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AN ETHICS SAMPLER: FIVE TOP MISTAKES TO AVOID

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FRANCINE FRIEDMAN GRIESING

Francine Friedman Griesing has 28 years of experience handling complex business, litigation and alternate dispute matters. She has considerable experience representing clients in the tourism, hospitality, foodservice, real estate, and manufacturing industries.

From 1997 to 2000, Ms. Griesing served as Chair of Litigation for City of Philadelphia Law Department, appointed by former Philadelphia Mayor Edward G. Rendell, current Governor of the Commonwealth of Pennsylvania. As the City's lead trial lawyer she handled legal matters involving the City's most popular tourist venues, including Veterans Stadium, the Pennsylvania Convention Center, Penn's Landing/Delaware Avenue, Fairmount Park, historic Old City and Main Street Manayunk. She advised the Mayor, ranking administration officials and members of City Council on cutting-edge legal issues, while managing over 2,000 matters, supervising 75 lawyers, plus attendant support staff and overseeing outside counsel. As the City's lead attorney on several high-profile matters, she is accustomed to working with a diverse constituency and performing under intense public scrutiny.

Ms. Griesing has been recognized for her professional and community leadership, having served on numerous bar association and civil projects. She has been recognized by Chambers & Partners, USA Guide to leading lawyers, 2008 and 2009, and as a Pennsylvania Super Lawyer 2004-2009. Ms. Griesing has taught at Temple University's Beasley School of Law and Fox School of Business Management; she has also been a guest lecturer at the Wharton School of the University of Pennsylvania. She is a highly-sough speaker on business and legal topics, including litigation strategy, dispute resolution, e-discovery, negotiation and presentations skills, and professional ethics.

KATHRYN GOLDSTEIN LEGGE

Kathryn Goldstein Legge is a litigation associate at Griesing Law. She has experience representing clients in commercial litigation, business counseling, and alternate dispute resolution with particular experience in the hospitality, foodservice, financial services and pharmaceutical industries.

Ms. Legge routinely counsels clients on risk management and document maintenance policies. Kate has developed hands on expertise in E-Discovery matters and liability associated with online activities. She writes and speaks to lawyer and business groups on how to mitigate expense and reduce exposure through proactive information management.

Prior to joining Griesing Law, Kate was a litigation associate at Greenberg Traurig. Prior to joining Greenberg Traurig, Kate participated in high-profile multidistrict pharmaceutical litigations.

Ms. Legge received her J.D., *magna cum laude*, from American University Washington College of Law and her A.B., *cum laude*, from Bowdoin College.

TABLE OF CONTENTS

I. SCOPE OF ARTICLE

This program will discuss five critical mistakes that lawyers make, and are even more likely to make, in the current challenging economic environment. These mistakes raise an array of professional responsibility and ethical issues that have particular implications for practitioners serving the hospitality, travel, leisure, foodservice, and franchise sectors.

A. Five Top Mistakes to Avoid

Specifically, here's how many lawyers find themselves in trouble:

(1) We practice in jurisdictions in which we are not licensed or not sufficiently expert to give advice particularly across state lines and foreign borders through online communication.

(2) We fail to protect client confidences, assure preservation of electronic data, and protect privilege in electronic communications.

(3) We neglect to manage our clients' online presence and social media activity responsibly.

(4) We change firms or employers without addressing conflicts, preserving confidences or protecting client interests.

(5) We fail to control rogue clients from crossing the ethical line for fear of jeopardizing the relationship.

B. Applicable Rules

All attorneys are subject to the professional and ethical rules of the forum in which they practice. The rules may be promulgated on the federal, state, local, alternate dispute resolution and/or individual judge level. Although those rules may vary, this program focuses on the Federal Rules of Civil Procedure, Federal Rules of Evidence and ABA Model Rules, which have broad application and are a model for many others.

C. The Objective of this Program

The purpose of this presentation is to provide guidance for attorneys serving clients or practicing in hospitality, foodservice and franchise industries so they avoid making some common, and costly ethical mistakes. In-house counsel and outside counsel, both have the ethical responsibility to advise clients and assure compliance with the obligations under the applicable rules.

II. IN PRACTICE: A CASE STUDY[1] OF PRACTICING OUTSIDE YOUR HOME JURISDICTION

A. "There's No Place Like Home"

My Corporation ("My Corp.")[2] is a mid-sized corporation, based in suburban New York, which supplies high end food products to hotels, restaurants, caterers and event venues along the east coast of the United States. It does not have an in house legal department, but relies upon a small local law firm, "New York Firm" as its principal advisor. My Corp. is doing well and has the opportunity to acquire Your Corporation ("Your Corp."), a beverage distribution business, which serves customers in the southeast. Your Corp. also has a bottling plant in Mexico, which will be sold as part of the deal. Your Corp. has an in-house lawyer in its Florida headquarters, "Florida In House," and relies upon a Mexico law firm to handle any local issues involving the plan. When New York Firm learns of this transaction, it is eager for the work, especially in the current environment where not as many deals are being done and there is not always enough work to keep the firm lawyers fully occupied. New York Firm is also reluctant to engage co-counsel in Florida for fear another firm might try to take client business away from the firm. New York Firm feels it has enough general transactional and industry experience to handle this deal without Florida support or advice on any issues relating to the plant in Mexico.

B. An Invitation for Trouble on at Least Two Fronts

There are two areas where New York counsel can readily get in trouble here. First, if the transaction occurs in Florida, New York counsel may be deemed to be practicing law without a license in Florida. Notably, Florida is not a "reciprocity" jurisdiction. That means that admission in another jurisdiction does not provide for easy admission in Florida. Second, New York Firm is likely not sufficiently knowledgeable about any unique issues of Florida or Mexico law that may impact the deal. This could result in failing to comply with local law, as to taxation or otherwise, or failing to advise the client as to all the legal implications of the deal. These problems expose the New York Firm to ethics violations and/or malpractice claims.

1. Practicing Law Without a License

Each jurisdiction has its own rules regarding licensure of lawyers and the procedures to be followed if out of state lawyers seek to practice on a limited basis within its boundaries. Often the protocol is clearer for litigation matters where counsel can seek permission from the court in question for leave to represent a client. In doing so, the out of state lawyer is expected to collaborate with a lawyer licensed within the state who bears responsibility for the matter and compliance with local rules. For transactional representations, such as at issue here, the process may be less clear. However, even if it is not spelled out, it is generally appropriate to engage local con counsel to advise on issues specific to the venue.

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[1] This study is not intended and should not be construed as legal advice as to any particular situation.

[2] All names used in this Case Study are fictional and any resemblance to any actual person or entity is unintended.

2. Failing to Give Sound Advice Due to Ignorance of Local Law

Often despite the best intentions and substantial research, counsel unfamiliar with the jurisdiction is likely to make mistakes, often costly mistakes. For example, outside lawyers may be unaware of transfer tax obligations associated with the transaction which could be avoided or minimized it the deal is structured differently. Alternatively, if tax savings are not possible, the tax burden may cause the deal to be structured differently. This ignorance of local obligations could lead to professional responsibility claims as well as ethics violations and the attendant consequences

3. Lessons Learned

Counsel handling a transaction outside its usual jurisdiction should affiliate with local counsel and have that counsel advise on compliance with local practice rules as well as the substantive law relating to the type of transaction.

III. IN PRACTICE: A CASE STUDY OF FAILING TO PROTECT CLIENT INFORMATION

A. Keeping the Lid on Confidential and Privileged Information

My Corp. has a two person human resources department with a supervisor and an assistant. The department keeps both a paper file and an electronic file for every employee. Historically, My Corp. has terminated very few employees, and none have initiated litigation against the company. The company also has a small IT department with a supervisor and three employees who oversee the company's general IT needs, maintaining servers, email systems, hardware, etc. The company does not have a formal document retention policy relating to hard copy and electronically stored information ("ESI").

My Corp. executives learn that an employee ("My Corp. Employee") is using confidential customer information to assist an identity theft ring operating nationwide and overseas. My Corp. has both a written policy and an email policy that forbids the distribution of confidential information to outsiders. As a result of discovery of the wrongdoing, My Corp. terminates My Corp. Employee without severance and reports his offenses to the authorities who begin an investigation.

My Corp. Employee files a suit against My Corp. in federal court for violation of the Americans with Disabilities Act and Wrongful Discharge alleging he was fired because he was blind in his left eye. My Corp. Employee also claims that one of his managers ("My Corp. Manager") was sending harassing emails to various subordinates. My Corp. hires New York Firm to represent it in this lawsuit even though New York Firm Partner does not routinely handle litigation matters. New York Firm Partner, unfamiliar with the process, but eager to bill time, tries to handle this without involving a litigation partner. New York Firm Partner does not promptly implement a litigation response plan or take steps to preserve documents relevant to the dispute with My Corp. Employee. In the interest of saving expense, New York Firm Partner asks My. Corp.'s HR Department to oversee identifying and gathering documents My Corp. might need to defend itself. HR, in turn, ask selected employees to review their hard copy files and computer files and print out what they think the company might need. They then scan the documents and turn over several disks to their lawyer for production. The HR

Department assures New York Firm that nothing privileged was included on the disks and expressly requests that counsel not waste time or money reviewing the contents of the disks.

B. Problems Abound from Failing to Preserve and Protect

There are multiple issues embedded in this hypothetical. Many of these were covered in prior programs.[3] Some of the most critical mistakes by counsel included: (1) failure to follow a document retention policy; (2) failure to implement a litigation response plan; (3) permitting the client to control document gathering and review; (4) failing to review documents for privilege or to take the requisite steps to avail itself of "claw back" protection. This paper will include a brief discussion of the first three items, and focus principally on the final mistake -- failure to preserve privilege.

Prior to even the faintest glimmer of litigation, My Corp. did not establish and My Corp. Employee and Harris failed to advise My Corp. that it should develop a formal Document Retention Policy. The failure to have a formal document retention policy caused the following problems: (1) when My Corp. received the complaint and accompanying document requests from My Corp. Employee, they were unable to respond in a timely manner; (2) My Corp. also discovered that some of their documents had been lost because the IT staff deleted documents two weeks after My Corp. received the Complaint; and (3) finally the company realized that it had hundreds of thousands of documents related to My Corp. Employee going back 15 years.

1. Consequences of Failing to Implement A Proper Document Retention Policy

Because My Corp. failed to implement a formal Document Retention Policy, My Corp. and its counsel may both be sanctioned for spoliation which occurs when a party knew or should have known about litigation and documents were destroyed. Once spoliation is established, potential sanctions include: (a) dismissal of the suit (for a plaintiff) or entry of a default judgment (for defendant); (b) creation of an "adverse inference" at trial (in which the fact finder is permitted to presume that the destroyed evidence would have been unfavorable to the spoliator); (c) establishment of certain facts as true for the remainder of the litigation; (d) striking of claims or defenses; (e) barring certain documents and testimony from introduction into evidence at trial; and (f) monetary sanctions, such as the award of attorney's fees.4 My Corp. will also likely incur considerable expense assembling and reviewing voluminous documents.

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[3] *See* Griesing, *Ethical Issues Facing the Hospitality Industry When Communicating Electronically*, Seventh Annual Hospitality Law Conference, 2009.

[4] *See Zublake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), 2003 WL 21087136 (S.D.N.Y. 2003), 216 F.R.D. 280 (S.D.N.Y. 2003), 220 F.R.D. 212 (S.D.N.Y. 2003), 2004 WL 1620866 (S.D.N.Y. 2004); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley, Inc.*, 2005 WL 27071 (Florida Cir. Ct., March 1, 2005); *Residential Funding Cor. v. DeGeorge*, 306 F.3d 99 (2d Cir. 2002); *GTFM, Inc. v. Wal-Mart Stores, Inc*., 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y. 2000); *Qualcomm, Inc. v. Bradcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008); *Samsung Elecs. Co. v. Rambus, Inc.*, No. 3:05cv406, 2006 US Dist Lexis 50074 (E.D. Va., July 18, 2006; *McPeak v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); *Peskoff v.* Faber, 240 F.R.D. 26 (D.D.C. 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.NJ 2006).

C. Company Did Not Implement a Litigation Response Plan

Upon service of the complaint filed by My Corp. Employee against My Corp., New York Firm gets right to work preparing their motion to dismiss. They interview witnesses and look at the incriminating documents that were the basis for My Corp. Employee' termination. They do not, however, initiate a litigation response plan, including a company-wide litigation hold, or a meet and confer discovery meeting with opposing counsel. When they begin discovery, key witnesses have not retained relevant documents. In addition, having been served with extensive requests for electronic discovery, New York counsel has no idea of the extent of documents on My Corp.'s network. They begin a piecemeal process, rather than an thoughtful, coherent one, of collecting documents.

1. Consequences of Failing to Implement a Litigation Response Plan

Because My Corp.'s counsel failed to implement a Litigation Response Plan, the following may occur: (1) spoliation of documents; (2) failure to collect responsive documents; and (3) neglecting to meet and confer with opposing counsel as require. Both My Corp. and counsel may be sanctioned for spoliation of documents. "Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." Zublake v. UBS Warburg LLC, 229 FRD 422, 434 (SDNY 2004). The responsibility lies largely with counsel to ensure that all potentially relevant documents are reviewed for production. It is no longer enough to preserve documents; litigation counsel must "proactively ensure compliance."5 It is also possible that by failing to acquire a detailed knowledge of the location and status of all potentially relevant documents, My Corp. may not collect all relevant documents. This could lead to missing potentially important evidence that could help the case, or, being held liable for spoliation of documents or the intentional withholding of responsive documents for not searching all files and ESI for relevant documents. By not meeting and conferring with opposing counsel, New York Firm lose the opportunity to limit the scope of discovery. Without the input of opposing counsel to determine appropriate scope and search terms, New York Firm risks an extremely costly discovery process and they may neglect to produce relevant documents.

D. Delegating the Document Assembly and Review to Client

My Corp. Employee's counsel has asked for all ESI including any documents stored on individual user computer hard drives, any documents saved to disk or external drive in the possession of relevant custodians, any documents saved to PDAs like Blackberries, and any documents from the relevant time frame stored in back-up or disaster recovery systems. My Corp. is obligated to produce both TIFF images of documents, as well as the accompanying metadata. Instead of insisting that an outside vendor collect the ESI, maintaining the integrity of the ESI, counsel allows My Corp. to collect the documents.

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[5] Best, Richard E., "E-Discovery: What Courts Expect of Counsel," "Judge's Prospective," *California Civil Litigation Reporter*, Vol. 28, No. 5, page 201, Continuing Education of the Bar, October 2006.

1. Consequences of Failing to Hire an Outside Vendor for ESI Collection

My Corp. and its counsel face several consequences for failing to hire an outside vendor to collect the ESI. These include (1) expenditure of employee time that could be spent on other business; (2) crashing of company servers, My Corp. loses valuable working time and its employees are losing or are unable to access documents; (3) jeopardizing integrity of the electronic documents, such as employees editing which electronic documents he wanted to produce or inadvertently altering the ESI in the system; (4) failing to produce responsive documents may lead to sanctions against both the company and its counsel.

2. Consequences of Relying on Company Employees to Collect Their Own Documents

New York Firm requests that My Corp. instruct their employees to turn over any documents related to the My Corp. Employee litigation. Another employee who had previously worked directly for My Corp. Employee is one of the individuals charged with collecting documents from his own personal files. The other employee, in fact, has a file on his computer hard drive where he collects jokes, funny forwards, and some questionably inappropriate material. The Employee, understandably, is embarrassed by the contents of this folder. Even though it contains copies of emails sent by My Corp. Employee that attached pornographic materials, the other employee does not provide the folder to counsel. Due to his embarrassment and his fear of getting in trouble, he deletes the folder from his hard drive. By not sending an attorney to collect the other employee's documents, not will never see the incriminating documents in the other employee's possession that could assist in their defense.

a) Other Employee Purposely Withholds Documents To Help The Litigation

As part of the document collection process, the HR Director pulls the personnel files of all of the individuals New York Firm requests, including My Corp. Employee. She keeps all of the personnel files electronically in folders on her computer's hard drive. Upon her review of My Corp. Employee' personnel file, she discovers that My Corp. Employee' file lacks signed copies of My Corp.'s email policy and sexual harassment policy. While the policies are in the file, there is no signature to indicate that My Corp. Employee reviewed the policies. The HR Director suspects that the lack of signatures may be a bad thing for the litigation, so she decides to delete the documents from the folder before turning over the personnel file. As a result, New York Firm is left without a full picture of the evidence and have a very difficult time contesting My Corp. Employee's argument that he never saw the email or sexual harassment policies, and therefore had no idea he was violating company policy.

E. Lessons Learned

1. Failure to Implement a Document Retention Policy

As an advisor to My Corp., New York Firm has a responsibility to educate My Corp. about best corporate practices that will save the My Corp. time, money, and grief in the event of litigation and extensive electronic discovery. The most important practice that a company can have in advance of electronic discovery is a detailed document retention policy. If you are an outside counsel, like the firm in this case study, recommend to your clients that they establish a formal Document Retention Policy. It is possible, especially in these economic times that they will decline your help in establishing a formal Document Retention Policy. You should stress the consequences of not establishing a formal policy. Courts are now increasingly punishing both clients and lawyers for failure to produce documents, and not having established Document Retention Policies.

The company should have at the very least the following:

(a) a detailed schedule for the retention and writing over of network back-up tapes; and

(b) a defined process for the retention of email.

Further, upon the termination of any employee or the break-down of a deal that may lead to litigation, for two examples, the company should automatically assume that there could be the threat of litigation. As a result, it is imperative that all electronic information related to the terminated employee or the documents from the deal be retained at least until the statute of limitations for wrongful discharge or breach of contract have run out.6 In this case, the My Corp. should have retained the employee's entire email profile including inbox, sent items, and all folders created by the employee; all documents/information saved on the C: drive of the employee's work computer; all documents/information saved in the employee's personal location on the company's network; all documents /information saved in the employee's company owned Blackberry or comparable PDA; all documents/information saved in the employee's company owned laptop or home computer; all instant messenger records within the company's control; and all land-line and company cellular telephone records for the employee's duration of employment.

2. Failure to Implement a Litigation Response Plan

The advent of electronic discovery has led to one significant change in the typical schedule of a litigation: the discovery phase now should begin when the complaint is filed. Upon engagement, litigation counsel should prepare a litigation response plan. The first step of the litigation plan is to issue a litigation hold to relevant employees of the company. Litigation counsel and the client should identify relevant employees who may have knowledge of the litigation or may have relevant documents in their possession. Second, litigation counsel should meet with client representatives, especially

[6] In PA the statute of limitations for wrongful discharge is two years and the statute of limitations for breach of contract is four years. The statute of limitations for violating the Americans with Disabilities Act is 180 days.

members of the IT department, and determine where potential responsive documents may exist. This includes both hard copy documents and electronically stored information. Finally, litigation counsel should develop an understanding of the general document retention practices of different areas of the company. The litigation hold should state the following:

(a) no hard copy documents may be destroyed

(b) no electronic mail may be permanently deleted

(c) all destruction of back-up tapes and other stored electronic data must stop

From the issuance of the litigation hold, all materials as they exist on that day must be maintained until the end of the litigation. The reason for this retention is that if documents are deleted, opposing counsel can reasonably make arguments for spoliation "if the documents were destroyed when the company anticipated, or reasonably should have anticipated, litigation." (Samsung Elecs. Co. v. Rambus, Inc., No. 3:05cv406, 2006 US Dist Lexis 50074 (E.D. Va., July 18, 2006)). All documents in existence at the time of the litigation should be considered potentially relevant. By treating them as such, litigation counsel will preserve the available record and have a complete and accurate universe of documents from which they can begin their review for production.

It is of the utmost importance for litigation counsel for both the plaintiffs and defendants to meet and confer to discuss how discovery will unfold in the litigation. FRCP 26(f) provides guidance for the parties to have an initial discovery conference at the beginning of the litigation, directing them to discuss issues regarding electronic data, including preservation, form of production of documents, and privilege. In this conference (and perhaps subsequent ones) it is also very helpful to create a mutually agreed-upon list of search terms and custodians that both parties will use to search the preserved electronically stored information. By agreeing upon search terms in advance of document searching, the parties will have a defined plan to which each must adhere. They have only to adhere to that plan to ensure that their document collection process has been complete. It is also strongly recommended that the parties prepare a joint stipulation outlining the agreed-upon search terms and the requirements of both parties in order to have a formal document binding each side to the discovery plan they have created. Filing with the Court will only make the discovery plan official, thereby binding the parties to a fair and equitable discovery process. In this conference, counsel should also specify in what format they would like to receive documents. Typically documents are produced in single-page image files like PDFs or TIFs accompanied by a file showing where the document breaks exist. Production of the document images is the barest response to document requests. If opposing counsel requests, you must also produce various forms of metadata, the native files of the images, and a special load file so that opposing counsel's vendor can upload the document production into their document review software. By enacting a thorough litigation hold with the client and upholding the terms of the agreed-upon discovery plan with opposing counsel, litigation counsel can avoid proceeding down a road that could lead to the selective and arbitrary searching for documents.

3. Allowing Client to Control Document Assembly

To collect ESI, it is critical that outside counsel engage an electronic discovery vendor whose business it is to extract data from the client, use sophisticated searching tools to narrow down potentially responsive documents, and compile the results of the searching in a litigation software database that will ease the reviewing process. The benefits of using a vendor significantly outweigh the costs.

The final benefit of using an electronic discovery vendor for your discovery process is that the vendor can run productions in whatever format you wish, prepare production disks, and provide them to you for review and ultimate production to the other side. The vendor removes much of the hands-on administrative aspects of a document production and maintains the documents in a much more usable format.

One note regarding in-house IT staff. At the beginning of the discovery process, it may seem like it would be more cost effective than hiring a vendor. It is true that it would save money to use in-house resources, however, there are significant drawbacks to relying on client representatives to conduct your searches including: (i) the IT staff is still part of the client company and they can still show bias, leading to withholding of critical evidence; (ii) running search terms on electronic systems can be a very time-consuming process; and (iii) in-house tech people may not have sophisticated enough searching capabilities or strong enough servers to handle the extensive searching required by the new discovery rules.

E-discovery vendors are also critical for collecting documents from individual computers. By retrieving documents from all electronic systems consistently, the vendor will be able to ensure that all potentially relevant data has been evaluated. By relying on professionals the company can better ensure compliance with discovery rules and assembly of the documents from which the company can construct its defenses.

4. Allowing Client to Control Privilege Review

When entering into litigation, parties tend to rely strongly on the protections that the attorney-client privilege provide to them. This is a particularly slippery slope when it comes to in-house corporate counsel, and even at times with outside corporate counsel, especially if they function in a business role within the company or are part of making business decisions. In companies where the general counsel is also an executive with the company or provided business advice, which is commonplace, his or her actions and communications are not automatically considered privileged. First, stated simply, attorney client privilege protects from compelled disclosure confidential communication between client and counsel for the purpose of obtaining legal advice as long as such advice is not sought in furtherance of a crime or fraud, provided the privilege is not waived. All of those elements must be present for privilege to apply. These issues arise in a dispute when a party seeks to withhold from discovery information that the withholding party considers to be privileged and thus exempt from production. Generally, the issue crystallizes when the party seeking production challenges the other side's invocation of privilege. The burden of establishing that privilege exists rests with the party invoking its protection, but the burden shifts to the party seeking to overcome the privilege to show that the criteria are not really met or that a waiver has occurred.

IV. IN PRACTICE: A CASE STUDY OF ONLINE IRRESPONSIBILITY

A. Conducting an Ethical Online Presence

The proliferation of online social networks and the ubiquity of websites, blogs and electronic communication has changed the business world dramatically. Imagine that My Corp. hires a recent hospitality school graduate ("New Grad") to work in its marketing department. New Grad and My Corp. sign a two year contract. Like many in her generation, New Grad uses Facebook™ and Twitter™ to keep in touch with her friends and family. While working at My Corp., New Grad routinely logs onto Facebook to keep in touch with others in her network and uses her Twitter account to share updates on her day. New Grad announces her position on Facebook and begins to share her experience. She openly complains about work colleagues and criticizes company policy. Her personal life is not going well and she is unhappy that one of her "friends" is dating her former boyfriend. In a moment of frustration, she posts some untrue rumors about this so-called "friend" accusing her of unethical behavior. The "friend" is alerted to this posting by others and files a defamation claim against New Grad and My Corp. When My Corp. terminates New Grad, she in turn files a wrongful discharge claim against them. She contends My Corp. did not have any policy that limited her use of Company computers to access online media. She also contends My Corp. had no right to limit what she posts on "her page."

Assume, instead that New Grad was a relatively inexperienced lawyer hired to work in the in house legal department of My Corp. Would that person have additional obligations or constraints?

B. Too Many Ways to Get in Trouble

It is counsel's responsibility to advise My Corp. of the risks of online presence by employees and the benefits of promulgating and enforcing consistently a written online policy. When an employee uses company access to post defamatory content, the company may find itself at risk of liability. Similarly, absent a clear policy and consistent adherence or express provisions in the employment agreement, the company may find it more difficult to terminate the employee. Easy access to online media exposes employers to risk that confidential information may be disclosed or that employees may vent about company issues.

To avoid these problems or reduce the risk of liability, My Corp's counsel should prepare a comprehensive policy regarding online activity using company access and such policy should be in writing, provided to employees at the outset and signed by all expected to abide by it. In addition, employees should be expected to sign and agree to policies keeping confidential company information to themselves. To avoid exposure from employee claims for wrongful discharge, the policy should be enforced in a consistent way.

If the offender is an attorney there are additional concerns. Counsel is charged with promulgating and enforcing the policy. In addition, counsel had a professional ethical duty to maintain client confidences. Communicating about the company on public sites exposes the company to potential privilege waivers, as well as undermining the integrity of the policy generally.

One key issues that can be raised inadvertently is identifying clients or customers by inviting them to join your social network. This could lead outsiders to learn confidential information about your company's business partners.

C. Lessons Learned

Counsel has responsibility to advise the client of the risks associated with online access and the issues to be covered in a formal online policy. Counsel has additional duty to keep client information and identity confidential.

V. IN PRACTICE: A CASE STUDY OF MOVING ON TO A NEW PROFESSIONAL HOME

A. Moving on Without Exposing Yourself

Ten years ago, Attorney Ollie Wise joined New Advantage, a small hotel development whose two owners, the Advantage Brothers, wanted to grow the business. At the time, he assumed dual roles, namely to serve as a business development advisor and as in house legal advisor. He agreed to sign an employment agreement which offered incentive based compensation and an opportunity to earn a stake in the business. The agreement also specified that he would not divulge any confidential information obtained in his new capacity and that, if he left the company, he would not work for a competitor for two years after his departure. Over the past few years, Wise has gained increasing responsibility and now oversees two other lawyers and three business development staff.

The Advantage Brothers have worked with Wise to grow the business and are currently negotiating to acquire a group of five hotels. Unbeknownst to Advantage, another development company, Rainbow Travel, is competing with New Advantage to acquire the same package of properties. Wise is actively involved in evaluating the financial terms and advising on legal issues as to the structure of the deal. While the deal is underway, but before the terms are finalized, Wise is called by a headhunter soliciting his interest in moving to another bigger company with more assets. Wise is intrigued by the opportunity and agrees to go for an initial interview. It turns out the other company is Rainbow and during the interview it becomes apparent to Wise that the two companies are competing for this acquisition and that Rainbow has more resources to improve the properties after acquisition. Wise accepts the position and joins Rainbow as its General Counsel while both companies are still competing for the hotels. He does not disclose the rivalry to New Advantage. He then negotiates for Rainbow which ultimately acquires the hotel properties, leaving New Advantage feeling cheated and betrayed.

B. Avoiding Conflicts, Maintaining Confidences and Not Breaching Restrictive Covenants

The likelihood that a lawyer will change jobs during his career is fairly high. Generally, lawyers acting solely as such in private practice are not subject to restrictive covenants. However, they are bound by duties of protecting client interests, not acting in conflict situations without permissible waivers, and protecting confidential information. Here, a court may well enforce the restrictive covenant given his multiple roles and the company setting, But, even if the restrictive covenant is not enforceable, Wise still has clear obligations and has done a number of things wrong. Wise had a responsibility to maintain New Advantage's confidential information and not to use it against them. For

example, ABA Model Rules of Professional Conduct, specifically, Rule 1.6 governing the Client-lawyer Relationship and Confidentiality of Information, provides, in pertinent part:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (The provisions of subsection b do not apply here and are discussed below.)

Wise continues to have obligations in this regard even if New Advantage is no longer his client. This situation is addressed by Rule 1.9:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Even if he did not use information he learned from New Advantage to benefit his new employer (which would be difficult to imagine in this situation), his jumping ship midstream and the result that flowed from it would jeopardize New Advantage's position. If he wanted to make this move and assuming that it was not a violation of his non-compete to do so, at a minimum, he should have created a Chinese wall and kept himself out of the negotiations for Rainbow in this transaction. Ideally, he should have disclosed the situation to both sides and sought informed consent. It is unlikely that New Advantage would have been inclined to waive any conflict here and it is questionable whether a waiver would have been appropriate. A waiver is generally not appropriate unless it can be done so as not to materially prejudice the former client.

Alternatively, if Wise met with rainbow and then elected to say in his existing position, he would still have obligations under the Model Rules. Rule 1.18 relates to Duties to Prospective Client and provides as follows:

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (i) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (ii) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;
>
> (iii) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client.

Once Wise learned that Rainbow was competing with new Advantage, he was in a bind. He may have been obligated to Rainbow not to inform New Advantage, but the knowledge would clearly impact his ongoing representation of New Advantage in the negotiations.

C. Lessons Learned

A lawyer considering making a professional move needs to consider whether doing so will impact any existing clients and prospective clients. The lawyer needs to assess potential conflicts upfront and obtain waivers where appropriate. In addition, the lawyer has a continuing obligation to maintain client confidences even after the representation ends.

VI. IN PRACTICE: A CASE STUDY OF RESTRAINING THE ROGUE CLIENT

A. Counsel's Responsibility for Client Conduct/Misconduct

Assume that Attorney Wise does not leave his position at New Advantage or even consider doing so. Instead, assume that he is working on a transaction whereby New Advantage is seeking to joint venture with the existing property owners to remodel and upgrade the hotels. As part of the deal, New Advantage is committing to infuse a substantial amount of resources into the improvement project. Wise learns that his client is materially misrepresenting its ability to proceed with the venture, hoping that once it gets started, other funding will come through. Further, he feels his company is overstating its experience with this type of project. He raises these concerns with the rest of the executive team, but they think he is being "too cautious" and tell him that their "puffing is no big deal." They suggest that if he is not up to playing with "the big guns" maybe he would be happier elsewhere. Wise does not want to have to find another job in the tough market, so he is torn.

B. Duties to the Client vs. Duties to Others

Wise has a duty to maintain client confidences and to represent his client zealously. However, that does not mean there are no bounds. A lawyers' duty to assure his client does the right thing varies depending on the circumstances and which state and federal laws are implicated. For example, an analysis of these issues under Sarbanes-Oxley is beyond the purview of this program.

However, focusing on the ABA Model Rules of Professional Conduct, specifically, Rule 1.6 governing the Client-lawyer Relationship and Confidentiality of Information, Wise has *may* take steps to prevent this financial fraud.

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(i) to prevent reasonably certain death or substantial bodily harm;

(ii) 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;

(iii) 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;

(iv) to secure legal advice about the lawyer's compliance with these Rules;

(v) 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

(vi) to comply with other law or a court order.

The language of this rule appears to leave to the attorney's discretion whether to reveal the fraud. It does not mandate that the lawyer do so. Failure to do so could cause Wise to be liable for civil and criminal consequences. Another option is for him to resign. By continuing to represent the client he is allowing the fraud to proceed.

C. Lessons Learned

Sometimes counsel may be faced with difficult ethical choices. If consultation with the rules does not provide guidance, bar associations and the disciplinary boards in manner jurisdictions will provide advisory opinions on ethical questions. In some situations, counsel may need to seek independent counsel for advise on how to proceed.

VII. CONCLUSION

This is not intended to be an exhaustive treatment of professional mistakes or ethical issues associated with these highlighted mistakes. It is intended to sensitive hospitality practitioners to issues for consideration and to encourage further exploration under the applicable rules for the jurisdictions in which you practice. Given the greater economic pressures counsel and clients have faced over recent years, there is a temptation to cut corners or avoid thorny issues. It is even more important than ever during tough times to attend to practicing on the high road.