Ethics and Professionalism in the Digital Age

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Afternoon Session

PROFESSOR SAMMONS: Welcome to the afternoon session of the Symposium. The topic of panel three is "The Internet and Lawyer Marketing." We have a terrific panel, and I have enjoyed spending time with them. My role as the moderator is to stay out of the way. In line with that, I am going to skip over any biographical information because you have complete biographical information in the pamphlet.

For the students in the room, I will give a little bit of background. Commercial speech is protected under the First Amendment. The protection that it gets is less than other covered speech, though. The test there is somewhat of an intermediate level of scrutiny. The protection does not apply if the speech is false or misleading. And then there is a question about the application of prior restraint, and there's dicta of Justice Brennan that that doctrine does not apply. That is a legal backdrop to what our speakers are going to be talking about.

Micah Buchdahl is going to give you an overview of issues involved in lawyer marketing and lawyer advertising and then an overview of the types of websites involved. I think you will find it very interesting.

We will then move on to Paula Frederick. As many of you know, she is the Deputy General Counsel of the State Bar of Georgia. Paula is going to give you an example of what is referred to as the home state regulation—the application of Georgia rules to internet advertising. Georgia does not have internet-specific rules. It has variations on the model rules. Paula will be talking about what it is like to try to apply those rules in this completely new, and for the most part, unanticipated setting—unanticipated by the drafters of the rules.

Finally, Diane Karpman is going to talk about existing firms' compliance problems beyond the home state. Diane is involved in compliance work, as is Micah, and one thing that Diane does is assist in roll-outs of advertising campaigns, and in the process of doing that, setting them up so that they are in compliance with the regulations in other states, and especially something that she will refer to as the sticky states.

And with that, I will turn the program over to Micah Buchdahl.

MR. BUCHDAHL: Thanks. Good afternoon. I am going to take about twenty minutes to talk about some slides that I could spend four hours on, so I am going to be very quick. And really, the purpose of my opening in twenty minutes is to give you a fast overview of some of the issues that come about.

Professor Sammons mentioned *Central Hudson*.[1] I have shown you the website of Van Osteen; Van Osteen, along with Bates, was a plaintiff in *Bates v. State Bar of Arizona*.[2] I call Van the grandfather of lawyer marketing. Lawyer marketing as a whole has only existed for thirty years. If you basically take the thirty years of lawyer marketing, which is again still relatively new to people, combined with the internet and technology, it makes things very difficult for some to keep up.

Just because you are a lawyer does not mean that you know how to market. I show you this website not because there are any ethical issues regarding it, but because they thought it was a good idea to call their website bslegalhelp.com. So there is always some genius there that says, "Well, our names are Bernard and Stuczynski, so let's call ourselves bslegalhelp." That is usually not the kind of marketing you want to do, but there are a lot of firms like this that still have trouble grasping the importance of advertising and marketing properly.

One of the people who I always point to as one of the premier users of technology among lawyers in this country is Greg Siskind, who has basically taken the internet from the mid-1990s and built one of the

1. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
2. 433 U.S. 350 (1977).

most successful immigration law practices in the country, if not in the world, using websites and using the internet. This is the website as it looked in 1997. In 1997, I was doing lawyer marketing panels with Greg, and he would sit there talking about this site. This site was state of the art, cutting edge, in 1997. People were blown away by it.

If you go to the website today, he is continuing to use technology, as I always say, for good as opposed to evil, in regard to the way that he markets and shows off his practice. One of the things that is key to Greg's success is that he has done it in a way that most people would find to be very powerful and very professional. I have never heard people talk about Greg in negative terms in regard to his entrepreneurial nature as opposed to many of the other law firms, other plaintiff's firms, that are doing things that are a little bit outside the box.

When I talk about internet ethics as it relates to advertising, what we are talking about today mostly relates to advertising restrictions. But this is one of my oldest slides in my deck. It has not changed much in ten years. What are some underlying aspects that you have to concern yourself with from an advertising standpoint, in terms of not just ethics compliance but in terms of advertising, and some of these other concerns?

One of the concerns is developing a website in which it may be too easy to create an unwanted attorney-client relationship. You make it too easy for someone to give you all the data and assume that you are now representing them. There are attorneys who have had trouble with this.

The issue of competence really comes up when it comes to whether or not you are now promoting yourself on the web in regard to an area in which you actually know how to practice. I remember sitting with a general practitioner a number of years ago where his practice area list started with antitrust and ended with zoning and every conceivable practice area in between. Was he competent to actually practice in those areas? Probably not.

Confidentiality and conflicts both come into play. Again, the concept of using the internet, via e-mail, via referral sites, via your website, means you may not have had the opportunity to do a conflict check or in some occasions results in being conflicted out of matters due to the way that you use the internet for marketing process.

One of the examples I often give people, and something I dealt with a couple of years ago, involves a large employment law firm, very big national firm, and somebody getting fired in their community. That person goes online. They look for a big labor law firm to represent them. They do not know the difference between a plaintiff's firm and a defense firm. They just wanted a big labor law firm.

They go onto the website. They find a guy. They send him an e-mail, and they attach documents. They tell the story. Well sure enough, in that community the big corporation that fired him is also the big corporation that uses this law firm. Based on this particular instance, the law firm ended up having to be conflicted out because of the fact that they now had the story. They now had all this information.

The unauthorized practice of law I am going to talk about a little bit regards competition that lawyers have with nonlawyers that are practicing law on the internet and the issues that people have to face in that regard. You are sitting there trying to comply with these ethics rules, the rules that the panel is going to talk about. Yet there are people that are not members of the Bar, they are not lawyers, and in most cases they are not scared of us or the Bar, and so they are setting up shop and dispensing legal advice. They are not lawyers, but you are competing against them.

Multistate jurisdiction is another area that the web has basically made it very easy for us to market outside of our home state and our home territory and the places that we regularly practice. It is very easy to basically practice throughout the world. People will say to me, "I am marketing on the world wide web." And I say, "Well, you do not need to comply with the rules of the world. You do not have to go find every rule in the world to make sure you comply with them."

Diane, I think you were at a program that I did this summer in New York. The counsel for the Connecticut Bar basically suggested to the audience that if he could access your website in Connecticut, you were practicing law in Connecticut or you were under their jurisdiction. And it is just ridiculous, but it is in effect.

And then fee sharing referrals, the way that you actually generate business off the Web. One of the things that I always point out to most law firms is the importance of the disclaimer. You will find in many states they will make it clear to you, that they make sure the legal disclaimer is on there. Make sure it complies. Make sure it has the right information.

In this case, I just picked Jones Day. They start off with attorney advertising and prior results do not guarantee a similar outcome. That is language that's specific in many cases to New York. They are trying to comply with the New York rules. At the bottom they have the Texas Rules of Professional Conduct in trying to comply with the Texas rules.

In the middle are a very interesting couple of sentences that have become more and more prevalent with people: The attorney's experience. That is a fight many lawyers are having with their prior law firms. Is your lawyer's experience, does it belong to the firm or does it belong to the attorney? And if I represent you and I am with the firm, and then

I leave the firm, is that still a representative client of the law firm? It is really an interesting area, and Jones Day is one of the first that I have seen to add that kind of language to the disclaimer page.

Morrisoncohen.com. I am showing you this website because, again, this is another timely example. This is the law firm that Donald Trump recently sued because he wanted them to take his name off their website. He hates these guys. He sued them. He said, "Stop saying that you work for me. I do not want to be a representative client."

Now, in a number of states you would not be allowed to list Donald Trump there without his permission. And even in states where you do not have to seek that permission, you know, ninety-nine percent of lawyers will check and make sure that it is okay with their client. And certainly, if the client says, "I would not like to be listed, do not list me," they will take them off. But in this case, Morrison & Cohen keep Trump on there despite the fact that he sued them for putting his name on their site.

I am sure Diane Karpman is familiar with topgundui.com. And one of the reasons I keep Myles Berman in my program is that his site has been in my program since 1997, and it is one of the first law firm websites that I ever saw. It is a lot more proactive and interactive and different today, but the bottom line is that Myles Berman has built a tremendously successful business off the internet, just like Greg has.

Just like there are very few people who sit there and look at Greg's immigration practice and find it somewhat distasteful, there are many people who look at Myles's website in various markets and think there are things there that are outrageous. There is the link to the cop hideouts. And my favorite page is really the page that lists his partial list of successful DUI cases.

Now, if you have a blood alcohol of .21, not guilty. If I am ever in California and I was drunk and I got picked up—and I would never do that, but if I did—I can tell you the first person I would likely call is Myles Berman at Top Gun DUI.

But you will also find the argument that is made against listing results. Say I went to Myles and he represented me and I lost or I was convicted, and I would say, "Well, my blood alcohol level was .19. You got off people that were .21. You misrepresented yourself. You misled me." But the concept of listing results is often very critical and often very controversial in a number of states.

People throughout this morning's session referred to the famous pit bull case. I love Pape & Chandler. These guys are great. I have interacted with them a number of times. I did an ABA program with Mark Chandler. This is one of the great rarities nationally, and that is the law firm that received the letter from the Bar saying that

they were in violation of Rules X, Y and Z, and they go [lifted arms in air].

And so they continued to market, and they disagreed with the Florida State Bar, and this case went on for years. Both the State Bar and Pape & Chandler spent a lot of money fighting over that cartoon dog. That is what the fight was over, whether or not the cartoon dog is deceptive and misleading. And they lost, and they had to go to attorney advertising school, which is like a drunk driving school but for attorney advertising in Florida, and pay the $250 fine.

But if you go to papeandchandler.com today, after years of fighting, they now have this horrific robot that comes flying out. You hear clanging and noise from this robot. So, the question is whether robots are not deceptive and misleading by nature. It's just interesting the arguments and discussions over whether a dog or a robot is allowed or disallowed, and it really lends itself to the subjective nature of a lot of the things that exist on a state-by-state basis.

Here is a photo gallery from a law firm in Philadelphia, and they have recently issued an ethics opinion in Pennsylvania. It does not say that it is this one, but I believe it is this site, and it is whether or not it is appropriate to have photos of famous people on the website. Are they really a form of client testimonials?

Are you trying to suggest that these people are clients? That I represent Arnold Schwarzenegger? That I represent Jon Bon Jovi? And if you go on down the page, Bill Cosby is there. All kinds of people are there. So, the question is whether or not you can have these photos on there and whether it is misleading to have these photos on there. They are not clients of the firm, and to me putting up personal photo galleries does not serve a purpose. That is not the disclaimer that I would be looking for.

But this website has been up for a while, and this stirred up some controversy in Pennsylvania, as did this site: healthierbaby.com. I looked for it again the other day, but it is gone now. But, basically, this website dealt with the question, "How did your baby get cerebral palsy?" And it has a little doctor there in the white coat. It appears to be educational, but this is a law firm website. Does it say that it is a law firm website? No. Does it identify the law firm? No. Does it identify in any way what their true purpose is? What is the true purpose of the website? It is obviously to look for clients. And so, there are people out there who are still creating these websites that in no way comply and in many ways go completely against the reason that we have rules on professionalism in place.

This is E. Eric Guirard in Louisiana, and I point out Louisiana specifically because Louisiana is on the verge of implementing some of

the strictest rules in the country. As of December 1, 2008, if they implement those rules, a lot of the things that guys like E. Eric Guirard will do or have done will have to change. The reason I wanted to use Eric here is because, again, he is another example of a young attorney who came right out of law school and basically built a very successful personal injury practice right out of the gate by using marketing. And this guy is just a good marketer. The "E" in "E. Eric" stands for nothing. He added it on there because he thought it sounded good for marketing purposes.

Now, in some states you might question the URL, the e-guarantee, because you probably cannot make a guarantee. Guarantee is not necessarily the word that I would likely use in a number of states in terms of my URL. What are you guaranteeing? Obviously, we are never guaranteeing success.

MS. KARPMAN: By the way, the Louisiana Supreme Court, having been sued, has delayed the implementation of their rules until April 2009. I just got that on the website this morning.

MR. BUCHDAHL: A lot of times you read these rules, like the rules in New York and some opinions in New Jersey, and as soon as we read them we know that they are never going to pass muster, and they are never going to fly, but people are still trying to put them into place.

Blogging is a very interesting area, and the question regarding a blog is, is a blog different from a website? My friend Mike Downey will say a blog is a website. A website is advertising. Advertising needs to comply with our advertising rules.

There are other people out there who suggest that a blog is more editorial, that it is more journalism. It is more information. The problem really is, who would ever decide which blogs are informational versus advertising? Today these blogs should comply with the ethics rules for websites, but I would guess that the vast majority of them do not.

Okay, this is a blog. This is a very standard one, the Delaware Employment Law blog. Law firms are trying to get creative. This is one of my favorite ones. This is by an associate at Ford & Harrison. It's called "That's What She Said," and it actually takes episodes of "The Office" television show each week and actually plays out the real life employment law applications and costs involved with every episode. Lawyers are trying to become a little bit more creative in the way they market. This is one of the most creative and successful ways. I really enjoy this website.

And then law firms have had to deal with other blogs like "Above the Law," which is literally the lawyer version of TMZ. It is a tabloid that basically dishes dirt on what is going on with law firms. Between that and "The Skadden Insider," which is very similar. It's a tabloid in Skadden that basically shows the power of the internet, that law firms cannot really control a lot of the information that is disseminated that relates to them. You cannot control your image online the way that you could control your image previously.

I have shown you the platform just to show that this is not something just about outside counsel. This affects in-house lawyers as well. This is the Cisco website. This Cisco site previously had an attorney who was behind the patent troll blog, and it was uncovered that it was a Cisco lawyer basically out there trying to identify patent trolls. This became a very ugly battle. The guy who created the website at Cisco is no longer there. He is actually practicing in California. And then Cisco had to implement a new employee blogging policy, but they actually had to implement it because of the work of an IT lawyer at Cisco. That is what created the need for the revised update on employee blogging.

YouTube is another great area for potential marketing. If you go on YouTube and you look for lawyers, you can find legal FAQs. You can find the actual television commercials. There are some great blow up commercials, if you want to see a bunch of things blowing up that are in lawyer commercials. There are seminars and all kinds of information on there.

But again, law firms have to be careful about what they put on there, and you can often lose control of what you have put on YouTube. What Cohen & Grigsby did was not necessarily an ethics violation, but they actually thought it would be cool to put online a portion of their seminar dealing with how to avoid the green card rules and how to avoid hiring Americans. It was sort of a seminar. It goes up on YouTube. You know, a lot of people do not like the idea of lawyers teaching people how to avoid hiring Americans. So, if you go onto YouTube now and you look for Cohen & Grigsby and you look for that information, what you will see is Blue Dot bashing them and Glenn Beck bashing them. You will see NBC and CBS. You will see lots of clips of people bashing this law firm. The seminar is gone, but the remnants of what they did are not gone and will not be forgotten.

The question again regarding YouTube is, When you put a clip up there, are you going and filing that in your state in terms of attorney advertisement? My guess is not likely. You get a lot of YouTube information, but there are a lot of YouTube clips up there. Is that advertising? Sure it is.

"We the People," again, is nonlawyers trying to practice law, similar to Lexington Law. These are entities that have basically put themselves out there, and we are often competing against them. They are not law firms. They are not supposed to be practicing law, but we are competing against them online. It is a lot harder to discipline people who are not lawyers and who are not members of the Bar. You cannot discipline people who are not part of your organization. You have to send the state after them.

Another concept is the virtual law office, which you read a lot about now. This is virtuallawpartners.com, and it's a group of lawyers who are mostly doing corporate law throughout the country. They are based out of their homes in various parts of the nation. The question is, Where are you based? Where are you practicing law? And so, if you look at the homepage, then the answer is nowhere and everywhere.

So in some states I would suggest that it would not be unusual if I were an attorney in a certain state, and I lost a piece of business to Virtual Law Partners, then I would suggest that they were competing for business against me and not following the rules in their state. These are issues that come up in regards to the virtual law partners.

The concept of law firm referral networks: legalmatch.com is one of the popular uses of online pay-for-play advertising. Google is another concept of pay-for-play advertising. What are advertisements? Down the right side of the webpage and up at the top, sponsored links. What about the rest of those listings? The rest of those listings are organic searches where there are a lot of very entrepreneurial attorneys who find and hire people who spend their days getting themselves placed with the right language there. Are those advertisements or not? They are organic searches in the world of Google. The others are ads. Who is complying with the rules?

One of the areas that people are spending more and more time in, depending on their practice, are areas like Craig's List. I know a lot of attorneys that derive a significant amount of business off Craig's List. So, here I go to Philadelphia. I do a legal services search, and you see law firms offering legal services on Craig's List. Is that lawyer advertising? Of course that is.

I know people who have hired people who spend their days, every day, relisting their attorney so they will come up near the top on legal services. How many times, Professor Sammons, have you sat there in your committee and sat there and said, "Well, what are we going to do about Craig's List?" None, right?

MS. FREDERICK: In Georgia, we have. I'll tell you about it.

MR. BUCHDAHL: Okay. Now, the e-mails that you receive. Here's a spam e-mail I received as a consumer basically soliciting business. Here is another one I received as an attorney offering me clients. Both of these are inappropriate in a variety of ways. I always have to remind lawyers that just because somebody calls you and has a case that they send your way does not mean that it was done in a legitimate fashion even if it is through some overarching legal marketing business.

"Who Can I Sue" is another newer entity. I have seen their billboards and their ads. Yet another attempt to basically marry lawyers and clients through the web, through something like "Who Can I Sue?" And then, I am going to go into real quickly the concept of divorce. Divorce is a great example of a consumer-driven practice. Everybody who is married, raise your hand. Okay. Half of us will need a divorce lawyer at some point. It is not as good as death and taxes, but it is fifty percent of the way there.

So here's a billboard that went up in Chicago about a year and a half or two years ago. And it came down very quickly, but this billboard was on "Good Morning America." It was in "USA Today." It was everywhere. So what is this billboard? "Life's short, get a divorce." Does it violate the ethics rules of Illinois? No, it does not. What does it violate? Taste.

And so, what happens is people remind folks that these rules are subjective. If you find this billboard and this marketing campaign offensive, then don't use their services. But they don't violate the rules, even though there was an uproar and it came down the next day.

Now, the thing that I found extremely fascinating is that the attorney on here with these pictures—I don't know about the guy—but that is the actual lawyer there. That's Corri Fetman, the lawyer of love. And if you go to Playboy.com, which I have to do for professional purposes for programs like this, you will find her Q&A and her dispensing of legal advice. Again, if you find it offensive, you would not use her. If you find it clever, you might. And you can borrow my password. I had to really make sure that I knew everything about her, and so there is a pictorial as well.

Another area where a law firm in Florida has created a divorce deli, making the practice of divorce law as easy as $249 without children, $299 with children.

And the concept of mediation and alternative dispute resolution is another area that is very interesting as it relates to the advertising rules because a lot of mediators are not necessarily lawyers. You are not a lawyer, and you are not practicing law, so you do not need to comply with these rules. This is divorcedoneright.com. They are a bunch of lawyers, but they are not practicing law. They have their disclaimer.

They have a little shield there between sending out the legal work and keeping it in-house, but the concept of mediators, lawyer mediators often having to compete against nonlawyers creates some difficulty, at least with rates and referrals.

Chambersandpartners.com and superlawyers.com are two examples. There was a time when the only attorney directory was Martindale-Hubbell. Martindale-Hubbell is struggling now to keep up with the thousands of lawyer referral networks, and the concept of when you receive an award by one of these entities, you know, is it credible? Is it legitimate? How can you market it?

Avvo.com is another lawyer website where some lawyers in Washington state sued to try to get Avvo.com shut down. They did not like the fact that information about them was displayed to potential consumers and customers. There is a ranking to Avvo. There is a concept to the way you are displayed, and you see here I have a no concern rating. That is my rating, but if I had a stop sign up there from some disciplinary actions, I probably would not be too happy about it and there would be nothing I could do about controlling it. Jdsupra.com is another website that allows lawyers to market themselves.

And then getting into one of the other hot areas of the last year or two are social and business networking sites. There is my Facebook profile, just like with my Playboy subscription, my wife wants to know, "What are you doing trolling on Facebook?" I always say, "It's part of my presentation."

And then we get to linkedin.com, which I personally find to be one of the most effective sources of generating business. The concept of linkedin.com is—the question for many states is whether or not a LinkedIn profile or what you have on there is lawyer advertising. I can talk about that for an hour. It is a very interesting subject to debate. But if you go onto linkedin.com, you will see attorneys from WilmerHale, and you will see attorneys from Skadden, and you will see a lot of attorneys that are out there with their profiles marketing their information.

Secondlife.com, again, another area not so much right now. I see a lot of people use Craig's List and a lot of people use linkedin.com. Secondlife.com is cool and it is cute, but it is not an area that a lot of people use really effectively.

You can be a pit bull on secondlife.com, in your second life. And then I am going to end with my last slide, just when you start to try to figure out how the rules are changing and how technology is changing, you have people out there selling text messaging of lawyer advertising, through places like Text My City.

And so again, the concept of text messaging, sending out ads through your cell phone from lawyers, is sort of what is down the pike. That is a real quick overview of some of the areas that concern us on a daily basis.

PROFESSOR SAMMONS: Thank you, Micah. I don't know whether you noticed it or not, but on one of the early screens, at the top, it said fraud monitoring is on. I didn't know that computers could monitor lawyer ads for fraud, but that's terrific. And if you could add false and misleading to that, just have the computer do it, then our next speakers job would be much easier. Paula Frederick is Deputy General Counsel for the State Bar of Georgia, and these kinds of problems come her way.

MS. FREDERICK: Thank you. My office interprets and enforces the Georgia Rules of Professional Conduct and then prosecutes lawyers who violate those rules. As both speakers have already said, none of the rules on lawyer advertising were created with the internet in mind. Certainly, the Rules did not anticipate the extent of lawyer advertising and the lawyer presence on the internet that we've seen in the last ten or twenty years.

Many states are trying to deal with this through creating rules that deal specifically with internet advertising. Georgia is not among them. Our rules in this area have not changed tremendously since the late 1970s and early 1980s. The last significant changes were right after the *Bates* decision that said that you can't outright ban lawyer advertising. Of course we have made changes to comply with United States Supreme Court cases that have changed the rules on advertising—most of the time liberalizing those rules. But by and large they are the same as they were twenty-five to thirty years ago before all of this internet "stuff" even existed.

Part seven of the Georgia Rules of Professional Conduct prohibits lawyers from using advertisements that are false, deceptive, or misleading. Rule 7.1 includes a laundry list of things that we consider to be false, deceptive, or misleading. Beyond the list, whether an ad is false, deceptive, or misleading may be in the eye of the beholder. What might be false and misleading to you might be something that a regular old member of the public thinks is routine. I mean the public knows that Robert Vaughn doesn't work at the law firm he's advertising for, so why are lawyers so upset about people using actors in their lawyer ads? Is that misleading? It depends on who you talk to.

Since we do not have specific rules on internet advertising in Georgia, we have figured out ways the rules that we do have can be used to regulate this changed landscape of lawyer advertising.

I think we are considered a liberal state in this area. Most people believe we take a fairly lenient approach to lawyer ads. For instance, we require that somebody file a grievance, or we have in the past required that somebody file a grievance, before we will look at a lawyer ad to determine whether there is a violation of the rules. Our process generally requires that we get a grievance from somebody before we conduct an investigation. And we use that with lawyer ads no matter how much in the public domain they appear to be. For instance, as I drive to work I may hear a radio ad that violates the rules. I don't go into the office and start investigating and prosecute the responsible lawyer. If we don't get a grievance about it, in the past we have not begun an investigation. That has changed recently, and I will tell you about that in a minute.

My office and the disciplinary board really have tried to look at the *Central Hudson* test that Jack talked about initially, and whether the public is being harmed by whatever it is that is being done, as opposed to simply prosecuting lawyers for a technical violation of the rules such as some of the ones in the slides that Micah just showed.

What was your DUI guy's website?

MR. BUCHDAHL: Topgundui.com.

MS. FREDERICK: Topgundui.com, that's the guy's website. That is not his *law firm* name. That is not *his* name. So, is the lawyer responsible for this website now practicing law under more than one name, something that the Rules of Professional Conduct prohibit in Georgia? I think if we wanted to take a hard-edged approach to this, we could say, "You're violating the rules. You are not Top Gun DUI Attorney. You're (whatever your name is), and so your website must be the same as your name." If you read the language of the Rule, there might be grounds for my office to insist that the name of a lawyer's website be exactly the same as the firm name.

If we get a grievance about something that seems to be a technical violation when no member of the public has actually been harmed, we send a warning letter to the lawyer. We write the lawyer a letter and say, "It has come to our attention that you have a website with content that people consider to be misleading or that could be considered to be misleading. Fix it."

Most of the time the lawyer voluntarily complies and does what we have asked him or her to do. Internet advertising is much easier to fix informally than a lot of forms of advertising that have come before it. For instance, on the few occasions when we have had people complain about lawyers' advertisements in the Yellow Pages, we send the lawyer

a warning letter. Even if the lawyer agrees to change the ad, the Yellow Pages publisher is not going to reissue a zillion volumes of the Yellow Pages so that the lawyer can fix the ad. It is going to have to wait until the next year's issuance of the Yellow Pages for anybody to take care of it. So the immediacy of the internet makes it easier for people to quickly fix any problems with their advertising.

As I have described, in Georgia we have tackled these issues fairly routinely as they have come up. For us the larger issue, much larger than print ads, has been solicitation. So, the cases you see in Georgia that deal with the advertising rules arose out of problems with lawyers soliciting business in person or using third parties to solicit business for themselves.

We were sued over our rules in the late 1990s in a case that was the result of a lawyer using runners at accident scenes to get business. The case went to the Eleventh Circuit Court of Appeals, and the Eleventh Circuit upheld the constitutionality of the rules that we use in Georgia. Since that is as close as we are going to get without going to the United States Supreme Court, we have been reluctant to change the rules that we use here.

But there continues to be concern among Georgia lawyers about advertising. In my experience in twenty years with the Office of the General Counsel, it is true that the people most concerned about lawyer advertising are not members of the public but are other lawyers. The complaints that we get about lawyer advertising come from lawyers. They rarely come from members of the public. My guess is that in an office that gets roughly three thousand grievances a year, I can count on two hands the number of complaints that we have had from actual people, if you don't mind my using that term to exclude lawyers, but from real folks out there.

MS. KARPMAN: There are only two types of individuals—clients and lawyers.

MS. FREDERICK: Clients and lawyers. We rarely get complaints about this stuff from anyone except for lawyers. Most of the complaints that we do get stem from solicitation letters; an advertising lawyer soliciting business from somebody who turns out to be already represented. We also see targeted mailings that include exaggerated claims, but for those cases we write a warning letter and the lawyer makes the required changes.

There appears to be this feeling among members of the Bar that perhaps the enforcement my office does of lawyer advertising problems needs to be more aggressive. Maybe we are too laid back about it.

Maybe we should go out and affirmatively look for violations of the rules instead of waiting for them to come to us and prosecute these cases.

As a result of this feeling, two years ago the Bar president created a lawyer advertising task force to take on this issue. The task force members include advertisers, non-advertisers, some of the folks who were rabidly anti-advertising, and some of the biggest advertisers in the state. It is a motley crew, which I think is good when you're talking about the possibility of changing the rules and creating new rules.

The task force's mission was to take a look at everything that we were doing, to take a look at what we have to decide if it's working okay or if it needs to be changed. And if it appears that changes are necessary, it was to create a different mechanism to bring advertisements and soliciting to the attention of the General Counsel's Office of the Bar.

The solution they proposed is still in effect. It is what Jack has called the "neighborhood watch" solution. Instead of requiring that we have a grievance before we can begin an investigation into possibly unethical conduct, anybody who has a concern about a lawyer's ad they have seen on TV, heard on the radio, read in the paper, seen on the internet, whatever, anybody can contact one of several designated lawyers around the state. Just call that person and say, "I saw this ad. I think it violates the rules of professional conduct. Please have the Bar look into it." They do not have to file a grievance that has their name on it, that shows they are the one who was concerned. The Bar does not need a grievance form in order to begin the investigation and to try to get the whole thing fixed.

Frankly, I believe the process was created to make it easier for lawyers to police each other with this kind of conduct, because lots of folks find it distasteful. A lawyer thinks twice before filing a grievance against another member of the Bar. They are going to get the grievance. It is going to have your name at the top. It is not an easy thing to do.

This new process allows potential rules violations to be reported to us anonymously. The source does not matter; we will take a look at whatever it is. Since this project began, quite often we have had to ask the lawyer to provide us with the necessary material or information to conduct the investigation, which is another reason I think enforcement is sort of difficult in these cases.

Usually we contact the advertising lawyer and require that that person send us a copy of whatever it is that is being broadcast. We can also contact the station—the radio and television stations have been very very cooperative with this project—and get the advertisement, take a look at it, and then work with the lawyer on trying to straighten out any potential problems with the ad.

So, that program has been up and running for a year or two now. It has resulted in more advertisements that comply with the rules.

Micah Buchdahl scrolled through several ads during his presentation and asked, "Is this an advertisement?" Quite often he said, "Yes" when I would have said, "I'm not sure." Facebook, for example. I have a Facebook page. I'm a lawyer. It says so on my Facebook page. Yet my page is not out there for me to get business. I do not want business. I have more than I can handle. So the fact that you are a lawyer who has a presence on the internet does not necessarily mean that you are advertising for business in a way that is any of the Bar's business.

In my experience, you really have to search to find a particular person on a site like Facebook or YouTube. If the advertising rules really are there to protect the public and to prevent members of the public from being misled by something that is out there, I have less sympathy when you have taken twenty minutes to track down the thing that might mislead you. It is hard to say that something like a Facebook page deserves the same level of scrutiny and that the same rules should apply to, say, a letter that you are sending directly to an accident victim or something like that.

AUDIENCE QUESTION: I want to ask a question. I practice primarily in tax law, and all these companies that advertise 1-800 numbers about offers to compromise with the IRS and helping people with taxes, they are getting lists of them. They are soliciting people. About thirty to forty percent of the people who come to my office have been ripped off by them. They are not really subject to any regulation.

MS. FREDERICK: Who are they? Are they lawyers?

AUDIENCE QUESTION: No, they are just people who claim they're qualified to represent you before the IRS. One of the big firms is J.K. Harris. There are about twenty or thirty of them that advertise on TV. They get tax lien indexes off the clerk's websites. They call people, solicit for help, which would be almost illegal, with the IRS, and they rip them off.

MS. FREDERICK: So it is nonlawyer advertising on television, soliciting business from people who have problems with the IRS. They are not lawyers, and I do not know whether they are subject to any regulation. I think that is a particularly difficult area because you can probably be an accountant and help people with a tax matter.

PROFESSOR SAMMONS: Thank you for the question, but if you don't mind, let's hold the questions until the panelists are finished.

MS. FREDERICK: I am running out of time, but I wanted to give you a laundry list of the sorts of things that we wrestle with and really have not come to terms with. I think we approach these situations on a case by case basis, which is what I understand is required by the commercial speech test. You do not just get to say "no" to an advertisement because you wish it was not there. There needs to be a reason for saying that something is outside the bounds of the rules. And you have to remember that the rationale for allowing lawyer advertising in the first place is because it does serve a valuable function in educating the public about their legal rights, letting people know when they have a legal problem, and helping them find a lawyer. So it is not all just bad. But here are the kinds of things that are hard for us to deal with.

· Websites go all over the world. If you can access the website here in Georgia and the law firm or lawyer acts like he or she can handle a case for a person in Georgia, then we, in the State Bar of Georgia, believe that we have jurisdiction over that person's conduct while they are either virtually in our state or representing a Georgia client.

Now, we have never tried to prosecute somebody for what their ad said that induced the Georgia client to hire them. We are more interested in whether the client was harmed by the relationship, not necessarily how they got there. So, if you have a website and you are in Spain and a Georgia person hires you, and you screw the case up, we think we have jurisdiction over you for that part of it and not necessarily just by virtue of your advertisement being beamed into our state.

· We have some Craig's List issues. *Creative Loafing* and Craig's List sometimes have ads that violate the rules. A lot of folks seem to forget that they need to include in their advertisement their name or the name of their firm or the name of a lawyer. And that is our current hangup on Craig's List advertisements; a lot of ads that are listed there do not include any lawyer's name.

· We have had grievances filed by people on the other side of the case, very similar to the Donald Trump situation that Micah Buchdahl talked about. What I have seen is the opposite of the Donald Trump situation. My client has given me permission to tell her story on the web. Great success story. I represented her. We had a great result.

It was wonderful, and you should hire me as a result because by implication, I can do similar sorts of things for you.

In telling the client's story, the lawyer reveals things about the other side. They are not privileged, I guess, because we learned of them in the context of litigation. Nonetheless, they are things that this person does not want floating around out there on the world wide web. And so we have had adverse parties contact us to say, "Can't you make this lawyer take this stuff about me off his website?"

My office gets that call, and initially you want to tell the caller, "You've got the right to confidentiality in all your dealings with your lawyer." It turns out it's not their lawyer; it's the opposing counsel. So, that happens quite often, and there is not a whole lot to be done about it.

· Similarly, there is not a whole lot lawyers can do when somebody tells a lie about them on the internet. And it is interesting to me that because we regulate what lawyers say, lawyers believe that we can regulate what other people say as well. So we will get calls from a lawyer who is offended that there is untruthful information about the lawyer out there.

· We get calls from people who say I am listed on this referral site, and I have not given them permission to list me. What can I do about that? There is nothing my office can do about that. I have advised the lawyer to notify the site to take their name off.

· There is another thing that we are wrestling with now in Georgia. We have decided that we are going to try to define what a lawyer referral service is for purposes of these rules. There are web-based entities that approach a Georgia lawyer with the promise that, "If you pay us money, any time somebody types into our web engine 'Georgia divorce lawyer,' your name will come up first." They claim they are not lawyer referral services, they are marketing entities. What's the difference? We have asked the Bar's Formal Advisory Opinion Board to take a look at that for us and just tell us if they want us to treat those entities like lawyer referral services, which would mean they have to register with the Bar, they have to tell us what Georgia lawyers have subscribed to them, and comply with other requirements.

· And one last thing is these LISTSERVs where groups of lawyers gather to help each other, as opposed to seeking business. My favorite is SoloSez, which is run through the ABA's General

Practice Division. Groups of solo practitioners, that is an oxymoron—but solo practitioners sign up there, and they call themselves the world's largest law firm now because there are thousands of members. They write each other all day long and ask each other questions about cases, advice on how to handle things. Sometimes there are concerns about the confidentiality of information on LISTSERVs—who knows who else is on the site? That is an area that my office, first of all, has not gotten any complaints about; but second, has not begun to figure out how to deal with.

PROFESSOR SAMMONS: Thank you, Paula. That was terrific. She mentioned "neighborhood Watch." Let me tell you about that a little bit. There is one person at the Office of General Counsel who has the responsibility for responding to those complaints that come in from the neighborhood watch group. And initially she takes a look at those to make sure they constitute a rule violation, and then generally it is a call to the offending lawyer. So far, and the last time I checked with her it was just a couple of months ago, every single call that she has made has resulted in voluntary compliance.

MS. FREDERICK: Absolutely.

PROFESSOR SAMMONS: And we are really pleased with that. We also redrafted the comments to the model rules to try to make the comments educational both for lawyers and for the Watch folks. That is, unfortunately it got combined with the major revision of the rules and the comments before they go to the court, so it will be awhile. But I am hoping they will be in place before our students are in practice. Thank you, Paula.

Our next speaker is Diane Karpman. Ms. Karpman's practice is limited to the representation of lawyers. In recent years, she has focused on class action lawyers, because they are often concerned about ethics violations in advertisements.

MS. KARPMAN: Lawyers who are trolling the internet for plaintiffs[3] in class actions and lead counsel are justifiably concerned regarding the advertisements they are publishing in search of "adequate" lead plaintiffs. These counsel have an affirmative obligation to find as many members of the class as they can, and yet because the advertising regulations governing the legal profession are idiosyncratic and

3. For an example of this activity, see Barton v. U.S. Dist. Court for Cent. Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005).

provincial, it is almost impossible for them to comply with all regulations in all states.

I will explore the issues concerning compliance with legal advertising regulations, which differ throughout the country, and the problems presented with the often mutually exclusive regulations that govern this area. The majority of regulations that govern lawyers, that form the body of legal ethics, are engendered by the fact that lawyers have been deemed fiduciaries for centuries, and are fairly consistent throughout the nation. Legal advertising is, however, a relatively recent phenomenon, authorized in 1977, by the seminal *Bates* decision. Legal advertising is highly controversial. It elicits outcries among the more staid members of the legal profession, who believe it denigrates the profession in the eyes of the public. They may forget the important subtext of *Bates*, which is that lawyer advertising is permissible because consumers need to know where to locate lawyers in order to achieve the vindication of their rights.

The overarching theme in legal advertising is that the advertisements must be true, accurate, and not confusing. From those simple concepts, each state has enacted increasingly byzantine regulations, intended to enhance the esteem in which the profession is held. The connection between legal advertising and the public's perception has never been clearly established. Nevertheless, the organized Bar seems to believe that if we could just "fix" those tasteless ads, everything would be fine. This idea persists in the legal profession and causes the profession (on a state-by-state basis) to enact detailed and complex regulations designed to eliminate ads demonstrating an absence of professionalism in conveying the message and the manner of presentation. Compliance with this patchwork quilt of rules becomes substantially more difficult as each state enacts additional restrictions—including "suggesting" preapproval or filing of the advertisement with the appropriate regulatory agency before it appears in the media.

In The Trenches

As an ethics lawyer who advises firms on compliance, I have experienced some of the issues that demonstrate the problems that have been considered today. For example, if an advertisement includes a picture, is that a dramatization? California Rule of Professional Conduct 1-400 requires that a disclaimer be included if a dramatization is employed pursuant to Standard (13).[4] Yet, the regulations in Arkansas, New

4. California has a unique system of regulations governing the legal profession. Its lawyers are regulated by the Rules of Professional Conduct, enacted by the California

Jersey, and Wyoming prohibit the use of dramatizations. If the advertisement is on the internet (and may be viewed from anywhere), it is difficult to achieve compliance with these facially inconsistent regulations.

Is a picture a dramatization? No one is certain. There is not a large body of caselaw to guide practitioners. In actual practice, if an ad is offensive or technically flawed, generally the regulators will contact the attorney responsible for publication and request compliance with the local regulations. Therefore, there is not a body of well-established caselaw or reported decisions interpreting the specific regulations of a given jurisdiction.

When a group of aggregate litigation[5] or class action lawyers decides to publish a national rollout of an advertisement, it becomes troublesome in terms of how to get that ad approved on a national basis. Six states (Nevada, Texas, Kentucky, Florida, Mississippi, and soon Louisiana) have difficult restrictions. They heavily regulate lawyer advertisements, urging the preapproval or prefiling of the communication before it is published in the media.

These states "suggest" that the attorneys obtain preapproval of their communications before they are released to the public. Many authorities maintain that this is a prior restraint on speech. However, because it is not mandatory and the lawyer is only requesting an advisory opinion, they have been able to avoid significant litigation with this process. Florida has successfully employed this protocol for years, and the new proposed Louisiana regulations try to replicate the Florida scheme.

Compliance with the overlapping state regulations is difficult because often the goal of a specific regulation is not clearly articulated in the legislative history.[6] In achieving national compliance, law firms are often forced to contact members of the local ethics committees to determine the meaning of unusual regulations. At first blush, this may appear to be a costly enterprise. However, it is actually economical.

Supreme Court, and the CAL. BUS. & PROF. CODE §§ 6000 to 6238 (West 2003 & Supp. 2009), enacted by the legislature. Thus, Rule of Professional Conduct 1-400 governs lawyers' advertisements, as does Business and Professions Code Article 9.5 "Legal Advertising." This is further complicated by the Board of Governors of the State Bar. It has adopted "Standards" that apply to communications, and are used as presumptions that affect the burden of proof in disciplinary proceedings.

5. The American Law Institute is drafting the *Principles of Aggregate Litigation*. This is the term it employs for class action lawyers involved in representative litigation.

6. California has a requirement that the outside of an envelope contains the word "advertisement," or a similar indication. At the time this was enacted, a member of the Board of Governors did not want to be bothered with opening up each letter before he placed it in the proper container for waste disposal.

Often, the proper local lawyer can sanitize any problems and almost guarantee compliance. The firms I represent will retain a lawyer that is well-known in that region and has local credibility.

Many large firms are distressed with the idiosyncratic regulations that are being imposed. Yet, whenever an issue is taken to the appellate level, they are successful in having the regulation deemed impermissible. The problem is that few lawyers or firms aspire to become a "reported decision," and this is all the more true in the field of legal ethics.

However, these eccentric rules are more problematic for lawyers involved in aggregate litigation. In order to be a viable candidate in the competition for lead counsel, an unblemished ethics record is almost a prerequisite. Lawyers know that there is a heightened standard of practice when they are representing a national group of claimants. Thus, they are reluctant to face the glare of any negative media attention or be involved in questionable advertisements that could potentially result in a disciplinary inquiry or investigation.

The community of plaintiffs' lawyers who regularly participate in class actions is small and consists of many repeat players and their firms. They practice law throughout the country, often by satisfying the requirements to achieve pro hac vice status in a particular jurisdiction. The various pro hac vice forms, applications, and requirements are profoundly inconsistent. A handful of states inquire if any disciplinary inquiries or investigations are pending. Since an advertisement inquiry generated by a state Bar or other regulatory agency might trigger the involvement of some disciplinary or quasi-disciplinary authority, they are loath to run advertisements that raise any questions. Yet paradoxically, they need to contact as many potential plaintiffs to participate in the claim as possible.

Often the regulation will fall within the overall penumbra of Model Rule of Professional Conduct 7.2, which will frequently demonstrate local modifications designed for parochial needs. National and international firms are justifiably frustrated with this state-by-state process. Lawyers seek to comply with existing regulations, but determining exactly how compliance can be achieved is becoming increasingly difficult as the rules are being fractured on a state-by-state basis.

Frequently Encountered Problems

Anyone can turn on a television and see lawyer advertisements that fail to comply with local regulations. In attempting to create a generically compliant ad, few of these TV ads strictly comply with the specific regulations of any state. The rapid fire disclaimers (in minute print) do little to alleviate the problems.

We are all familiar with these types of national lawyer advertisements seeking to appeal to a large class or group of claimants. The inadequacies of these communications are apparent. Still, they also demonstrate good faith attempts to comply with as many states as possible, given the time and space restraints inherent in broadcast media.

When an advertising complaint is submitted to the state Bar, it is usually filed by another lawyer, because clients rarely complain. It is other lawyers who routinely attempt to trigger regulatory oversight, because they do not want out-of-state lawyers soliciting business in their state or home market.

In addition to preapproval "suggestions," states have wildly inconsistent retention requirements. In California, the Business and Professions Code has a two-year retention requirement, whereas the Rule of Professional Conduct has a one-year requirement. Internally, in one state, the retention requirements for lawyers are explicitly inconsistent.

Another inconsistent aspect of lawyer advertisement regulations is the use of testimonials. Can a lawyer ad have a client testimonial? Does it create an unrealistic expectation in the mind of a consumer that what was achieved by the client on screen will also be achieved by the recipient of the ad?

Some additional issues are presented by the following, actual examples, which acutely demonstrate the problems created by well-intended but myopic regulatory oversight. An Indiana firm purchased the naming rights for a sports stadium for $500,000. The name of the law firm that appears on the stadium does not comply with a fairly common regulation involving listing in which jurisdictions those lawyers are admitted.

In California, lawyers are required to include the name of a living lawyer who is responsible for the advertisement. Few ads in California include that information. Also, many of the esteemed national firms have only the names of deceased lawyers, which is obviously not in compliance with this regulation. Many law firms sponsor news programs or other public service announcements but rarely state whom to contact for additional information, as required in California legal advertisements.

Another interesting regulation that is common in many states is the restriction on the use of images. A law firm using an image of a pit bull resulted in discipline for Florida lawyers.[7] In California, a lawyer was investigated for soliciting victims of defective breast implants to create a class action. He had a tasteful drawing of a breast. Another lawyer

7. *See* Fla. Bar v. Pape, 918 So. 2d 240 (Fla. 2005).

complained about the use of the drawing to the state Bar, claiming that the drawing was tantamount to a prohibited symbol. Another symbol that is widely restricted is the dollar sign. These are iconic symbols in our public consciousness, and frequently employed in the marketplace, but not by lawyers who want to avoid the oversight of regulators.

There is a California regulation which requires that lawyers (in twelve-point type) state on the outside of targeted direct mail or on the envelope containing the advertisement that the mail is an "advertisement," or use a similar word.[8] One lawyer, who was leaving the country, rushed out an ad to about two thousand people. He notified his staff to put "Advertisement" on the outside of the envelope. His staff misunderstood his directions, and put on the outside of the envelope "Joe is a great lawyer." This violated the rule because it was supposed to merely state "Advertisement." He was investigated for a year and a half by the state Bar.

Choice of Law

Choice of law for an internet advertisement can become a major issue of concern.[9] It is always recommended that lawyers follow the law of their home states. Authorities also suggest that a firm comply with the law of the home states of any partners in the firm. If a firm's letterhead shows an asterisk for lawyers who are not admitted in California or New York, their advertisements should follow that same process in order not to create confusion in the minds of the public. Clearly, this becomes a problem when dealing with international or multinational firms, who are increasingly involved in international class actions and can be representing the claimants of numerous countries.

The overarching basis of lawyer advertisement regulations involves the creation of false expectations in the minds of the public. However, it is almost impossible to comply with the myriad number of prohibitions because that in itself creates a negative expectation in the public perception. For example, a New York requirement that is currently being litigated mandates that on the first page of the firm's website there be a statement that "this is a lawyer advertisement which complies

8. CAL. RULES OF PROF'L CONDUCT R. 1-400, STANDARD (12).

9. Some states specifically exempt internet advertisements from their regulatory scheme. There are few reported decisions involving websites, although the State Bar of California has recently made inquiries about a few. Advertisement irregularities have appeared in civil cases involving legal malpractice, but in those cases, they are merely tag-a-long allegations. When advertising irregularities appear in negligence claims, the hurdle will involve the causation requirement, because how could the advertisement have caused damage to the plaintiff?

with the New York disciplinary regulation." However, if a lawyer or firm does not practice in New York, or is not admitted in New York, that statement could create an expectation in the mind of a consumer that the firm is admitted to practice in New York.

The Federal Trade Commission (FTC) is active in lawyer advertisements. They have opposed many of the burdensome regulations imposed by individual states. There have been a number of inquiry letters issued by the FTC to state Bars regarding proposed additional regulations. They are generally opposed to the increasing prohibitory restrictions being adopted across the country. The FTC would appear to be sending a message that it is possible for states to go too far on these restrictive regulations.

YouTube and Social Network Sites

YouTube is an area for expansion in lawyer advertising because it is free, and therefore, traditional marketing agents are entirely or partially eliminated. Lawyers are using YouTube, Facebook, and Twitter to reach existing and potential clients. Because United States Senators are using Twitter[10] and Facebook, we can anticipate that this will become a popular media source for lawyers in the future.

Although lawyers and Bar regulators demonstrate an increasing trend toward more restrictive regulations of lawyer advertisements, it may be that these regulations are antithetical to the needs of the public. Again, the subtext of *Bates* must be considered. The public needs to know where to find a lawyer. The internet is reportedly the first place consumers now go to locate a lawyer, yet there is little if any regulation of lawyer advertisements in that venue.

Cyberspace presents a huge market, often with unintended recipients. Lawyers are using disclaimers to avoid regulations in nontargeted markets, where an ad may be inadvertently viewed by a possible client, or where an ad may accidentally spill over into a nonintended state and snare a lawyer into a regulatory minefield. If a disclaimer is deemed inadequate, and the offending advertisement comes to the attention of a regulator, generally the regulator will first contact the attorney and request compliance with the local requirements.

With the proliferation of lawyer internet advertising, a viable issue becomes whether the organized Bar can regulate these ads. The state Bars barely have sufficient resources to monitor hard-copy advertise-

10. Senators John McCain and Claire McCaskill are reported to actively use Twitter. *See* James Oliphant, *Capitol Hill's a-Twitter About Networking Site*, L.A. TIMES, Mar. 3, 2009, at 15.

ments. The absence of resources and knowledge may be the reason for the dearth of reported cases involving the regulation of lawyers in cyberspace.

PROFESSOR SAMMONS: Thank you. What a terrific panel. Now it's time for questions. Yes, sir?

PROFESSOR FREEDMAN: When I went to Hofstra, in 1973, it was four years before *Bates*, and I was invited as the new dean to speak at the Nassau County Bar Association. I talked to them about what I called the professional responsibility to chase ambulances, and I explained why it was important public policy for lawyers to advertise and to solicit and why it was a First Amendment right that I thought would be recognized sometime in the future.

In the question period afterwards, one of the lawyers stood up and said, "Listen, Dean, when I got out of law school I had to sit on my ass in my office and wait for clients to come in the door. Now you're sending out all of these students who are going to be competing with us for legal business, and you want them to be able to advertise. I say let them sit on their asses in their offices the way I had to." There was an uproar of applause. That is what we are talking about.

MS. KARPMAN: I agree with you one hundred percent. The subtext of the *Bates* case was that people do not know how to find lawyers. I think that was by far the most important part of the entire analysis.

PROFESSOR FREEDMAN: The most important point here today is that we have serious professional problems nationwide of incompetent lawyers representing indigent criminal defendants and prosecutors who routinely abuse the powers of the government by depriving criminal defendants of their constitutional rights by not giving Brady information, by suppressing information, by knowingly putting on lying cops and incompetent and lying expert witnesses. We are spending all of this time on anticompetitive rules that have little to do with lawyers' ethics.

MS. KARPMAN: I am in favor of no regulations on lawyer ads. I think that people need to find lawyers, and I think that these anticompetitive regulations are just there to make people crazy.

MS. FREDERICK: It's funny that we should be in Georgia talking about underfunded indigent defense. But I do think that there needs to be some regulation of lawyer advertising. But in my mind, we do not go willy-nilly traipsing around people's escrow accounts assuming that they

are going to violate the rules, and I do not see that there is any reason to believe that advertising is any different.

We have rules. You know what they are. Comply with them. If somebody is injured, they will file a grievance and we'll take a look at it. But typically the injury is not because of the advertisement or the way that the lawyer has gotten to the client. Typically the injury is because the lawyer is incompetent.

PROFESSOR FREEDMAN: What is the comparative time that your office puts into lawyer advertising as compared to the time that your office puts into incompetent representation of indigent criminal defenses and unlawful conduct by prosecutors?

MS. FREDERICK: We estimate that probably one third of the grievances we get right now in Georgia are from prisoners alleging a lack of communication or some sort of problem with their representation. And I don't know how familiar you are with Georgia's indigent defense system, but it is in a state of crisis. It is completely underfunded. Lawyers have huge case loads, three hundred cases. There are lots of young lawyers who are being made to do things that they have not been properly trained for.

But on the other hand, we spend way more time on that than we do on advertising. We have one lawyer who spends about a fifth of her time with this lawyer advertising task force, and we do not pay it as much attention maybe as the members of the Bar would like for us to.

PROFESSOR FREEDMAN: How many lawyers have been disciplined for the incompetent representation of indigent criminal defendants?

MS. FREDERICK: I have not broken it out that way, but unfortunately if we get a grievance that alleges a lack of communication and send it to the lawyer for a response, quite often we don't get a response. They make it pretty easy for us. We have taken a policy in my office now, with the permission of our disciplinary board, to try to work those cases out instead of prosecuting them because we understand that we are dealing with lawyers who are completely overwhelmed with the volume of what they have to deal with.

PROFESSOR FREEDMAN: That's not an excuse. When they take the overload, they are taking on a conflict of interest.

MS. FREDERICK: But what do you say to a young lawyer who would have to stand up to a judge and say, "I refuse the appointment that you have just made because I am overworked?"

PROFESSOR FREEDMAN: You tell that young lawyer to say to the judge, "Your Honor, I cannot accept that appointment because I cannot give effective assistance of counsel consistent with the Constitution, and I cannot give competent representation consistent with the ethical rules if I take on that representation." If the judge nevertheless insists that the lawyer take the case, the lawyer has an obligation under the ethical rules in most jurisdictions —

MS. FREDERICK: Not ours, but go ahead.

PROFESSOR FREEDMAN: — to report the judge's unethical conduct in making the appointment under those circumstances. The lawyer then has an obligation when the plea bargain is offered to tell the defendant, "I cannot advise you ethically whether to take it or not. This is the offer. I have to communicate it to you. I cannot tell you whether to take it or not because I am forbidden ethically to do so until I have investigated the case, and I have not been able to do that."

And if the defendant decides to accept the plea, instead of standing up next to the defendant as if the defendant is being represented and providing a facade of representation, covering up the violation of *Gideon*[11] and the Sixth Amendment, the lawyer should say to the court, "Your Honor, this defendant is pleading without the advice of counsel because I have not been able to investigate the case, and I have not been able to advise the client about the plea."

MS. FREDERICK: I absolutely respect what you are saying. It is easy for me to sit up and advise a new lawyer to do that. I am not the one who is standing there in front of the judge.

PROFESSOR SAMMONS: There are things that are a lot more important for the Office of General Counsel to do than prosecute advertising cases. I think we all agree with that. Are there, nevertheless, questions about the advertising? Yes, sir?

AUDIENCE QUESTION: I started advertising two months after the big decision was decided. I started out in the newspaper with, "Do you

11. Gideon v. Wainwright, 372 U.S. 335 (1963).

need a lawyer?" And a client came to see me who worked in a department store as a janitor and when he left, he didn't get his severance pay. It took me about two months, and I had gotten that pay.

The last thing I remember doing is I had a billboard. It was above the parking lot that they kept repossessed cars in. We put up on the billboard, "Has Ford repossessed your car today?" We got quite a few clients. And one day we had a case in federal court, and it was a woman who had been molested by the repossessor. We sued under the Fair Debt Collection Practices Act.

We were there for a settlement conference, and they were at $70,000 and I wanted $175,000, and we settled it for $157,000. On the way out, the attorneys from Ford Motor said, "We were just wondering, what kind of an attorney is going to put up that type of an ad for clients?" I looked him straight in the face and said, "The kind that your company will pay $157,000 to."

It is so important that people know there are lawyers out there that have specialties or areas that can help them. And I think what we need to look at is not the anticompetitiveness issue but instead make sure that advertising informs and helps individuals find lawyers for the needs they have.

MS. KARPMAN: Tell that to Texas, Kentucky, and Florida.

MR. BUCHDAHL: The question you asked before was regarding the unauthorized practice of law and how to deal with nonlawyer entities. If you can sit there and prove or have somebody prove that they dispensed legal advice, then you can send the proper authorities after them.

The other related issue that a lot of people struggle with is when attorneys air commercials nationally for products liability cases, and you get angry about it in Georgia rather than Pennsylvania, and you actually need to rely on the state in which they are a member of the Bar to discipline them. We do not have that kind of reciprocity in this business, but what you often need to do is go to the Bar of the home state that the person practices in.

I would say in my practice—most of my law firms in which I am advising on ethics, there are usually about two hundred firms—I can tell you that nine times out of ten the state that they get in trouble with is not the state that they are based in. It is always the satellite offices.

But those are the areas that you do not want to go: chasing after people using your Bar resources because they did not follow the technical procedure in their ad. But you do want to go after the people that are either nonlawyers practicing law in your market or lawyers from other

markets trying to practice law where you live—the unauthorized practice of law.

MS. FREDERICK: Let me just throw out one thing, too, for anybody who is interested in the topic. The American Bar Association's Law Practice Management section has a very good set of best practices that I bet some of these folks actually helped develop for lawyers with their internet advertisements and websites. They talk about things that ought to be obvious but that you do not see on a lot of websites, like putting a date for the material that is posted there. When was this material added? So that if somehow the site gets abandoned later and somebody is going to it two years later and the law has changed, they are not relying on old information in the self help portion of the website. It is just a little laundry list of several things to consider as you are setting up your internet ad, and they are the things that I would be concerned about if I were looking at an ad for claims that the ad was misleading.

MS. KARPMAN: I am very active in legal malpractice. We are beginning to see malpractice claims based on statements made in internet websites, and this is surely going to be a wave of the future. It is only at this point sort of another ornament on an already overly decorated Christmas tree. But I think that more and more frequently we will need to be aware of that. And it is not so much the Bar regulatory activity that you need to be afraid of, but the civil liability that could be engendered.

PROFESSOR SAMMONS: Thank you so much. We are out of time. There is so much more that we could explore here. Does prior restraint really not apply to commercial speech? Is the court serious, is it just dicta? Micah Buchdahl mentioned about the difference between informational websites and commercial websites, and he felt that there are none, but are there differences? We can pursue that at length. And I wonder about the difference between passive and active internet, whether there should be different rules to apply depending upon how passive the internet site is. But we will have to pursue those at another time.

Please join me in thanking the panel.

— SHORT BREAK —

PROFESSOR HRICIK: Welcome back. Welcome to our final session of the day, "The Dangers of Electronic Documents and Communications:

Lessons for Attorneys." We are going to talk about metadata in a very broad sense. We have talked about it throughout the day. We decided that because we are last in the day we would provide some pictures, some hands on, "ooh and aah" sort of examples to make some of what we have seen real and to keep us all awake at four o'clock in the afternoon.

I am really happy to be joined by the two people to my left. First is Professor Andy Perlman from Suffolk University School of Law. I have known Andy for six or eight years now. I gave a talk with him up in Boston a few years ago. Then we started blogging together with a group of other law professors including Professor Freedman and John Steele and others at the legal ethics forum.

And to his left is the managing director of Huron Consulting Group in Houston, Texas, Carolyn Southerland. Carolyn and I were talking last night. We have known each other for twenty-five years. We worked together at Baker Botts for many years. After I left that firm, Carolyn became the in-house guru for e-discovery at Baker Botts. In talking to her after I left it seemed like that kind of took over her practice. About a year and a half ago, she moved to Huron Consulting, which is a large organization specializing in electronic discovery and related issues, and she has quickly moved to become the managing director. She has been to the Sedona Conference as part of that group and has a wide range of experience. So with that background, let me tell you a little bit about our topic.

We are going to talk about metadata and other hidden information, and we are going to look at it in three different formats. First of all, electronic documents such as Word documents, PDF, WordPerfect, and things like that. Andy is going to take the lead on that part and show you some real examples, and I will talk about some things that I have seen. We are going to make this a little more interactive between us and not so much as three people talking serially.

Then Carolyn is going to talk about e-mail and some of the issues that come up. If you ask for metadata, you may get way more than you want. At the same time there is some information in e-mail that many people do not know exists, and she will talk about that.

And then finally, I am going to take the lead when we talk about hidden information in the internet and show some examples and talk about some of the ethical issues that arise just by using the internet. Just by going to a webpage you create hidden information.

First, we are going to start with Carolyn giving us a little bit of technical background, talking about the definition of metadata and a little bit more technical information than Andy and I are competent to do.

MS. SOUTHERLAND: I think that the most common definition of "metadata" that you see out there in the world is "data about data," which I do not think is very helpful. In fact, it does not really tell me anything. So my favorite definition of metadata is the Sedona Conference definition.

I am going to give a little plug on the Sedona Conference. The Sedona Conference is a think tank. They have a lot of different things that they do, but they have a group that is focused particularly on electronic discovery. They produce a number of documents that I think are very useful for lawyers and law students who are trying to learn more about the electronic discovery arena generally.

One of my favorites is the Sedona glossary. It has all kinds of stuff in it about electronically stored information. All those acronyms and different things, different tech talk that the information technology professionals use that is a complete mystery to most lawyers, much of it is defined with a great deal of precision in the Sedona Conference glossary.

One of those definitions is metadata. We bullet pointed some of the key points of the fairly long metadata definition in the Sedona Conference glossary. By the way, you can get all this stuff free. You can download the free PDF from www.thesedonaconference.org. I highly recommend it.

Metadata is the information about the building or construction of a document. It is things like what we e-discovery geeks like to refer to as the MAC dates, Modified Accessed Created, which is sort of out of order, but it would not make a good acronym if it were in the right order—created, accessed, modified or created, modified, accessed. But it is the information about the document. Who was the author? Who created it? When did they create it? When did they last access it? When did they modify it?

And you can get down into a fair amount of minutia in metadata. As David mentioned a few minutes ago, you can look at fascinating things like word count. How many words are in the document? Which, by the way, would have been really helpful when I was in school and we had to write those "X" hundred word essays. Now you can just go to word count. There are all kinds of interesting things that you can see. Some of you are probably very familiar with what you see in the properties and advanced properties.

But some metadata, particularly those dates I was talking about, can be very easily modified or altered, either purposefully or inadvertently. And most often it is the dates that get modified, and most often they get modified accidentally. When you run a virus program, most of the time

you change your last access date. And that may or may not be important in litigation.

If you take a document that you have saved on your hard drive and move it to a thumb drive, when you look at the document on the thumb drive, your create date is different. Your last access date and your last modified date will likely stay the same, particularly that last modified date. So, you will have a document that appears as if it was created after it was last modified, which is kind of interesting. Play with it, and see what you find. You will see that in Word and Excel. It is a little glitch in Microsoft.

PROFESSOR HRICIK: I have never heard about the virus software. Can anybody tell, whether it is a normal person like me or a high tech person like you, can they tell whether it is the virus software that changed the access date?

MS. SOUTHERLAND: You can do it by deduction. You cannot look at it and then investigate behind it and say, "Oh, that must have been what happened." But if you look at every document on a server, and every document has the last access date that is exactly the same, then you can conclude that there was something going on there. Most likely a virus program was run and changed the date. But if you take one of those documents and produce it in litigation and make a representation that indeed that was the last access date by a human being, you could be in trouble unless you go in and investigate and find out the situation.

One of the other things about metadata is that there is a lot of it in all kinds of electronic documents and in e-mail. I have been told by people who are much more forensically technically savvy than I am that there are between one hundred forty and two hundred metadata fields in e-mail. So some of that probably matters in litigation. Most of what matters in litigation is probably in about ten metadata fields. The rest of it, like font size and word count and that sort of thing, probably is not going to matter in litigation, but we do see that coming up a fair amount.

One of the things that I am seeing in the discovery context is that people are getting a general understanding that metadata is important and that they know they need to ask for it. So they start talking about it without really having an understanding of what it is and what aspects of metadata they want and what matters to them.

And so we get agreements like, "Well, we agree to exchange all metadata fields." Really? Do you want to do that? Because that is going to get really expensive and kind of complicated. Instead, maybe you are interested in other things like author, create date, last access

date, modified date, and maybe an agreement on what date you are going to operate under. What is the most stable date or what date of the three MAC dates could be what you need for your litigation.

So, when you are thinking about metadata, do not think in terms of, "I want it all, because that can get very expensive." Think about it in terms of, "What do I really want for this litigation?" I want to know who created the document. I want to know when they touched it. I want to know if anybody else accessed it and when and who that might be.

PROFESSOR PERLMAN: I heard the word "metadata" over and over today, and I thought it would be useful to take a look at some actual examples of documents containing metadata and what kind of information you can get out of those documents. The documents fall into three general categories: WordPerfect documents, Word documents, and PDF files. Those are just the examples I am going to use, but really as Carolyn was just saying, almost any electronic document, such as e-mail, contains metadata. These are just for illustration.

Let me start with WordPerfect, and let's imagine a hypothetical contract. It is a one-sentence real estate transaction. Imagine that you represent the seller of this piece of property, and your client suggests that you ask for $750,000 for the property. After some discussion, you and your client decide to change the amount requested to $1,250,000. So you delete $750,000 and type in $1,250,000. You then save the document and send it to the potential buyer.

What you may not realize is that, particularly in older versions of WordPerfect, the changes that you made were saved with the document. So when you sent this document to opposing counsel, you also sent the previous edits. They can go to the "undo" command and see that you originally had thought that $750,000 was an appropriate sale price.

Some of the newer versions of WordPerfect do not retain the information necessary to make the undo feature work after the document has been saved, so you have to affirmatively turn it back on. But in the older versions, if you're not careful and you're working in the native format of the document and that is what you're transmitting to opposing counsel, you could be disclosing to your adversary information that you did not intend to disclose.

This is metadata in the broadest sense of the term, but it is a form of metadata because it is information contained in the document that you really cannot see on the face of it. If you were to have printed out this version of the document, all you would have seen is the final figure of $1,250,000. The information about the original amount, $750,000, is embedded in the electronic version of this document, but you can't see

it on the document's face. It is still there, and it can be read by an adversary if you're not careful.

PROFESSOR HRICIK: One of the things a small firm lawyer told me about when I was talking to him about metadata somewhere, he said, "My secretary goes in and turns this stuff on. Because I don't know about how many of you do this, but I would hack out a paragraph and then two revisions later I would say to my secretary, you know that paragraph we hacked out, can you put it back in?" What this does is, it saves it. You can actually get a list of the things. The secretary can say, "Oh, let's put this one back in." So that sometimes the secretaries will turn this stuff on and you won't know it, and they e-mail you the document. You say, "That looks great. E-mail it out." You just e-mailed out every change you made to the document. Opposing counsel can just sit there and take a peek at it.

PROFESSOR PERLMAN: And we will get into the issue of whether opposing counsel should be allowed to go in and peek at it, which is a separate question.

So let me give you a couple of Microsoft Word examples. One very prominent example came out of litigation involving Merck and the drug Vioxx. Merck had submitted a study to a prominent medical journal in Microsoft Word format that described the safety of Vioxx before Merck began marketing the drug. After the drug came to market, people started having heart attacks that appeared to be caused by the drug. One issue in the case was whether Merck knew that heart attacks could occur as a side effect at the time that Merck began marketing the drug.

Somebody went back and looked at the metadata for the study that Merck had submitted to the medical journal and discovered that the document, which had been submitted in Microsoft Word format, still had "track changes" information. Those edits revealed that Merck had deleted references to heart attack victims before formally submitting the article to the journal. That information was obviously heaven for the plaintiff's lawyers.

Let's look at another example from the British government. This document on the screen was published in Microsoft Word format shortly before the invasion of Iraq. As the title suggests, the document concerned the infrastructure of concealment, deception, and intimidation in Iraq. The report allegedly draws on intelligence sources, confidential intelligence sources.

The report was released, and there was an allegation that the British government was not really drawing on confidential intelligence sources. Rather, a large portion of the document was allegedly taken from a

United States researcher. Well, that is an interesting allegation. How do you prove it?

You can go into the author history of the document—and this goes to what Carolyn was talking about—and see where the document came from. I got a copy of the document, and then went to the source of all information about how to extract electronic information: I went to a teenager. He directed me to a website where I could download free software called "Trace It." After downloading the software, I ran the document through it. It produced this report that you can see on the screen, which shows the author history, the last ten authors.

It takes you through a number of British government officials. And if you trace it back, ultimately this information was used to prove that the document and the information contained in it came from a post-graduate student in the United States, a rather embarrassing revelation for the British government.

Now look at an example from the United States government, in particular the Justice Department. This document came from the Department of Justice. They conducted a study about diversity and attorney satisfaction within the Justice Department. You can see the key findings of the study. Well, actually, you cannot see the key findings of the study because they are all blacked out. What a lot of people think is that if you convert a document into PDF, suddenly you have solved all of your problems. That is not necessarily the case, because if you manipulate the PDF document after it has been created, there is still information embedded in that document.

That is what happened here. The Department of Justice created a PDF version of their report and then placed a black graphic image over some of the text. With a few keystrokes, you can simply remove that graphic image and reveal the underlying text. You can see that the report revealed that "minorities perceive unfairness in a number of human resources settings," and this sort of thing. Obviously, the Department of Justice had not intended for the public to see this information.

This next example is a PDF document from a prominent law firm who was defending AT&T. The claim was that AT&T impermissibly allowed the federal government to use AT&T facilities to monitor telecommunications in the United States. There was some sensitive information contained in one of the briefs, so the firm converted the brief to PDF format and placed a black graphic image over the sensitive text. All you have to do is highlight the text and hit control/insert. You can then open up a blank document and hit shift/insert to see exactly what is underneath. Pretty easy.

Ultimately, there are many dangers associated with electronic metadata. Granted, a lot of metadata is going to be useless to most people, but occasionally you can have disastrous consequences like these. What I am going to be talking about later are some of the ethical issues associated with it.

Before I move on, I just want to mention one last thing that is not really about metadata, but more a danger associated with electronic communications more generally, and that is the use of e-mail. Carolyn is going to talk about e-mail in more detail in just a moment, but I wanted to give a relatively recent, prominent, and scary example of how careful you need to be regarding e-mail.

The example turns on the autocomplete feature in e-mail. We have all had the experience of starting to type an e-mail address and the full address pops up. The software assumes that we are looking for a particular address based on the first few letters that we type. But if it is not the e-mail address you really want, you have to go back and correct it.

In this particular case, there was a lawyer who wanted to send a fairly confidential document and a privileged piece of information to co-counsel in Chicago, a lawyer named Bradford Berenson. The reason the lawyer's name is important is that there happens to be a *New York Times* reporter named Alex Berenson, who was also in this particular lawyer's e-mail address book. In any event, the lawyer sent the e-mail to Alex Berenson by mistake, and the information ultimately made its way to the front page of the *New York Times*. It's a very embarrassing situation, but yet another cautionary tale for those of us, which is basically everyone, who use technology to communicate.

PROFESSOR HRICIK: There was a classic case even more recently, and it raised an issue I never even thought about. This lawyer is in New York City representing a New York client, and he gets in a tussle with opposing counsel, but then he goes on vacation to Hilton Head.

He is in South Carolina and his client sends him an e-mail saying opposing counsel is a jerk and asking, "What are we going to do about this?" The lawyer, intending to write back to his client, inadvertently wrote to opposing counsel, and according to the court said some colorful language about opposing counsel.

So opposing counsel receives this e-mail basically saying you are a jerk. And the court had to deal with the question of inadvertent production and those sorts of things. But the court also had to deal with the question of choice of law. You have a lawyer who is now in South Carolina, which has one approach to waiver of privilege, when he was

normally in New York, and I am assuming his e-mail went through his New York server, and he got it by his Blackberry in Hilton Head.

So, the court had to struggle with whether privilege would be waived, and if so, what law applied to it? These are the things that we are just beginning to see the tip of the iceberg with respect to e-mail.

MS. SOUTHERLAND: If you get on Amazon.com, there are at least three books that I am aware of about how to write e-mail and the dangers of e-mail. I think there probably should be more. But this is my personal favorite. Will Schwalbe, who was the editor in chief of Hyperion Books, put this book together. It is a very easy light read. There are dozens of e-mail stories that will frankly scare the crap out of you if you read this book, but it is fascinating and very interesting. And there are some insights on how to write an e-mail that would not offend people. I understand that I have made some mistakes, like using the word "please" in an e-mail. Apparently that offends some people. And on the back are the eight deadly sins of e-mail. This is a fascinating book about living in the world of e-mail. It's called *Send: The Essential Guide to Email for Office and Home*.[12]

We did talk earlier about the details of metadata. I am going to spend just a couple of minutes kind of geeking out on you. I am going to show you an e-mail example and where somebody who is technically adept can get by the e-mail and see how it traveled to its ultimate destination and know what's behind it.

This is an e-mail that I actually received. I am a very good customer of the M&M Mars people. I have in my office, and have for at least twenty years or so, little M&M men. One is shaped like a peanut M&M, only larger, and one is shaped like a plain M&M. And it brings a lot of office camaraderie because I usually get visits, you know, kind of that midmorning lull. And actually, when David and I worked together, his lunch was frequently M&Ms.

So I selected this e-mail in honor of David just to show you a little bit about what you can find behind an e-mail. If you will just show the next slide. I am not going to walk through this because this is just way too much information. But if you get behind an e-mail you can look in excruciating detail about where it came from and where it's going.

What we will find out here is that the sender in this e-mail, or the e-mail box that shows when I pull it up on my computer, does not actually exist. So the next slide will show you it goes from an originating point, and it relays through several computers. It can tell you where it

12. DAVID SHIPLEY & WILL SCHWALBE, SEND: THE ESSENTIAL GUIDE TO EMAIL FOR OFFICE AND HOME (2007).

bounced and where those servers are, and you can track them by IP addresses.

The last one is sort of the graphic representation of this. It shows it is coming out of an e-mail box that does not actually exist and ultimately into my e-mail box as it runs through this system. Now, what I discovered when I started looking at this is that the e-mail address does not actually exist. They spoofed it. If I was creative enough, I probably could have created an e-mail from maybe whitehouse.gov, inviting me to dinner, but I didn't do that; I picked this one. And so you can see, if you are technically adept, an e-mail address may actually not exist.

This has actually come up in the domestic relations context. There was an ugly divorce case, where the husband produced an e-mail that was purportedly from the wife. It was vile. It was profane. It was rude. And it impacted the judge's perspective on who should get primary custody of the children. The judge elected to hire an expert to look behind the e-mail and discovered that, indeed, the wife did not send this e-mail to the soon to be ex-husband. The ex-husband created the e-mail and sent it to himself, but it looked like it came from her.

So we have to be very careful about where the data may come from, and you need to be very careful about relying on the accuracy of what you see in an electronic document as well as what you might not see in an electronic document. There are some ethical issues associated with this that I am going to let David Hricik and Andrew Perlman talk about.

PROFESSOR PERLMAN: I am going to take the lead on this part of the program. There are two different ethics issues when you are dealing with metadata. On the one hand, there are ethics issues for the lawyer who sends out electronic information. And then there are some ethics issues for the recipient of that information, including whether or not you are allowed to mine the document for metadata. Let me talk first about the duties of the sending attorney, and then we will talk about the recipient.

Regarding sending lawyers, there is a New York opinion from a few years back that discussed what precautions a lawyer must take when sending electronic documents to prevent the disclosure of confidential information. It concluded by saying that lawyers must "exercise reasonable care to ensure that they do not inadvertently disclose their client's confidential information." And if you think that's vague, it gets worse.

It says, "What constitutes care will vary with the circumstances." And then, "reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with response to

the mode of transmission." Now it's clear, right? If it is, you let me know what that means, because I do not understand it.

I think it is worth breaking this topic out into two different contexts, nonlitigation and litigation. I think the lawyer's obligations are going to be quite distinct depending on the context that we are talking about.

Let's start with nonlitigation. This is a scenario where there is really no circumstance when you are going to have to disclose the metadata to the other side as part of a transaction. It may be that the other side requests it. And perhaps they insist on seeing the metadata and will not close the deal unless they see it, in which case you can negotiate about it. But for the most part there will not be a legal obligation for you to turn it over.

So one thing that is important to do, to the extent that you have got a limited enough universe of electronic information that you can figure it out, is to know what is in the metadata and be careful about what you send across. Just to use that basic contract as the example, be aware that older versions of a document might still be embedded in the current version. Be aware of the content so that you are not disclosing something unnecessarily to your opponent.

Be aware also of how you can extract metadata from documents. You can buy metadata scrubbers, and these days most larger firms have these scrubbers built into their e-mail systems. I think Carolyn might talk a little bit about this issue later because I have basically exhausted my knowledge of scrubbers by saying "metadata scrubbers." They basically extract metadata from a document. If you have a scrubber built into your e-mail system, it will warn you when you are sending a document that has metadata in it and offer to remove that metadata before you send the document. But there is more to it than that.

In any event, I think it is wise in the nonlitigation context to send documents without metadata intact unless it is a situation where it is essential, such as needing for the other side to see the redlined version of a contract. In short, there might be some circumstances where you intend to send metadata, but otherwise there is no reason to send anything that your adversary is not entitled to see.

The other way of dealing with the nonlitigation context is to agree in advance regarding how you are going to deal with the issue. If we are going to be sharing a lot of information, let's just agree up front that we are not going to be looking at each other's metadata. That should, to some extent, protect you. So that is another potential course of action.

The litigation context raises a different set of issues because many times an electronic document may contain relevant discoverable information. If you go about trying to eliminate that metadata before

turning it over, that could be spoliation of evidence, and you could be sanctioned for it.

On the other hand, if the requesting party at discovery—and this goes back to the morning panel—makes a generic document request and simply says give me all of your electronic documents on a particular issue and does not specify that they want the native format or they do not specify that they want the metadata included, then you as the sending attorney might be able to decide, "Well, I am just going to give them the PDF version of this document." In that case, you might effectively remove some of the metadata that you do not want them to see.

Now, if they go ahead and ask for the metadata, then you may have to disclose it. Indeed, an increasing number of courts are permitting discovery of metadata when a party requests it. But I think there are some interesting nuances here for a producing attorney regarding how to respond to generic requests for electronic documents that do not specify the format or do not specify the inclusion of metadata.

Again, this goes back to some of the discussions we had this morning, but my take on it would be that the sending attorney is under no obligation to give the requesting party a version of the document that contains metadata unless the party has asked for it. It seems to me somewhat analogous to a situation where a requesting party does not ask for a key piece of information. In a deposition or in a document request, if they do not ask for it, that is not your problem. They should have thought to ask for it.

I do not think it is any different here. If the requesting party in discovery does not ask for the document in its native format or does not ask for the metadata, I think the sending attorney is under no obligation to produce it.

So to summarize what's going on here, the producing party in litigation should be aware of what's in the electronic documents to the extent that it is possible to do so. Sometimes production can be so big that it might not be possible.

On the spoliation issue, be careful about eliminating metadata. If the metadata is being requested, you cannot eliminate it, if it is discoverable and not privileged.

On the flip side, if you are disclosing documents that contain privileged information and contain privileged metadata, that disclosure could lead to a waiver of the attorney-client privilege in certain circumstances in some jurisdictions, which is wishy-washy, but the law is really all over the map regarding when you waive the attorney-client privilege upon an inadvertent disclosure of privileged information.

Finally—and this was alluded to this morning—there are these clawback agreements, and at least under the Federal Rules, and you can now clawback information that you have already disclosed to the other side. This morning, Chilton Varner said that a lot of lawyers were reluctant to take advantage of these clawback agreements because they do not want to let the cat out of the bag, but it is still worth considering such an agreement. It might say that, "If I send you a document and it contains metadata, you are not going to look at the metadata without discussing it first." And if you contractually agree to that, there is nothing wrong with that approach.

MS. SOUTHERLAND: Before we move on, though, one of the things that I want you to think about is that, as I mentioned earlier, a lot of metadata, particularly those dates, can be altered very easily and inadvertently at the outset.

So, when you talk to somebody about production, you are probably at least reasonably far into the litigation. And you have to think about preservation long before you are in a situation where you are discussing production of metadata with the other side. You have to think about whether or not you need to preserve that type of metadata information when you reasonably anticipate litigation, and you go about capturing or collecting the information you may need to ultimately produce.

So your client says to you, "I will e-mail you all of the documents I have that matter to this litigation," and they forward it to you via e-mail. If there are Word documents attached to a series of e-mails or they are in a zip file that all come to you in one great big fat attachment, and then you save them somewhere and then produce them in the litigation, and if you negotiate with the other side to produce that metadata, you have not given them the correct metadata. You have to know how to capture the information. There are programs out there that can keep that metadata intact where you can move it from, if you will, medium to medium or storage device to storage device to ultimately get to where you need to be.

But you need to think about spoliation when you are in the preservation mode, if you will. That is likely going to be long before you have the discussion about whether or not the other side even wants it. It is preservation in a forensically sound way. That is, you keep that metadata intact. It is something you have to contemplate very early in the litigation.

PROFESSOR HRICIK: On clawback issues, it did not surprise me that people were not using them. I read an article about this a couple of years ago. Here is what struck me about the provision. Normally the

default rule is that if I do not exercise reasonable care, I waive privilege if I accidentally produce a privileged document to you. You and I can agree as part of litigation that we are not going to take that approach, that we are going to agree we are not going to assert inadvertent production waives privilege, and that's fine. That is between us. But if I produce a document to you and you agree you are not going to claim privilege waiver, what about if Carolyn and I get in litigation?

MS. SOUTHERLAND: What about if I sue you in state court?

PROFESSOR HRICIK: Right.

MS. SOUTHERLAND: You two are in federal court and you are governed by those rules. But what about if I sue you in state court and I say you have given that document to him? I get it.

PROFESSOR HRICIK: I think everyone is just staying away from a lot of that. But still, the rule was designed so we would not spend so much time as lawyers reviewing documents, for example, privileged metadata or whatever, and waste so much time with privilege reviews, but I think it gained nothing in that area, at least from what I have seen, and it sounds like Chilton Varner's evidence is confirming.

MS. SOUTHERLAND: Just to take a step out of the e-discovery world and into the ordinary practice of law, once you turn over privileged information to the other side, how do you unring that bell? How is it going to impact the way that they approach the litigation? Even if they cannot use the document, say, in a deposition, it will impact their strategy. So I think that there is some reticence that existed long before we started talking about electronic discovery, and that remains when you start talking about these clawback agreements.

I think that the idea of inadvertently producing privileged information inside of metadata or hidden in the document that you are not aware exists is enough to be scary. But there are some things, some tools that you can use that will help you, and metadata scrubbers are probably the ones that come to mind immediately.

There are common ones out there. A lot of law firms, especially the bigger law firms, have those metadata scrubbers attached to their e-mail system. So what happens is if you send a native document, if you have a Word document or an Excel spreadsheet or something attached to an e-mail, and that e-mail is an external address to the firm, a question box will pop up asking, "Do you want to 'scrub' it?"

And you have various options in these metadata scrubbers. I think Easy Clean is probably the one that is used mostly by law firms. KKL is the software manufacturer. And there is one called 3-D Clean or something along those lines, and there are others that I will talk about in a minute.

But it will prompt you and ask you if you want to scrub the document of metadata. You can also go in and, using various options inside the metadata scrubber, say, "I want to scrub all of the track changes. I do not want them to see any of the track changes, but I do not care about the other metadata. I do not care if they know when the document was created, who created it, or any of that." Or you can get very broad and it will scrub virtually everything out of the native document. So those are some options.

Microsoft has a tool called Remove Hidden Data, RHD, that is available on XP and Microsoft Office 2003. It removes hidden data. It, in and of itself, I think is dangerous because while it removes hidden data, it does not touch the track changes. It really only focuses on that metadata I talked about earlier, that is kind of outside the document, author information and that sort of thing. So it can be a trap for the unwary to rely strictly on that Microsoft tool.

As Professor Perlman mentioned earlier, lots of different entities, governments and individuals, law firms, and corporations have gotten in trouble with inadvertently producing metadata. This has become such an issue with the United States government that the National Security Agency actually produced a paper called, "Redacting with Confidence: How to Faithfully Publish Sanitized Reports Converted from Word to PDF."[13] I love this acronym—the Systems and Network Attack Center—the acronym being SNAC—of the National Security Agency.

And you can get this also on the internet, but it walks you through step by step how you take a document in Word that has things like track changes in it, that has other metadata information that you may not want to provide to the public, and produce it. So one of the things we talked about was buying, actually spending the money, spending the money to buy some sort of a metadata wiping program.

But the other thing you can do is go through the many more manual steps that are provided in this document. The example that they give here is a Word document. Essentially what they say is that in order to wipe the kind of metadata that we have been talking about out of this document, you essentially create three new documents.

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13. http://www.fas.org/sgp/othergov/dod/nsa-redact.pdf.

So you take your original document. You save it as a new document. You go into the new document. You turn off track changes or accept what you want to change. You delete comments, whatever you want to do to it to take out the information we have been talking about that a lot of people are not even aware exists once you turn off the track changes, for example. You take the text of that document, copy it, paste it into a new Word document that you save with yet another new name. You take that document, convert it to PDF, and then send it out.

Why has the government spent a lot of time, and I assume a lot of money, trying to educate people to do this? Because they have produced information that they did not want to produce.

The one I remember had to do with the Italian journalist in Iraq and the investigation that followed, where they produced a Word document where they had turned off the track changes but not deleted the information. They simply turned off the track changes, and a journalist got hold of it, turned on the track changes, and there was all the information they did not want anybody to see.

So that is another example of why you have to be very careful about knowing what is in documents that you would not necessarily see on their face.

PROFESSOR HRICIK: We were talking about the duties of the sender, and I remember someone once said to me when I was talking about this, "I just print everything out and mail it." That was their solution to all of these problems, and it does solve all the problems. But then somebody told me that a lot of photocopiers put some sort of little tiny embedded code on them, so there is actually metadata in pieces of paper coming out of modern copiers, so we are going back to scriveners I think pretty soon.

But, what is reasonable care here? Do people have to make three copies of the thing and PDF it and all that? We have seen making it an Adobe file and blacking it out does not work. Did that person exercise reasonable care when they did that? I would have thought it was gone if you put a big black sticky over it. Is paper required? Are scriveners required? Should we not write documents? What is the answer?

PROFESSOR PERLMAN: The answer is that what constitutes care will vary with the circumstances. Unfortunately, that is the best that we can do. I think there is a spectrum of negligence when it comes to electronic documents, and there will be certain situations that are so obviously negligent that I think an attorney could be subject to malpractice. And then there are circumstances where no reasonable lawyer could have possibly foreseen that somebody was going to be able

to extract the information. And then there are all sorts of cases in between.

What makes it particularly difficult is that what is going to be considered negligent is changing over time. That was the clear import of the New York opinion: you have to stay abreast of technological changes. What we consider to be within the bounds of reasonableness today may not be reasonable four or five years from now.

I know I am being cagey here and not giving you an answer because I do not think that there is one. I really think that it is a moving target and that some of the mistakes that lawyers can get away with today, they will not get away with a few years from now. So I think the devil is in the details. You must look at every example and say, "Should a lawyer have figured this out?" I think it is going to be debatable.

MS. SOUTHERLAND: You said the standard of care is changing. Is the fact that more and more firms are buying metadata scrubbing programs going to impact that analysis?

PROFESSOR PERLMAN: I think so. I think if you go back five years, if a law firm sent out a document that had metadata in it and the other side got it, it would be unfortunate but perhaps forgivable, at least from a malpractice perspective. Increasingly, I think we are getting to the point where if a lawyer sends out a WordPerfect document (for example) with the undo changes embedded in there, that is getting pretty close to negligence given the state of the knowledge that we have today.

I think somebody would have a decent case for legal malpractice against a lawyer who did that because I think lawyers should be aware in this day and age of the undo command. It is very easy to turn it off, and you know you had other sensitive information in the document and changed it. If you did not take proper precautions to make sure that the previous changes were unavailable, I think that might be considered negligence today, even if it would not have been considered negligence ten years ago. So I think it is a moving target and it depends on what the issue is.

MS. SOUTHERLAND: Well, in that context, too, the person could have taken that document with the correct number in it, with the $1,250,000 in it, converted it to PDF, probably with one or two mouse clicks, and sent out a PDF. That was not a particularly long or complicated contract.

If the other side or my client wanted, the notes could be handwritten and faxed or a PDF faxed, as opposed to a document that may be multi-

hundred pages that many people may be needing to actually access the native file to make comments on. So some of it may depend on the need for the document and the medium out of, or by which you send it may be impacted by how the document is going to be used.

PROFESSOR PERLMAN: I agree, and that is probably why the New York opinion was written the way that it was. I think it is very difficult to draw bright lines here as to, well, this would be unreasonable and that would be reasonable. Like I said, I think it is a moving target.

PROFESSOR HRICIK: I know you will disagree with me on this, but let me see what you think. I think that what you are saying is true in part, but I think you have to take into account the size of the lawyer's firm. I would fault more readily the lawyer at Baker Botts for e-mailing out that WordPerfect document than I would for one at a small Macon firm, or a solo practitioner, or one of those overworked indigent defense attorneys we were talking about earlier. They have more important things, perhaps, to worry about than reading the manuals for Word and WordPerfect. What do you think? Is that a factor?

PROFESSOR PERLMAN: I think it is debatable that it should not be a factor. The standard of care in legal malpractice cases turns on how an ordinary lawyer in a particular state would have behaved. Whether the standard of care is going to be different for a large firm lawyer than it would be for a small firm lawyer in this particular context, I think maybe you could make an argument that it should be. But something as simple as the undo command in a WordPerfect document seems to me to be sufficiently commonplace that I would not make a distinction between a large firm and a small firm.

There might be other circumstances where I could imagine such a distinction. For example, consider the metadata scrubber. Let's assume that the best scrubbers are sufficiently expensive and complicated that only larger firms are able to afford them and operate them. In that case, should we be more inclined to forgive the small firm lawyer for a mistake that a large firm lawyer (with the more sophisticated metadata scrubber) would not have made? Perhaps, but I do not think it is a mistake that would be forgivable in every circumstance.

PROFESSOR HRICIK: So it sounds like in order to avoid malpractice, everybody is going to have to get a scrubber or do the United States government three step?

PROFESSOR PERLMAN: I think there are lots of areas in the law where it does not matter what kind of practice you have, no matter how big or small, everyone has to take the same precautions. If you have a trust account for a client, you should not be overdrawing on that trust account. I do not care if you do not have a secretary, if you do not have a lot of time, or how small your practice is. It is a violation, plain and simple. And I think there are some circumstances in the context of metadata where we are going to reach a point where every lawyer—no matter how big or small the firm—should be held to the same standard.

PROFESSOR HRICIK: One last thought, and then we need to move along to the recipient. I have only worked in a firm once that had scrubbers on it, and I hated them because usually you do your e-mails and click send and you can walk away. Instead some little box came up and said, "This document has metadata. What do you want to do?" If I did not remember it, I would walk away, and two hours later I would come back and that little box would still be on the screen and the e-mail hadn't gone out. The one I had, this was years ago. You had to go through and click, "Do I want the track changes gone?" *Do* I want this gone? It took me an extra thirty seconds, which isn't much to send out an e-mail, but it was enough to tick me off.

PROFESSOR PERLMAN: But you do get to bill that time.

PROFESSOR HRICIK: Then I am all for that. But with saying that, let's move along to the duties of the recipient.

PROFESSOR PERLMAN: This is actually my favorite issue in the whole metadata discussion: the ethical duties of the receiving party. So let's say that you are on the receiving end of that WordPerfect document, and you see the undo command up in the corner. You see that it is not grayed out, so there is something there that you could discover if you click "undo." Should you be allowed to look? What are your ethical duties regarding mining of metadata? Should you be permitted to examine it?

The first opinion that came out was in New York, and it said that a lawyer may not make use of computer software applications to surreptitiously get behind visible documents. That was the ultimate conclusion. It seemed that the opinion was directed to the nonlitigation context, but nevertheless the ultimate conclusion was that it would be unethical for a lawyer to examine the metadata in an electronic document. So in that WordPerfect example, if you hit the undo button, presumably this New York opinion would suggest that doing so is unethical.

Some subsequent opinions have come out the same way. The Florida Bar issued an opinion that reached the same conclusion, and my favorite quote came from a board member of the Florida Bar who said, "I have no doubt that anyone who received a document and mines it for metadata is unethical, unprofessional, and un-everything else." I'm not sure what "un-everything else" is, but that is a fairly strong statement that a lawyer should not be allowed to mine a document for metadata.

Since then, there have been a number of other ethics opinions that have been issued, some of them coming out the same way as Florida and New York. Alabama and Arizona have reached the same conclusion. Lawyers should not be looking at metadata unless they have permission to do so.

And then some Bar associations have issued opinions that say, generally, it should be okay for a lawyer to look at metadata. The ABA, Colorado, the District of Columbia, and Maryland have reached this conclusion.

And then, of course, there is the law professor's favorite scenario, you can almost guess what it is. It depends on the circumstances. Pennsylvania issued an opinion that essentially reached that conclusion.

So regarding whether you can look, Bar associations are split. It is unclear. The answer might turn on the practice setting, whether it is litigation or nonlitigation. So, I think this whole area is quite a mess regarding lawyers' ethical duties.

AUDIENCE QUESTION: Has any Bar said or court said there is an affirmative obligation to look? If you have received this information from opposing counsel and you think there is a possibility that there were changes, would you have an obligation to look to see on behalf of your client? Would he not want to know?

PROFESSOR PERLMAN: I think one could make an argument to that effect, but the person two rows or three rows behind you could make that argument very convincingly. Monroe Freedman, I think, probably would take that view. I do not want to speak for him, but he might take the position that you have such an obligation. If the metadata might have information that is helpful to your client, absolutely you should be looking at it.

I will take a poll here. Among the students in the room, how many of you think it should be ethical to mine metadata from an electronic document? Okay. Now, among the lawyers in the room, how many of you think it should be ethical to look? Okay. For the record, I would say the vast majority, eighty to ninety percent of the student hands went

up when I asked whether it should be ethical to look. Very few of the lawyer hands went up.

My sense has been that there is a very large generational divide on this particular issue. People who have grown up in the electronic generation think that when you send somebody a document, it has lots of information. It is not just what you see on the face of the document. It has lots of information in it. You sent it to me. Why can't I look?

I will not say older, I will say more "senior" attorneys tend to think a document is what you see on its face. I did not intend to send you anything else but what you see. If you are digging around in it for other information, it is like going through my briefcase when I have left the room. How dare you? That is unethical.

There is a very interesting difference of perception regarding what an electronic document is and when it is permissible to look at metadata. This poll right here is a very nice illustration of that generational divide. So I think this is an issue that is going to be continuously debated over the next few years. It will be interesting to see the way that it plays out, but we certainly have not heard the last of this particular issue.

PROFESSOR HRICIK: What I also think is interesting—and you can't explain these decisions on this basis, but it does explain some of them—some states have the equivalent of Model Rule 4.4(b), which requires lawyers to at least notify opposing counsel if they inadvertently transmit a document.

And so, you get into this question in those states: Well, you intended to transmit this document but not the stuff behind it. And you can see why those states go the way they do and that you should not look for it. You should notify the other side. That explains some of the split.

The other states, though, and it is interesting to me, and Monroe Freedman mentioned it last night, they say it is deceitful to look. And I have a hard time hanging the result on that word. In other words, you commit a dishonest act by clicking undo. I wonder if anybody could ever be disciplined, putting aside any Bar counsel opinion you should follow, but could a Bar counsel succeed in a grievance against somebody based upon the notion that you were dishonest by clicking? We do not know.

But what troubles me still is that those examples we had up there were not from dumb lawyers. Those were big law firms, fairly recently, and mistakes continue to occur. I do not know if those folks use scrubbers and they goofed up. There is the more recent case where a major firm posted a complaint in Word online. And if you looked at the track changes, you could actually see that they were intending to sue a different party than they sued.

AUDIENCE QUESTION: I know for a fact that the Florida opinion came from just the generational conflict you talked about. My buddy, Rob Ryan, who was a lawyer of an older generation who learned from that opinion that you could do it. The analogy he used interestingly was, "This is like I left my briefcase behind during a deposition, and you riffled through it." He was bloody furious.

I wonder if that is part of this? He would say, "Hey, I did not know that and I was taken advantage of by someone who did. That is not fair. And it is not fair to say to me I made a conscious decision. It is really because of my ignorance, not from my knowledge."

PROFESSOR PERLMAN: Reading into what you are saying, it sounds like you are somewhat unsympathetic to the attorney who has not stayed abreast of technological changes and is not aware.

AUDIENCE QUESTION: I think he runs into the New York problem. But I can tell you, he was furious.

PROFESSOR PERLMAN: I wonder if that is the quote that I read?

JUDGE FACCIOLA: You know, it used to be said in the early days of the CIA, "Gentlemen do not read each other's mail." That was the generation from which he came. And that happens on a daily basis. If I am doing a settlement discussion, it always amazes me one lawyer will say, "Judge, I want to get my client outside. Is it okay to leave my briefcase?" I am always stunned. "Of course it's okay to leave your briefcase. Did you really think I was going to go through it?" I know he is speaking through me to his opponent, who is sitting there.

AUDIENCE QUESTION: I want to ask a question in this context. I have a case right now where I'm thinking of the documents perhaps the opposing counsel may or may not forward to me by e-mail that he obtains from his client, like you were speaking of earlier. In my case there is a crucial issue right now, but it appears certain documents that were in their native format were different than they are now being turned over in hard copy. We are pretty certain of that. In fact, we are positive that is the case. I have just got to get the evidence to prove that. So of course, in my request for production I am going to ask for them in their native format and the metadata, which I was not aware of prior to right now.

So, my question is whether it is unethical? Because if I do get those documents from him e-mailed, by chance he does that, you better believe I need to look back at the original because I know they have already

changed them. So I would need to be able to access that to prove that my clients were gravely injured by this particular company, and this would prove the company is lying.

MS. SOUTHERLAND: The spoliation of information; the metadata. Some of this discussion really sort of centers around the concept that metadata is not part of a document, and it is part of an electronic file. It is all within the electronic file, except to the extent that we talked a little bit earlier when we were talking among ourselves whether there is such a thing as system metadata and document metadata.

And so where the document lived on a server, there could be metadata around where the document physically sat that technical people would have to go in and extract. You would not necessarily see data in that file, but it comes your way. So there is another piece to sort of keep in mind that you may need; you may even need more than you might see in those data files. You may need to know where it lived and on whose computer or what server and the information behind that.

But really, what we are talking about through this concept that this is really all there is to a document, when in fact when you are talking about electronic files there is a lot more. And to say, in my view, that if somebody sends you an electronic file you can only look at a part of it, you cannot go to file properties, which I think everybody in this room has done at some point in time, and look at other pieces of this electronic file, is disingenuous.

PROFESSOR PERLMAN: Just to follow up on this, and also to circle back to Monroe Freedman's comments from last night: "Whatever Happened to the Search for Truth?" The point that you raise is that if there is information in this case that has not come out that you think really needs to see the light of day and you have the opportunity to discover it, why should there be an ethical prohibition to prevent you from doing that?

I see some hands going up. These hands are going to tell me exactly why there should be an ethical prohibition. I think Professor Freedman would certainly think that your observation is consistent with the point that he made last night.

PROFESSOR HRICIK: Somebody tell Professor Perlman why it is wrong.

MR. LOSEY: Even Florida does not prohibit or discourage looking through the metadata of a document produced in production. And I think that is an important distinction that we are talking about here is

that you may have a duty to understand what information was produced that may be outcome determinative.

PROFESSOR PERLMAN: If you do not ask specifically for the metadata and electronic documents are produced, do you have to ask before looking at the metadata?

MR. LOSEY: If it is a production, of course not. But when you are talking about a personal lawyer who you know may be old and does not understand these things who writes you a personal letter, only he sends it through the internet, and then you take advantage of his ignorance because he told you something he did not have a clue that he told you, and disclosed confidential information, you know you are taking advantage of him. You know you are exploiting his ignorance. You know you are finding out confidential information and then you are secretly using it. That is what gets the Florida Bar. I am not defending it, but I am giving you why they think this is unethical, plus they do not understand the limitations of metadata. They honestly think there are all kinds of secret information in there. Anytime you ever did anything it still stays there if somebody is smart enough to mine it.

And plus, how many clients are going to pay me to mine every darn e-mail I get from opposing counsel? I would have two extra billable hours a day if I did that. That is a lot of money. Clients do not want that because 999 times out of 1000 you do not get anything out of this.

MS. SOUTHERLAND: But to your point, the last native file that I got from a lawyer on the other side before I left the practice of law, I got from a lawyer who was about three years out of law school and somebody I considered to be technically savvy. So there is no gray hair involved. There was not a situation where there was that generation gap you were talking about. So would it be okay in that circumstance? I know she owns an iPod, she probably downloads music. She seemed otherwise to be technically savvy. In fact, we were having a discussion about the electronic discovery issues in the case. She sent me a native Word document, a letter. Can I look at the metadata in that one?

MR. LOSEY: Does your client want to pay you to do that on the off chance that the attorney might have been stupid enough to put something in there of value, which probably they are not? I do not know. It comes back to the client. I do not think most clients are willing to pay an attorney to do that.

PROFESSOR HRICIK: Professor Freedman, a comment and then I am going to move to our last topic real quickly.

PROFESSOR FREEDMAN: If you know that the older lawyer has not kept up on the latest development in the evidence rules, and you knowingly take advantage of it —

MR. LOSEY: There is the impartial third party, the tribunal that is going to sustain or not the objection. I mean there is a judge there. That is his job. If I take advantage of Rule 502, for instance, the clawback, then it is not like you enforce it and the court says, "Yes, Losey is right. Where have you been? We're not in that situation here. I have read your e-mail, and we've e-mailed. You didn't send me anything accidentally. I don't know because I didn't look. If I did, I wouldn't tell the Florida Bar."

So, do you know what I mean, it is different than the rules. It is the briefcase scenario. And the problem is if, in fact, there was all kinds of valuable information that would help my client, then everybody would do it. But the truth is there is usually nothing there.

PROFESSOR FREEDMAN: It is not an issue for the court. The lawyer on the other side does not realize that there is a new rule that has not existed in that jurisdiction, that if you do not make a motion for judgment at the close of the plaintiff's case you cannot ask for a new trial. You are taking advantage of that older lawyer.

MR. LOSEY: I agree. I like where you are going with that but we are not there yet because you are then positing that lawyers have a duty to keep up with technology, and I agree with you. I agree with you, but the Florida Bar does not.

AUDIENCE: And the New York Bar does not.

PROFESSOR HRICIK: I will make one last point about this, and then I will spend about two minutes on our last topic because it is something that people do not see very often. The last point I will make is this. Maybe this is the solution to this problem.

Lawyers are planting fake metadata. I know lawyers who go around and put in fake stuff like that contract they may have been willing to pay a half million for, they put in $1,250,000, and, "Hey, man, if we get $750,000, we are golden." So, watch out for that. That may be the solution is just put a bunch of fake stuff in there.

But the last topic is dealing with something, and I honestly did not know about this until we started blogging a few years ago, and it is amazing what we can learn. It is a form of hidden data, and it shows up when we blog. And the first time, about five or six months ago, I got an e-mail from John Steele, who blogs with us, and he said, "David, you are becoming really popular." What he then went on to explain to me was that some law firm in California had been searching the webpage and would search for my name repeatedly. We make money off of the number of hits we get and we get about $81 out of it because of this. But it turns out I had been retained as an expert witness in a case, and the firm was just mining the heck out of our site trying to find any place that my name was mentioned.

I am going to show you in a second, when you go to a webpage we can see what brought you to the webpage. We can see where you are. We can see what time you came, and I will show you some interesting information we have learned. One thing I have noticed in my statutory interpretation blog, there is a fella, whose name I will not mention, who ego surfs. About once a month he searches his own name on Google, and he comes to my webpage and he finds his name there, and so I can see when he has done that.

And then, I was thinking this morning when Ms. Frederick was talking about how she typed in "Georgia porn lawyer." Somebody at YouTube saw that somebody from the Disciplinary Council of Georgia was typing in "porn lawyer" and trying to find something.

This is from Site Reader, which is behind our blog. And what this shows me is that somebody from the Pentagon, pentagon.mil—and more specifically the Army Information Systems Command, whatever that is—ran a search. It tells me the search that they ran. If I click on that, I can actually see the exact Google page they were looking at that brought them to our page. So I see people typing in Bob Smith and I will see all the stuff they saw, or whatever the phrase is that brings them to our page.

So when you are out there surfing on the web, you may think that you are invisible or that nobody knows who you are or they cannot tell who you are. But the old cartoon that on the internet nobody knows you are a dog is wrong. I can tell whether you are a dog. I can tell what you are searching for. And I know with Site Reader if we paid a little bit more money we can actually get even more information than we get on that basic page. We are just too cheap to do it.

We are at the end of our discussion, but hopefully we have raised your awareness of some issues about hidden data. If you will please join me in thanking our panelists and thank you all for attending.

PROFESSOR LONGAN: This concludes our day and concludes our Symposium. We hope you have had a good day and thank you for coming.