic** goes from strength to strength in helping law firms to create interactive platforms that clients can interrogate to find answers to legal issues, or use to complete legal forms.

There is simply too much to cover in this review. And while 2016 will be remembered by the history books (AKA **Wikipedia**) as the year legal AI went from theory to wide-scale real world use, who knows what 2017 will bring? Whatever does develop Artificial Lawyer will be here for you, whether you just want to dip in and find out the latest news, or to contribute to this growing community of readers and writers, who include: lawyers, Bar organisations, legal technologists, academics, legal tech companies, entrepreneurs and investors.

THANK YOU!

And finally, Artificial Lawyer would like to say a very BIG THANK YOU! To all the people who read this site, to all the people who have contributed their time and writing for guest posts and to all those who have reached out to share ideas or just to say hello and give feedback. Thank you, without you none of this would be possible.

Artificial Lawyer wishes you a very Merry Christmas and a Happy New Year!

[P.S. over the Chri interviews with legal tech founders to help act as a reminder of what has happened so far and keep everyone with something legal AI in flavour to read over the holidays.

Also, while you're recovering from your festivities and are pondering what to do in 2017, please have a think about anything you'd like to share with Artificial Lawyer, whether that's a guest post or a piece of news. I look forward to hearing from you.

Please contact: **Richard Tromans, Editor, Artificial Lawyer**

Richard@Tromansconsulting.com

Thank you.]

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2 COMMENTS

J Maskew

19TH DECEMBER 2016 AT 4:04 PM

Great reading Richard, thank you for sharing, regards Jonathan

REPLY

Nick Potts

22ND DECEMBER 2016 AT 7:04 PM

Excellent Review Richard, we certainly expect 2017 to be even bigger! Look forward to more guest posts and AI Lawya updates. Regards, Nick

REPLY

5 TRACKBACKS / PINGBACKS

- Start Up: Facebook's video switch, cyberattack in Ukraine, the browser line of death, and more | The Overspill: when there's more that I want to say
- Artificial Lawyer: The New Era of Legal AI Begins - InhouseBlog
- Artificial Lawyer's Spring Review – Green Shoots – Artificial Lawyer
- 2017, el año de legaltech
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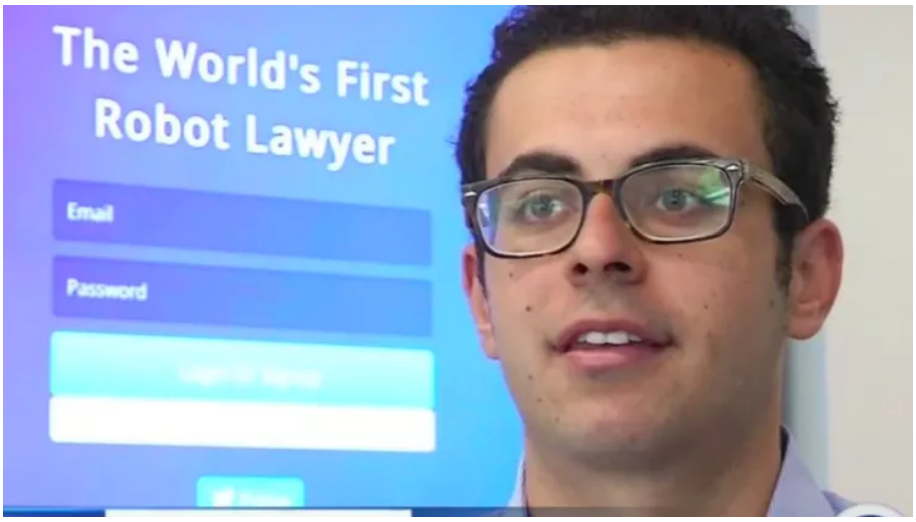
ARTIFICIAL LAWYER

Legal Bot DoNotPay Expands Massively Across US + UK

12th July 2017 artificiallawyer Legal Bot 1



This morning, what is probably the world's most famous legal bot, **DoNotPay**, is launching in 1,000 legal areas across all 50 US states and also the UK.

As was exclusively revealed in May **to Artificial Lawyer**, DoNotPay founder, **Joshua Browder** had decided earlier this year to massively expand the bot to handle far more than the parking ticket appeal capability it had rose to fame on. Since its launch it had already added consumer law capabilities as well as providing help to refugees.

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Joshua Browder: DoNotPay Will Create Legal Bots for Free, For Everyone

Legal AI Market Expands, ROSS Signs With US Firm Sedgwick

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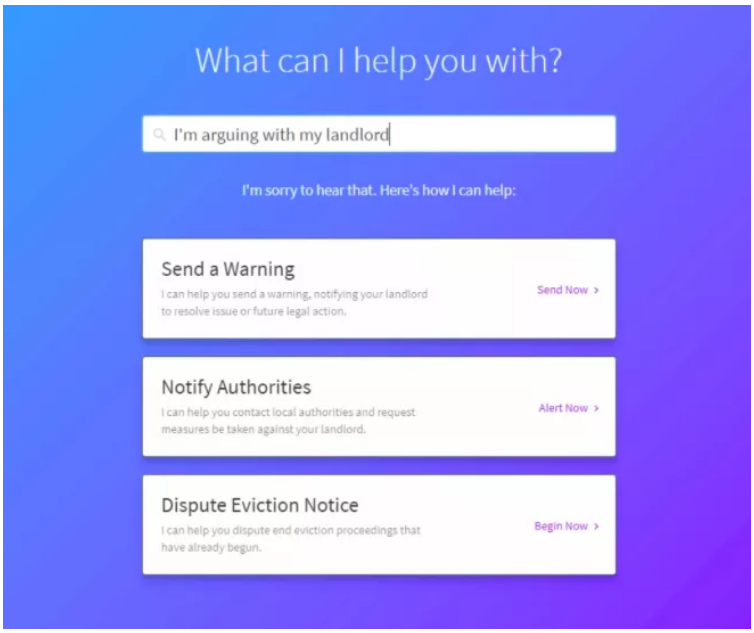
The new July rollout is the result of this plan and greatly expands the total number of areas where it can be of assistance. The new expansion will cover a much broader range of legal issues, from reporting harassment in the workplace to making complaints about landlords.



While the bot is not giving 'legal advice', at least from a strict regulatory point of view, it is designed to help a person move their legal issue forward by first identifying the problem, then using Q&A questions produced by the bot to gather the necessary data to make a simple, but relevant, document that can be used in that type of situation, for example a claim against a person or entity.

The tech used involves **IBM Watson** for some of its natural language processing capabilities. DoNotPay has also been using Facebook Messenger to host the bot.

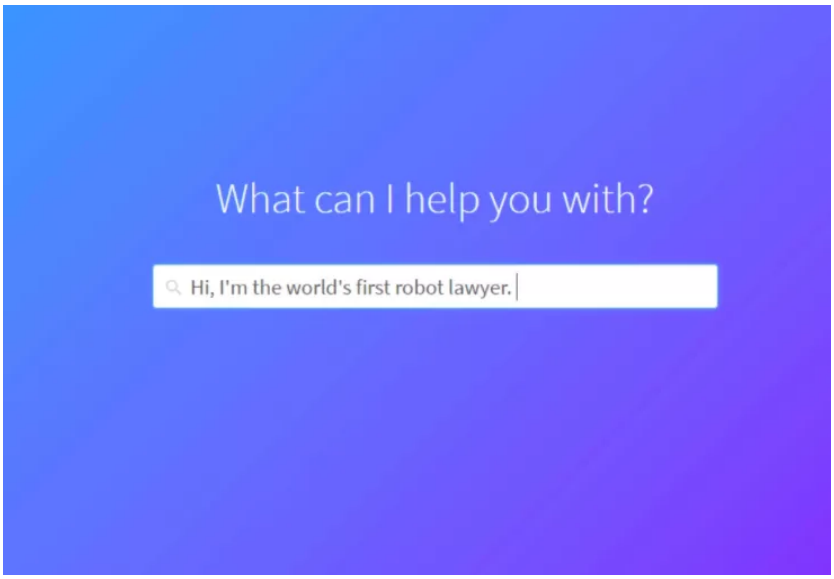
In a message to Artificial Lawyer, British born, but currently US-based **Stanford University** student, Browder said: 'The user can type in their issue in their own words (for example: "my airline scammed me" or "my employer is racist") and receive immediate suggestions as to how DoNotPay can help.'

'Once it knows the problem, the bot talks to the user to get the details and automatically **generates a legally sound document** which can be sent directly to the authorities. If the user needs more help, we will point them to the right direction (often a charity) within 24 hours.'

While clearly this is a bot working in the legal field, it is probably fair to say Browder has mixed feelings toward the legal profession. Or, as he says: 'I originally started DoNotPay two years ago to fight my own parking tickets and became an accidental witness to how **lawyers are exploiting human misery**.'

'From discrimination in Silicon Valley to the tragedy in London with an apartment building setting on fire, **it seems the only people benefitting from injustice are a handful of lawyers**. I hope that DoNotPay, by helping with these issues and many more, will ultimately give everyone the same legal power as the richest in society.'

In which case it is perhaps best to see DoNotPay 2.0, (or is it 3.0 now?) as very much an Access to Justice (#A2J) project, rather than seeking to build a consumer legal brand such as **RocketLawyer**, even if many of the practical uses of the legal bot are commercial in nature, e.g. helping in a dispute with an insurance company or airline.



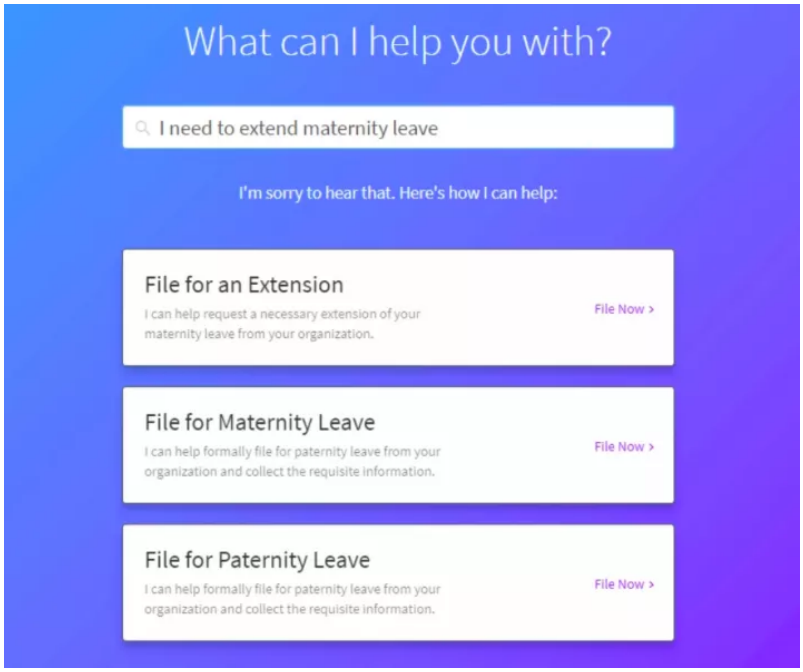
What seems to unite the many strands of the offering is the focus on addressing what Artificial Lawyer terms the issues of 'information asymmetry' and 'inequality of arms'. That it to say, first, the general public simply has never been given the information they need to handle a legal dispute, so are immediately at a disadvantage.

Handling legal issues is not taught at school as part of the general curriculum. Legal information is often behind pay walls or framed in impenetrable jargon and generally presented as something the general public shouldn't be seeking to understand without a lawyer's input.

The other issue is 'inequality of arms', i.e. the insurance company has a team of hundreds of lawyers, the member of the public has none, or they can use a lawyer or claims company that may only want the case as part of a broader consumer claim without really taking an interest in the individual. The reality is that many people simply cannot get the right lawyer to help them, if any at all. This is the case in England & Wales where legal aid is not available for vast areas of the law, including employment and civil claims.

This is exactly the problem that Browder and DoNotPay want to solve. Speaking to Artificial Lawyer in May, Browder added that despite the expansion the original brand would stay in place.

'For better or for worse, I think it's a brand people know. **It has gone from DoNotPay 'Parking Tickets' to DoNotPay 'Lawyers'!**' he said.



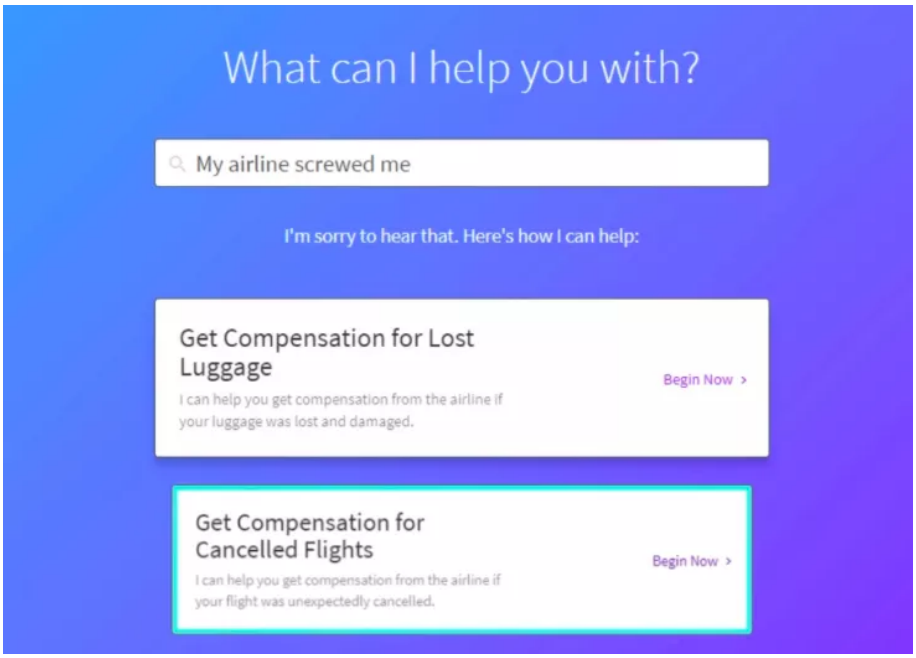
He also maintains that he will never charge for DoNotPay's services, though he may then redirect users to other service providers, though as noted, the hoped for support will preferably be from charities.

Clearly this bot will not remove the need for legal advice once a dispute has escalated beyond the sending of the document to make a claim. For example, once the target of the claim responds, presumably with the intervention of their own lawyer, the user will then be under pressure to seek a lawyer as well, though a charity could help.

Moreover, although Browder's legal bot performs very well in narrow Q&A fields, it can sometimes be prone to 'communication breakdown'

when a user gives responses to the bot that have not been planned for, or are not recognised. This is often due to a limitation of the NLP program, which then tends to stop the flow of the process. It's also the major challenge faced by all other bots, in the legal space or elsewhere.

Artificial Lawyer has tested out the bot's earlier iterations and these Q&A limitations are likely to remain a challenge going forward. That said, it remains a superb project with A2J at its heart. Moreover, with continued machine learning in terms of the decision trees for each legal query, as well as improvements in NLP use, DoNotPay will improve the more people use it and the data set expands.



While critics may say that it is still at an early stage and hence is 'not perfect yet', the reality is that legal bots have indeed only just started to evolve and surely anything that at least helps a consumer is a very positive step. If this and other bots, such as UK-based, **LawBot**, can keep going through new iterations and improve in areas such as NLP and decision tree design then their value to consumers will likely grow rapidly.

That said, it's important that the general public understands the limitations of bots and have realistic expectations of the services they can deliver, e.g. legal document/claim production. But, as said, this journey is just beginning. In two years DoNotPay has come a long way and will no doubt keep improving rapidly.

If you'd like to see a short video by DoNotPay about the new aims, please see below.

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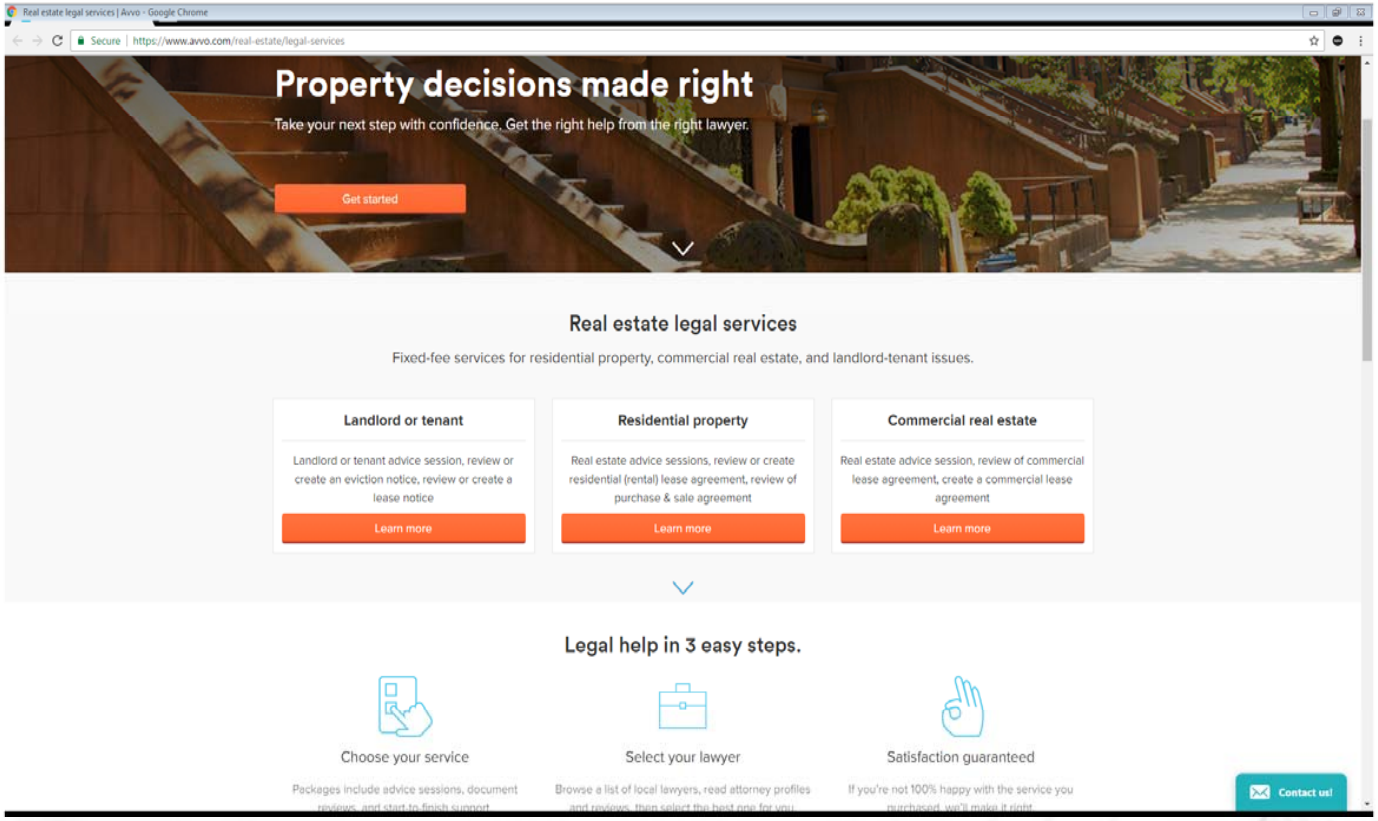

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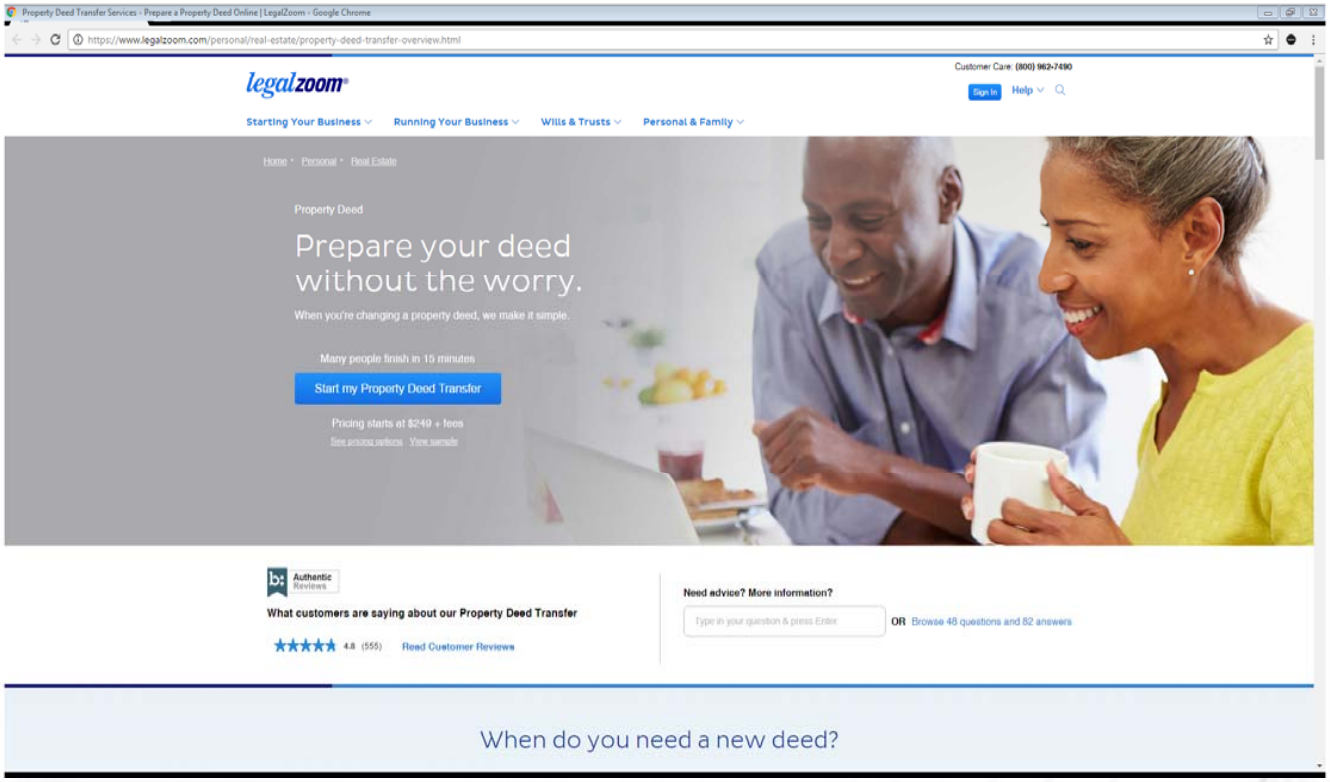

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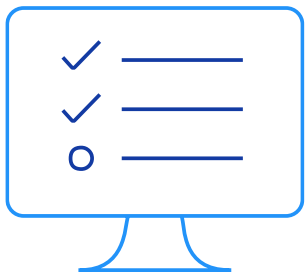

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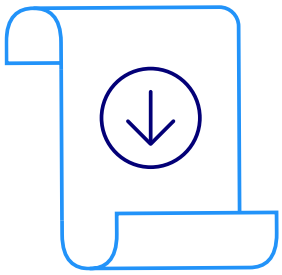

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Leave property to those you love

DOCUMENTS INCLUDED

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KEY BENEFITS

Save over $400 compared to hiring a lawyer*

Create a complete plan for one person

Leave property to those you love

Protect your children and their inheritance

Plan for a medical emergency

Get help from our team when you

need it

Make unlimited changes and updates

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Advance Directive (Living Will)

Power of Attorney

Couples

The perfect option for married couples.

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KEY BENEFITS

Save over $800 compared to hiring a lawyer*

Create a complete plan for a married couple

Leave property to those you love

Protect your children and their inheritance

Plan for a medical emergency

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Make unlimited changes and updates

DOCUMENTS INCLUDED

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Advance Directive (Living Will)

Power of Attorney

Homeowners

Our most complete package for people who own a home.

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KEY BENEFITS

Save over $1,500 compared to hiring a lawyer*

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Leave property to those you love

Protect your children and their inheritance

Plan for a medical emergency

Get help from our team when you need it

Make unlimited changes and updates

Keep your home from being locked up in court

DOCUMENTS INCLUDED

Last Will and Testament

Advance Directive (Living Will)

Power of Attorney

Revocable Living Trust & Home Transfer Deed

*Based on cost of hiring an attorney to draft similar documents as reported by Investopedia.com. (Willing.com is not a law firm and cannot provide legal advice.)

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– Maryland client

Richard Lebovitz
Divorce and separation attorney

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I'm making changes to my parenting plan. Can you take a look?

Jen

3 min ago

Thanks for hiring me! I received your documents, let's talk about what you've got so far and what kind of edits you want to make.

Regina
3 min ago

Business

15-minute Business advice session (/business/legal-services/business-advice-session)

30-minute Business advice session (/business/legal-services/business-advice-session-30-min)

Create a bill of sale or sales contract (/business/legal-services/create-a-bill-of-sale-or-sales-contract)

Create a business contract (/business/legal-services/create-a-business-contract)

Create a demand letter (/business/legal-services/create-a-demand-letter)

Create a non-compete agreement (/business/legal-services/create-a-non-compete-agreement)

Create a non-disclosure agreement (/business/legal-services/create-a-non-disclosure-agreement)

Create a partnership agreement (/business/legal-services/create-a-partnership-agreement)

Create a promissory note (/business/legal-services/create-a-promissory-note)

Create a resignation letter (/business/legal-services/create-a-resignation-letter)

Create a termination letter (/business/legal-services/create-a-termination-letter)

Create an asset purchase agreement (/business/legal-services/create-an-asset-purchase-agreement)

Create an employee confidentiality agreement (/business/legal-services/create-an-employee-confidentiality-agreement)

Create an employment contract (/business/legal-services/create-an-employment-contract)

Create an employment offer letter (/business/legal-services/create-an-employment-offer-letter)

Create an operating agreement (/business/legal-services/create-an-operating-agreement)

Document review: Asset purchase agreement (/business/legal-services/document-review-asset-purchase-agreement)

Document review: Bill of sale or sales contract (/business/legal-services/document-review-bill-of-sale-or-sales-contract)

Document review: Business contract (/business/legal-services/document-review--business-contract)

Document review: Consulting agreement (/business/legal-services/document-review--consulting-agreement)

Document review: Contractor agreement (/business/legal-services/document-review--contractor-agreement)

Document review: Demand letter for breach of contract (/business/legal-services/document-review-demand-letter-for-breach-of-contract)

Document review: Demand letter for payment (/business/legal-services/document-review-demand-letter-for-payment)

Document review: Employment contract (/business/legal-services/document-review--employment-contract)

Document review: Non-compete agreement (/business/legal-services/document-review-non-disclosure-agreement)

Document review: Non-disclosure agreement (/business/legal-services/document-review--non-disclosure-agreement)

Document review: Promissory note (/business/legal-services/document-review-promissory-note)

Document review: Vendor agreement (/business/legal-services/document-review--vendor-agreement)

Document review: employee confidentiality agreement (/business/legal-services/document-review--employee-confidentiality-agreement)

Document review: employment offer letter (/business/legal-services/document-review-employment-offer-letter)

Document review: operating agreement (/business/legal-services/document-review-operating-agreement)

Document review: partnership agreement (/business/legal-services/document-review-partnership-agreement)

Document review: resignation letter (/business/legal-services/document-review-resignation-letter)

Document review: termination letter (/business/legal-services/document-review-termination-letter)

Form an S Corp or C Corp (/business/legal-services/form-an-s-corp-or-c-corp)

Start a single-member LLC (/business/legal-services/start-a-single-member-llc)

Estate planning

15-minute Estate planning advice session (/estate-planning/legal-services/estate-planning-advice-session)

30-minute Estate planning advice session (/estate-planning/legal-services/estate-planning-advice-session-30-min)

Create a last will and testament (individual) (/estate-planning/legal-services/create-a-last-will-and-testament-individual)

Create a living trust (individual) (/estate-planning/legal-services/create-a-living-trust-individual)

Create a living trust bundle (couple) (/estate-planning/legal-services/create-a-living-trust-couple)

Create a living will (/estate-planning/legal-services/create-a-living-will)

Create a power of attorney (individual) (/estate-planning/legal-services/create-a-power-of-attorney-individual)

Create an estate plan bundle (couple) (/estate-planning/legal-services/create-an-estate-bundle-couple)

Create an estate plan bundle (individual) (/estate-planning/legal-services/create-an-estate-bundle-individual)

Document review: Last will and testament (/estate-planning/legal-services/document-review-last-will-and-testament)

Document review: Living trust (/estate-planning/legal-services/document-review-living-trust)

Document review: Living will (/estate-planning/legal-services/document-review-living-will)

Document review: Power of attorney (/estate-planning/legal-services/document-review-power-of-attorney)

Real estate

15-minute Real Estate advice session (/real-estate/legal-services/real-estate-advice-session)

30-minute Real Estate advice session (/real-estate/legal-services/real-estate-advice-session-30-min)

Create a commercial lease agreement (/real-estate/legal-services/create-a-commercial-lease-agreement)

Create a lease notice (/real-estate/legal-services/create-a-lease-notice)

Create a residential lease agreement (/real-estate/legal-services/create-a-residential-lease-agreement)

Create an eviction notice (/real-estate/legal-services/create-an-eviction-notice)

Document review: Commercial lease agreement (/real-estate/legal-services/document-review-commercial-lease-agreement)

Document review: Eviction notice (/real-estate/legal-services/document-review-eviction-notice)

Document review: Lease notice (/real-estate/legal-services/document-review-lease-notice)

Document review: Residential lease agreement (/real-estate/legal-services/document-review-residential-lease-agreement)

Document review: Residential purchase and sale agreement (/real-estate/legal-services/document-review-residential-purchase-and-sale-agreement)

Immigration

15-minute Immigration advice session (/immigration/legal-services/immigration-advice-session)

30-minute Immigration advice session (/immigration/legal-services/immigration-advice-session-30-min)

Application review: Family green card (/immigration/legal-services/application-review--family-green-card)

Application review: Green card renewal (/immigration/legal-services/application_review_green_card_renewal)

Application review: H-1B visa (/immigration/legal-services/application_review_h1b_%20visa)

Application review: H4 visa (/immigration/legal-services/application_review_h4_visa)

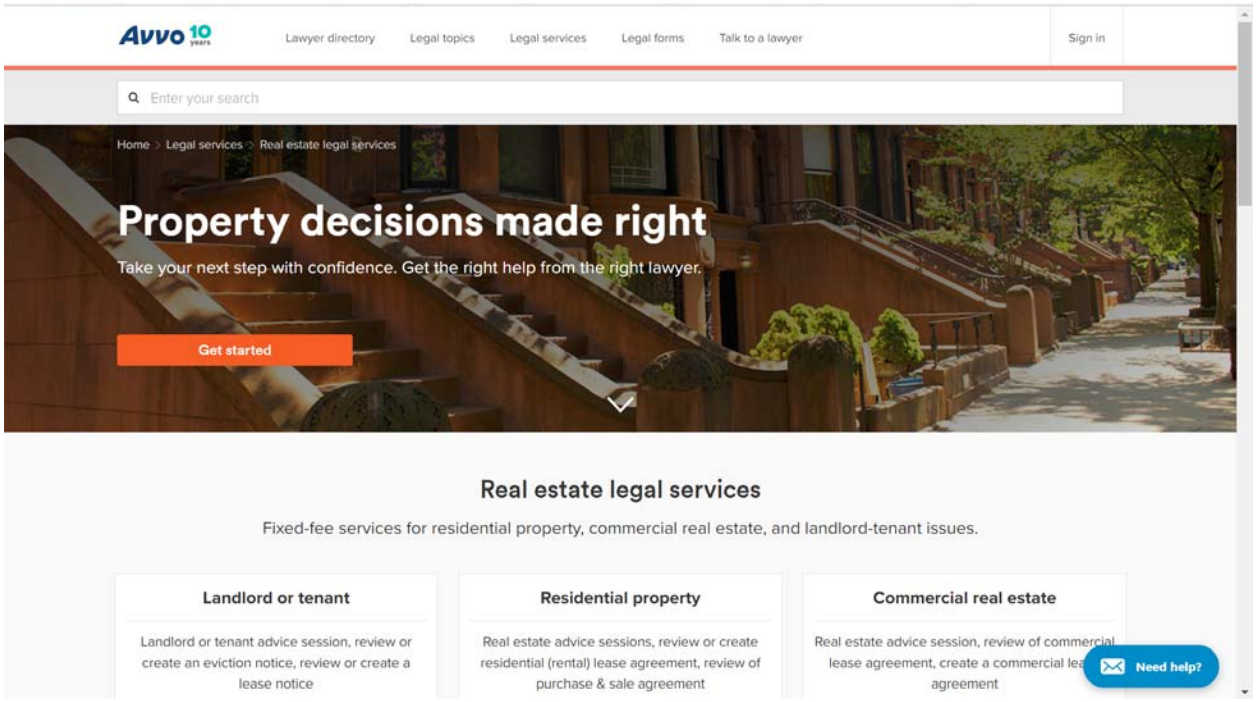
Application review: K1 fiancé(e) visa (/immigration/legal-services/application_review_k1_fiance_visa)

Application review: Petition for alien relative (/immigration/legal-services/application_review_petition_for_alien_relative)

Application review: US citizenship (/immigration/legal-services/application-review--us-citizenship)

Apply for US citizenship (/immigration/legal-services/apply-for-us-citizenship)

Apply for a family green card (/immigration/legal-services/apply-for-a-family-green-card)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Commercial real estate
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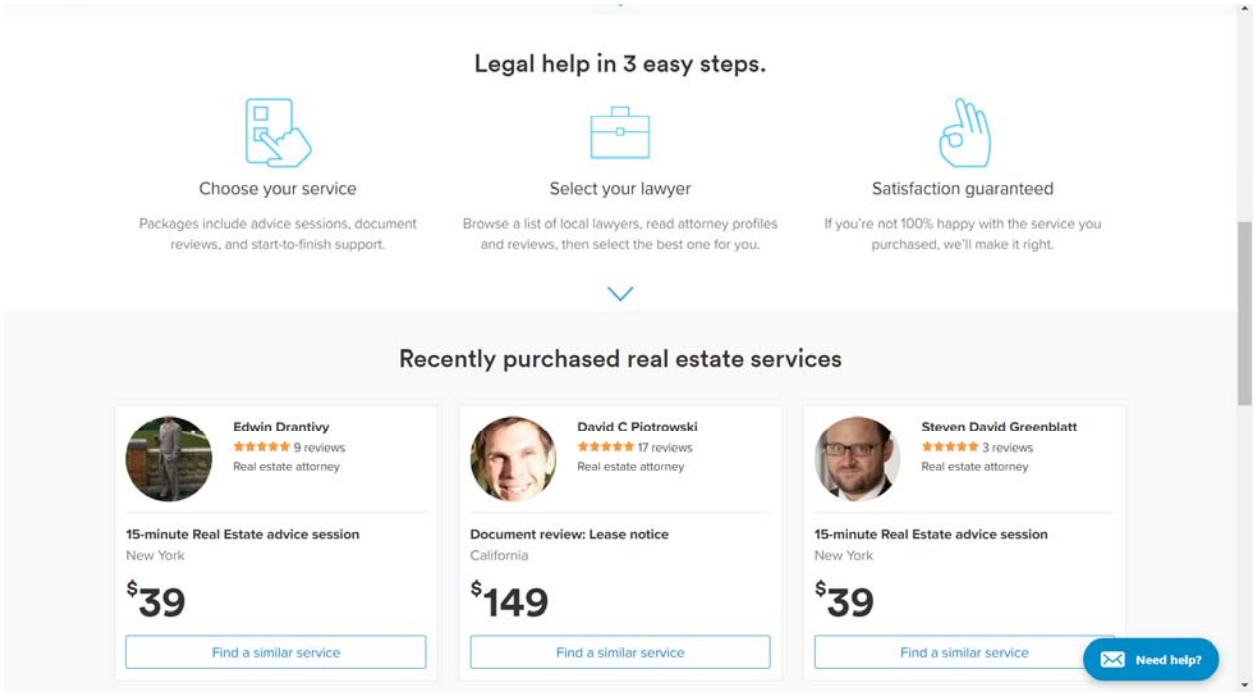
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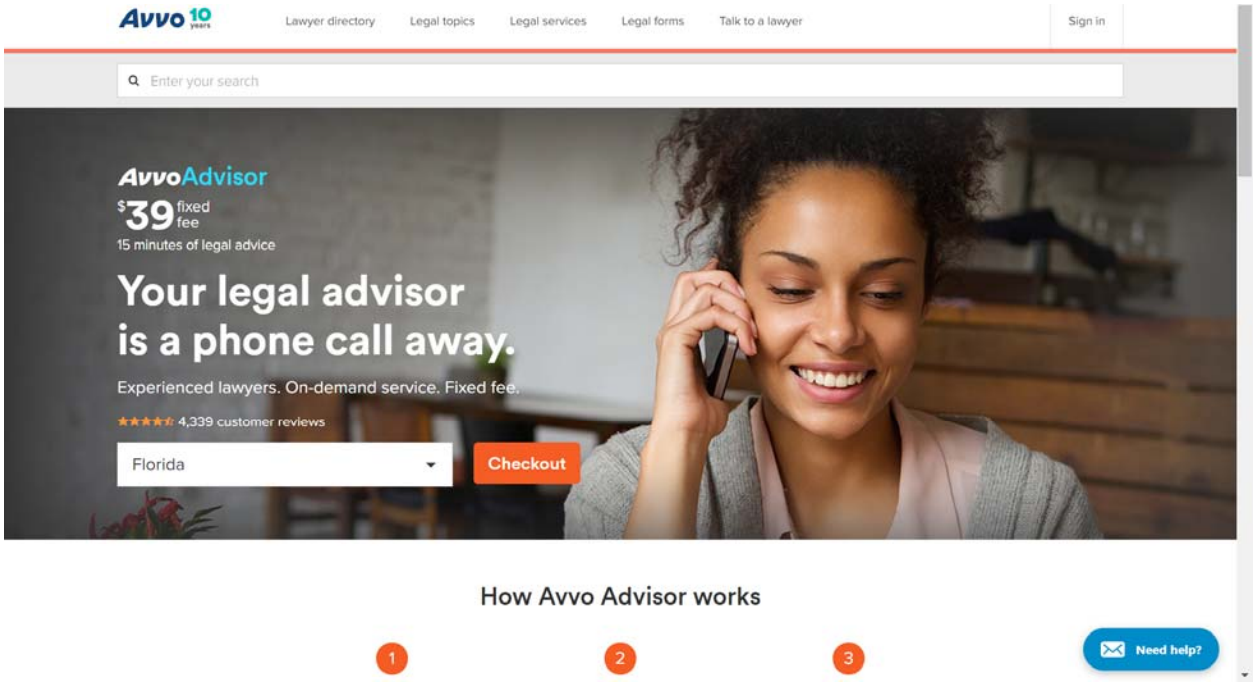
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#INTEL

APRIL 12, 2017 / 4:15 PM / 3 MONTHS AGO

Florida Bar wants to regulate Avvo and other legal marketers. Will state Supreme Court allow it?

Alison Frankel

(Reuters) - In 2015, the Florida Supreme Court directed the Florida Bar to solve a particular problem with for-profit lawyer referral services that purport to help consumers find law firms. A special Bar committee that spent more than a year investigating dozens of Florida referral services had reported in 2012 on all kinds of ethical pitfalls: improper solicitation of clients, undisclosed conflicts of interest, even unlicensed practice of law.

But many of the referral services were beyond the reach of the bar association because they were run by non-lawyers. After some give-and-take with the Bar, the state Supreme Court decided the most effective solution was to prohibit Florida lawyers from accepting referrals from any service not owned by a member of the Florida Bar. Its 2015 order instructed the Florida Bar to amend its rules to include that restriction.

Instead, as the Florida Supreme Court heard in oral arguments last week, the Florida Bar decided the real problem was not just lawyer referral services but the more recent proliferation of online legal directories and client matching services. Rather than adopt the rule change the Supreme Court directed, the Florida Bar proposed amending its regulations to

pooled advertising program with a common telephone number or URL, a lawyer directory, an internet 'matching' site, or a tips or leads service, among others."

The Bar's proposal was controversial even before it was approved by the Board of Governors in July 2016 and, based on arguments at the state Supreme Court, continues to raise a lot of questions about exactly which legal marketers are covered by the rules and what they have to do to comply.

Chief among the proposed rules' opponents is the online service Avvo, which described itself in a brief to the Florida Supreme Court as "the web's largest and most heavily-trafficked legal resource," with more than 8 million visits a month. According to Avvo, both in its brief and in arguments to the Florida justices by chief legal officer **Josh King**, the Florida Bar rule changes will end up hurting consumers.

Nationwide outfits, Avvo said, aren't going to want to put in the effort to come up with the extensive due diligence the Florida Bar is asking for. Florida lawyers aren't going to want to use the services of non-compliant directories or advertising shops. The result, according to Avvo, will be a chill on information about legitimate legal services for Florida consumers. Even a broad-based marketing provider like Google AdWords could be swept up in the Bar's new rules, Avvo said.

The proposed rules – which are the first state bar attempt to regulate Avvo – may violate the First Amendment, Avvo said, and will certainly put "an exponentially larger burden of monitoring and compliance" on the Bar. "We know that the Bar is motivated by a desire to look out for the best interests of Florida consumers," Avvo said in its brief. "However, in its attempt to 'level the playing field' by applying a uniform set of rules to lawyer referral services and all other mediums in which attorneys might market and sell their services, the Bar has created regulations that are over-extensive, under-targeted and out of step with the needs of consumers and clients."

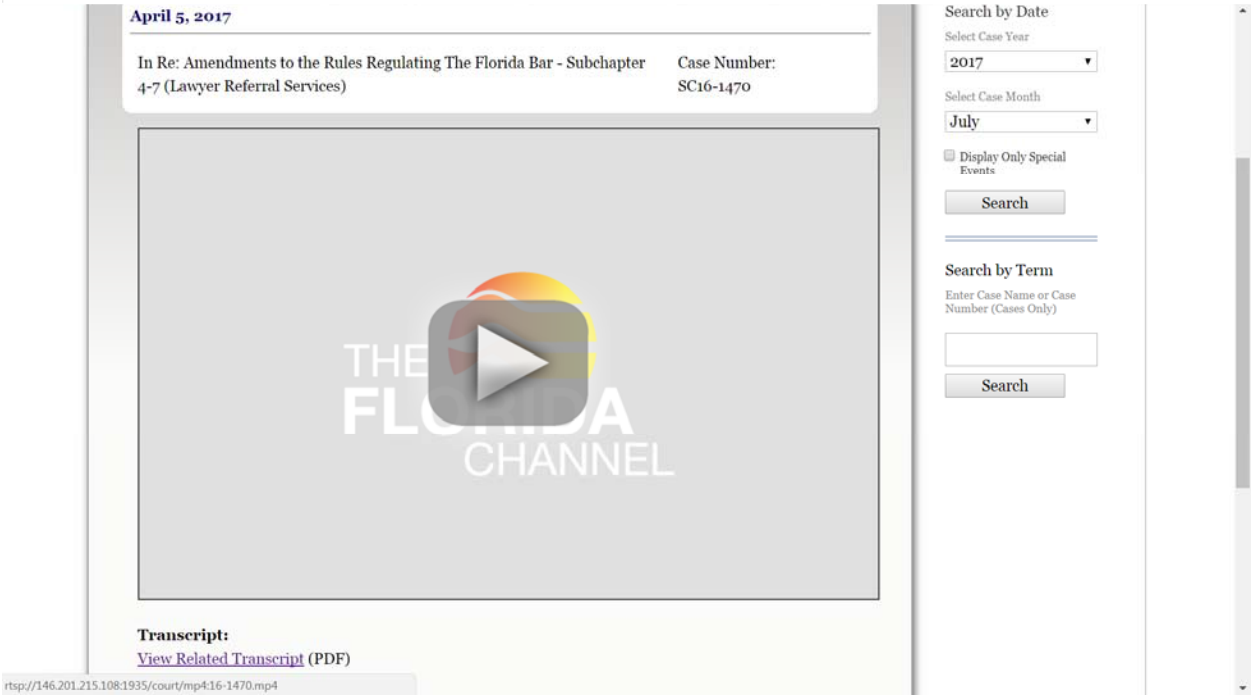
The Florida justices at last week's hearing seemed hazy on exactly what Avvo does and whether some of its services could be considered the sort of fee-sharing it wants to restrict. But the justices were also puzzled about why the Florida Bar has reached so broadly in response to the court's narrow instruction. (**Carl Schwait** of **Upchurch Watson White & Max**, who led arguments for the Bar, explained that the group didn't think the Supreme Court's order simply to restrict referral services owned by non-lawyers would actually do enough to protect consumers and might run into First Amendment problems.)

In an interview, Avvo legal chief King said he expects the Florida justices to refuse to adopt the Bar's proposed rules, which he said are fatally vague. It's not clear, for example, whether Avvo would be expected to provide a list of its advertisers to the Florida Bar or a list of every Florida lawyer in its directory, which includes all members of the Florida Bar. The proposed rule also seems to call for the Bar's advertising committee to clear ads. "Does that mean every iteration of our website?" King said. "There's a hornet's nest of problems."

It's entirely possible, however, that the state Supreme Court will agree with the Florida Bar that online marketing's impact on consumers of legal services needs more attention, King said. He told me he wouldn't be surprised if the justices called for a commission to dig into the issue. "That's a dialogue we are happy to have," he said.

I don't think there can possibly be too much transparency in legal marketing. I've heard way too many stories about consumers who had no idea what they were getting into when they responded to an ad on television or the Internet. On the other hand, there's plenty of evidence that prospective clients would never receive the legal help they need were it not for lawyers exercising their free speech right to market their services. I'm glad the Florida Supreme Court is trying so hard to find the right regulatory balance.

I left a message for Schwait, who represented the Florida Bar at last week's Supreme Court arguments, but didn't hear back.


April 5, 2017
In Re: Amendments to the Rules Regulating The Florida Bar - Subchapter 4-7 (Lawyer Referral Services)
Case Number: SC16-1470
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Supreme Court of Florida

WEDNESDAY, MAY 3, 2017

CASE NO.: SC16-1470

IN RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR - SUBCHAPTER 4-7 (LAWYER REFERRAL SERVICES)

Previously, in In re Amend. to Rule Reg. The Fla. Bar 4-7.22—Lawyer Referral Services, 175 So. 3d 779, 781 (Fla. 2015), the Court rejected amendments to Rule Regulating the Florida Bar 4-7.22 proposed by The Florida Bar and directed the Bar to propose amendments that "preclude Florida lawyers from accepting referrals from any lawyer referral service that is not owned or operated by a member of the Bar." In this case, the Bar proposes amendments to rule 4-7.22 that do not comply with the Court's direction concerning lawyer referral services that are not owned or operated by a member of the Bar and that seek to expand the scope of the rule to include "matching services" and other similar services not currently regulated by the Bar.

The Court having considered the Bar's prior petition, the amendments proposed in this case, the comments filed, the Bar's response, and having had the benefit of oral argument, the Bar's petition in this case is hereby dismissed without prejudice to allow the members of this Court to engage in informed discussions

with the Bar and those who are in favor or against the proposed regulation of matching and other similar services. The Court lacks sufficient background information on such services and their regulation at this time.

No rehearing will be entertained by this Court.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

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LEGAL ETHICS

'Marketing fees' paid to Avvo violate New Jersey lawyer conduct rules, ethics opinion says

POSTED JUN 26, 2017 07:00 AM CDT

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)

Lawyers in New Jersey can't participate in client-linking services offered by Avvo because of ethics issues stemming from the company's "marketing fee," according to a joint ethics opinion by three New Jersey Supreme Court committees.

The fee paid to the company violates the ban on lawyer-referral payments and the ban on sharing fees with nonlawyers, the June 21 opinion (https://www.dropbox.com/s/5plgfqgi26zuym1/ACPE%20732%20Avvo%2C%20LegalZoom%2C%20Rocket%20Lawyer%206.21.17.pdf?dl=0) said. The New Jersey Law Journal (http://www.americanlawyer.com/id=1202790850219/Avvo-LegalZoom-Rocket-Lawyer-Declared-OffLimits?mcode=0&curindex=0&curpage=ALL) (sub. req.) has a story.

Two other services linking clients to lawyers, LegalZoom and Rocket Lawyer, appear to be offering legal services plans that would pass muster under those ethics rules—if they were registered with the courts' administrative office, as required by such rules, the opinion said.

The ethics opinion found that none of the companies interfered with the independent professional judgment of participating lawyers, and no violation of lawyer trust account regulations by Avvo's practice of holding fees until legal services are performed.

The opinion was issued by the Advisory Committee on Professional Ethics, the Committee on Attorney Advertising and the Committee on the Unauthorized Practice of Law. The New Jersey Bar Association had sought the ethics opinion, according to a press release (https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=7617).

The opinion describes the services offered by three companies' websites.

Avvo offers two legal services products through its website: Avvo Advisor and Avvo Legal Services. Consumers who use Avvo Advisor pay a flat fee for a 15-minute phone conversation with a lawyer, while consumers who use Avvo Legal Services purchase specific services, such as an uncontested divorce, for a flat fee.

Avvo places the flat fee into the lawyer's bank account, then withdraws a "marketing fee." The ethics opinion said the marketing fee is an impermissible referral fee, rather than a fee for the cost of advertising, as well as an impermissible shared fee.

The opinion cited ethics opinions in Ohio, South Carolina (http://www.abajournal.com/news/article/ethics_opinion_on_fee_sharing_is_bad_news_for_avvos_legal_referral_service) and Pennsylvania that found marketing fees charged by "Avvo-type companies" were improper referral fees or constituted impermissible fee sharing.

Consumers who use LegalZoom's Business Advantage Pro and Legal Advantage Plus pay a flat monthly fee for legal advice. Users can then purchase additional services from participating lawyers at a discounted rate. LegalZoom retains the monthly subscription fees.

Consumers who use Rocket Lawyer's legal services plan pay a flat fee for limited legal advice on document-related matters and a free 30-minute lawyer consultation. Rocket Lawyer keeps the subscription fees, and participating lawyers offer legal services at discounted rates.

Avvo's chief legal officer, Josh King, told the New Jersey Law Journal that Avvo is happy the legal opinion found the company doesn't interfere with lawyers' professional judgment. But Avvo is "disappointed that the committees focused solely on mechanistic application of the rules rather than what the law requires: consumer protection and respect for the First Amendment," he said.

"Avvo is attempting to address the pressing need for greater consumer access to justice, and we will continue to do so despite this advisory opinion" he said.

-- *N.J.L.J.* ---
(June --, 2017)
Issued by ACPE, CAA, & UPL June 21, 2017

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
COMMITTEE ON ATTORNEY ADVERTISING
COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

ACPE JOINT OPINION 732
CAA JOINT OPINION 44
UPL JOINT OPINION 54

Lawyers Participating in Impermissible Lawyer Referral Services and Providing Legal Services for Unregistered Legal Service Plans – Avvo, LegalZoom, Rocket Lawyer, and Similar Companies

The Advisory Committee on Professional Ethics received an inquiry from a bar association requesting a formal opinion on "whether it is ethical for lawyers to participate in certain online, non-lawyer, corporately owned services that offer legal services to the public." Inquirer stated that three companies (Avvo, LegalZoom, and Rocket Lawyer) are soliciting New Jersey lawyers to provide legal services to customers of the companies. The inquiry was jointly considered by the Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and Committee on the Unauthorized Practice of Law. The Committees find that New Jersey lawyers may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer in violation of *Rule of Professional Conduct* 5.4(a), and pay an impermissible referral fee in violation of *Rule of Professional Conduct* 7.2(c) and 7.3(d). The Committees further find that LegalZoom and Rocket Lawyer appear to operate legal service plans through their websites but New Jersey lawyers may not participate in these plans because they are not registered with the Administrative Office of the Courts in accordance with *Rule of Professional Conduct* 7.3(e)(4)(vii).

Inquirer asked four specific questions:

1. Does a lawyer's participation in these services constitute impermissible fee sharing with nonlawyers in violation of *Rule of Professional Conduct* 5.4(a)?

2. Does participation in these services interfere with a lawyer's independent professional judgment in violation of *Rule of Professional Conduct* 5.4(c)?

3. Are Avvo, LegalZoom, and Rocket Lawyer impermissible attorney referral services in violation of *Rule of Professional Conduct* 7.2?

4. Do the services violate *Rule* 1:28A-2, which requires lawyers to establish an IOLTA account in which to hold client funds until they are earned, by having a nonlawyer company hold such funds instead and/or by allowing a nonlawyer company to have direct access to a lawyer's trust or bank accounts?

The Committees reviewed the websites and public information posted on the internet by Avvo, LegalZoom, and Rocket Lawyer, and considered written responses provided by the companies setting forth their positions on the ethical issues. Avvo offers, on its website, two legal services products: Avvo Advisor and Avvo Legal Services. Through Avvo Advisor, users may purchase a 15-minute telephone conversation with a lawyer for a flat fee. The user pays the fee to Avvo, Avvo contacts participating lawyers, and the first lawyer who responds to Avvo gets the job. Users can also select a lawyer from the Avvo profiles of participating lawyers. After the telephone conversation is completed, Avvo electronically deposits the flat fee into the lawyer's bank account and then withdraws a "marketing fee" (currently $10, about 25% of the $39.95 flat fee for the legal consultation). Avvo suggests that the deposit be made into the lawyer's trust account, and the withdrawal be taken from the lawyer's operating account.

Through Avvo Legal Services, users may purchase various legal services for fixed fees paid to Avvo, such as an uncontested divorce or a green card application. Participating lawyers provide these services to the user. When the services are completed, Avvo deposits the fees into the lawyer's bank account and then withdraws a "marketing fee" in set amounts that vary according to the fee charged for the specific legal service.

LegalZoom offers what appear to be legal service plans to users through its website. For Business Advantage Pro, users pay a monthly flat fee subscription and receive legal advice on limited business matters. For Legal Advantage Plus, users pay a monthly flat fee and receive legal advice on various matters such as estate planning, family law, and tax. Under both plans, users receive "unlimited" 30-minute consultations with lawyers. Users may make appointments with participating lawyers or request to receive a phone call from the "first available" lawyer. Users may receive additional services directly from participating lawyers at a discounted fee rate. The "Join Our Attorney Network" page of the LegalZoom website states that lawyers do not pay LegalZoom to participate; the monthly subscription fees are retained by LegalZoom.

Rocket Lawyer offers what appear to be legal service plans to users for a monthly flat fee; subscribing users receive limited legal advice on document-related matters, such as

enforcing a legal document (called "document defense"). Users also receive a "free" 30-minute consultation with a lawyer, and can use the "ask a lawyer" section of its website for legal advice. Participating lawyers do not pay Rocket Lawyer but agree to offer a discounted fee for additional services; Rocket Lawyer retains the monthly subscription fees.

The Committees find that the LegalZoom and Rocket Lawyer websites appear to offer legal service plans to paying subscribers, rather than an attorney referral service. *Rule of Professional Conduct* 7.3(e)(4) governs legal service plans. That *Rule* permits a "bona fide organization" to "recommend[], furnish[,] or pay[]" for legal services to its "members or beneficiaries" under certain conditions. If the organization is for profit, the legal services cannot be rendered by lawyers "employed, directed, supervised or selected by it . . . ." *RPC* 7.3(e)(4)(i). The participating lawyers must be separate and apart from the bona fide organization and cannot be affiliated or associated with it. *RPC* 7.3(e)(4)(ii) and (iii). The member or beneficiary must be recognized as the client of the lawyer, not of the organization. *RPC* 7.3(e)(4)(iv). The member or beneficiary must be entitled to select counsel other than that furnished, selected, or approved by the organization for the matter (though the switch in counsel may be at the member's or beneficiary's own expense). *RPC* 7.3(e)(4)(v). Participating lawyers must not have any cause to know that the organization is in violation of applicable laws, rules, or legal requirements. *RPC* 7.4(e)(4)(vi). Lastly, the organization must register its plan with the Supreme Court (Administrative Office of the Courts, Professional Services). *RPC* 7.4(e)(4)(vii).

LegalZoom submitted a response that stressed that its employees do not provide legal advice or assistance; it merely offers prepaid legal service plans. It stated that it contracts with a New Jersey law firm to provide legal consultations for its members and pays this law firm a monthly capitated fee per plan member in New Jersey.

Rocket Lawyer submitted a response, including its Service Provider Agreement. It stated that it offers prepaid legal service plans through independent lawyers who are not employees of the company. The Service Provider Services Appendix A states that participating lawyers are paid an undisclosed sum by Rocket Lawyer for participation in the "Q&A Service."

The LegalZoom and Rocket Lawyer offerings appear to be legal service plans, as they "furnish" and "pay for" limited legal services through outside participating lawyers to "members" who pay a monthly subscription ("membership") fee. Members select lawyers from the respective websites; participating lawyers are not officially affiliated with LegalZoom or Rocket Lawyer; and members become clients of the participating lawyer. As of the date of this Joint Opinion, however, neither organization has registered a legal service plan with the Administrative Office of the Courts. Therefore, New Jersey lawyers may not provide legal services to members of these unregistered legal service plans.

The Avvo plans do not meet the definition for legal service plans; they are pay-for-service plans. There are no "members or beneficiaries" to whom legal services are "furnished" and "paid for" through a legal service plan.

As noted above, Inquirer asked four questions. The first question asks whether lawyers who participate in these programs are engaged in impermissible fee sharing in violation of *Rule of Professional Conduct* 5.4(a) ("[a] lawyer shall not share legal fees with a nonlawyer"). The

Committees find that the Avvo business model violates *Rule of Professional Conduct* 5.4(a). The participating lawyer receives the set price for the legal service provided, then pays a portion of that amount to Avvo. The label Avvo assigns to this payment ("marketing fee") does not determine the purpose of the fee. *In re Weinroth*, 100 *N.J.* 343, 349-50 (1985) (referral fee was disguised as a credit for future legal services to client; law firm was aware that client intended to forward that amount to the nonlawyer who referred the firm the case); *In re Maran*, 80 *N.J.* 160 (1979) (improper referral fee to a doctor took the form of an inflated medical bill). Here, lawyers pay a portion of the legal fee earned to a nonlawyer; this is impermissible fee sharing, prohibited under *Rule of Professional Conduct* 5.4(a). *See also In re Bregg*, 61 *N.J.* 476 (1972); Joint ACPE Opinion 716/UPL Opinion 45 (June 2009).

The Committees further find that the monthly subscription fees paid by consumers to LegalZoom and Rocket Lawyer for the "free" consultations with lawyers do not violate this *Rule*. Those monthly subscription fees are not paid to the lawyers providing the service; the lawyers have not shared their legal fees. In legal service plans, members pay membership fees to the plan and, in return, get access to limited legal services by participating lawyers. Participating lawyers usually are paid a lump per-capita amount by the plan for providing the limited-scope legal services to plan members who select them.

The second question presented by Inquirer asks whether these services unduly interfere with the lawyer's professional judgment in violation of *Rule of Professional Conduct* 5.4(c). This *Rule* provides that "[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." Inquirer suggested that Avvo directs or regulates the lawyer's professional judgment because it "defines the scope of the legal services offered, receives payment from clients, sets the fee and pays lawyers only when legal tasks are completed." The Committees disagree. Avvo does not insert itself into the legal consultation in a manner that would interfere with the lawyer's professional judgment.

As for LegalZoom and Rocket Lawyer, Inquirer suggested that lawyers may be constricted in the service they provide for clients in the limited phone consultations. Again, however, this is the nature of legal service plans. Members get a limited consultation with participating lawyers and if the member needs more, they can retain the lawyer separately (usually at a discounted rate).

The third question presented by Inquirer asks whether the companies offer impermissible attorney referral services. *Rule of Professional Conduct* 7.2(c) provides in relevant part:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; . . . and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Rule of Professional Conduct 7.3(d) provides:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by the client except that the lawyer may pay for public communications permitted by *RPC* 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

Accordingly, the *Rules* prohibit a lawyer from giving anything of value to a person for recommending the lawyer's services, or compensating or giving anything of value to a person or organization to secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client. *RPC* 7.2(c); *RPC* 7.3(d). Both of these *Rules* provide that lawyers may, however, "pay the reasonable cost of advertising" or "public communication."

The Committees find that the "marketing fee" that lawyers pay Avvo after providing legal services to clients is not for the "reasonable cost of advertising" but, instead, is an impermissible referral fee. The fee "bears no relationship to advertising." ACPE Opinion 481 (May 1981); Joint ACPE Opinion 716 / UPL Opinion 45 (June 2009). Rather, it is a fee that varies with the cost of the legal service provided by the lawyer, and is paid only after the lawyer has completed rendering legal services to a client who was referred to the lawyer by Avvo.

Lawyers may "advertise" by placing an ad on the Avvo website or participating in other parts of the website without paying this "marketing fee." Lawyers may pay a set, flat amount for *potential* client inquiries or "leads" that may or may not result in retention of a client for a specific matter, but they may not pay a fee in exchange for referral or retention of a client for a specific case. CAA Opinion 43 (June 2011). This service offered by Avvo is a lawyer referral program that does not conform to the requirements of *Rule of Professional Conduct* 7.2(c) and *Rule of Professional Conduct* 7.3(d). Accordingly, New Jersey lawyers may not participate in the program.

The Committee on Attorney Advertising has issued several opinions on the distinction between "advertising" and an impermissible referral service. *See, e.g.,* CAA Opinion 13 (October 1992); CAA Opinion 43 (June 2011). Because the companies at issue in those opinions did not charge a fee for each case a lawyer received (as opposed to inquiries or "leads"), the opinions focused on whether the companies were making improper statements or restricting information about the participating lawyers. When the lawyers pay a fee to the company based on the retention of the lawyer by the client or the establishment of an attorney-client relationship, the answer to the inquiry is simple: the company operates an impermissible referral service.

LegalZoom and Rocket Lawyer offer what appear to be legal service plans through a different business model. Participating lawyers do not pay referral fees to those companies.

The fourth question raised by Inquirer asks whether payment of the legal fee by the user to Avvo violates *Rule* 1:28A-2, which requires lawyers to maintain a trust account registered with the IOLTA program. Avvo holds the legal fee until the services are performed and then electronically transfers the monies to the law firm bank account.

In New Jersey, lawyers are not required to hold advance payment of fees in their trust account absent an agreement with the client; while that is the better practice, they may deposit such monies in their operating account. *In re Stern*, 92 *N.J.* 611 (1983); Michels, K., *New Jersey Attorney Ethics*, § 8:4-3a, p. 126-27 (Gann 2017). The arrangement by Avvo does not violate *Rule* 1:28A-2.

The Committees notified Avvo, LegalZoom, and Rocket Lawyer that they were considering whether New Jersey lawyers may, consistent with the rules governing attorney ethics and advertising, participate in their programs, and requested written responses setting forth their position. In its response, Avvo claimed to be serving a public purpose of improving access to legal services. The Committees acknowledge that improving access to legal services is commendable, but participating lawyers must still adhere to ethical standards.

Avvo stated that it is not recommending or referring lawyers to potential clients. The Committees disagree; Avvo is connecting its users to the lawyers who have signed up with Avvo to provide those specific services. Avvo asserted, in essence, that all lawyers licensed in a jurisdiction are listed on its pages and, conceivably, a user could select any lawyer, even those who do not participate in this service, by merely finding that lawyer's contact information on its site and reaching out directly to that lawyer for representation. Avvo is conflating its two services – the attorney-referral service and the attorney-directory service. Only those lawyers participating in the "Avvo Legal Services" plan can provide users with the requested legal services. It is irrelevant that other lawyers can be found on the general lawyer directory.

Avvo claimed that the "marketing fee" is not a referral fee but an advertising cost, and because the "marketing fee" is a separate transaction, there is no improper fee sharing. The label and timing of the fee does not transform it into an advertising cost. This fee varies depending on the cost of the legal service provided, which is inconsistent with the essential elements of an advertising cost. Avvo defended the varying amounts of its "marketing fees" by stating that in the online market, bigger-ticket services should have bigger-ticket fees. It stated that it spends more to advertise the range of services and takes a bigger payment processing risk for more expensive services. The Committees are not convinced that the sliding scale of fees for legal services rendered bear any relation to marketing.

Avvo asserted that its marketing scheme is commercial speech that must be tested against the intermediate scrutiny standard applied to First Amendment commercial speech. The Committees are not restricting Avvo's marketing; the focus of this Joint Opinion is on the for-profit lawyer referral program and sharing of a legal fee with a nonlawyer. The First Amendment does not protect lawyers who seek to participate in prohibited attorney referral programs or engage in impermissible fee sharing.

Avvo further asserted that fee sharing is only unethical if it compromises the lawyer's professional judgment. The Committees acknowledge that concerns about independent professional judgment undergird the prohibition on sharing legal fees with nonlawyers. But the precedent in New Jersey, in case law, opinions, and the language of the *Rule of Professional Conduct* itself, do not restrict the prohibition to situations where there is a clear connection between the fee sharing and the lawyer's professional judgment. *See, e.g., In re Weinroth*, 100

N.J. 343, 349-50 (1985) ("The prohibition of the Disciplinary Rule is clear. It simply forbids the splitting or sharing of a legal fee by an attorney with a lay person, particularly when the division of the fee is intended to compensate such a person for recommending or obtaining a client for the attorney"). Sharing fees with a nonlawyer is prohibited, without qualification.

Avvo acknowledged that what it calls its "pay-per-action" model may look like a referral fee. It asserted that its model is permitted because the user chooses the lawyer, no "runners" are involved, and there is no element of deception in the Avvo website. The prohibition on for-profit referral fees or sharing legal fees with a nonlawyer does not depend on whether deception is involved; as noted above, it is unqualified.

One need not parse the Avvo website to determine if the language used improperly restricts choice or directs users to a particular lawyer. Avvo charges a pay-per-legal-service fee, which is a hallmark of an attorney referral service.

The Committees reviewed advisory opinions about Avvo-type companies issued by other states. Ohio found that the "marketing fee" was not payment for advertising but, rather, a referral fee because the amount is based on a percentage of the fee for rendering legal services. Supreme Court of Ohio, Board of Professional Conduct, Opinion 2016-3 (June 3, 2016).

> Even where a business model states that it does not engage in impermissible fee splitting because the fees are separated into two different transactions or are called a "marketing fee" or similar term, fee splitting with a nonlawyer likely occurs. Such fees are not traditional advertising fees, as outlined in Adv. Op. 2001-2. Unlike advertising fees that are fixed amounts and paid for a fixed period of time, these "marketing fees" are a percentage of the fee generated on each legal service completed by the lawyer. Therefore, a fee-splitting arrangement that is dependent on the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct.

South Carolina found that the arrangement violates *Rule of Professional Conduct* 5.4(a), improper fee-sharing, and *Rule of Professional Conduct* 7.2(c), improper referral fee. South Carolina Ethics Advisory Opinion 16-06 (July 14, 2016). As for fee-sharing, South Carolina stated:

> In the situation described above, the service collects the entire fee and transmits it to the attorney at the conclusion of the case. In a separate transaction, the service receives a fee for its efforts, which is apparently directly related to the amount of the fee earned in the case. The fact that there is a separate transaction in which the service is paid does not mean that the arrangement is not fee splitting as described in the Rules of Professional Conduct.
>
> A lawyer cannot do indirectly what would be prohibited if done directly. Allowing the service to indirectly take a portion of the attorney's fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its "per service marketing fee."

South Carolina further found that the payment by the lawyer to the company is not payment for the cost of advertisement but, rather, a referral fee. It stated:

> The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.
>
> Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

Pennsylvania also found impermissible fee-sharing. Pennsylvania Bar Association, Legal Ethics and Professional Responsibility Committee Formal Opinion 2016-200 (September 2016). It stated:

> The manner in which the payments are structured is not dispositive of whether the lawyer's payment to the Business constitutes fee sharing. Rather, the manner in which the amount of the "marketing fee" is established, taken in conjunction with what the lawyer is supposedly paying for, leads to the conclusion that the lawyer's payment of such "marketing fees" constitutes impermissible fee sharing with a non-lawyer.

Pennsylvania further found that the "marketing fee" was not the "usual cost of advertising" within the meaning of *Rule of Professional Conduct* 7.2(c). It stated: "The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter."

In sum, the Committees find that the Avvo website offers an impermissible referral service, in violation of *Rules of Professional Conduct* 7.2(c) and 7.3(d), as well as improper fee sharing with a nonlawyer in violation of *Rule of Professional Conduct* 5.4(a). LegalZoom and Rocket Lawyer avoid those problems but appear to be offering legal service plans that have not been registered pursuant to *Rule of Professional Conduct* 7.3(e)(4)(vii). New Jersey lawyers may not participate in the Avvo legal service programs. In addition, New Jersey lawyers may not participate in the LegalZoom or Rocket Lawyer legal service plans because they are not registered with the New Jersey Supreme Court (Administrative Office of the Courts).

5. ADA Compliance

ADA mandates
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July 14, 2017

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52 NEW ARTICLES

Companies Face 'New Frontier' in ADA Compliance

Graham L. Day
Elizabeth T. Gross

Polsinelli PC

Friday, February 10, 2017

Most companies and individuals who operate businesses at physical locations are familiar with their obligations under the ***Americans with Disabilities Act of 1990 (ADA)*** to not discriminate against, and possibly provide accommodations for, qualified individuals with disabilities. **However, these same companies and individuals may not be aware of the newest frontier of plaintiffs' lawsuits — claims that websites do not comply with the ADA.**

Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodations. Places of public accommodations include businesses that are generally open to the public, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, hospitals, and doctors' offices. Title III of the ADA also requires newly constructed or altered places of public accommodation, as well as commercial facilities (privately owned, nonresidential facilities, including factories, warehouses or office buildings whose operations affect commerce), to comply with ADA standards.

At the time of the ADA's passage, the internet was not a consideration in the ADA's provisions or implementation. However, given the internet's now prevalent use for consumer applications, the ADA's requirements now extend to include company websites. The growing consensus of the courts and the United States Department of Justice (DOJ), the agency responsible for enforcing Title III of the ADA, is that websites are places of public accommodation that must comply with the ADA. State laws may also impose similar compliance obligations on companies. The DOJ is reviewing websites for compliance. In actions brought by the DOJ, monetary damages and civil penalties may be awarded. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

Private parties may also file suit to obtain court orders to compel companies to bring their websites into compliance with the ADA's public accommodation provisions. No monetary damages are available in such suits under federal law; however, reasonable attorneys' fees may be awarded—making these attractive potential class actions for plaintiffs' attorneys. State laws may also provide for monetary damages.

The DOJ has not yet established binding regulations governing website ADA compliance, and is not expected to do so until 2018. However, it appears to be a near certainty that the DOJ will adopt the current "Web Content Accessibility Guidelines (WCAG-2.0) Level AA" (WCAG) as the relevant regulations. The WCAG explain how to make web content more accessible to people with disabilities. Web content generally refers to the information in a web page or web application, including natural information such as text, images, and sounds and code or markup that defines structure, presentation, etc.

Until the adoption of binding regulations, the plaintiffs' bar and the DOJ seem to be treating WCAG as the *de facto* standards for ADA compliance. Therefore, compliance with WCAG is highly recommended. Evaluating reasonable accommodation issues for applicants and employees is complicated enough. To keep pace with companies' ever-growing list of compliance obligations, companies are strongly encouraged to seek counsel to determine whether their websites comply with the ADA and any applicable state laws.

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BY CELIA AMPEL

PUBLISHED: JUN 22, 2017

How a Miami Court Ruling Could Affect ADA Compliance Nationwide

(http://images.law.com/contrib/content/uploads/sites/292/2017/06/scola-robert-n-2-Article-201706211547.jpg) 6/24/16– Miami– Robert N. Scola, Jr. (born October 1955) is a judge of the United States District Court for the Southern District of Florida.

A **Miami federal court decision (http://www.almcms.com/contrib/content/uploads/sites/292/2017/06/16-cv-23020-63-Verdict-Order_WinnDixie.pdf)** about website accessibility is sounding the alarm for businesses across the country, according to attorneys who focus on disability issues.

U.S. District Judge Robert Scola ruled last week that supermarket chain **Winn-Dixie Stores Inc. (https://www.winndixie.com/)**violated a blind customer's rights under the **Americans with Disabilities Act (http://www.law.com/search/?query=americans+with+disabilities+act&searchSubmit=SEARCH&sort=date&sorttype=des** not making its website usable via screen reader software, which has been around in some form for decades.

It was the first time the issue had made it to trial in the United States, where various circuits are still deciding the circumstances under which a company's website qualifies as a "public accommodation" under the ADA.

“Even though hundreds of these [cases] have been filed, the reason why none of them have been tried is because this is something that can be fixed relatively easily, depending on the size of the website,” said Miami attorney Matthew Dietz of Disability Independence Group, who was not involved with the case.

Scola ruled Winn-Dixie’s website served as a gateway to the chain’s hundreds of physical locations across the Southeastern U.S., dismissing the grocer’s argument that plaintiff Juan Carlos Gil’s rights were not being violated because he was not being denied physical access to Winn-Dixie stores.

The ADA doesn’t just require physical access, Scola wrote: It also requires that customers with disabilities be able to enjoy the same goods and services as everyone else, such as access to coupons or the ability to fill prescriptions without having to announce one’s medical needs to everyone in a 5-foot radius.

“These services, privileges, advantages, and accommodations are especially important for visually impaired individuals since it is difficult, if not impossible, for such individuals to use paper coupons found in newspapers or in the grocery stores, to locate the physical stores by other means, and to physically go to a pharmacy location in order to fill prescriptions,” Scola wrote.

The judge also found the cost of making the website accessible to the blind, which one expert placed at $37,000, paled in comparison to the millions of dollars Winn-Dixie had spent on website upgrades in recent years.

“We are disappointed with this ruling,” Anna Kelly, vice president of corporate and consumer affairs at Winn-Dixie parent Southeastern Grocers, said in a statement. “While we are sensitive to the needs of the visually impaired and are currently improving our website, the legal position[s] regarding website standards are unclear and we believe improvement can be achieved through customer dialogue, rather than through the courts. We believe our website is no better, or indeed no worse than thousands of other consumer-facing websites and will certainly be appealing this judgment.”

Winn-Dixie was represented by Susan Warner of Nelson Mullins Riley & Scarborough in Jacksonville, where the supermarket chain is based.

Gil’s attorney, Scott Dinin, said he believes Winn-Dixie seeks to “lead from behind.” He said he hopes the ruling will push other companies to bring diverse voices into their decision-making processes, particularly as mobile apps and other technology-based business interactions proliferate.

“This decision will send a message far and wide that the ADA does not stop at the storefront and large companies like Winn-Dixie need to respect the diverse and the disabled,” said Dinin, who worked on the case with Richard Della Fera of Entin & Della Fera in Fort Lauderdale.

Robert Fine, a Greenberg Traurig shareholder in Miami who chairs the firm’s accessibility practice group, said the next big frontier for accessibility litigation is health care technology such as sign-in kiosks at hospitals.

But he said litigation over accessible websites might not have been necessary if a federal moratorium on new regulations hadn’t left businesses trying to interpret the “public accommodations” section of the ADA without clear standards to follow.

“The problem is, in a sense, quickly getting remedied,” Fine said. “But it’s getting remedied at the cost of litigation as opposed to an announcement or education that you need to do this and you’ve got six months or a year. … Because there’s no regulation, nothing says there’s a grace period or time to comply. If there’s a lawsuit today, you’re liable today, if the court finds against you.”

But Dietz said in 20 years of working on accessibility cases, he’s learned that litigation is often necessary.

“Clear regulatory standards don’t always mean compliance,” he said. “With regards to accessible websites … the guidance is out there, and web designers know how to remove barriers such as putting ALT tags on pictures [to describe them] or making forms usable to people with screen readers. So none of the changes, which need to be done, are that complex that a web designer would not know how to do it, even in the absence of guidelines.”

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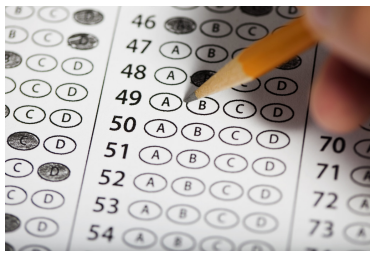

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Omaha Steaks among companies facing ADA compliance lawsuits over websites

By Russell Hubbard / World-Herald staff writer Feb 26, 2017

Products whiz along the conveyors at the Omaha Steaks distribution center in September 2016.
KENT SIEVERS / THE WORLD-HERALD

Legal experts are calling it the next frontier when it comes to business compliance with the Americans with Disabilities Act: the Internet.

Lawsuits are proliferating against business websites — civil suits citing lack of compliance with the law requiring companies to not discriminate against people with disabilities. In brick-and-mortar cases such as those involving stores, restaurants and workplaces, the objection is often over restroom ramps and parking spaces.

But when it comes to the Internet, it is usually a matter of visual aspects. This month, Omaha Steaks was sued by a nonprofit advocacy group that alleges the company's website isn't compatible with screen-reading software that converts text to audio, the method by which blind and visually impaired people navigate the Internet.

"Screen reader software provides the primary method by which a blind person may independently use the Internet," reads the suit filed this month in U.S. District Court in Pittsburgh. "Unless websites are designed to be read by screen reader software, blind individuals are unable to fully access websites and the information, products and services available through the site."

The lawsuit, filed by the advocacy group Access Now and three blind people, cites 13 "access barriers" for blind people on OmahaSteaks.com. They include not providing a "text equivalent for every non-text element" and that "text cannot be resized up to 200 percent without assistive technology."

The suit asks for a court order requiring Omaha Steaks to comply with the Americans with Disabilities Act and payment of attorney fees for Access Now and the people who filed the suit.

Omaha Steaks declined to comment on the matter, citing the pending nature of the litigation, the company's staff attorney said.

But the employer of more than 5,000 people during the peak holiday season has spoken on the matter in its own court filing. The company filed papers in U.S. District Court in Omaha late last month saying Access Now in January sent a letter outlining its objections and offering to not file a lawsuit "in exchange for payment of certain attorney fees and expenses."

The letter from the Access Now attorneys, the lawsuit said, proposed the Pittsburgh law firm Carlson Lynch Sweet & Kilpela would "represent Omaha Steaks for the next two years to ... assist and cooperate in the prevention of the Additional Potential Website Claims" against Omaha Steaks.

The Pittsburgh firm didn't return requests for comment.

The Omaha Steaks filing says Access Now has filed 18 similar lawsuits. The company asks a judge to clarify the legal standard that applies in the case and determine if the suit should progress.

The legal standards are somewhat unclear, some ADA lawyers say. Joe Lynette, a lawyer for the Jackson Lewis law firm who defends companies against ADA claims, said the U.S. Department of Justice in 2010 issued a notice on regulations governing website access as it applies to people covered by the disability law.

A final determination has been pushed back until next year, Lynette said. And now, he said, the policy of the Trump administration that two old regulations must be scrapped for every new one adopted puts even that in jeopardy.

"What is clear is that what started out as a trickle of litigation has turned into a growing wave," Lynette said. "Certain industry groups view them as a nuisance and are taking an aggressive stance."

In practical terms, the controversy lies within the computer code on which websites operate, the instructions that govern the operation of elements such as "buy now" buttons, drop-down menus and the appearance of graphics when rolled over by a mouse or other navigation device. Generally speaking, to be ADA-compliant for the blind, such elements must operate as easily with screen-reading software as they do when clicked on with a mouse by a person with clear vision.

Richard Baier, president and chief executive of the Nebraska Bankers Association, said "a couple" of Nebraska financial institutions have been contacted regarding their websites' compliance with ADA requirements.

He said the organization and its member institutions are aware of the issues and are "working diligently" with IT vendors to be sure their websites meet the needs of visually impaired customers.

As for Omaha Steaks, the company says in its court filing that amid the ambiguity of how the Justice Department will enforce the website aspect of the ADA, its has hired a specialist company to assist with compliance and that progress is being made.

"Omaha Steaks asserts that its ongoing efforts at compliance are sufficient under the guidelines, and that it should not be held to a higher standard or earlier deadline than federal agencies must meet," the company said in court papers.

Jim Butler, an ADA defense lawyer for the Jeffer Mangels Butler & Mitchell firm in Los Angeles, said, "The average business owner isn't focused on website compliance with the law."

But everyone with a commercial website should. Butler said the law applies as evenly to a tiny bed-and-breakfast as it does to the largest international hotel chain. He specializes in representing hotels, whose websites are among the most heavily trafficked commercial ones.

Butler said it is easy to believe in the concept of making sure websites are accessible to everyone. But it is another, he said, when the lawsuits are "excessive and abusive" and the law firms handling the cases take on the appearance of "extortion artists."

World-Herald staff writer Cole Epley contributed to this report.

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Is Your Website ADA Compliant?

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Title III of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in places of public accommodation. Businesses and corporations, both large and small, are affected by the ADA. While Title III of the ADA is best known for its applicability to barriers such as lack of wheelchair access, acceptance of service animals, effective communication for hard-of-hearing individuals and accommodations for the vision impaired, its focus in the digital age has turned to websites.

The Department of Justice (DOJ), which enforces the ADA, has made it clear that it interprets the ADA as applicable to websites. In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking stating it would amend the language of the ADA to specifically ensure accessibility to websites for individuals with disabilities. The DOJ's proposed amendments to the ADA are expected in 2018, but enforcement actions are ongoing. Title III claims are on the rise, and in 2015, the DOJ received 6,391 accessibility complaints—a 40% increase over the prior year. Moreover, website compliance litigation filed by plaintiffs' firms and advocacy groups have similarly seen a significant rise over the past year, and especially in the past several months. As such, prudent businesses should ensure compliance now.

In 2015 and 2016, certain plaintiff law firms sent letters to scores of companies, universities and other entities on behalf of disabled individuals throughout the United States who use the Internet to facilitate their access to goods and services. The letters typically identify certain alleged ADA violations based upon "access barriers" on the recipients' websites. The letters further claim that unless the recipient company modifies its website to meet the standards in the World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines (WCAG 2.0 AA), the company will continue to violate Title III. The WCAG 2.0 AA Guidelines have been endorsed by the DOJ. In addition, the United States Access Board has promulgated accessibility standards that apply to electronic and information technology procured by the federal government (Section 508 Standards). Together, according to the letters, the Guidelines and Section 508 Standards are recognized as setting the baseline requirements for website accessibility and have been used by the DOJ as a benchmark in settling website accessibility matters.

The letters from plaintiffs' counsel typically seek settlement negotiations on an expedited basis and stipulated injunctive relief and payment of attorneys' fees and costs. The remedial measures requested in the letters may include the following:

- Designate one or more individuals to manage web accessibility testing, repairing, implementing, maintaining and reporting for a Section 508 and WCAG 2.0 compliant website within a reasonable time period.
- Create, adopt and maintain a web accessibility policy consistent with prevailing standards.
- Initiate a needs assessment and subsequent training for web and content development personnel on Section 508 and WCAG 2.0 accessibility programming, functionality and design.
- Contractually require that services procured and performed by third-party developers and other relevant service providers conform to prevailing Section 508 and WCAG 2.0 compliant accessibility standards and the company's web accessibility policy.
- Conduct monthly independent third-party automated and disabled end-user testing of website.
- Implement other related policy, technology and programming, monitoring and training measures as they are identified and needed.

In addition to the letters from plaintiffs' counsel, numerous lawsuits have been filed seeking to force companies to modify their websites to comply with the WCAG 2.0 AA Guidelines.

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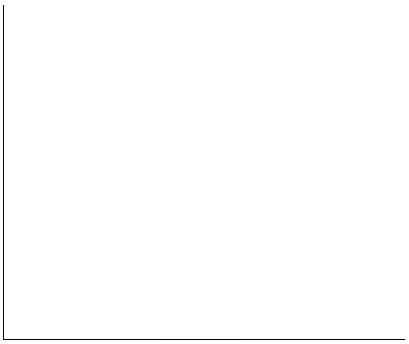

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6. Funding Technology in Florida Courts

Mecca for lawyers
Consistency across courts
Judges; clerks of court

State, counties, and clerks
Technology resources
Inadequate funds

FLORIDA BAR NEWS

Court sees many of its priorities met; technology funding will have to wait

The courts received much of what they wanted from the Legislature for the 2017-18 budget, but its biggest ticket items went unfunded.

Judges will see a 10 percent pay raise — also a priority of The Florida Bar — but a broader pay package for court branch employees, intended to bring to parity with similar positions in the public and private sectors, failed. Employees instead will get an across-the-board raise approved for other state workers.

The Legislature also ignored a long list of requests for the trial courts, from technology enhancements to more case managers, law clerks, and interpreting services. Instead, following a $2.5 million reduction last year, the Legislature eliminated 39 positions in the trial courts, and, despite pay raises, cut the appropriation for salaries by $2 million.

Court administrators are expected to make up the shortfall by delays in filling vacant positions.

State agencies are authorized to pay the annual Bar membership fees and CLE costs for their employees who must be a Bar members to hold their jobs — a Bar legislative priority.

As this *News* went to press, the budget is awaiting submission to Gov. Rick Scott, who is unhappy the fiscal plan ignored or differed on his priorities for promoting economic development, tourism, and education. There has been speculation Scott could veto the entire budget or major parts, which would require the Legislature to have a special session. Scott might also extensively exercise his line-item veto power, which might prevent a special session.

The governor has 15 days to act once the budget reaches his desk.

None of the 12 new judgeships requested by the Supreme Court were approved, nor did lawmakers decertify six county judgeships the court said were no longer needed. The Legislature did approve the $3.4 million necessary to complete repairs and upgrades to the Third District Court of Appeal Courthouse.

Judicial pay raises had been a priority for both the Supreme Court and the Bar. Chief Justice Jorge Labarga had noted that while Florida is the third largest state, its judicial salaries rank 27th in the nation.

Pay Raises

The pay raises included judges, state attorneys, public defenders, and criminal conflict and civil regional counsels.

Here's how their pay is affected:

- Supreme Court justices — from $162,200 to $178,420.
- District court of appeal judges — from $154,140 to $169,554.
- Circuit court judges — from $146,080 to $160,688.
- County court judges — from $138,020 to $151,822.
- State Attorneys — from $154,140 to $169,554.
- Public Defenders — from $154,140 to $169,554.
- Criminal Conflict and Civil Regional Counsels – from $105,000 to $115,000.

The Senate, in its preliminary budget, had included an extra pay raise for assistant public defenders, but that was not in the final budget. However, there are special raises for attorneys working for the Attorney General's Office, including a boost in starting pay for assistant attorneys general.

Other lawyers working for the state, as well as court staff, will participate in the raise given to all employees. Those making $40,000 or less will get a $1,400 raise and those earning more than $40,000 will get a $1,000 raise. (Anyone earning between $40,000 and $40,400 will get a raise to $41,400.)

Not Funded

Other than pay raises and the Third DCA Courthouse, much of the additional requests in the court budget were not addressed. Those items not funded include:

• $22 million for court technology improvements, including upgrading capabilities and tying together the courts throughout the state.

• $6.3 million for more interpreting services, particularly using technology to allow better use of interpreters and to obtain interpreters in areas of the state where it has been difficult to find them.

• $3.1 million for 39.5 additional staff attorney positions to help trial court judges with research and case management.

• $3.3 million for 50 court case manager positions.

If the Legislature did not grant many of the judicial branches priorities, it did add several items that were not requested by the Supreme Court as part of the court's budget. Those include $304,000 for senior judges and administrative support in Flagler and Citrus counties; $250,000 for a driver's license reinstatement pilot project; $124,421 for drug court funding in Seminole County; $175,000 for juvenile drug court funding in the 18th Circuit; $420,000 for courthouse improvements in Nassau and Liberty counties; $550,000 for Children's Advocacy Center initiatives; and $2.5 million for the drugs that treat opioid overdoses. That last item is a pass-through appropriation that goes to rehabilitation centers that work with drug courts.

Overall, the court budget for next year will be $514.7 million. The court had requested $508.2 million as a base budget with additional requests of $48.7 million. Last year, the total base budget and additional requests totaled $521.7 million.

News HOME

[Revised: 07-05-2017]

7. Conclusion

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[1] See LairdALile.com/LegislativeUpdate