

GRAY'S INN
FLORIDA SIXTH DISTRICT COURT OF
APPEAL

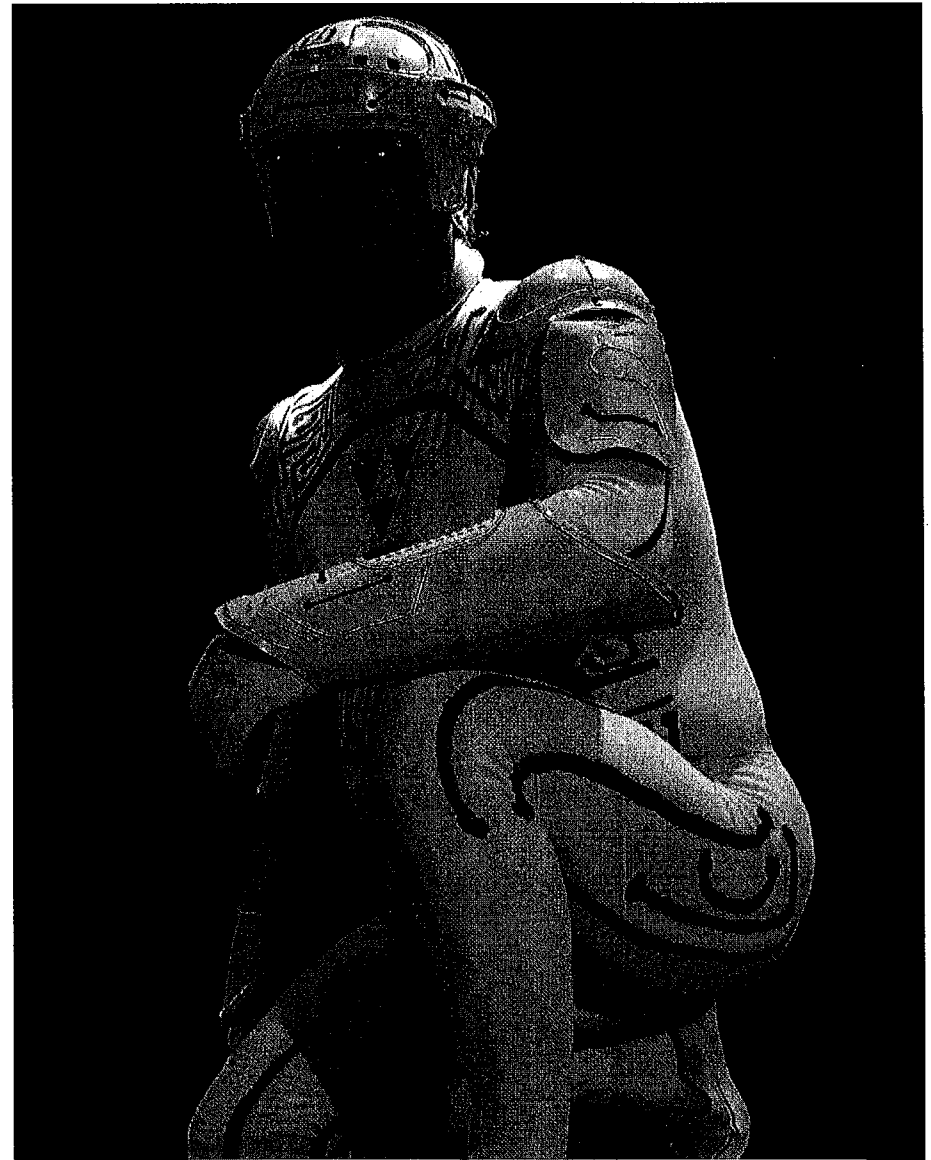
TUESDAY, JANUARY 18, 2011

APPELLATE PANEL DISCUSSIONS
REGARDING LEGAL ETHICS AND
PROFESSIONAL WHEN USING
TECHNOLOGY

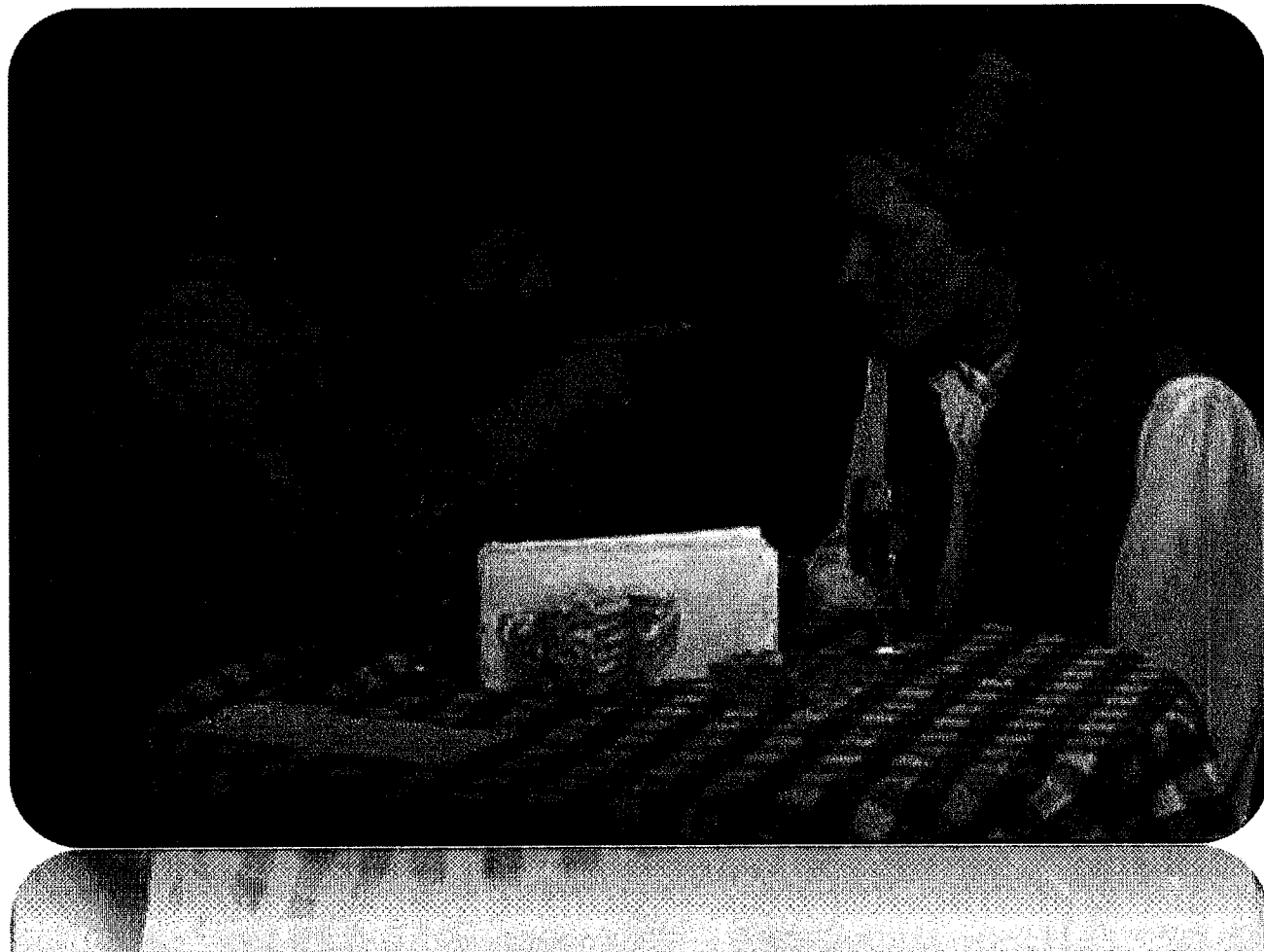
Ethics

&

Technology



KRAMER v. KRAMER
CASE NO. 6D10-7231



Question No. 1

Was the e-mail from the husband's attorney to his client directing that he disregard the spoliation letter and destroy his hard drive "now or never" properly admitted over the husband's claim of privilege?

Answer

- Yes, pursuant to the crime/fraud exception. § 90.502(4)(a), Fla. Stat.
- See Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010) and BNP Paribas v. Wynne, 967 So.2d 1065 (Fla. 4th DCA 2007) (regarding the need for a hearing to determine whether the exception exists).
- Additionally, this attorney has breached Rules 4-3.4(a); 4-3.4(c) and 4-1.2(d) of the Rules Regulating the Florida Bar, Rules of Professional Conduct.
- The 6th DCA may consider *sua sponte* the referral of the attorney to the Florida Bar.

Question No. 2

Was the court correct in drawing an adverse inference that the destroyed e-mails were *as damaging* as the recovered e-mails?

Answer

Yes.

See Golden Yachts, Inc. v. Hall, 920 So.2d 777, 780-781 (Fla. 4th DCA 2006).

Question No. 3

The wife discovered the e-mails because her husband left them open on the computer screen.

Were these e-mails to the husband's psychologist properly admitted over the husband's claim of privilege?

Answer

Yes.

When the husband left his *confidential* e-mails open on the screen of a computer used by people other than himself, he ceased to treat these e-mails as confidential. Therefore the trial court could have properly concluded that the husband waived any privilege.

See § 90.507, Fla. Stat. (2009); Delap v. State, 440 So.2d 1242, 1247 (Fla.1983) (“[W]hen a party ... ceases to treat the matter as confidential, it loses its confidential character.”). [Minakan v. Husted, 27 So.3d 695, 699 (Fla. 4th DCA 2010)]

Question No. 4

What is the difference between silent and audio videotape recordings with regard to whether or not they are deemed *illegal interceptions*?

Answer

If the videotape recording is SILENT, then the recording is NOT deemed an illegal interception.

Minotty v. Baudo, 42 So.3d 824, 832 (Fla. 4th DCA 2010).

In this scenario, the video recording of the husband's violence toward the poor, defenseless computer would not violate §§ 934.02(3) and 934.02(7), Fla. Stat.

Question No. 5

Is there a difference in the admissibility of e-mails captured from images on a hard drive versus e-mails captured by contemporaneous keystrokes?

Answer

Yes, there is a difference.

E-mails captured from images on a hard drive may be admissible, while e-mails captured by contemporaneous keystrokes are deemed illegal interceptions. O'Brien v. O'Brien, 899 So. 2d 1133 (Fla. 5th DCA 2005).

PRESLEY v. STATE
CASE NO. 6D10-7342



Issue 1

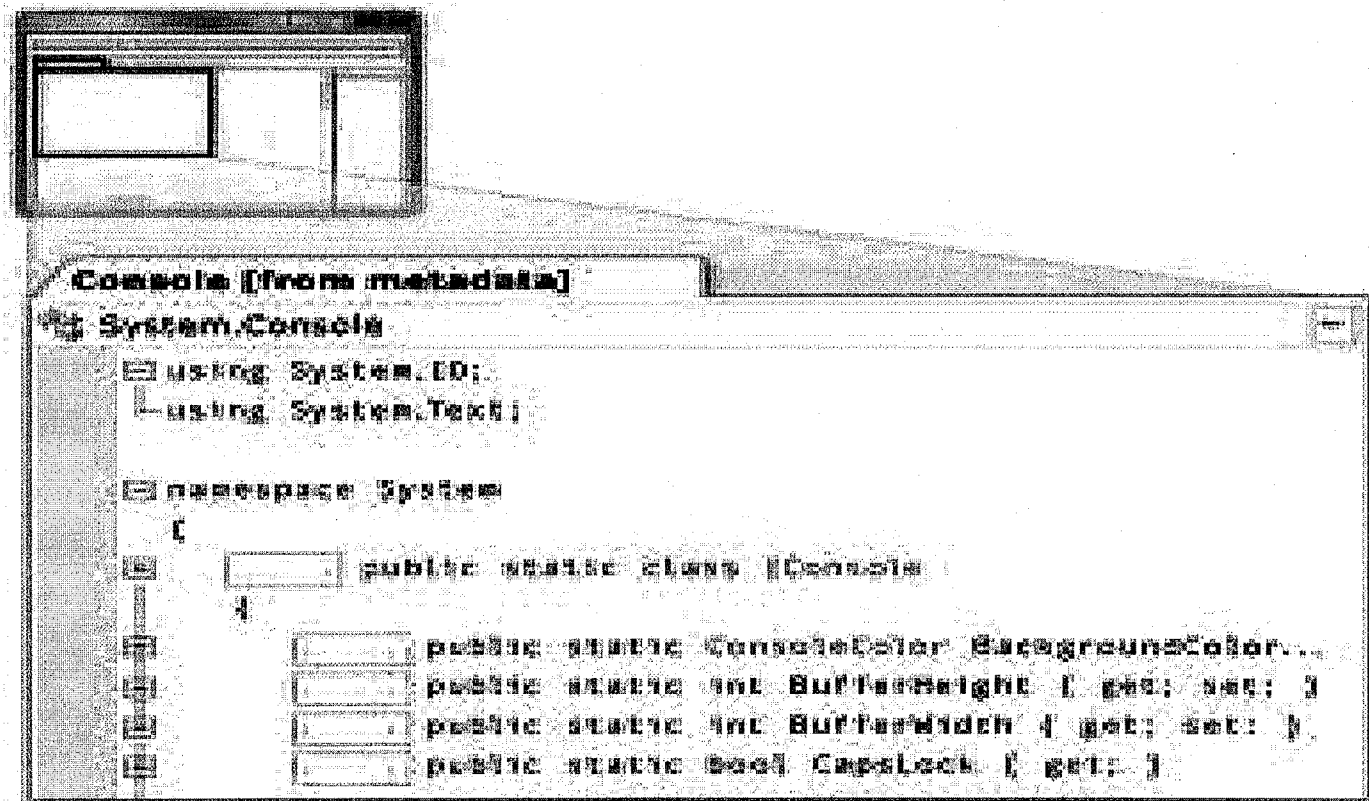
May a prosecutor revoke a plea offer based on metadata information inadvertently disclosed by defense counsel?

Issue 2

Whether the trial court erred in allowing metadata, inadvertently disclosed, into trial as substantive evidence against the defendant?

Definition of Metadata

Metadata is data that provides information about other data.



LETTER OF APOLOGY

Dear Miss Whiner,

I write to express my sincere regret for robbing you. If I could go back in time, I would have done things differently. I never should have robbed you. I am truly sorry for the way things went down and I wish I could change it.

Sincerely yours,

LETTER OF APOLOGY

Formatted: Font: 28 pt

Dear Miss Whiner,

I write to express my sincere regret for robbing you. If I could go back in time, I would have done things differently. I never should have robbed you. I am truly sorry for the way things went down and I wish I could change it.

Deleted: getting caught

Deleted: I would have worn a better mask, used a bigger gun and taken your ID to make sure I could find you later.

Deleted: been caught, and I never should have given you the chance to tell the police that I

Sincerely yours,

Deleted: getting caught

Deleted: I would have worn a better mask, used a bigger gun and taken your ID to make sure I could find you later.

Deleted: been caught, and I never should have given you the chance to tell the police that I

LETTER OF APOLOGY

Dear Miss Whiner,

I write to express my sincere regret for getting caught robbing you. If I could go back in time, I would have done things differently. I would have worn a better mask, used a bigger gun and taken your ID to make sure I could find you later. I never should have been caught, and I never should have given you the chance to tell the police that I robbed you. I am truly sorry for the way things went down and I wish I could change it.

Sincerely yours,

Let the deliberation begin. . .



Question No. 1

**CAN AN ADVERSE PARTY USE
AN ATTORNEY-CLIENT
COMMUNICATION THAT WAS
INADVERTENTLY DISCLOSED
BY THE LAWYER?**

Answer

- **It depends upon the “relevant circumstances” of the inadvertent disclosure.**
- **The attorney-client privilege belongs to the client. To determine whether the inadvertent disclosure waives the attorney-client privilege, Courts consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) and delay and measures taken to rectify the disclosures, and (5) whether the overriding interest of justice would be served to relieve the party of its error. *Nova Southeastern University, Inc. v. Jacobson*, 25 So.3d 82 (Fla. 4th DCA 2009)**
- ***Horning-Keating v. State*, 777 So.2d 438, 447-48 (Fla. 5th DCA 2001)(prohibiting the derivative use of information obtained by the prosecutor in violation of Fla.’s Security of Communications Act to formulate discovery deposition questions).**
- **And . . .**

- **Effective January 11, 2011 Rule 1.285
INADVERTENT DISCLOSURE OF PRIVILEGED
MATERIALS addresses the rights, duties, and
procedure of all parties concerning
inadvertent disclosure in civil proceedings.**

Question No. 2

**WHAT IS LEGALLY WITHIN A
PROSECUTOR'S DISCRETION?
MAY A PROSECUTOR REVOKE A
PLEA OFFER WITHOUT ANY
JUSTIFICATION?**

Answer

- **ASBOLUTE DISCRETION**

- Because a prosecutor is vested with the long-standing responsibility to enforce the criminal laws of the state, the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice. *State v. Bauman*, 425 So.2d 32, 34 (Fla. 4th DCA 1982), *citing State v. Cain*, 381 So.2d 1361, 1367 (Fla. 1980)

- **NO JUSTIFICATION NEEDED TO REVOKE PLEA OFFER**

- “No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.” FLA. R. CRIM. P. 3.172(G)

Question No. 3

**IS PROSECUTORIAL DISCRETION
UNLIMITED?**

**ARE THERE ANY LIMITS TO WHAT
A PROSECUTOR CAN DO?**

Answer

- **YES, there are limits.**
- In addition to the ethical prohibitions set forth in Rule Regulating the Florida Bar, 4-8.4 (Misconduct), Rule 4-3.8 (Special Responsibilities of a Prosecutor) requires a prosecutor to refrain from prosecuting a charge the prosecutor knows is not supported by probable cause, not seek a waiver of important pre-trial rights from an unrepresented accused, and to make timely disclosure of evidence or information that tends to negate guilt of the accused or mitigates the offense.
- Prosecutors have an absolute immunity from lawsuits for damages resulting from their quasi-judicial functions and initiating/maintaining of a prosecution, but prosecutorial acts outside these functions may not enjoy absolute immunity. *Swope v. Krischer*, 783 So.2d 1164, 1168 (Fla. 4th DCA 2001)

Question No. 4

**WHAT IS THE PROSECUTOR'S
ETHICAL OBLIGATION UPON
RECEIVING THE INADVERTENT
DISCLOSURE OF THE
METADATA?**

Answer

“An attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney’s receipt of the documents.”

See *Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc.*, 724 So.2d 572 (Fla. 3d DCA 1998) quoting *Fla. Bar. Op. 93-3*. See also, *Fla. Bar Op. 06-2* and 4-4.4(b), *Rules Reg. Fla. Bar* for a discussion of an attorney’s ethical obligations upon receiving inadvertently disclosed information.

Question No. 5

**WAS IT PROPER FOR THE
PROSECUTOR TO REVOKE THE
OFFER BASED ON THE
INADVERTENTLY DISCLOSED
METADATA?**

Answer

Yes.

A prosecutor does not need any justification to revoke a plea offer prior to it being accepted by the trial judge. A prosecutor can revoke the plea offer based upon any information at his disposal whether it is inadmissible evidence or inadvertently disclosed communications that still remain privileged.

Fla. Crim. R. P. 3.172; *State v. Bauman*, 425 So.2d 32, 34 (Fla. 4th DCA 1982), *citing State v. Cain*, 381 So.2d 1361, 1367 (Fla. 1980)

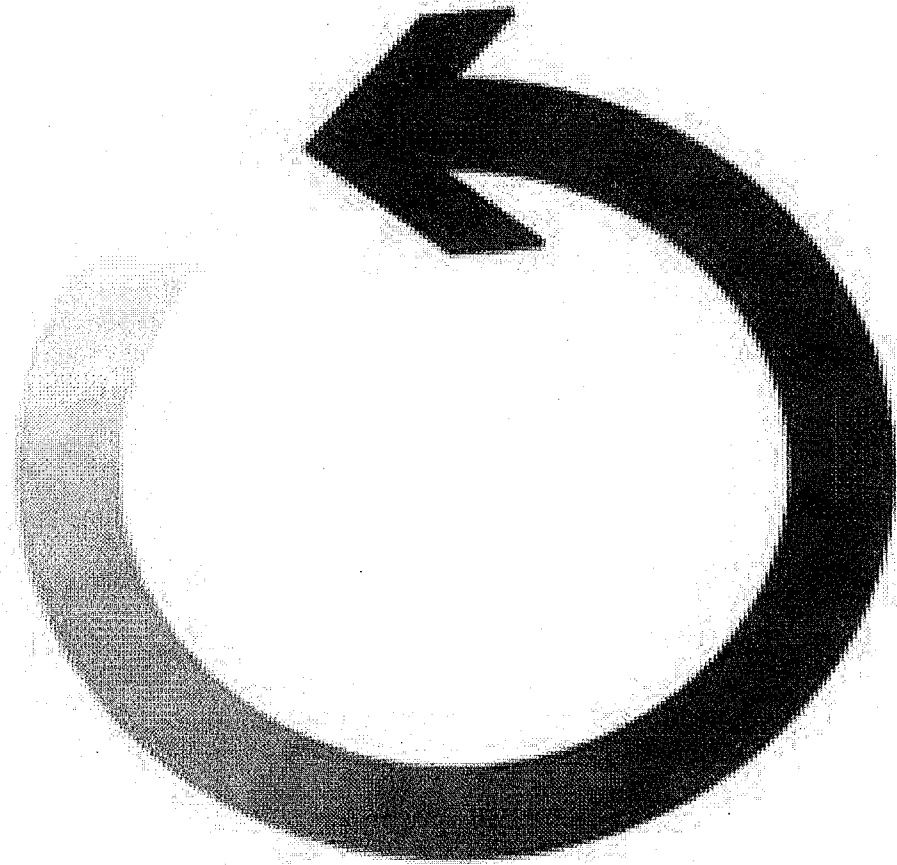
Question No. 6

**IF THE INADVERTENT DISCLOSURE
OCCURRED DURING A
PRIVILEGED SETTLEMENT
DISCUSSION DOES THE PUBLIC
SAFETY CONCERN ETHICALLY
JUSTIFY THE REVOCATION OF
THE OFFER?**

Answer

There is no wrong answer.

- The discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice. A prosecutor is ethically obligated to protect public safety by enforcing criminal laws but the prosecutor is also ethically obligated to comply with the Rules of Professional Conduct.
- A prosecutor has the discretion to revoke an offer at any time prior to a judge signing off on the offer. If a prosecutor learns through an inadvertent disclosure during settlement communications about facts that would otherwise cause the prosecutor to revoke the offer the prosecutor, in his or her discretion, can revoke or not revoke the offer. However, the prosecutor still has an ethical obligation to inform opposing counsel of the inadvertent disclosure and act accordingly.
- *State v. Bauman*, 425 So.2d 32, 34 (Fla. 4th DCA 1982), *citing State v. Cain*, 381 So.2d 1361, 1367 (Fla. 1980); Rule 3.172; See *Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc.*, 724 So.2d 572 (Fla. 3d DCA 1998) *quoting Fla. Bar. Op. 93-3*. See also, *Fla. Bar Op. 06-2* and *4-4.4(b), Rules Reg Fla. Bar* for a discussion of an attorney's ethical obligations upon receiving inadvertently disclosed information.



Full Circle

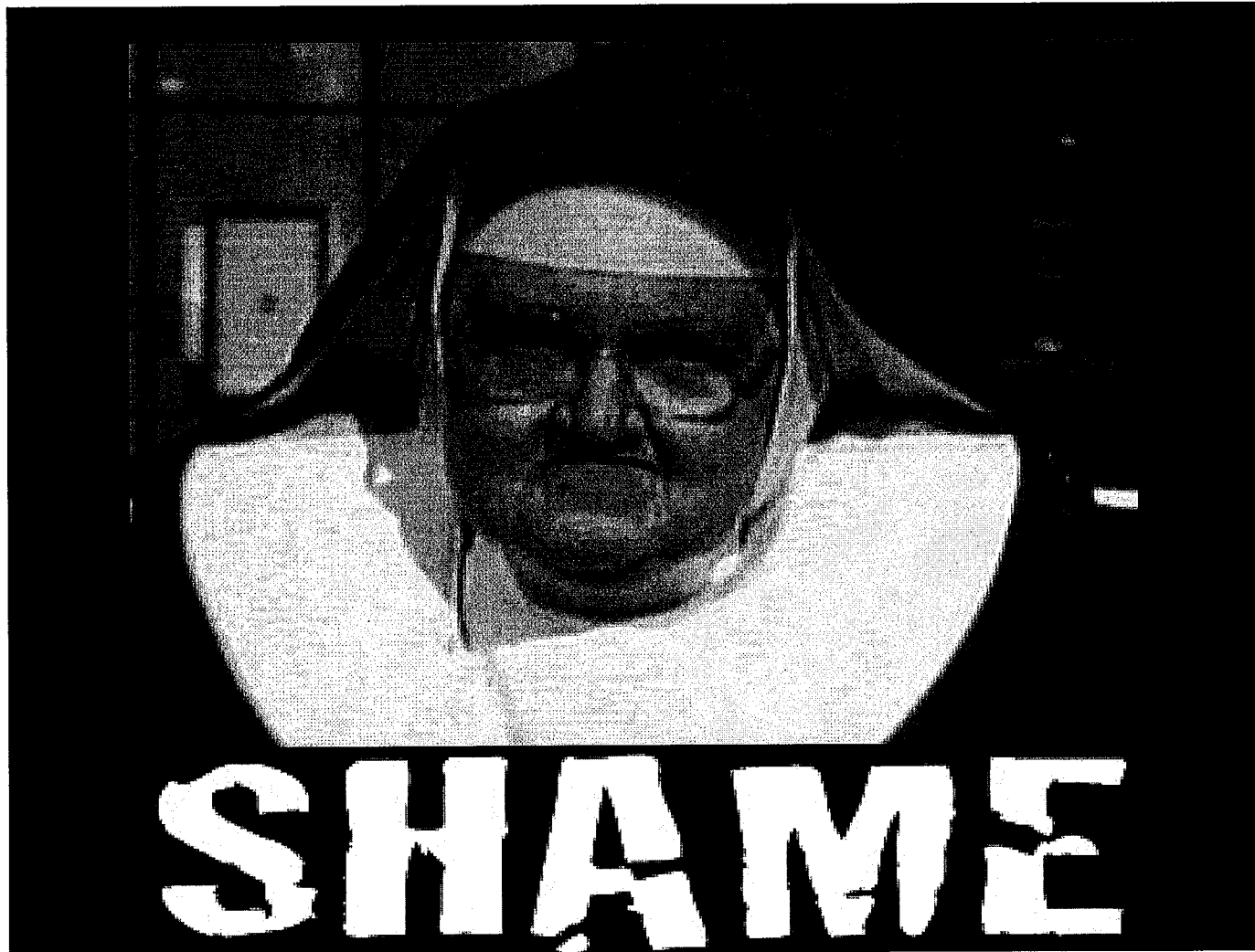
Issue 1

May a prosecutor revoke a plea offer based on metadata information inadvertently disclosed by defense counsel?

Issue 2

Whether the trial court erred in allowing metadata, inadvertently disclosed, into trial as substantive evidence against the defendant?

Attorney Grievance/Judicial Conduct Proceeding



Social Media - LinkedIn

Relationships Matter | LinkedIn - Windows Internet Explorer

http://www.linkedin.com/home?trk=hb_home

File Edit View Favorites Tools Help




Convert Select

Favorites Date Difference - Calculate ... Suggested Sites Free Hotmail Web Slice Gallery

Relationships Matter | LinkedIn

Home What is LinkedIn? Join Today Sign In

Over 85 million professionals use LinkedIn to exchange information, ideas and opportunities

-  Stay informed about your contacts and industry
-  Find the people & knowledge you need to achieve your goals
-  Control your professional identity online

Join LinkedIn Today

First Name:

Last Name:

Email:

Password:

6 or more characters

Join Now *

Already on LinkedIn? Sign in.

Search for someone by name: First Name Last Name

LinkedIn member directory: a b c d e f g h i j k l m n o p q r s t u v w x y z more | Browse members by country

* By clicking Join Now or using LinkedIn, you are indicating that you have read, understood, and agree to LinkedIn's User Agreement and Privacy Policy.

Internet 100%

Social Media - Facebook

Chief Justice John G. Roberts - Windows Internet Explorer

http://www.facebook.com/home.php#!/profile.php?id=270838&v=wall

File Edit View Favorites Tools Help

Convert Select

Favorites Date Difference - Calculate ... Suggested Sites Free Hotmail Web Slice Gallery


Chief Justice John G. Roberts


facebook Search Home Profile Account

Chief Justice John G. Roberts [+1 Add as Friend](#)

Wall Info Photos


Filters

 **Ari Cole** MERRY CHRISTMAS CHIEF JUSTICE ROBERTS, Dr. Cole (R-PA) December 24, 2010 at 9:14pm

 **Michael Pilecki** In this note: Chief Justice John G. Roberts


How "Accessible" Are We Making Society?
We need to share the vision of a world where all forms of disability can be avoided, healed or intergrated; and in which the rights of people with disabilities are respected and applied here and everywhere!!...

August 3, 2010 at 2:35pm · View note

 **Ari Cole**

Ken Robinson says schools kill creativity | Video on TED.com
www.ted.com
TED Talks Sir Ken Robinson makes an entertaining and profoundly moving case for creating an education system that nurtures (rather than undermines) creativity.

July 12, 2010 at 9:05pm · Share

 **Ari Cole** A silly video sent to me by a Harvard brother...Goofy but maybe too...


Ari

Information

Networks:
Harvard Alum

Relationship Status:
Married


Mutual Friends
1 friend in common See All


Daniel Glassman


Friends

Create an Ad

Palm Beach Bucket List x
partners.livingsocial.com


Things to do in Palm Beach before you die. One huge coupon emailed daily.

Teach Kids with Autism x
degreeamerica.com


Earn a Masters Degree in Special Education. 100% Online!

[Chat \(9\)](#)

Internet 100%

Social Media - Twitter

Twitter - Windows Internet Explorer

http://twitter.com/

File Edit View Favorites Tools Help

Convert Select

Favorites Date Difference - Calculate ... Suggested Sites Free Hotmail Web Slice Gallery

Twitter

Have an account? Sign In

twitter

The best way to discover what's new in your world.

SEARCH

HOME DIAG Style Pamela Vasquez, LLC TRENDING TOPICS Jer Jer Binks Maria Elena Walsh

See who's here

Friends and industry peers you know. Celebrities you watch. Businesses you frequent. Find them all on Twitter.

Top Tweets [View all >](#)

patrickmadrid "The problem with Internet quotations is that many of them are not genuine." — Abraham Lincoln
about 1 hour ago

MiamiHEAT Congrats to @KingJames on being named @NBA Eastern Conf. Player of the Week. LeBron avg 33.3ppg, 9.5rpg & 6.3apg last week.
about 1 hour ago

TheEllenShow I met @NickiMinaj today and a few of her alter egos. She's an amazing performer with an inspiring story.
<http://ellen.tv/gQQIOh>
about 1 hour ago

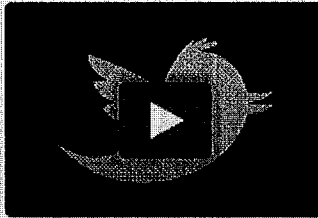
New to Twitter?

Easy, free, and instant updates. Get access to the information that interests you most.

[Sign Up >](#)

A #NewTwitter

Catch a glimpse of the new Twitter.com.



**IN RE: VINNY BOOMBATZ
CASE NO. 6D10-8564**



facebook

Search



Suggest to Friends

this is not the real snooki its just a fan page people

426,835 People Like This



Miriam El Mahdi



Jason Rivera



Eric Dawicki

Photos

1 of 2 albums

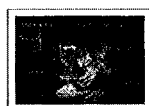
See All



Snookie Created on December 6, 2009 at 8:17pm

4 of 254 photos by others

See All



Snookie

Like

Wall Info Photos Discussions Reviews

Snookie + Others Just Snookie Just Others



Snookie Sal DeLeonardi is not a "TRUE" Italian! He is barely Italian at all. JERSEY SHORE RULES!

1,975 people like this.

View all 585 comments



Snookie gunna b on jay lenno soon!!

March 1, 2010 at 12:06am

761 people like this.

View all 434 comments



Snookie who heard me on the radio today

February 23, 2010 at 5:50pm

593 people like this.

View all 393 comments



Snookie wooo 100000 fans yay

February 10, 2010 at 6:57pm

525 people like this.

View all 218 comments



Snookie 200 more to 100000

February 9, 2010 at 7:12pm

115 people like this.

View all 46 comments

Create an Ad

DON OMAR LIVE PERFORMANCE @...



Karu Fort Lauderdale

RSVP to this event

Palm Beach Bucket List

partners.livingsodal.com



Things to do in Palm Beach before you die. One huge coupon emailed daily.

Fun and Function



Toys, games and therapy products with playful features, cool styling and...

Chat (11)



Suggest to Friends

Snookie



Wall

Info

Photos

Discussions

Reviews


Snookie + Others


Just Snookie

Just Others



Snookie Sal DeLeonardi is not a "TRUE" Italian! He is barely Italian at all. JERSEY SHORE RULES!

 1,975 people like this.

 View all 585 comments

Question No. 1

Do the rules of professional conduct dealing with competency and diligence apply to “social media?”

Answer

- **PROBABLY, BUT THERE IS NO CLEAR ANSWER UNDER THE RULES.**
- The issues in the lawsuit may control the attorney's obligations.
- For instance, the American Academy of Matrimonial Lawyers reports that 66% of family lawyers use Facebook as their primary source for online evidence. Obviously, when a lawsuit deals with the personal lives of one or more of the parties, it may be necessary to research social media sites.
- Rule 1.1 of the ABA Model Rules requires lawyers to be competent in their representation of clients. In addition, Model Rule 4-1.3 requires an attorney to "act . . . with zeal in advocacy upon the client's behalf."
- While there are no cases or ethics opinions in Florida that presently consider this issue, Rule Regulating the Florida Bar 4-1.1 would appear to require any attorney to research various social media sites to glean as much evidence as is necessary.

Question No. 2

Do ethical duties require an attorney to be adept in social media?

Answer

- **PROBABLY, BUT AGAIN, THERE IS NO LAW DIRECTLY ON POINT.**
- There are presently no cases or ethics opinions in Florida that address this issue. However, as the methods of social media continue to grow, there is very little doubt that it will become the duty of an attorney to utilize such media.
- We think the attorney would be held accountable in this situation.

Question No. 3

Does “social media” qualify as evidence?

What do you do if a client has unsavory images or content on their Facebook, LinkedIn, or Twitter page that may adversely impact their case?

Can a lawyer advise their client to take that material down?

Answer

- **Social media is evidence.**
- Rule Regulating the Florida Bar 4-3.4 prohibits attorneys from unlawfully altering or destroying evidence and assisting others from doing so. Accordingly, lawyers have an ethical duty to preserve electronic evidence, presumably including social networking information.
- **While there is no case or ethics opinion on point, it would seem to make sense that instructing a client to delete evidence, including a client's Facebook, LinkedIn, or Twitter pages, may constitute spoliation of evidence.**
- **It appears that the better alternative would be to have the client set their page to *private*, but otherwise preserve the relevant information.**
- This way, the opposing party will not have direct access to the page or information, but could request the evidence through formal discovery channels.

Question No. 4

In satisfying a document request for “all emails,” may an attorney advise the client to produce only those emails that have not been deleted?

Or, put another way, what duty does a lawyer have to produce other less accessible electronic “metadata,” and who bears the cost of that production?

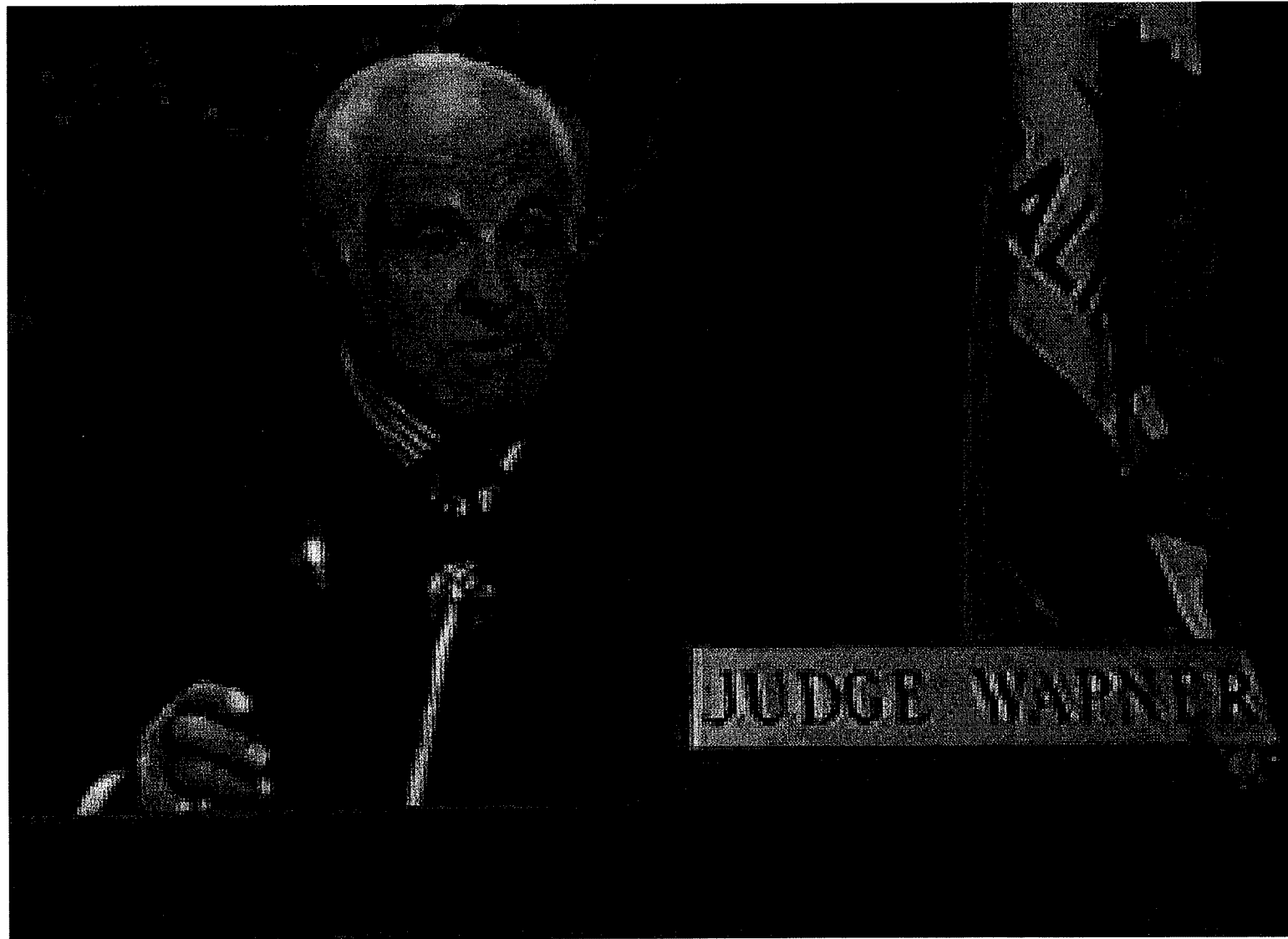
Answer

- **PROBABLY NOT, however, there are currently no universally accepted standards for electronic discovery.**
- **AS FOR COSTS, Federal Courts have devised a balancing test to determine if cost shifting is available in such production requests.**
- Zubulake v. UBS, Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y 2003) distinguished between “accessible data” which is stored in a regular usual format and “inaccessible data” which is not readily usable such as a backup or legacy data.
- The court held the cost of producing the assessable data should be borne by the producing party in accordance with traditional rules. With respect to inaccessible data, the court set forth a seven factor test to determine whether the cost of restoration and production should lie with the producing party or the requesting party.

7 Cost-Shifting Factors

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

In Re: Judge Joseph Wapner



Question No. 5

May a judge add lawyers who may appear before the judge as “friends” on a social networking site, and permit such lawyers to add the judge as their “friend?”

Answer

- **No.**

- Florida Supreme Court Judicial Ethics Advisory Committee, Op. 2009-20 (Nov. 17, 2009). The Committee determined such conduct would violate Canon 2B of the Florida Code of Judicial Conduct which prohibits lending “the prestige of judicial office to advance the private interests of the judge or others.”
- However, the opinion was limited to lawyers who may appear before the judge and therefore does not apply to persons other than lawyers or lawyers who do not appear before the judge. Further, a lawyer who practices before the judge may designate himself or herself as a “fan” or supporter of the judge, so long as the judge or committee controlling the site cannot accept or reject the lawyer’s listing of himself or herself on the site.
- However, Opinion 2009-20 also states that a “committee of responsible persons” that is conducting an election campaign on behalf of a judge’s candidacy may post material on the committee’s page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct. Further, such a committee may establish a social networking page that allows persons, including attorneys who may appear before the judge, to list themselves as “fans” or supporters of the judge’s candidacy, so long as the judge or committee does not control who is permitted to list themselves as a supporter.

Question No. 6

May judges do their own social media research regarding a pending case or comment on a case on a social media web site?

Answer

- **No.**

- Judges have been sanctioned for misusing social media in this way. In re Terry, Inquiry No. 08-234 (North Carolina Judicial Standards Commission, April 1, 2009). Judge B. Carlton Terry Jr. was publicly reprimanded by the state's Judicial Standards Commission for "friending" defense counsel in an ongoing custody dispute and discussing the case with him, as well as conducting independent online research regarding the plaintiff, including surfing the plaintiff's website, even though the contents of the web site were never offered as nor entered into evidence during the custody hearing. Judge Terry was found to have violated numerous provisions of the North Carolina Code of Judicial Conduct.
- However, note Model Rule 3.3 (Rule 4-3.3, Florida Rules Regulating the Florida Bar) which prohibits attorneys from making a false statement to a tribunal. A lawyer in Galveston told Judge Susan Criss she needed a continuance because of a death in her family. The judge granted the continuance, but checked the lawyer's Facebook page. At a subsequent hearing the lawyer's senior partner informed the judge his colleague would need a month-long continuance. Judge Criss "knew from her bragging on a Facebook account that she had been partying that same week." The judge told the senior partner about the Facebook discovery and denied the request.

