CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

Vol. XXXVI, No. 1 THE FLORIDA BAR Fall 2015

The Sovereign's Grace and Equitable Estoppel

by Craig E. Leen, City Attorney, City of Coral Gables

The sovereign may not be estopped. This principle was the traditional rule at common law. *See* David K. Thompson, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 551 (1979). Essentially, this meant that a government official could make a representation to a private party, knowing that the representation would be reasonably relied upon, and then not be bound to it later if it was determined that the representation was mistaken. The principle is based on the idea that a mistake by a government official should not bar the government from correcting a mistake and applying the law fairly. Likewise, it was also a well-accepted principle that a government could change how it interprets and applies the law as long as it does not act arbitrarily.

But what if there is substantial harm to a resident or business; is there room for a municipality, which is the most proximate government to the people, to recognize an estoppel itself? The goal of this paper is to demonstrate that a local government should be able to recognize an estoppel, and provide relief in circumstances where a resident or business has relied on a reasonable government mistake (often in the permitting process), particularly where that

See "Sovereign's Grace," page 16

Chair's Report

by Mark CS Moriarty

My Gratitude for the members of the City County Local Government Section of The Florida Bar.

To Craig Leen for this Agenda, to the Executive Council for the leadership of the section, to Marion Radson for his continuing efforts regarding Rule 4-4.2, to all contributors of the list serve for making it an interactive thought provoking resource, and especially to all members who donate their time and efforts for making the section a rewarding and worthwhile section of the Bar, thank you.

Court cases generally involve two sides. The controversy or case between them is not tried until the action is "as issue". This usually occurs after months of pleadings, months of discovery and months of prepping and honing of the issues.

On any particular city, county or local government agenda, any particular action item is potentially a front page controversy with implications for the entire community.

To all of our brethren who prize themselves as being "bad-asses" in the court room, try lawyering issues in the public without the benefits of pleadings and discovery, and without the rules of evidence before a commission, or a segment of the public, or a news organization with a political axe to grind.

Needless to say, the commission or council's lawyer needs preparation. The City County Local Government section provides it.

Again, to all members thank you. Please keep up the involvement. Next week is the 41st Annual Public Employment Labor Relations Forum. It is one of many seminars the section sponsors. Go. As my Grandmother used to say "you might learn something."

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2015-2016 CALENDAR

CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

January 21, 2016
Executive Council Meeting
The Florida Bar Winter Meeting
Hilton Orlando Lake Buena Vista
Orlando

March 11, 2016
Sunshine Law, Public Records and Ethics for Public Officers & Employees
FSU University Club, Tallahassee

May 5, 2016
Land Use
Caribe Royale, Orlando

May 5, 2016
Executive Council Meeting
Caribe Royale, Orlando

May 6-7, 2016
39th Annual Local Government Law in Florida
Caribe Royale, Orlando

June 17, 2016
Executive Council Meeting
The Florida Bar Annual Convention
Hilton Orlando Bonnet Creek

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

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Log on to The Florida Bar's website (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."

The "No Contact" Rule is in Jeopardy in the Government Context

by Miriam Soler Ramos and Marion J. Radson

Miriam Soler Ramos, was a member of the Florida Bar Professional Ethics Committee (the "PEC") in January 2010, when the PEC voted to approve Ethics Opinion 09-1. Ms. Ramos served two terms on the PEC and while it addressed and opined on many issues of importance to our profession, she found the issues in 09-1 of great interest given its impact on local government law practitioners as well as on attorneys who practice in areas that result in their routine opposition to municipal governments.

Marion J. Radson, former Chair and currently ex officio member of the Executive Council of the City, County and Local Government Law Section of The Florida Bar, was heavily involved in the appeal of Opinion 09-1 to the Board of Governors, and its subsequent revision and adoption by the Board of Governors. He is currently involved with a proposed revision to the "no contact" rule, Rule 4-4.2, which is scheduled to be presented to the Board Review Committee on Professional Ethics in July 2015.

How we arrived at the current situation?

In order to understand how the PEC and, subsequently, The Florida Bar Board of Bar Governors (the "BOG") arrived at current Ethics Opinion 09-1, we must look at the Rule of Professional Conduct (the Rule) that governs, as well as at two pervious Ethics Opinions that laid the groundwork for the rationale and ultimate opinion reached by the PEC and BOG.

All three opinions rely heavily on both the language of the Rule (also known as the "no contact rule") itself, as well as the comment to the Rule. Thus, the Rule in its entirety is set forth as follows:

"Communication with person represented by Counsel.

(a) In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, a lawyer may, without such prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person's lawyer.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is **considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance** under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation." Rule of Professional Conduct 4-4.2

The first noteworthy Opinion establishing the analytical framework on the issue of represented parties is Ethics Opinion 78-4. The opinion addressed the issue in the context of corporate in-house counsel and, in it, the then-PEC answered two specific questions. One, when is a party "sufficiently" represented by counsel to trigger the rule? It was unanimous decided that representation of a party commences when the "attorney-client privilege has been established with regard to the matter in question," (irrespective of litigation). Two, who, in the corporate structure, is a "party" for purposes of the rule? On this question, the then-PEC was divided. The majority ultimately applied the rule to "officers, directors or managing agents of the corporation," but not to other employees unless they were "directly involved in the incident or matter giving rise to the investigation or litigation."

Nearly 10 years later, after the issuance of numerous staff opinions relying on 78-4, the then-PEC was asked to clarify the application of the Rule with regard to government entities. In Ethics Opinion 87-2, the then-PEC extended the rationale of Ethics Opinion 78-4 to government entities, in addressing the issue "of communications with officials and staff of a government entity that is the opposing party in litigation..." The PEC concluded that, "the guidelines set out in opinion 78-4 for communications with managers and employees of corporate parties apply to government-agency parties as well." Thus, it stated that "...[i]f the professional and direct care staff in question have been directly involved in the matter underlying the litigation, the inquiring attorney must obtain the consent of the hospital's counsel before the [sic] interviews them about the matter."

In 2008, the PEC was asked to further evaluate the requirements of Rule 4-4.2, in light of Ethics Opinions 78-4 and 87-2. In July 2008, inquiring attorney received a Florida Bar Ethics staff opinion and sought its reconsideration by the PEC. In September 2009, the PEC voted 22-8 to adopt Proposed Ethics Opinion 09-1. It was published for comment in the October 1, 2009 issue of the Florida Bar News. The City, County

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and Local Government Law Section then filed written comments to the PEC, requesting it disapprove the proposed Opinion. In January 2010, the PEC heard arguments from representatives of the City, County and Local Government Law Section, the Government Lawyers Section, and the Florida Association of County Attorneys and ultimately issued Ethics Opinion 09-1, voting 15 to 11 in favor. Formal appeals to the Board of Governors were filed by the City, County and Local Government Law Section, and the Florida Association of County Attorneys arguing that Opinion 09-1 would improperly allow a lawyer to openly communicate with state agency officers and employees who are represented in a matter. In December 2010, the BOG voted unanimously to approve revised Ethics Opinion 09-1.

Ethics Opinion 09-1

Facts: The inquiring attorney represented clients in proceedings involving a state agency that handles state regulatory matters. Attorneys for the state agency informed the inquiring attorney that all communications with an employee of the state agency by an attorney of the firm, pertaining to any client of the firm, must go through the legal department of the state agency. The attorney for the state extended this to client matters not connected in any way to the cases in litigation.

Analysis: In analyzing the facts presented under Rule 4-4.2, the PEC and BOG looked to the Rule's Comment. It noted the Comment stating "this rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." It further noted the Comment stating that "in the case of a represented organization, [the] rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability." Finally, the PEC made note of the Comment stating that a lawyer must have "actual knowledge of the fact of representation; but such actual knowledge may be inferred from the circumstances."

Three particular questions were answered in Ethics Opinion 09-1. In answering these questions, the PEC relied on the Rule, its Comment and the analysis provided by previous PECs in Ethics Opinions 78-4 and 87-2. First, it set out to determine whether all persons within an organization are deemed to be represented by the organization's counsel. Relying on the comments to the Rule, it ultimately applied the rule only to certain individuals in the organization in finding that consent is only required in order to communicate with the agency's "officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to the State Agency."

Second, it analyzed when the prohibition arises. The Rule is not limited to matters in litigation and may extend to transactional or non-litigation matters. A formal appearance by an agency lawyer is not required in order to "in fact" represent his/her agency on a particular matter, not is there a requirement that the agency lawyer give other lawyers formal notice of such representation. Thus, it found that the inquirer and his/her firm are *not* precluded from communicating with employees of the agency, regarding subjects unrelated to the specified matters on which the attorney has knowledge of the representation by the agency's lawyer.

Lastly it contemplated whether, because the agency has a general counsel, the general counsel is effectively representing the agency on all matters. The Opinion concluded:

> "...Rule 4-4.2 should not be read to bar all communications with government officials and employees merely because the government entity retains a general counsel or other continuously employed lawyers. Conversely, the rule cannot be read to allow lawyers representing a client to approach represented public officials and employees to make inquiry about a matter, the status of a matter, or obtain statements about a matter without affording such officials and employees an opportunity to discuss with government counsel the advisability of entertaining the communication."

In conclusion, Ethics Opinion 09-1 established the following: (1) if the lawyer knows that the public official or employee is represented by counsel, prior consent from the government lawyer is required; (2) if the lawyer does not know if the public official or employee is represented by counsel, the lawyer should inquire; and (3) in all instances, the lawyer must identify himself to the public official or employee as a lawyer who is representing a client.

THE ENFORCEMENT CASE

The impact of Professional Ethics Opinion 09-1 was early put to the test in an enforcement case initiated by The Florida Bar. On April 25, 2013, The Bar filed an enforcement case against a land use attorney who was seeking to obtain redress from a county government on behalf of his client in a zoning dispute. The Florida Bar v Andrew M. Tobin, Supreme Court Case No. SC13-768; The Florida Bar File No. 2012-70,451 (16B).

The attorney communicated directly with several county officers, both orally and in writing, through e-mail or letter. The County Attorney did not consent to those communications and instructed the land use attorney not to engage in direct communications with his clients. Despite repeated instruction, the attorney continued to communicate directly with the County Commissioners and other local government officers and employees.

The land use attorney had filed two related lawsuits against the county government while pursuing administrative remedies with the county government. The land use attorney maintained that the communications, some of which were about the same subject as the pending lawsuits, were permitted because they were independently justified and made in pursuit of the administrative remedies.

After a hearing where both parties presented evidence and argument, the Referee Judge found that the land use attorney's communications "…were independently justified as

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contemplated in the …Comment (to Rule 4-4.2)". Two sentences in the Comment read: "Also a lawyer having independent justification for communicating with the other party is permitted to do so. *Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."(e.s.).* Since Professional Ethics Opinion 09-1 does not specifically address the "independent justification" and the ensuing example provided in the Comment, the Referee Judge concluded that The Bar's reliance on the directives of Opinion 09-1 was unfounded.

EFFORTS TO AMEND RULE 4-4.2

In December 2013, the BOG considered the Report of the Referee Judge and decided not to appeal the decision to the Florida Supreme Court. Instead, the BOG referred the issue to the Disciplinary Review Committee to consider possible revisions to the Rule. After several meetings, the Committee recommended revisions. The BOG received negative comments about the proposed revisions and Professional Ethics Opinion 09-1, and referred the matter to the Board Review Committee on Professional Ethics (the "BRC").

The BRC considered proposed revisions to the Rule offered by the City, County and Local Government Law Section, the Florida Association of County Attorneys, and the Government Lawyers Section (the "Consortium). At the December 2014 meeting of the BRC, then President Coleman asked the Consortium to try and reach consensus with those who had filed objections. In February 2015, the Consortium met with representatives of the Business Law Section, the Real Property, Probate and Trust Law Section, the Eminent Domain Committee, the Education Law Committee, and a public school board attorney. Despite best efforts, a consensus was not reached. In May 2015, the Consortium prepared and filed additional Rule revisions in an attempt to address the objections to the Rule revisions. The BRC and BOG scheduled the proposed Rule revisions for consideration at their meetings in July.

Written objections to the proposed Rule revisions were subsequently filed with the BOG and made a part of their agenda packet. It was evident from these written comments that the Consortium's best efforts to address the objections through rule revisions were made in vain. At the BRC meeting in July, the Consortium orally withdrew its proposed Rule revisions. Instead, the Consortium requested the BRC and BOG simply remove the troublesome sentence from the Comment to the Rule that was cited by the referee judge to find no rule violation in the Tobin enforcement case.

In support of this latest recommendation, the Consortium referred to The Bar staff report that was included in the packet of the BOG for the July meeting. The report included the following pertinent historical information about this troublesome sentence:

> *"When the Rules of Professional Conduct were adopted in the Rules Regulating The Florida Bar in 1986, the Special Study Committee on the Model Rule of Professional Conduct had recommended omitting the "authorized by law" exception to the general rule prohibiting communication with persons represented by counsel about the subject of the representation. Although the "authorized by law" exception was omitted from the rule, the following sentence was left in the comment: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." A letter from a member of that committee, Tom Ervin, (dated November 1, 1989), that was written in response to a request from the Professional Ethics Committee to add the "authorized by law" exception to the rule, indicates that the committee erred in leaving that sentence in the comment. (e.s.)*
>
> *In 2004, the rule was amended to change "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government official about the matter" to "Permitted communications include, for example the right of a party to a controversy with a government agency to speak with government officials about the matter" in response to a special committee's recommendation."*

THE NEXT STEP

At the BRC meeting in July 2015, representatives of the Business Law Section and the Real Property, Probate and Trust Law Section offered to work with the Consortium in preparing a Rule amendment that specifically addresses the impact of the Tobin decision. The Consortium will work diligently with these two Sections to try and reach consensus within the next few weeks. As of the writing of this Article, the BRC has placed this item on their agenda for the meeting of December 3, 2015 in Naples, Florida.

If the BOG decides not to amend the Rule, we are troubled that the Rule will be feckless in the government context where uncertainty and confusion will prevail. If the BOG decides to amend the Rule, final approval rests with the Florida Supreme Court.

WHAT YOU CAN DO

The Board of Bar Governors welcomes your participation in the business affairs of The Bar. A self-regulated Bar is only as strong and effective as the participation of its individual members, particularly in the rule-making process. Opponents to any Rule amendment have filed written objections with the BOG. Some argue that the Tobin decision is fact specific and not likely to be replicated. The experience of government lawyers and attorneys who represent the government is different. The benefit of your experience can help guide the Governors to reach the best decision. You are encouraged to communicate with your Governors and inform the BOG in writing of the importance of the "no contact" Rule to your public client and your practice.

The Consortium has consistently maintained that it merely seeks to place the Rule, as interpreted by Ethics Opinion 09-1, in the same enforcement status that it held prior to the Tobin decision. The removal of this

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holdover erroneous sentence can accomplish this result. The Consortium could also support the other Rule revisions proposed by the Disciplinary Review Committee of the BOG.

No Rule amendment means the Tobin decision would be cited as support for the unauthorized and unsanctioned communications with represented government officers and employees in represented matters. The "no contact" Rule would effectively have no application in the government context. Stated another way, governmental clients would be categorically excluded from the class of represented persons for whom the Rule is designed to protect. The preservation of the time-honored attorney-client privilege and the integrity of the attorney-client relationship are at the heart of the issue.

CONCLUSION

Since the rendition of the Referee's Report in The Florida Bar v Tobin, the BOG is considering an amendment to the Rule that addresses the impact of that decision, and at the same time provides greater clarity and guidance to attorneys. An effective Rule furthers the best interest of Florida's legal system, honors the American legal tradition, and most significantly, benefits the government as client. The governmental client deserves the benefits and safeguards of the attorney-client relationship. The government should not be treated as second-class clients, and government attorneys should be able to represent their clients with fairness and equal treatment under the rules of our profession. Communicate your experience and position to the BOG. Urge them to amend the Rule in the best interest of our public clients and the attorneys who are directly impacted by this Rule.

Marion J. Radson *is Past Chair of the Section and retired City Attorney of the City of Gainesville. He is currently working with the Government Lawyers Section and the Florida Association of County Attorneys and representing this Section in the pending amendment to Rule 4-4.2 before the Board of Bar Governors.*

Social Media and Ethics: The Odd Couple

by Angela C. de Cespedes, Litigation Partner, Akerman LLP

The use of social networking sites is commonplace among lawyers and throughout the legal industry. With an ever- changing landscape and new technologies developing daily, navigating the world of social media poses significant challenges generally, and even more so for law firms and attorneys.

In general, there are six different types of social media: 1) social networking sites *(e.g.,* Facebook; Linked In), 2) blogs and microblogs *(e.g.,* Blogger; Twitter), 3) content communities *(e.g.,* YouTube), 4) collaborative projects *(e.g.,* Wikipedia), 5) virtual game worlds *(e.g.,* World of Warcraft), and 6) virtual social worlds *(e.g.,* Second Life). However, the boundaries between the different categories are increasingly blurred. Thus far, it appears that blogs, content communities and social networking sites are the categories causing the most concern for lawyers attempting to abide by the bar ethics rules in their respective jurisdictions.

At least 91 percent of the American adult online population, and 98 percent of online l8-to-24 year-olds use social media each month. *See The 2011 Social Media Consumer Trend and Benchmark Report,* Experian Marketing Services, 3 (2011), http:// www.experian.com/assets/simmons-research/brochures/ experian-marketing-services-20ll-social-media-consumer -report2.pdf. Thus, there is a massive amount of information on various social networking sites that can be acquired about parties, witnesses, experts, judges,jurors and lawyers. To quote Facebook founder Mark Zuckerberg, privacy is no longer a "social norm." Social media has changed the manner in which litigation is conducted, as a result of the ability to utilize the content uncovered on social networking sites such as Facebook, Instagram, Twitter, YouTube and LinkedIn, just to name a few. Attorneys are making use of this type of evidence regardless of what side of the courtroom they are sitting on and the courts are allowing it in cases. While the information garnered from these sites is valuable, attorneys must be aware of the ethical rules which apply to obtaining and using the information.

Ethical obligations to which an attorney is bound create hurdles and potential pitfalls of which one must be weary. The following is a discussion of social media and the ethical rules that apply to attorney use, both individually, or as a firm, and in litigation.

Use of Social Media by Attorneys

As it relates to lawyer ethics and any disciplinary liability, an attorney's use of social media for the practice of law will typically fall into one of two categories: 1) Commercial Speech *(e.g.,* online advertising, solicitation), and 2) Noncommercial Speech *(e.g.,* political discourse, posting of information online). The use is therefore governed by your particular state bar's ethics rules as to lawyer advertising, solicitation and marketing, and by any specific rules or opinions issued as to the use of social networking sites.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). the United States Supreme Court opined that commercial speech is entitled to some protection. Based on the public's right to receive the free flow of commercial information, the Court held that commercial speech is protected First Amendment speech and may not be prohibited absolutely. Subsequently, in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the Court extended the "Commercial Speech Doctrine" to lawyer advertising, holding that a total prohibition on the advertisement of routine legal services is unconstitutional. Lawyer advertising, as a form of commercial speech, receives a level of constitutional protection that is above unprotected speech *(e.g.,* false, deceptive or misleading statements or advertisements concerning unlawful activities) but below that provided completely protected speech *(e.g.,* political statements). Under the "Commercial Speech Doctrine," a state may totally prohibit misleading advertising and may impose restrictions if the particular content or method of advertising is inherently misleading or if experience demonstrates that the advertising is subject to abuse. *In re R.M.J.,* 455 U.S. 191, 203 (1982). If the content of the advertisement is not misleading, the state may regulate it only when there is a substantial government interest being served. *Id* However, the state may place reasonable restrictions upon the time, place, and manner of lawyer advertising, so long as the content or subject matter is not regulated. *See Bates,* 433 U.S. at 384.

As a result, when attorneys are using social media sites, the distinction to keep in mind to avoid running afoul of the ethics rules is the difference between commercial and noncommercial speech. Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience:·*See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 441* U.S. 557, 561 (1980).

While state jurisdictions vary, and there is very little guidance in the way of decisions disciplining lawyers for improper use, in April 2013, the Florida Bar Standing Committee on Advertising Guidelines for Net working and Video Sharing Sites published helpful guidelines for lawyers using social networking sites. The following is a summary of those guidelines, which can be found in their entirety on the Florida Bar's website at www.floridabar.org:

- Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules.

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- Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules.
- Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are solicitations in violation of the rules, unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer.
- Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.
- Lawyers who post information to Twitter whose postings are generally accessible are subject to the lawyer advertising regulations. A lawyer may post information via Twitter and may restrict access to the posts to the lawyer's followers, who are persons who have specifically signed up to receive posts from that lawyer. If access to a lawyer's Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules, but is exempt from filing requirements. Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above. Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county.
- If a page on a networking site is sufficiently similar to a website of a lawyer or Jaw firm the pages on networking sites are not required to be filed with The Florida Bar for review.
- In contrast with a lawyer's page on a networking site, a banner advertisement posted by a lawyer on a social networking site is subject not only to the requirements of the advertising rules and misleading information rules, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information.
- Videos of individual lawyers on video sharing sites that are used solely for purposes that are unrelated to the practice of Jaw are not subject to the lawyer advertising rules.
- Videos appearing on video sharing sites that are used to promote the lawyer or Jaw firm's practice are subject to the lawyer advertising rules. These videos and all information the lawyer or law firm posts with them must therefore comply with prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the rules. Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable.
- Invitations to view or link to the lawyer's video sent on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are direct solicitations in violation of the rules, unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer.
- Videos posted solely on video sharing sites are information at the request of the prospective client and therefore not required to be filed with The Florida Bar for review.
- In contrast with a video posted on a video sharing site, a banner advertisement posted by a lawyer on a video sharing site is subject not only to the requirements of the advertising rules and misleading information rules, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information.

A listing of State Ethics Rules for all fifty (50) States which govern lawyer advertising, solicitation and marketing can be found at http://www.americanbar.org/groups/delivery_legal_services/resources/ad_rules_states.html.

Use of Social Media in Litigation

As it relates to lawyer ethics and any disciplinary liability, an attorney's use of social media in litigation will typically fall into one of two categories: 1) the use of social media as a discovery and investigatory tool, and the counseling of clients about their social media use.

The following is a list of legal ethics opinions and decisions from various jurisdictions which serve as a general guide for lawyer use of social media in litigation:

- Communications with represented parties. An attorney is barred from making an *ex parte* friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented

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party. *San Diego County Bar Association Ethics Opinion* 2011-2.

- Communications with unrepresented witnesses. An attorney's duty not to deceive prohibits him from making a friend request of unrepresented witnesses without disclosing the purpose of the request. *San Diego County Bar Association Ethics Opinion* 201 1-2.
- Lawyers obtaining information from social networking websites. A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent. *New York City Bar Association Formal Ethics Opinion* 2010-02.
- Lawyer's access to public pages of another party's social networking site. A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation. *New York State Bar Ethics Opinion* #843.
- Lawyer access to a witness or party's social networking site through use of a third person. A lawyer is not permitted to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. The communication by the third party with the witness would be deceptive, as it omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. Lawyer would be held responsible under the rules for the conduct of that third person. *Philadelphia Bar Association Ethics Opinion* 2009-02.
- Deleting or destroying online content The intentional alteration or destruction of social media evidence that could have been used as evidence in litigation is spoliation and will be punished accordingly. *See Gatto v. United Air Lines, Inc.,* No. 1O-cv-1090-ES-SCM, 2013 WL 1285285 (D.N.J. March 25, 2013); *Lester v. Allied Concrete Co.,* Nos. CL08-150, CL09-223, 2011 WL 9688369 (Va. Cir. Ct. Oct. 21, 2011).

Lawyer Investigation of Jurors

It is proper and ethical for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send tweets

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to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly bring such misconduct to the attention of the court before engaging in any further significant activity in the case. *New York County Lawyer's Association Formal Ethics Opinion* 743.

Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court. *New York City Bar Association Formal Ethics Opinion* 2012-02.

Judicial Ethics and Social Media

The widespread use of social media in today's society is not only causing ethical dilemmas for attorneys, but also for judges. Judges are held to a heightened standard of social propriety and dignity in both their professional and personal lives. *See* ABA Model Code of Judicial Conduct (2012), Preamble [2]. A judge must always promote public confidence in the independence, integrity and impartiality of the judiciary, and should avoid even the appearance of impropriety. *See id* at Rule 1.2. In the context of social media interactions, does this mean that a lawyer practicing before a judge cannot be Facebook "friends" with a judge? Does a Facebook "friendship" create the impression that the lawyer is in a special position to influence a judge? Does a judge need to de-friend or disclose the existence of a Facebook friendship with a lawyer or litigant that appears before the court, and is this a basis for recusal?

In an attempt to answer these questions, several states have issued judicial ethics advisory opinions focusing on social media. The answers vary. Florida, Oklahoma and Massachusetts broadly prohibit judges from including a lawyer who is likely to practice before the judge on the judge's social networking sites. *See* Florida Judicial Ethics Advisory Committee, Opinion 2009-20 (Nov. 17, 2009); Oklahoma Judicial Ethics Advisory Panel, Opinion 2011-3 (July 6, 2011); Massachusetts Committee on Judicial Ethics, Opinion No. 201 1-6 (Dec. 28, 2011). Other states, such as Ohio, Kentucky and New York do not prohibit lawyer/judge social media connections, but still advise that judges proceed with extreme caution to ensure that their social media activity does not violate the applicable judicial canons. *See* Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (Dec. 3, 201O); Ethics Committee of Kentucky Judiciary, Opinion JE-119 (Jan. 20, 2010); Advisory Committee on Judicial Ethics, Opinion 08-176 (Jan. 29, 2009). Arizona recently issued a thorough opinion that specifically advises judges not to recommend or endorse attorneys who appear before the court on LinkedIn, but takes a more relaxed approach with Facebook friends and Twitter or Instagram followers, suggesting instead that the judge evaluate the actual relationship and consider disclosing it if appropriate. *See* Arizona Supreme Court Judicial Ethics Advisory Committee, Opinion 14-01 (Aug. 5, 2014). Notably, that opinion advises that if a social media relationship rises to the level that might require disqualification of the judge, "[i]t is insufficient to simply 'de-friend' a lawyer or litigant while presiding over a case in which the individual is involved." *See id.* at n. 11.

The Ethics Committee of the Kentucky Judiciary aptly explained the difficulties in answering the question of whether a judge may "participate in an internet-based social networking site... and be 'friends' with various persons who appear before the judge in court":

> While the nomenclature of a social networking site may designate certain participants as "friends," the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge.
>
> [T]he Committee's view is that the designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend." The Committee conceives such terms as "friend," "fan" and "follower" to be terms of art used by the site, not the ordinary sense of those words.
>
> [T]his Committee believes that judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" which should be disclosed and/or require recusal.
>
> [T]he Committee struggled with this issue, and whether the answer should be a "Qualified Yes" or "Qualified No." In speaking with various judges around the state, the Committee became aware that several judges who had joined internet-based social networks subsequently either limited their participation or ended it altogether. In the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they serve tipped the Committee's decision. Thus, the Committee believes that a Kentucky judge or justice's participation in

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> social networking sites is permissible, but that the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.

Ethics Committee of Kentucky Judiciary, Opinion JE-119, 1-3,5 (Jan. 20, 2010).

The National Center for State Courts keeps an updated list of state-issued judicial ethics opinions regarding social media, which is available at http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial Ethics Advisory Opinions on Social Media (last visited Aug 20, 2014). It is recommended that attorneys check for opinions issued in their state before interacting with local judges through social media.

Whether or not a state has issued an opinion on social media interactions with judges, American Bar Association Formal Opinion 462, "Judge's Use of Electronic Social Networking Media;" offers guidance. The ABA concluded as follows:

> A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

See id at 1. Overall, the ABA took a positive approach to judicial interactions through social media, noting that it "can be beneficial to judges to prevent them from being thought of as isolated or out of touch." *See id.* The ABA cautioned, however, that 'judges participating on [social media] sites used by lawyers and others who may appear before the judge" may invoke concerns regarding disclosure or disqualification. *See id* at 2. While acknowledging that certain state-issued opinions completely prohibit attorney-judge social relationships, the ABA does not recommend an outright ban. *See id* The ABA suggests that a judge should evaluate the degree or intensity of the judge's relationship with the person to determine whether the relationship should be disclosed upon the person's initial appearance before the judge. In other words, the "judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally." *See id* at 3. Finally, as a cautionary reminder that applies equally to lawyers, the ABA stated that "[i]n contrast to fluid, face-to-face conversation that usually remains among participants, messages, videos, or photographs posted to [social media sites] may be disseminated to thousands of people without the consent or knowledge of the original poster," and social media "messages may be taken out of context, misinterpreted or relayed incorrectly." *See id.* at 2.

Because the ethical boundaries in this area are still evolving, leaving plenty of room for argument, litigants and their attorneys frequently raise a judge's social media connections as an alleged basis for disqualification or a new trial. *See, e.g., Shafizadeh v. Bowles,* 476 F. App'x 71, 72 (6th Cir. 2012) (seeking an injunction directing the trial judge to recuse himself from further proceedings due to alleged bias demonstrated by, *inter alia,* the judge's Facebook friend status with opposing counsel); *Onnen v. Sioux Falls Indep. Sch. Dist. #49-5,* 801 N.W.2d 752 (S.D. 2011) (affirming the denial of a motion to recuse the judge on the basis that, *inter alia,* prior to testifying a witness in the case posted a message on the judge's Facebook page wishing the judge a happy birthday); *Chace v. Loisel,* No. 5013-4449, 2014 WL 258620, at *1 (Fla. 5th DCA Jan. 24, 2014) (quashing trial court's order denying a litigant's motion to disqualify where the judge sent the litigant a Face-book friend request prior to entry of final judgment, the litigant ignored the request considering it to be an ex parte communication, and the litigant's failure to accept the request created reasonable grounds to fear that the litigant had offended the judge). Therefore, a lawyer should think twice before sending a friend request to ajudge before whom the lawyer is likely to appear.

Juror Use of Social Media

Juror misconduct has always been a concern for trial lawyers. Social media has changed the game. Unless jurors are sequestered with no phones, tablets or computers, they have constant and instant access to the outside world. The temptation to research parties, witnesses, attorneys, and news headlines is ever present, and it only requires a few clicks on a handheld electronic device. Jurors are often caught posting comments about a case during trial or reaching out to otherjurors via social media. Alleged juror misconduct using social media is a now a commonplace basis for a losing party to request a new trial. The outcome is largely dependent on the particular circumstances of the case. What did thejuror tweet or post to his Facebook page, when, and to whom? Was it substantive infonnation about the case, or hannless vague ramblings not obviously connected to the case? Had the judge specifically instructed thejurors not to use social media during trial?

In *United States v. Ganias,* 755 F3d 125 (2d Cir. 2014), the Second Circuit concluded that a defendant's right to a fair trial and impartial jury had not been violated where a juror posted comments about the case to his Facebook page and "friended" another juror. *See id.* at 128 (vacating conviction on other grounds). In *Ganias,* Juror X began posting to his Facebook page the night before the start evidence was to begin in a tax evasion trial. Juror X posted, "Jury duty 2morrow. I may get 2 hang someone... can't wait." *See id.* at 130. This post prompted responses from Juror X's "friends," such as "gettem while the're young!!! lol" and "let's not be hasty. Torcher them first, then hang! Lol." Throughout the trial, Juror X continued to post questionable comments about his jury service, including:

> "Shit just told this case could last 2 weeks. Jury duty sucks!"
>
> "Your honor I object! This is way too boring, somebody get me outta here." "Guiness [sic] for lunch break. Jury duty ok today."

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See id. During the second week of trial,Juror X became Facebook friends with another one of the jurors. The evening after the jury convicted the defendant, Juror X posted, "(GUILTY:)." *See id.*

The defendant moved for a new trial based on juror misconduct. *See id*. at 131. The district court held an evidentiary hearing, and Juror X testified that his comments were written in a joking manner, that he did not have any conversations with the other juror prior to deliberations about the subject matter of the case, and that he had considered the case fairly and impartially. *See id*. The court denied the motion, finding Juror X to be credible. On appeal, the Second Circuit vacated the conviction on other grounds, but voluntarily addressed the issue of juror misconduct because of the "increasing popularity of social media." *See id.* The Second Circuit found that a defendant's Sixth Amendment right to a trial by an impartial jury is not violated "merely because a juror places himself in a 'potentially compromising situation.'" *See id* (citation omitted). "A new trial will be granted only the juror's ability to to perform her duty impartially has been adversely affected... and the defendant has been substantially prejudiced as a result." *See id.* at 132. (citations and quotations omitted). The Second Circuit found that the district court decision was not clearly erroneous, and affirmed the denial of the motion for a new trial. The Second Circuit noted that the Judge had provided a social media warning to the jury, but only before deliberations. A better practice would be to also read the warning at the beginning of trial and when dismissing the jury at the end of each day. *See id* at 133.

In 2012, the Judicial Conference Committee on Court Administration and Case Management updated its prior 2009 model jury instructions to address juror misconduct in the age of social media. *See Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case,* Judicial Conference Committee on Court Administration and Case Management (June 2012), http://www.uscourts.gov/file/jury-instructionspdf. These instructions caution jurors against using the internet to research or obtain additional information about a case, instruct jurors on the use of social media, and encourage them to report violations by other jurors:

Before Trial

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to *anyone* at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions. I hope that for all of you this case is interesting and noteworthy.

At the Close of the Case

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

The instructions are to be "provided to jurors before trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate." *See id.* at 1.

The Third Circuit, as well as various other courts, has "enthusiastically endorse[d] these instructions and strongly encourage[d] district courts to routinely incorporate them." *U.S. v. Fumo,* 655 F.3d 288, 305 (3d Cir. 2011) (referring to prior 2009 version of the model instructions). The Third Circuit explained that these instructions are necessary to address, "the risk of prejudicial communication

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[which] may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger." *See id.* A handful of states have also proposed model jury instructions to address social media concerns. Links to these instructions can be accessed from the website of the National Center for State Courts, available at http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Jury Instructions on Social Media#Federal Courts.

What happens when a juror ignores social media instructions? The Supreme Court of Arkansas reversed a capital murder conviction imposing the death sentence, in part because a juror tweeted during trial in defiance of the trial court's specific instructions against Twittering. *See Dimas-Martinez v. Arkansas,* 385 S.W. 3d 238, 242-43 (Ark. 2011). As one of the successful grounds raised in appealing his conviction, the defendant argued that "where it was apparent that the juror could not follow the judge's instructions [regarding social media] it could not be assumed that he followed the instructions with regard to the law." *See id* at 242. At the close of the State's rebuttal case during sentencing, the juror had tweeted, "Choices to be made. Hearts to be broken. We each define the great line." *See id.* at 246. The defendant moved to strike the juror, and the Court questioned him and again admonished him not to discuss the case, but the juror continued to tweet. He tweeted twice during the sentencing phase deliberations, including a 3:45 p.m. post that, "It's over"even though the jury did not announce that it had reached a sentence until 4:35 p.m. *See id* at 247. Notably, one of the juror's followers was a reporter, so the media had advance notice that the jury had completed its sentencing deliberations. *See id.* at 248. The court denied defendant's motion for a new trial. The Supreme Court of Arkansas reversed, noting that unlike the claims in other cases where prejudice is alleged to have resulted from the content of the juror's social media post, the prejudice here results from the fact that the juror admitted to his misconduct and so cannot be presumed to have followed the court's other instructions. *See id.* at 248.

The lesson to be learned from *Ganias and Dimas- Martinez* is that a lawyer should monitor jurors' social media activity, to the extent allowed in that lawyer's jurisdiction. The juror misconduct in these cases appears to have been discovered and reported by counsel, not the court or other jurors. Diligence in researching jurors through social media can literally reverse a death sentence against a client.

Conclusion

Evidence mined from social media can be a powerful litigation tool. It can help you settle cases, win at trial, or guarantee your client's defeat. It can provide you with juror insight, or lead to the overturn of your client's favorable jury verdict. It can provide you with a free marketing tool, or lead to a reprimand for violating bar rules. The key to obtaining a result in your favor is awareness. Regularly review the social media ethics opinions applicable to your jurisdiction. They will continue to evolve. Review your own social media accounts for compliance with bar rules. Think twice before messaging, tweeting, liking, following, or friending. Monitor your jurors during and after trial, to the extent allowed in your jurisdiction. Lookup opposing parties, witnesses, counsel and experts, before and after you serve discovery asking for social media evidence. Lookup your own clients, witnesses and experts, and advise your clients to post with caution.

Whether litigating, researching a prospective juror , marketing, networking with other legal professionals, or interacting with "friends'·on a personal level, lawyers should proceed cautiously in their social media activities. The ethical lines remain blurry and the consequences of social media use are not always easily predicted.

WHY YOUR DATA FORENSIC INVESTIGATIONS SHOULD BE DIRECTED BY COUNSEL

Reports generated from privacy and security audits and data breach investigations often contain statements about a company's security safeguards that can be unintentionally harmful to a company on issues like when a breach should have been discovered and whether the company was engaging in reasonable security practices. Courts are recognizing, however, that when those audits and investigations are directed by counsel to evaluate a company's legal rights and obligations they are protected from disclosure. A recent federal court decision underlined the importance of conducting these investigations through counsel.

The Middle District of Tennessee recently held that documents related to a compliance-related network security audit performed by a third party—and managed by counsel—were protected from disclosure by the attorney-client privilege. The **district court's order** is the latest in a hotly contested dispute between Genesco, Inc.—parent company to retail brands Journeys and Lids—and payment-card network provider VISA. After a 2010 data breach, VISA levied nearly $13.3 million in fines against Fifth Third Bank and Wells Fargo Bank, issuing banks for the payment cards involved in the breach, for violations of the Payment Card Industry Data Security Standards (PCI DSS). In standard industry practice, the banks then collected the assessed amounts from Genesco directly. In an industry first, however, Genesco challenged VISA's authority to impose such fines.

During discovery, VISA sought to compel production of documents related to security assessment work performed by IBM on Genesco's behalf. Genesco had retained IBM to provide consulting and technical services to assist with understanding and meeting the company's PCI DSS compliance obligations at the direction of Genesco's in-house and outside counsel.

Denying VISA's motion to compel, the court found that while relevant to the litigation at hand, the materials sought were protected by the attorney-client privilege because counsel retained IBM to provide consulting services in assistance with rendering legal advice to the client.

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Numerous courts outside the data security context have applied attorney-client privilege and work product protection to the work product of similar arrangements, i.e. where counsel serves as a legal filter for communications between individuals providing technical expertise necessary to answer a legal question and the client. *See Gucci America, Inc. v. Guess? Inc.*, 271 F.R.D. 58, 70 (S.D.N.Y. 2010) (citing the foundational *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) for its extension of the attorney-client privilege to an accounting hired by outside counsel to assist in representing client). Of course, the presumption of privilege is strengthened when outside counsel, rather than in-house counsel, manages the third-party relationship and information flow between experts and client. *See, e.g. United States v. ChevronTexaco Corp.,* 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002)("communications involving in-house counsel might well pertain to business rather than legal matters" and accordingly "the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel").

Plaintiffs' lawyers are increasingly filing class action lawsuits against companies that have suffered a data breach. Inevitably, these lawsuits are accompanied by discovery requests seeking forensic reports, security audits, and internal privacy policies. And litigation is not the only front where these documents are sought, as post-incident regulatory investigations often include a demand for materials generated during any post-breach forensic audits. Nevertheless, the attorney-client and work-product privileges remain an important tool to challenge such discovery. In this climate, companies should carefully consider the engagement of external counsel to direct information security assessments, regulatory compliance audits, and breach response investigations to preserve privilege over potentially damaging documents and allow the engaged consultants to provide the open and honest feedback required to efficiently manage a security incident and its aftermath.

mistake has not caused a material harm to another resident or business. A corollary of this position is that a local government also should act with care when it changes an interpretation, and that changes in accepted interpretations and practices should only be done on a going forward basis, and rarely be allowed to affect current projects where substantial reliance on a prior interpretation has already occurred. In addition, this paper hopes to show that a City Attorney (as the legal representative of the Commission) should be very involved in determining whether to recognize an estoppel, or to change an accepted legal interpretation of an ordinance or resolution, and should require staff to bring these matters to the Commission in appropriate circumstances.

As an initial matter, it is important to recognize that this analysis is not about vested right determinations or legally non-conforming uses. These legal principles, often encoded in a municipal Zoning Code, work to protect property owners that have received prior government approvals at some point, which have now been undermined by further events and legal changes. These principles prevent local governments from engaging in the equivalent of inverse condemnation in many instances, and ensure that developers will pursue significant developments in a municipality, knowing that their significant investment cannot be undermined by a change in the law after their rights have vested or the building has been fully constructed. The protection of legal non-conformities is particularly important in a city like Coral Gables, where so many properties are historic and would be non-conforming today. Coral Gables recognizes this by having a more permissive encoded policy towards legal non-conforming structures and uses, even allowing their improvement (as long as the non-conformity is not materially increased). This paper is focused on estoppel and interpretation issues, which are less likely to be addressed in a Zoning Code.

The common law rule that a sovereign cannot be estopped has been modified somewhat in Florida to allow for estoppel in "exceptional circumstances" where the following elements are present: (1) a property owner in good faith reliance (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he or she acquired." *See Castro v. Miami-Dade County Code Enforcement*, 967 So. 2d 230, 233 (Fla. 3d DCA 2007). This standard, particularly the third element and the "exceptional circumstances" test, makes it much harder to obtain an estoppel against the government than a private party.

These elements can be evaluated through reviewing two examples of cases where an estoppel argument was made. The first case, *Metropolitan Dade County v. Fontainebleau Gas & Wash*, 570 So. 2d 1006, 1007-08 (Fla. 3d DCA 1990), involved a property owner who was seeking to construct a gas station on a certain site. The owner received the necessary permits for the construction. Nevertheless, the County issued a red tag stop work order after determining that the issuance of the permit was a mistake. The site had been previously rezoned, and the applicant at that time had proffered a restrictive covenant only allowing the property to be used as a bank or savings and loan. This proffer was accepted by the County and was a basis for granting the rezoning, *which was reflected in the resolution granting the rezoning. Id.* The restrictive covenant was never recorded though. Even though the zoning district would have allowed for a gas station, the proffered condition and restrictive covenant made the use impermissible. In denying the estoppel argument, and in requiring compliance, the Third District held that the property owner was on constructive notice of the requirement because he or she should have read the resolution. *Id.*

In contrast, in *Castro v. Miami-Dade County Code Enforcement*, 967 So. 2d at 233, the Court recognized an estoppel against the County. In that case, a single family residence had a family room addition that was already in place when a new family moved into the property. *Id.* The addition was believed to be compliant, but it was eventually determined that it violated the setback requirements. The addition had been in place for many years and was built with a permit. In addition, a roofing permit was also issued more recently with no mention of there being an issue with a setback. The Third District determined that it would be highly inequitable to require the property owner to demolish the property in these circumstances. *Id.*

In comparing these two cases, it is noticeable that they apply essentially the identical standard. The cases come out differently because of the more significant amount of reasonable reliance that was demonstrated by the owner in the *Castro* case, and potentially because the Court found that requiring demolition of a family room addition was much less palpable and more harmful than requiring a gas station to comply with a resolution that it should have read.

A third interesting case where estoppel was found is *City of Coral Springs v. Broward County*, 387 So. 2d 389, 389 (Fla. 4th DCA 1980). In that case, the Court determined that the City could not enforce a lien where it was not disclosed following an outstanding lien check by Broward County. The Court determined that the appropriate officer of the City (i.e. Finance Director) had reviewed the file, and should have provided the disclosure. The Court then held that

> Historically, however, the doctrine has not been applied against a municipality when the action upon which the individual relies has been unauthorized or unlawful. Id. at 445.
>
> We believe the evidence of estoppel presented in this case was sufficient to meet the criteria set out in the cases cited, supra. In particular we note that the evidence relied on by the county indicates that the city employee was specifically authorized to supply lien information for the purpose requested by the county, and in addition, she was specifically advised of this purpose. Under these circumstances, and unlike the factual situation involved

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> in Enderby, supra, we believe the action of the municipal employee here was shown to be both lawful and authorized.

387 So. 2d at 390 (determining that estoppel applies).

The *Coral Springs* case demonstrates an area where a government should strongly consider recognizing an estoppel: namely, where the appropriate officer of the government reviews a matter and makes a determination that is relied upon by a resident or business, but which turns out to be mistaken. In these circumstances, the primary concern with estoppel (that an intermediate decision maker who does not speak for the government on this issue is binding the government to a mistake) does not exist.

An additional case of interest is *Department of Revenue v. Hobbs*, 368 So. 2d 367, 367 (Fla. 1st DCA 1979). This case establishes that a state agency, such as the DOR, can decide to defer audits and collections because of uncertainty or a mistake in relation to the law, and not be estopped from proceeding at a later time. Although not directly addressed, the case supports a concept analogous to prosecutorial discretion and the idea that an alleged mistake or estoppel should not prevent the government from acting in other cases. *Id.*

As a final case, the Florida Supreme Court's decision in *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963) is also instructive. The case involves the construction of a 12-story apartment building following a permit mistakenly granted by the City of Coral Gables. *Id.* at 434-35. The Court found that the property owner was not involved in the mistake and could suffer both a material change in position and substantial expense based on the mistake. *Id.* at 434. In these circumstances, the Court determined to recognize the estoppel.

Ultimately, the standard to demonstrate an estoppel may be high, but *Castro* and *Coral Springs* demonstrate it occurs. It is my view that all requests to recognize an estoppel should be reviewed by the City Attorney, who should be granted the authority to recognize an estoppel where warranted, or at least be authorized to bring the matter to the Commission or Council for a final decision. In Coral Gables, the City Attorney is authorized to recognize an estoppel under both the Zoning Code and the Municipal Code as either a matter of interpretation or settlement. *See* Zoning Code, Sec. 2-702; City Code, Sec. 2-201(e)(1), (6), and (8). This authority allows the City Attorney to review requests for recognition of an estoppel and ensure that a party's substantial rights are not harmed by the City in a manner that could result in an injustice and in substantial and costly litigation.

Likewise, in Coral Gables, the Zoning Code and City Code authorize the City Attorney to issue interpretations of both Codes on behalf of the City. The benefit of such a provision is that the City Attorney can ensure that the interpretation is consistent with the language in the Code (and the purpose or intent provided by the Commission). The City Attorney can exercise this interpretive authority on behalf of the Commission in order to ensure that the Commission's will is followed. If substantial interpretive questions arise that have a significant policy component, the City Attorney can bring the matter to the Commission so that the Commission can provide the interpretation by resolution. Under this approach, any important change in an interpretation that is requested by City staff should require approval of the City Attorney or City Commission to ensure that such changes reflect the will of the Commission. Otherwise, a change in interpretation prior to when an applicant receives vested rights can impose a significant burden on the applicant and can open up the local government to a claim of arbitrary action (i.e., why is the precedent being changed for this particular party who has already relied on the prior interpretation).

In the end, a municipality should not be hamstrung into disregarding a clear estoppel because of a lack of authority to recognize one. This may place the municipality in an untenable situation where it is defending its own mistake in a situation where the Court is likely to recognize the estoppel, or where substantial harm to a private party may occur if the estoppel is not recognized. In these situations, the sovereign should consider providing relief itself as a form of equity, and not require its residents or business owners to bear the burden of a government official's mistake where a resolution can be reached.