

# **ETHICAL OBLIGATIONS DURING DISCOVERY AND IMPLICATIONS FOR LEGAL MALPRACTICE CLAIMS**

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## **I. INTRODUCTION**

The purpose of this paper and the accompanying presentation is to provide a general overview of an attorney's ethical obligations during pre-trial discovery and provide a framework upon which attorneys at all levels of practice can view their ethical obligations during discovery and avoid potential costly legal malpractice claims.

### **A. You Have A Duty To Know What Rules Will Apply And Govern Your Behavior.**

"[T]he ethical landscape is not a uniform one from state to state." Pierre M. Gentin and Peter J. Kozlowski, Ethical and Legal Issues Arising in Discovery, PLI, 231 (2001)(citation omitted). "When faced with a question of legal ethics, a lawyer must determine which set of ethical rules are applicable to the jurisdiction in which the question arises." *Id.*

"An attorney is obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality, but he is not required to exercise perfect judgment in every instance." *Quarles Drilling Corp. v. Gen. Accident Insur. Co.*, 538 So.2d 1029, 1032 (La. App. 4 Cir. 1989) (citations omitted). "The question is not whether . . . the advice given was, by hindsight, correct, but rather whether . . . the advice given was the result of the proper exercise of skill and professional judgment under the conditions

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existing at the time the advice was given.” *Id.*(citations and internal quotations omitted). See also: *Drury v. Fawer*, 527 So. 2d 423, 425-6 (La. App. 4. Cir. 1988) (attorneys cannot be held liable in malpractice if, in hindsight, they could have done things differently); *Schwehm v. Jones*, 2003-0109 (La. App. 1 Cir. 2/23/04), 873 So.2d 1140, 1146 (trial strategy “cannot be questioned in hindsight”).

### **B. Competency**

Rule 1.1 of the Louisiana Rules of Professional Conduct (“Louisiana Rules”) and its analog in the ABA Model Rules of Professional Conduct (“Model Rules”) state the following: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.” Model Rules of Prof’l Conduct R. 1.1; La. Rules of Prof’l Conduct R. 1.1. This requires that attorneys keep abreast of changes in the law and its practices. *See* Model Rules of Prof’l Conduct R. 1.1 cmts. 5 and 6.

### **C. Diligence**

Under the Louisiana Rules and the Model Rules, “[a] lawyer shall act with reasonable diligence and promptness in representing a client” and must “make [a] reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Model Rules of Prof’l Conduct R. 1.3 and R. 3.4(d); La. Rules of Prof’l Conduct R. 1.3 and 3.4(d). Additionally, a lawyer shall not “unlawfully obstruct a party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.” Model Rules of Prof’l Conduct R. 3.4(a); La. Rules of Prof’l Conduct R. 3.4(a).

**D. Your Duties To Protect Your Client Are Nondelegable And Cannot Be Avoided.**

Louisiana Rules of Professional conduct make clear that an attorney's duties are hers alone and are nondelegable. Rule 5.1 provides that partners and senior attorneys with managerial authority are responsible for conduct of subordinate attorneys; Rule 5.2 provides that all attorneys are responsible for their own behavior and junior attorneys may rely on a supervising attorney's opinion on an arguable question of professional duty; and, Rule 5.3 provides that lawyers are responsible to make sure that their non-lawyer staff's conduct is compatible with the ethical obligations of an attorney.

While attorneys should be familiar with their personal ethical obligations, it is perhaps more important to know that an attorney can be held liable for the acts or omissions of others. The case of *Curb Records Inc. v. Adams & Reese, L.L.P.*, 2000 WL 991692 (E.D. La. 2000), is particularly interesting, especially to those attorneys that serve as co-counsel.

In *Curb*, local counsel was directed by national counsel that local counsel's services were limited to signing and filing pleadings and participating in discovery. After local counsel abided by national counsel's instruction not to comply with court ordered discovery, the client's defenses were stricken and the client was forced into an unfavorable settlement. Thereafter, local counsel was sued in malpractice by the client for failure to advise the client of discovery abuses by national counsel, who was admitted *pro hac vice*. Local counsel argued that he was only following orders and that his responsibilities were limited by the instructions of national counsel that had engaged him.

The court held that local counsel could not blindly follow instructions to communicate only with national counsel and avoid communicating with the client about the potential adverse consequences of national counsel's actions. The trial court realized that the attorney-client

relationship creates a duty to act to protect the client's interests, and will give rise to a malpractice action if breached. *Id.* at \*2. “[U]nder Louisiana law, there is an inherent and nondelegable duty of care that requires local counsel to inform its client of any known malfeasance or misfeasance on the part of lead counsel, which, to an objectively reasonable attorney would result in serious prejudice to the clients interest.” *Id.* at \*1(quoted *Curb Records Inc. v. Adams & Reese, L.L.P.*, No. 96-2908, Slip Op. at 3 (5th Cir. Nov. 29, 1999)).

## **II. ELECTRONIC DISCOVERY**

### **A. Changes in Federal and Louisiana Rules**

In addition to the more familiar duties owed to clients, recent changes in the Federal Rules of Civil Procedure and the Louisiana Code of Civil Procedure have, arguably, increased the burden on attorneys to understand the rules regarding discovery and their ethical duties thereunder. Attorneys must venture into areas of computer science to protect their client's interests in an opponent's electronic evidence and from adverse rulings resulting from destruction of their own electronic evidence.

Rule 16 of the Federal Rule of Civil Procedure has been recently amended to include provisions for disclosure and discovery of electronic data and party agreements regarding inadvertent production (“claw back” agreements) within the case scheduling order. See Fed. R. Civ. P. 16(b)(5).

Rule 26 now includes electronic data within initial disclosures and allows a party holding electronic data to object to its production based on undue cost burden or that it is not reasonably accessible. See Fed. R. Civ. P. 26 (1)(B),(b)(2)(B). It also requires the parties to communicate about “any issues relating to preserving discoverable information,” and provides directions on how to handle inadvertent production, including imposing upon the producing party the

obligation to attempt to retrieve it, if the production is discovered before notification by the receiving party, and requiring the receiving party to return, sequester, or destroy the data until the issue of privilege is resolved. See Fed. R. Civ. P. 26(b)(5)(B),(f)(2). Importantly, Rules 26 now requires the parties to include within their discovery plan their views and proposals on electronic discovery including handling of inadvertent disclosure. See Fed. R. Civ. P. 26(f)(3)(C),(D).

Rule 33 now includes recognition of electronic data as being part of “business records” that may be produced in response to interrogatories. See Fed. R. Civ. P. 33(d).

Rule 34 has been amended to specifically include electronic data within requests for production and to address the forms of production as well as disputes over the form of production. See Fed. R. Civ. P. 34 (a)(b).

Rule 37 has been amended to relieve a party from sanctions for destruction of electronic data when it is lost “on routine, good faith operation of an electronic information system.” See Fed. R. Civ. P. 37(e).

The Louisiana Code of Civil Procedure has also recently been amended to include discovery of, and limited protection to, electronically stored information.<sup>2</sup> Article 1424 now extends work product to “electronically stored information.” La. Code Civ. Proc. art. 1424.

Article 1425 now affords protection to drafts and electronically stored information of an expert that includes attorney work product. See La. Code Civ. Proc. art. 1425(E)(1).

Article 1462 allows a party to include “electronically stored information” in their requests for production of documents and allows access to computers and digital files on a showing of “good cause.” See La. Code Civ. Proc. art. (A),(C)(E).

Though no Louisiana court has directly confronted the ethical implications of e-discovery,<sup>3</sup> it is clear that competent representation now includes locating and preserving

electronically stored information. *See* Fed. R. Civ. P. 34 (2007). Indeed, one pre-revision case declares that “[n]ow that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) (“*Zubulake V*”).

*Zubulake V* involved an employment discrimination claim and addressed the obligations of both client and counsel to secure and produce electronic data. During pre-trial discovery, the plaintiff made numerous complaints that her former employer, UBS, had failed to conduct discovery in good faith and had destroyed or failed to produce numerous documents – primarily in or from electronic files. As a result of the complexity of the case and discovery issues, the district court wrote several opinions pertaining to the ongoing discovery battles.

Zubulake sued her employer and, during discovery, sought access to emails and other electronic data from UBS. Although being advised by its attorneys to place a “litigation hold” on the destruction and over-writing of electronic information, UBS and its attorneys failed to adequately monitor the retention of electronic data, to properly inform all involved employees, and to ensure that responsive and discoverable documents were produced. The failures allowed data to be destroyed. The trial court found that the destruction of data was intentional and supported a finding of spoliation.<sup>4</sup> The court imposed sanctions of a negative inference against

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<sup>2</sup> All Amended by Acts 2007, No.140 §1.

<sup>3</sup> As of yet, the terms “electronic discovery” and “e-discovery” have not been recognized by any published Louisiana court decision.

<sup>4</sup> “Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (Fed. Cl. 2007)(citations omitted)(also providing an excellent explanation of spoliation, the available sanctions, and the source of the court’s authority). See also *Gladney v. Milam*, 39,982 (La. App. 2 Cir. 9/21/05), 911 So.2d 366, 369(spoliation is the intentional destruction of evidence for the purpose of depriving the opposing party of its use); *Barthel v. State Dept. of Transp. and Dev.*, 2004-1619 (La. App. 1 Cir. 6/10/05), 917 So.2d 1, 20 (allegations of negligence are insufficient); *Nat’l. Union Fire Ins. Co. of La. v. Harrington*, 2002-832 (La. App. 3 Cir. 4/17/03), 854 So.2d 880, 886 (spoliation and adverse inference are not available where suit has not been filed

UBS, ordered UBS to pay the costs for re-deposing witnesses, and ordered UBS to pay attorneys' fees and costs.

It is important to note that, although not sanctioning counsel, the court held that counsel had not fulfilled its obligations to identify and protect relevant digital data. Regardless, given *Zubulake V* and the recent amendments to the Federal Rules of Civil Procedure and Louisiana's Code of Civil Procedure, counsel's duties to protect digital data, along with protecting its client's interests, has never been clearer. According to *Zubulake V*, an attorney should know how and where the client stores data and "[c]ounsel must take affirmative steps . . . so that all sources of discoverable information are identified and searched." *Id.* at 432. More specifically, this requires that "counsel and client must take *some reasonable steps* to see that sources of relevant information are located." *Id.* (emphasis in original). In addition, an attorney also has a duty to preserve relevant electronic data. To this end, *Zubulake V* instructs counsel to: (1) issue a "litigation hold" once litigation is "reasonably anticipated," (2) communicate the preservation duty directly to "key players," and (3) instruct all employees to identify the location of and produce electronic copies of their relevant active files. *Id.*

A failure to protect any evidence, including digital evidence, may have serious consequences.

## **B. Receiving And Protecting Metadata**

Metadata is loosely defined as data that is hidden in documents that is generated during the creation of those documents. *See* Dale M. Cendali, Emily Bushnell, & Julia Berman, Potential Ethical Pitfalls in Electronic Discovery, A.L.I. – A.B.A., CLE, at 1432 (March 7-9,

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and there is no evidence that party knew that suit would be filed when the destruction occurred); *Kammerer v. Sewerage & Water Bd. Of New Orleans*, 93-1232 (La. App. 4 Cir. 3/15/94), 633 So.2d 1357, 1364 (The inference will not be applicable where the destroying party provides a reasonable explanation such as that the destruction is part of routine procedures)(providing an excellent explanation of spoliation and the adverse inference).

2007). This data typically generated by word processing software, such as Microsoft Word. *Id.* Examples of information derived from metadata include the authors of the document, template information, hidden text, and any comments or annotations added by users throughout the creation of the document. *Id.* Inadvertent disclosure of metadata implicates ethical issues on both ends of the transmission. The sender must be careful that the documents and metadata sent do not compromise his confidentiality obligations. The recipient, on the other hand, must ensure that he upholds his duty of fairness to opposing counsel.

An attorney who carelessly transmits metadata to opposing counsel is at risk of breaching his confidentiality obligations. Under the Louisiana and Model Rules, an attorney “shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.” Model Rules of Prof’l Conduct R. 1.6; La. Rules of Prof’l Conduct R. 1.6. Therefore, an attorney is ethically only allowed to disclose metadata that she is impliedly authorized to transmit.

To combat this potential confidentiality breach, many firms have a routine practice of “scrubbing” documents to remove most or all metadata from the document. However, because scrubbing a document is akin to destroying “material having potential evidentiary value,” this practice may implicate other ethical obligations to opposing counsel. Model Rules of Prof’l Conduct R. 3.4; *see* Dennis Kennedy & George Socha, Muddling Through the Metadata Morass, (May 2004)(noting that with respect to documents subject to discovery, “scrubbing = shredding”).<sup>5</sup> Indeed, the recent trend has been to produce documents in their native form, including any metadata embedded within the document. *See* Kevin Fayle, E-Discovery Update:

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<sup>5</sup> Available at: [http://www.discoveryresources/04\\_om\\_electronicdiscoverers\\_0405.html](http://www.discoveryresources/04_om_electronicdiscoverers_0405.html)



ABA Ethics Opinion Approves of Metadata Use.<sup>6</sup> In fact, at least one federal court has ruled that a party must produce documents with the metadata intact when ordered to supply documents in the normal course of business. *Williams v. Sprint/United Mgmt. Co.*, 2005 WL 2401626 (D. Kan. 2005). An attorney, therefore, must distinguish between what metadata must be produced by law and what data is beyond the boundary of his ethical obligation of confidentiality.

The recipient of metadata faces ethical issues of his own. Under Model Rule 4.4, a lawyer who receives inadvertently disclosed metadata must “promptly notify the sender.” Model Rules of Prof’l Conduct R. 4.4. The rule imposes no additional ethical responsibilities. Therefore, an attorney receiving inadvertently disclosed metadata is not prevented from reviewing that document. In fact, the ABA Rules Committee has recently published an opinion that says that a lawyer is free to review and use embedded metadata in electronic documents. ABA Formal Ethics Opinion 06-442. To combat potential inadvertent disclosure, the ABA recommends scrubbing documents to protect information; however, as mentioned above, legal and ethical restrictions may limit the allowable use of scrubbing. *Id.*

Though the Model Rules allow a recipient of inadvertently disclosed metadata to review the data, the Louisiana Rules likely prohibit such conduct. While the Model Rules only require that the recipient “promptly notify the sender,” the Louisiana Rules require that the lawyer “refrain from examining the writing, promptly notify the sending lawyer, and return the writing.” *Compare* Model Rules of Prof’l Conduct R. 4.4 *with* La. Rules of Prof’l Conduct R. 4.4. Interestingly, although the Model Rules would not prevent the viewing of the inadvertently disclosed information, the Federal Rules of Civil Procedure require that the information be returned, destroyed, or sequestered, thereby eliminating the option to review the data until the issue of privilege is resolved.

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<sup>6</sup> Available at: <http://technology.findlaw.com/articles/00006/010602.html>

The Louisiana Rules Committee and Louisiana courts have not addressed the issue of metadata. Nevertheless, the ethics rule almost certainly would preclude a recipient from reviewing metadata that he knew to be privileged. Indeed, other states have published ethics opinions that explicitly prohibit this conduct. Alabama State Bar Opinion 2007-02; New York State Bar Opinion 249.<sup>7</sup> Still, the rule would only preclude review of metadata “where it is clear that the writing was not intended for the receiving lawyer.” La. Rules of Prof’l Conduct R. 4.4.

With metadata gaining renown and scrubbing becoming more prevalent, a receiving lawyer could reasonably assume that any un-scrubbed metadata was intended to be sent. The courts, however, have not addressed what circumstances would ethically warrant such an assumption. Arguably, Louisiana’s ethical rules require that, if a question exists, it is better to advise the producing party or the production.

Clearly, practicing attorneys need to be familiar with electronic data storage and transmission issues. In addition, they must be cognizant of their personal ethical duties and ensure that ill-informed non-attorney staff do not either transmit or scrub metadata that could lead to inadvertent production or possible sanctions.<sup>8</sup>

### **III. INADVERTENT DISCLOSURE**

Though the Louisiana Rules borrow heavily from the Model Rules, they are different in few important respects, including their handling of inadvertent disclosure. Textually, the two relevant rules read as follows:

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<sup>7</sup> Because these Alabama’s and New York’s ethics rules mimic Model Rule 4.4 and not Louisiana Rule 4.4, these opinions were based on Rule 8.4, which prohibits attorneys from engaging in “conduct involving dishonesty, fraud, deceit, or deception” or in conduct that is “prejudicial to the administration of justice.” See Model Rules of Prof’l Conduct R. 8.4.

<sup>8</sup> For Further reading on Electronic Discovery and Metadata see: Michele C.S. Lange, Am I Committing Malpractice by Not Considering Electronic Data in My Cases?, July 2004, ABA Law Practice Management Section, available at [http://www.abanet.org/lpm/lpt/articles/nosearch.ftr07048\\_print.html](http://www.abanet.org/lpm/lpt/articles/nosearch.ftr07048_print.html), last accessed on July 25, 2007); Steven C. Bennett, The Ethics of Electronic Discovery, Practical Litigator, 17 NO 2 Prac. Litigator 45, (March 2006).

Model Rule 4.4:

...

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Model Rules of Prof'l Conduct R. 4.4

Louisiana Rule 4.4:

...

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, **shall refrain from examining the writing**, promptly notify the sending lawyer, and return the writing.

Louisiana Rules of Prof'l Conduct R. 4.4.(emphasis added).

Louisiana case law has confirmed that inadvertent disclosure of privileged documents does not necessarily constitute a waiver of that privilege and, therefore, prohibits the receiving attorney from examining the documents. *Succession of Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138 (La. 1987)(attorney-client privilege); *Hebert v. Anderson*, 96-0994 (La. App. 4 Cir. 9/18/96); 681 So.2d 29, 32 (attorney work-product privilege). Thus, Louisiana ethics and privilege rules require a lawyer to refrain from examining inadvertently sent privileged writings. The Model Rules impose no such standard. Instead, the Model Rules merely require that the recipient "promptly notify the sender." Model Rules of Prof'l Conduct R. 4.4.

The question arises as to how to enforce the ethical duties to return inadvertently disclosed documents, once the inadvertent production has been discovered. Under an attorney's ethical obligation to protect its client, on recognizing that there has been an inadvertent

production, the attorney must take affirmative action to rectify the error. The following cases are instructive:

In *In re Crescent City Towing & Salvage Co.*, 1993 WL 483525 (E.D. La. 1993), the receiving party refused to return the document, and the producing party filed a motion to compel return of document. The court found that the document at issue, attorney work product, had been inadvertently produced and that the attorney had properly maintained its privilege. The court ordered the document and any and all copies returned within two days.

In *In re Vioxx Products*, Slip Copy, 2007 WL 1558700, E.D.La., May 30, 2007 (NO. MDL 1657), the trial court ruled that the plaintiffs' attorneys waived the work product protection through inadvertent disclosure of a 29 page legal memorandum that contained detailed litigation strategy. The document was provided to testifying experts and disclosed on the experts' list of referenced documents. The documents were also provided to defense counsel in response to discovery requests seeking all documents referenced by the experts in formulating their reports. Plaintiffs filed a motion to compel the return of the documents and the trial judge held that the plaintiffs counsel had waived the privilege.<sup>9</sup>

In the non-Louisiana case of *Fornaro v. Gannon*, 2004 WL 2731491 (1<sup>st</sup> Cir. 2004), the court held that a dispute between the attorney and his client over the handling of an inadvertently produced document supported the attorney's withdrawal. The court, citing New Hampshire Rule of Professional Conduct 1.16, which is similar to Louisiana's rule, recognized that the attorney was authorized to withdraw, when it became clear that the client's refusal would require the attorney to violate the rules of professional conduct.

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<sup>9</sup> Under Fifth Circuit precedent, in determining whether there has been an inadvertent disclosure, the court must review: "(1) the reasonableness of the precautions to prevent the disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness." *Allread v. City of Grenada*, 988 F.2d 1425, 1432 (5<sup>th</sup> Cir. 1993).

#### IV. CONTACT WITH OPPONENT’S CURRENT OR FORMER EMPLOYEES

##### A. Current Employees.

A lawyer’s communication with his adversary’s employees is governed by Rule 4.2 of the Louisiana Rules (the “no-contact” rule), which states:

[A] lawyer shall not communicate about the subject of the representation with . . . a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

- (1) who supervises, directs or regularly consults with the organization’s lawyer concerning the matter;
- (2) who has authority to obligate the organization with respect to the matter; or
- (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Louisiana Rules of Prof’l Conduct R. 4.2.

This section, which deviates from the black letter of Model Rule 4.2, was derived from the ABA’s comments to that rule. *See La. Civ. L. Treatise*, Louisiana Lawyering § 9.3. One thing the Louisiana rule does make clear is that it only applies to “present” employees.

Despite the helpful inclusion of this section in the Louisiana Rules, uncertainties still exist. The Louisiana rule nebulously prohibits communication with an employee “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” La. Rules of Prof’l Conduct R. 4.2. Although the rule would presumably not prohibit contact with most low-level employees, courts have not articulated a bright line defining who falls within the scope of this rule.<sup>10</sup>

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<sup>10</sup> Other jurisdictions have developed “tests” to help guide the courts in determining what employees should be covered by this rule. *See Snider v. Superior Court*, 113 Cal.App.4th 1187, 7 Cal.Rptr.3d 119, 03 Cal. Daily Op. Serv. 10,390, 2003 Daily Journal D.A.R. 13,056 (Cal.App. 4 Dist. Dec 03, 2003)

Additionally, the rule only applies when the lawyer “knows” the person is an employee of the represented organization. La. Rules of Prof’l Conduct R. 4.2. The ABA comments require actual knowledge, but state that actual knowledge may be inferred from the circumstances. Model Rules of Prof’l Conduct R. 4.2 cmt. 8. The comments further stipulate that, even if the employee initiates the communication, the lawyer must immediately terminate the communication once the lawyer learns the person is an employee of the opponent. Model Rules of Prof’l Conduct R. 4.2 cmt. 3.

### **B. Former Employees.**

There is only one Louisiana appellate case that deals with contact with former employees of an adverse party. See *Schmidt v. Gregorio*, 705 So.2d 742 (La. App. 2 Cir. 1993). In *Schmidt*, the party seeking to interview an opponent’s former employee requested a declaratory judgment that such communication was not prohibited or subject to formal discovery rules and processes. The trial court denied the motion and the appellate court reversed, holding that there is no ethical prohibition to ex parte communications with a former employee, under the Louisiana Rules of Professional Conduct. The opinion does not, however, make clear what the boundaries to communication are, if any.

The case of *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, 1998 WL 186705 (E.D. La.), however, is instructive. The court, relying on ABA Rules and citing *Schmidt*, found no prohibition to interviewing a former employee about the facts of a disputed matter, as long as the interviewing party or attorney did not intrude into areas protected by the attorney-client privilege held by the former employer. Because the privilege is held by the client, and the former employee is not the client, the former employee cannot waive the privilege. Therefore, skilled counsel cannot take advantage of an *ex parte* communication with an unrepresented former

employee to go into areas of inquiry that it knows or should know it would otherwise be precluded from going without the former employer's consent and/or presence. The cautionary note is: If there is a question about whether a particular question or area of inquiry is or may be prohibited, counsel should proceed carefully or not at all.

Case law in other jurisdictions supports the conclusion that an attorney is restricted by ethical obligations from actively seeking to have former employees divulge privileged information held by its former employer. See *Clark v. Beverly Health & Rehab. Servs., Inc.*, 440 Mass. 270, 797 N.E.2d 905 (Mass. Oct 29, 2003); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 562 n. 4 (N.D.Ga.1992); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41-42 (D.Mass.1987); *Sanifill of Ga., Inc. v. Roberts*, 232 Ga.App. 510, 512, 502 S.E.2d 343 (Ga. App. 1998).

## **V. POTENTIAL IMPLICATIONS FOR LEGAL MALPRACTICE CLAIMS**

### **A. What Is Legal Malpractice?**

For a plaintiff in a legal malpractice action to be successful, he must prove the following: “1) the existence of an attorney client relationship, 2) negligent representation by the attorney, and 3) loss to the client caused by that negligence.” *Francois v. Reed*, 97 1328 (La. App. 1 Cir. 5/15/98), 714 So. 2d 228, 229 30. In proving a legal malpractice claim, “the plaintiff must prove that negligence on the part of his former attorney caused the loss of opportunity resulting in the inference of causation and damages from the lost opportunity.” *Green v. Rice*, 41,818 (La. App. 2 Cir.1/24/07), 948 So.2d 376, 376. “[I]t is not enough that the defendant was negligent. An attorney is liable for the harm caused by his negligence only if the client proves that such negligence is a cause in fact of that harm.” *Abshire v. Nat’l Union Fire Ins. Co.*, 636 So. 2d 226, 232 (La. App. 3 Cir. 1993) (emphasis added). Once the client makes a prima facie case of legal

malpractice, the burden shifts to the attorney to “prove that the former client could not have succeeded on the original claim.” *Green*, at \*1.

To prove a claim for legal malpractice, a plaintiff must prove: (1) there was an attorney-client relationship; (2) the attorney was negligent; and (3) that negligence caused plaintiff some loss.” *Spellman v. Bizal*, 99-0723 (La. App. 4 Cir. 3/1/00), 755 So.2d 1013, 1017. The client must show that “the attorney failed to exercise the degree of care, skill and diligence which is exercised by prudent practicing attorneys in the locality where the attorney practices law.” *Id.*

Once the client establishes that the attorney failed to exercise the proper care, skill, and diligence, the burden shifts to the attorney to show that client would not have succeeded despite the negligence or that the negligence would not have altered the result. *Johnson v. Culotta*, 2003-1355 (La. App. 4 Cir. 5/26/04), 874 So.2d 942, 946.

**B. Ethical Breaches, Including Discovery Abuses, Can Support A Legal Cause Of Action For Malpractice.**

In *Maxwell v. Smith*, 1992 WL 112081 (La. App. 4 Cir. 1992), an attorney was sued by his client for legal malpractice for failing to timely file a personal injury lawsuit on her behalf. She also asserted claims for battery as a result of her attorney’s physical examinations of her. The trial court granted the attorney’s motion for summary judgment on the battery claim, holding that the examinations were consensual.

On appeal, the attorney argued that his alleged actions, even if proven to have occurred, were breaches of ethical obligations and could not support a legal malpractice claim.” The appellate court reversed and held that “Legal Malpractice is not limited to the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity possess. Legal Malpractice also means professional misconduct-conduct that takes place during the attorney-client relationship.” *Id.* at \*2. The court explained that “A lawyer’s duty of care



toward a client readily translates into a duty not to inflict intentional harm on a client, a duty that is at least as extensive as the duty that tort law generally imposes on non-lawyers.” *Id.*(quoting Modern Legal Ethics, practitioner’s edition, Wolfram). “[I]f a client alleges intentional actions by an attorney, which actions are not in the best interest of [the client] and which the attorney knows or should know are not, the client may sue the wrongdoer.” *Id.* at \*3(citing *Banger v. Harris*, 554 F.Supp. 235, 237 (M.D. Pa. 1982)).

In *Schlesinger v. Herzog*, 95-1127 (La. App. 4 Cir. 4/3/96), 672 So.2d 701, a client sued his attorney claiming that a conflict of interest by the attorney in a business transaction had not been fully disclosed or that he had not been fully advised of the consequences of dual representation. The attorney argued in his brief that the trial judge had erred in transforming a legal issue into a legal duty. The appellate court, noting that the attorney had recognized the Rules of Professional Conduct as having the “force and effect of substantive law,” agreed that an ethical issue can be transformed into a legal duty.”

**C. Anyone, Including Attorneys, Can Be Sanctioned For Discovery Abuses.**

According to Louisiana Code of Civil Procedure article 1469(4), an attorney can be sanctioned for discovery abuses as can her client. Although courts rarely enter a sanction against an attorney by name, the potential exists. Nevertheless, the attorney faces obvious problems if the client’s claims or defenses are jeopardized. See *Curb Records Inc. v. Adams & Reese, L.L.P.*, 2000 WL 991692 (E.D. La. 2000)(legal malpractice claim supported by attorney discovery abuse).

In *Johnson v. Tschirn*, 94-0085 (La. App. 4 Cir. 2/25/94), 635 So.2d 254, an attorney was sued by its client for legal malpractice for failing to conduct sufficient discovery in advance of a motion for summary judgment.

Although not a true “discovery” case, in *Benware v. Means*, 1999-1410 (La. 1/19/00), 752 So.2d 841, an attorney was sued in malpractice for loss of claim on abandonment. The claim may have been avoided by taking a step in the prosecution of the case, including conducting discovery. Interestingly, in *Benware*, a default judgment was taken against the attorney on the malpractice claim for refusal to participate in pre-trial discovery and procedure. The attorney was defending the claim himself. Because the Code of Civil Procedure allows sanctions to be imposed upon the attorney or the client, the attorney/defendant’s failure to comply with pretrial discovery obligations supported draconian sanctions, which are reserved for the most serious violations and include dismissal, limiting evidence or witnesses, and striking claims or defenses.

In *Smith v. 4938 Prytania, Inc.*, 2004-0833 (La. App. 4 Cir. 1/26/05), 895 So.2d 65, 69-79, the court recognized that the draconian sanctions of dismissal are reserved for serious discovery violations by the party, rather than its attorney. There must be a finding of the party’s willfulness, bad faith or fault in failing to comply with discovery orders. *Id.* at 70. If the court finds that the failure is due to counsel, the court can impose sanctions against the attorney, including paying the other parties attorneys fees and costs incurred in rectifying the abuse. *Id.*

In *Hutchinson v. Westport Insur. Corp.*, 2004-1592 (La 11/8/04), 886 So.2d 438, a *pro se* plaintiff sued the former attorney alleging legal malpractice for failing to timely file a claim. The case was dismissed for the *pro se* plaintiff’s failure to respond to discovery and bad faith refusal to comply with court ordered discovery.

One commentator, recognizing that attorneys frequently are denied recovery of their fees in malpractice, negligence and misconduct cases, suggests that “discovery abuse should be treated like legal malpractice.” Leonard E. Gross, Supreme Court Rule 219: The Consequences

Of Refusal To Comply With Rules Or Orders Relating To Discovery Or Pretrial Conferences, 24 Loy. U. Chi. L.J. 471, 475.<sup>11</sup> The author suggests that lawyers should not be paid the portion of their fees attributable to discovery abuses and that judges should order attorneys not to bill their clients for abusive discovery tactics or improperly withholding discoverable information. Although an interesting concept, the proposal is likely unworkable because (1) it would create a conflict of interest for the attorney to be worried about her own financial interests; (2) it may cause the attorney to violate client confidences by putting the attorney in the position of proving that the abuse was ordered by the client; and, (3) it creates potential recurring billing disputes. It does, however, find support in the attorneys' ethical obligation to protect her clients' interests and not to abuse the discovery process.

**D. A Client Can Discover An Attorney's File In Malpractice Action.**

Attorneys often, mistakenly, believe that their files are not discoverable, when a malpractice claim is filed.

According to Louisiana Rules of Prof'l Conduct R. 1.16(d), "Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter." As a practical matter, the rule makes sense in that the client has paid for the production of the file and its contents. Even if the client has not paid her bills and, arguably, for the file, the attorney cannot withhold it. *Id.* ("The lawyer . . . shall not condition release over issues relating to the expense of copying the file or for **any other reason.**")(emphasis added).

In *Hodges v. State Farm Bureau Cas. Ins. Co.*, 433 So.2d 125 (La. 1983), the Louisiana Supreme Court held that an attorney's files, although protected by attorney-client privilege and work product doctrine, are not immune from discovery by the client in a malpractice action.

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<sup>11</sup> Rule 219 is analogous to provisions of the Louisiana Code of Civil Procedure.

In *Pittman v. State Farm Bureau Cas. Ins. Co.*, 06-920 (La. App. 5 Cir. 4/24/07), 958 So.2d 689, the appellate court held that the trial court erred in granting the attorney's motion for summary judgment, where there was a motion to compel the production of the attorney's file pending and plaintiff argued that contents would allow opposition to motion. See also: *Collins v. Star Ins. Co.*, 2005-0014 (La. App. 1 Cir. 9/1/06), 2006 WL 2535047 (client in malpractice action can discover attorney's file).

**E. Legal Malpractice Claims Are Subject To A One-Year/Three-Year Preemptive Period.**

According to La. R.S. 9:5605(A), legal malpractice claims are subject to a preemptive period of one year from the act, omission, or neglect or one year from the discovery, and in no instance more than three years from the date of the act, omission or neglect. The exception is in cases of fraud as defined in La. Civ. Code art. 1953. La. R.S. 9:5605(E).

“[I]f fraud is proven, the three-year preemptive period will be inapplicable; the claim can be brought at any time after the act of malpractice, subject still, however, to the one-year preemptive period to which the fraud exception is inapplicable.” *Granger v. Middleton*, 2006-1351 (La. App. 3 Cir. 2/7/07), 948 So.2d 1272, 1275. The claimant has one-year from the date of the discovery of the fraud. *Id.*

*Atkinson v. LeBlanc*, 03-365 (La. App. 5 Cir. 10/15/03), 860 So.2d 60, a client's legal malpractice claim was dismissed on preemption, because it was filed more than one year after the client knew of the claim and the filing of an ethical complaint with the Office of Disciplinary Counsel.

**F. So What?**

As has been illustrated, the duties held by a lawyer cannot be delegated or abused; otherwise, there may be serious consequences for the attorney and his client. A case illustrating

the severity of the potential consequences is *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007), in which breaches of the duty to investigate, duty of candor, and duty to conduct or participate in discovery resulted in an enormous verdict against a law firm.

In *Seltzer*, the plaintiff, an art expert, sued an art collector and the art collector's attorney from an underlying action for malicious prosecution and abuse of process. The case stemmed from the expert's opinion of the authorship of a piece of art work. The owner of the artwork sued the expert claiming that the expert's opinion that the art work was a fraud, or improperly attributed to another artist, was defamatory and had diminished its value. The suit further sought a declaration of authorship.

The expert successfully defended the action, but, in doing so, learned that the plaintiff and the law firm had withheld evidence that indicated that the lawsuit was without merit. After successfully defending the suit, the expert sued the art owner and the law firm.

Finding that the owner and the law firm had improperly used litigation in an attempt to coerce the expert and had intentionally withheld evidence that supported the expert's defense, the jury awarded the expert over \$20 million in compensatory and punitive damages. Although the damages award was reduced on appeal to approximately \$10.2 million, only \$100,000 was imposed against the art owner. The remaining damages award was entered against the law firm.

The important element of this case is that the law firm intentionally filed a lawsuit that mischaracterized or ignored key facts, it impeded discovery, and harassed an adverse party. While the opinion does not discuss ethical obligations, the implications and potential references are clear.

As an added cautionary note, attorneys should be aware that intentional torts, such as using the threat of litigation in an attempt to coerce a party, malicious prosecution, and

intentional destruction or withholding of evidence, are not covered by legal malpractice insurance. Therefore, the nearly \$10 million judgment against the law firm represents an uninsured loss that would be paid from the firm.

## **VI. CONCLUSION**

Attorneys have an obligation to know and understand their ethical obligations, including those involving discovery, and to ensure that their fellow partners and associates understand and follow them. In addition, attorneys must ensure that paralegals and non-legal staff understand and follow the ethical rules that govern the attorneys under which they operate. Otherwise, the clients, the law firm, and the individual attorneys can face personal liability, not to mention discipline from the Bar.

**REFERENCED OR APPLICABLE**  
**LOUISIANA RULES OF PROFESSIONAL CONDUCT**

**Rule 1.1 Competence**

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

(b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, religious, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**Rule 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**Rule 1.4 Communication**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

**Rule 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in Paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

**Rule 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or



(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

### **Rule 2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

**Rule 3.1 Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**Rule 3.2 Expediting Litigation**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**Rule 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**Rule 3.7 Lawyer as Witness**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

#### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### **Rule 4.3 Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

#### **Rule 4.4 Respect for Rights of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

#### **Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

### **Rule 5.2 Responsibilities of a Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

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

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

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

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