Foreword: Ethics and Professionalism in the Digital Age

9th Annual Georgia Symposium on Ethics and Professionalism

A Symposium of the Mercer Law Review

by Patrick Emery Longan*

On November 6-7, 2008, the Mercer Center for Legal Ethics and Professionalism and the Mercer Law Review hosted the Ninth Annual Georgia Symposium on Professionalism and Ethics. The annual symposia are funded by an endowment created by order of the Honorable Hugh Lawson, United States District Judge for the Middle District of Georgia. The order settled allegations of litigation misconduct in exchange for payments that fund the symposia and funded the creation of academic chairs devoted to ethics and professionalism at the Walter F. George School of Law of Mercer University, the University of Georgia School of Law, the Georgia State University School of Law, and the Emory University School of Law.

The subject of the Symposium this year was "Ethics and Professionalism in the Digital Age." It began with a dinner on the evening of

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November 6 at the Cox Capitol Theatre in downtown Macon. Professor Monroe Freedman delivered the keynote address, entitled "Whatever Happened to the Search for Truth?" In that speech, Professor Freedman discussed a hypothetical: suppose a lawyer receives an inadvertent communication from opposing counsel and learns that an opposing party has destroyed evidence. In years past, this might have been the result of a misdirected fax. Today, it could as easily be a digital communication, a misdirected e-mail or even metadata buried within an electronic document. Professor Freedman criticized court decisions and ethics opinions that suggest that the receiving lawyer could not use that evidence. Professor Freedman emphasized three points. The receiving lawyer owes a duty of loyalty to his or her client to use the information for the client's advantage. Second, it is not unfair to the opposing party to allow such use. The opposing lawyer is an agent of his or her client, and principals generally are bound to suffer the consequences of the mistakes of their agents. Finally, the trial and discovery process has an overriding purpose, the search for truth, and allowing the evidence will aid that search, regardless of the source of the evidence. Professor Freedman thus began the symposium with a delightful and thought-provoking keynote address.

The next day, the Symposium included four panel discussions. The morning sessions discussed problems of "e-discovery." For at least a generation, civil discovery has generated some of the most difficult issues of lawyer ethics and professionalism. Civil litigators have been expected to be vigorous advocates for their clients and, also, responsible officers of the court. The central question of discovery ethics has been where to draw that line. For example, if a harmful but nonprivileged document was properly requested by the opposing party, the professional lawyer would be expected to turn over the document. But what if the document request did not quite precisely "capture" the harmful document? Could the professional lawyer keep quiet and not produce the document, or is there an obligation to interpret document requests broadly in order to ensure that all relevant evidence is known to both sides?[1]

New questions of professionalism are upon us with respect to e-discovery. For example, where is the line between advocacy and cooperation in the search for electronic documents? In the first panel of the Symposium, Jason Baron, of the National Archives and Records

1. *See, e.g.*, AM. BAR ASS'N SECTION OF LITIGATION GUIDELINE FOR CONDUCT 24, *available at* http://www.abanet.org/litigation/conductguidelines/counsel.html. "We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and nonprivileged documents.").

Administration, posed and sought to resolve the following problem. A document search now, when so many of the records exist only in digital form, must be done using (among other techniques) carefully selected search terms. The party "producing" the documents will have much better knowledge about what terms will capture the relevant material than the other side will have. What obligation is there, and what obligation should there be, for the side with the greater knowledge to assist its adversary in finding important material as part of the obligation to "meet-and-confer" in the discovery planning process?[2] Note how this question raises directly, now in a digital context, the exact same dilemma that has been with litigators since the advent of discovery: where do my obligations to my client end and my obligations to the system, and even to an adversary, begin?

Chilton Varner of King & Spalding and Magistrate Judge John M. Facciola of the United States District Court for the District of Columbia responded to Jason Baron's remarks. Ms. Varner provided the perspective of an attorney who served on the Advisory Committee on Civil Rules when it adopted amendments to deal specifically with questions of e-discovery and who has dealt with these issues extensively in practice. Ms. Varner agreed with Mr. Baron about the need and desirability for more cooperation, given the sheer volume of digital information. She also, however, sounded some cautionary notes about adopting or requiring a more cooperative approach, particularly in light of experience with the mandatory disclosure provisions of Federal Rule 26(a). Judge Facciola focused his remarks on the changing role of the judge and the need for lawyers to become competent in issues related to e-discovery. Judges have been acting in more "managerial" ways for many years now, and e-discovery is the latest forum for judges to be called upon to interject themselves in the name of just, speedy, and efficient resolutions. At the same time, however, lawyers who decline to become competent in the relevant technical issues are poorly serving both their clients and the system of justice.

The second panel discussion began with a presentation by Ralph C. Losey, a shareholder at Akerman Senterfitt in Orlando, Florida. Mr. Losey spoke on "Lawyers Behaving Badly—Understanding Professional Conduct and E-Discovery." He explained how dramatically the world has changed in civil litigation since he began practicing in the 1980s. Mr. Losey noted the alarming recent trend of cases in which lawyers have been sanctioned for spoliation of, or failure to produce, electronic evidence.[3] He discussed the competing duties of the lawyer to represent

2. *See* FED. R. CIV. P. 26(f).

3. *See, e.g.*, Qualcomm v. Broadcom, 539 F. Supp. 2d 1214 (S.D. Cal. 2007).

the client and also be fair to the opposing party and truthful to the court, and he expressed his fear that too many lawyers are striking the wrong balance. Because lawyers are not competent when it comes to issues of e-discovery, and because they are too willing to bend to pressure from their clients, lawyers find themselves in serious trouble with the courts.

The responders to Mr. Losey's presentation were William F. Hamilton, a partner at Holland & Knight in Tampa, Florida, and The Honorable David A. Baker, United States Magistrate Judge for the Middle District of Florida. Mr. Hamilton agreed with Mr. Losey that attorney competence with respect to e-discovery is the most important concern. Mr. Hamilton, however, emphasized that competence is so crucial because it is necessary in order for the lawyer to be able to represent his or her client adequately. He cautioned against any fundamental change in the adversarial nature of civil discovery. Judge Baker agreed that lawyers must develop sufficient technical expertise to have meaningful conversations with their clients about e-discovery. He also noted that lawyers need to be aware that although some judges will have the technical expertise to help resolve e-discovery issues, many judges will not be able to do so.

In the afternoon, there were two additional panel discussions. The first concerned the internet and lawyer marketing. Jack Sammons, Griffin Bell Professor of Law at the Walter F. George School of Law at Mercer University, moderated a panel discussion that included Paula J. Frederick, Deputy General Counsel of the State Bar of Georgia; Diane L. Karpman of Karpman & Associates in Beverly Hills, California; and Micah Buchdahl, President of HTMLawyers, Inc. in Moorestown, New Jersey. Mr. Buchdahl provided an overview of the issues that arise when lawyers attempt to market themselves on the internet, and he showed the participants and the audience numerous examples of lawyers' websites. The issues relate not only to advertising rules but also to questions of the unintentional creation of attorney-client relationships, competence, conflicts, confidentiality, multijurisdictional practice, and the unauthorized practice of law. Ms. Karpman focused her remarks on the multitude of problems associated with the inconsistent approaches that states take to lawyer marketing on the internet, which of course does not respect state lines. Ms. Frederick discussed the efforts of Georgia to regulate attorney marketing on the internet in a state that does not have a special ethics rule for such activities and that has many competing demands on it limited enforcement resources.

The final panel discussion of the day concerned the special issues of ethics and professionalism that surround the "dangers of electronic documents and communication lessons for attorneys." Professor David

Hricik of Mercer conducted a wide-ranging, open discussion with Professor Andrew Perlman of Suffolk Law School in Boston and Carolyn Southerland, Managing Director of the Huron Consulting Group in Houston. They began with a primer on terminology and technology. The panel then discussed three different formats in which there may be "hidden" information: (1) electronic documents such as Word, WordPerfect, or Portable Document Format (PDF) documents; (2) e-mail; and (3) websites and information generated by web searches. The panel showed numerous examples of hidden information and how it could be discovered and used by an adversary. They discussed particularly the problems of malpractice liability for the lawyer who did not take care to protect such information and the ethical issues that confront lawyers who inadvertently receive it.

The faculty, staff, and students of the Walter F. George School of Law deeply appreciate the efforts of our speakers and guests to be with us for the Symposium. We also wish to express our continued appreciation for the vision of Judge Lawson, who made these proceedings and so many similar events possible. We hope that this publication of the proceedings and papers from the 2009 Symposium will prove useful to attorneys, judges, and scholars as they deal with the emerging issues of the digital age.[4]

4. Professor Freedman's speech and the panel discussions are also available for viewing as webcasts at http://www.law.mercer.edu/academics/centers/mclep/lrsymposium.cfm.

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