WINNING CASES AND KEEPING CONFIDENCES: ETHICAL USE OF ELECTRONIC INFORMATION

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Biography: Mark A. Berman, JD

Mark A. Berman is a partner in the Commercial Litigation Practice of Ganfer Shore Leeds & Zauderer LLP. Mr. Berman is a seasoned litigator whose practice focuses on representing domestic and international companies and individuals in complex commercial disputes in courts and in arbitrations on both the plaintiff and defendant’s side with an emphasis on real estate and securities matters, as well as on electronic discovery disputes. Mr. Berman has written and spoken on social media, ethics, electronic discovery and cybersecurity before the American Bar Association, the New York State Bar Association, the New York State Judicial Institute, and the New York Appellate Divisions. He has been appointed by the Chief Administrative Judge as a member of New York State E-Discovery Working Group advising the New York State Unified Court System. Since 2005, Mr. Berman has had a column in The New York Law Journal addressing electronic discovery under New York State law. He is on the Executive Committee of the New York State Bar Association as well as the Chair of its Committee on Technology and the Legal Profession. He is also the former Chair of the Commercial and Federal Litigation Section.
Biography: Gail L. Gottehrer, JD

- **Founder, Law Office of Gail Gottehrer**
  - Practice focuses on technology-related litigation and counseling, including autonomous vehicle regulation, connected vehicle regulation, data privacy, biometrics, cybersecurity, facial recognition, and the IoT. She is one of the few defense lawyers to have been involved in the trial of a class action to verdict before a jury.

- Teaches Law for Knowledge Innovation at Columbia University, is a member of the Advisory Board for Rutgers University’s Leading Disruptive Innovation Program, and a Fellow at the Center for Legal Innovation at Vermont Law School.

- Appointed Co-Chair of the State of Connecticut’s Task Force to Study Fully Autonomous Vehicles, the NYSBA’s Transportation Committee, Law360’s Transportation Editorial Advisory Board, and NYSBA's Technology and the Legal Profession Committee. She is the New York Regional Co-Chair for the ABA’s Judicial Intern Opportunity Program, Co-Chair of the Programming Committee of the ABA’s Woman Advocate Committee, Vice-chair of the ABA-TIPS Automobile Litigation Committee, Co-Chair of NAWL’s IP & Technology Affinity Group, and a member of the Sedona Conference Working Group on eDiscovery Cooperation and Training (WG-1).

- Selected as one the Profiles in Diversity Journal’s 2017 Women Worth Watching in STEM and one of the Connecticut Technology Council’s 2016 Women of Innovation.

- Graduated from University of Pennsylvania Law School and served as a law clerk to the Honorable Murray C. Goldman, in the Philadelphia County Court of Common Pleas. She is admitted to practice in New York, New Jersey, Connecticut, and Pennsylvania.
Biography: Ronald J. Hedges, JD

• United States Magistrate Judge, District of New Jersey, 1986-2007
• Senior Counsel, Dentons US LLP
• Co-Senior Editor, *The Sedona Conference® Cooperation Proclamation Resources for the Judiciary* (all editions)
• Member, Committee on Technology and the Legal Profession, New York State Bar Association
• Co-Chair, Social Media Committee, Commercial & Federal Litigation Section, New York State Bar Association
Competence

• The “Technology” Amendments to the Rules of Professional Conduct
  • MRPC 1.1, cmt. [8]
  • New York RPC 1.1, cmt. [8]

• The Baseline Knowledge a Competent Attorney Should Have
  • CA Ethics Opinion 2015-193 and the Handling of Electronically Stored Information
Competence

- California State Bar Standing Committee on Professional Responsibility and Conduct states in Formal Opinion No. 2015-193 (June 30, 2015) that attorneys should have the technical competence and skill – either by themselves, co-counsel, or expert consultants
Competence

• The “facts”:
  • Client is in litigation against Chief Competitor
  • Opposing counsel suggests joint search of Client’s network using opposing counsel’s chosen vendor
  • Opposing counsel offers claw back, which court approves
  • Attorney prepares keywords for searches and accepts keywords proposed by opposing counsel
  • Client’s CEO tells attorney there is no electronically stored information (ESI) that has not been produced in hard copy
Competence

• Attorney relies on Client’s IT to understand searches so allows vendor to have unsupervised access
• Attorney does not review search results (assuming results same as hard copies)
• Attorney receives letter from opposing counsel accusing Client of destroying evidence
• Attorney cannot open data and retains forensic expert who determines ESI routinely destroyed following Client’s retention policy
• Chief Competitor receives privileged and proprietary information
Competence

• Attorney’s ethical duties in managing discovery of ESI:
  • “initially assess e-discovery needs and issues, if any;
  • implement / cause to implement appropriate ESI preservation procedures;
  • analyze and understand a client’s ESI systems and storage;
  • advise the client on available options for collection and preservation of ESI;
  • identify custodians of potentially relevant ESI;
  • engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
  • perform data searches;
  • collect responsive ESI in a manner that preserves the integrity of that ESI; and
  • produce responsive non-privileged ESI in a recognized and appropriate manner.” (footnote omitted)
Maintaining confidentiality: *Fed. R. Evid.* 502


- “Absent further Congressional action, the Rules Enabling Act does not authorize modification of state privilege law. Thus, the claw back provision in Fed. R. Civ. P. 26(b)(5)(B) and 16(b)(6), while respected in federal courts, might be deemed a common law waiver of privilege in state courts, not only for the document in question, but a broader waiver of attorney client privilege as to the subject matter involved.” *Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008).
Maintaining confidentiality: *Fed. R. Evid.* 502

- Reduce cost of privilege review
- Provide clear guidance on waiver of privilege
- Avoid broad waiver through inadvertent disclosure of privileged communications
- Give effect to agreements between parties and court orders regarding privilege

Maintaining confidentiality: *Fed. R. Evid.* 502(a)

- Waiver by disclosure in a federal proceeding or to a federal agency acts as a waiver of additional undisclosed communications only if:
  - Waiver was intentional
  - Undisclosed communication concerns the same subject matter, and
  - Disclosed and undisclosed communications “ought in fairness to be considered together”
Maintaining confidentiality: The “hierarchy” of *Fed. R. Evid. 502*

- No Agreement
- Agreement
- Order
Maintaining confidentiality: *Fed. R. Evid. 502(b)*

• Disclosure does not act as waiver if:
  • Disclosure is inadvertent
  • Reasonable steps were taken to prevent disclosure, and
  • Prompt and reasonable steps were taken to rectify the error
Maintaining confidentiality: \textit{Fed. R. Evid.} 502(e)

• “An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.”
Maintaining confidentiality: *Fed. R. Evid. 502(d)*

• “A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.”
Maintaining confidentiality: Practical consequences

• Can “the bell be unrung?” What might be the practical consequences of “returning” an inadvertently produced document?

  • “Plaintiffs are directed to return all copies ***. Plaintiffs may, however, rely on any material learned prior to *** [notification of the inadvertent disclosure] in challenging Defendants’ assertion of privilege.”
Maintaining confidentiality: Controlling effect of *Fed. R. Evid. 502*

- “this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.”
Maintaining confidentiality

- *MRPC 1.6* requires confidentiality. Rule amended to require 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.”

- Comment to *MRPC 1.6* amended to include factors to be considered in determining whether lawyer made reasonable efforts and to state that, “[a] client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures . . .,” and to note that state or federal laws may require lawyer to take additional steps, but that this is “beyond the scope of these Rules.”
Maintaining confidentiality

• New York RPC 1.6:
  
  • “(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . .”
  
  • “(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected . . . .” (emphasis added).
Maintaining confidentiality

• Comment to New York RPC 1.6(c):
  • An attorney must “make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer’s supervision.”
  • “Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected . . . does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure.”
Maintaining confidentiality

• New York RPC 4.4(b):
  • Requires “[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” to “promptly notify the sender” (emphasis added)
Maintaining confidentiality

• *Fed. R. Civ. P. 26(b)(5)(b):*
  • “Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”
Maintaining confidentiality

- **Miller v. Zara USA, Inc., 151 A.D.3d 462 (1st Dep’t 2017)** ("[P]laintiff[, the defendant’s general counsel,] lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, Inc. . . ., his employer, and thus lacked the reasonable assurance of confidentiality that is foundational to attorney-client privilege.")

- **Peerenboom v. Marvel Entm’t, LLC, 148 A.D.3d 531, 532 (1st Dep’t 2017)** ("Given the lack of evidence that Marvel viewed any of [the nonparty’s] personal emails, and the lack of evidence of any other actual disclosure to a third party, [the nonparty’s] use of Marvel’s email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections.")
Duty to supervise

• **MRPC 5.2:**
  
  • “(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
  
  • (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.”
Duty to supervise

• **MRPC 5.3:**
  
  • “With respect to a nonlawyer employed or retained by or associated with a lawyer:

    (a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;

    (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

    (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

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

  • “At the outset *** lawyers must conduct a due diligence investigation when selecting a provider. Reasonable inquiries and practices could include:

    1) “Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;

    2) Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;

    3) Investigating the provider’s reputation and history;

    4) Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;
Duty to supervise

5) Requiring an agreement to reasonably ensure that the provider will abide by the lawyer’s duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;

6) Requiring that all data is appropriately backed up completely under the lawyer’s control so that the lawyer will have a method for retrieval of the data;

7) Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business.”
QUESTIONS?
CLOSING COMMENTS

THANK YOU
Resources

• ABA Standing Committee on Ethics and Prof. Responsibility Formal Opinion 477R (revised May, 22, 2017 (“Securing Communication of Protected Information”),
  https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf

• ABA Standing Committee on Ethics and Prof. Responsibility Formal Opinion 480 (Mar. 6, 2018) (“Confidentiality Obligations for Lawyer Blogging and Other Public Commentary”),
  https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.authcheckdam.pdf

Resources

