

LAWYERS ARE NOT IMMUNE (TO DISCOVERY)

By Joseph S. Beckman

I receive a lot of e-mails and other materials relating, not only intellectual property issues, but issues in the management and practice of law. In some instances, as in the case of computer forensics and document management, these issues are intertwined. The scariest of these materials deal with attorney misconduct. This article references a couple of recent incidents highlighting the misfortunes of attorneys failing to consider the consequences of their written communications. In both these instances the issue before the court was the attorneys' conflicts of interest with their current or former clients. This should remind all attorneys of a twist on that old adage, "If you build it, they will come." Remember, "if you write it, they will find it."

A CLIENT SCORNED...

In November 2002, the Missouri Supreme Court suspended two young promising lawyers for engaging in representation that constituted a conflict of interest with their former client, making misrepresentations of fact to the federal court and failing to submit honest and complete responses to discovery requests in that same federal court. *In re: John J. Carey, et al.*, Case Nos. SC 84189 and SC84190 (The Supreme Court Opinion can be downloaded from <http://www.osca.state.mo.us>).

Attorneys John Carey and Joseph Danis spent years defending Chrysler Corporation from class-action lawsuits. When they started their own firm, they should have known better than to spearhead a class-action lawsuit against their former client. As if that wasn't bad enough, when that same client sued them in federal court for, not malpractice, but breach of fiduciary duty they should have known better than to hedge their responses to discovery requests. When they failed to produce documentation of communications with other counsel involved in related class-action litigation, Chrysler Corporation looked elsewhere and produced over 40 documents from third party counsel relating to communications with the two lawyers. This discrepancy was disclosed to the court, seemingly resolved, and the case continued forward. At trial however, the two attorneys made the mistake of disclosing yet another unproduced document, waving it before the court as impeachment evidence. This was the final straw, prompting the federal court to strike the attorneys answers and enter a default judgment in the sum of \$850,000. The attorneys lost on appeal and the matter was referred to the Missouri Supreme Court Disciplinary Hearing Panel for action.

The Supreme Court's lengthy slip opinion, is quite illuminating. Stating that the potential for a conflict of interest to exist went well beyond the disclosure of confidential information by the client, the court focused upon the attorneys' wealth of knowledge regarding their client's trial and negotiation strategies; information that was being used against their former client in the later litigation. The crux of the attorney's misfortunes, and the source of much ire in the federal and state court proceedings, however, lay in their failure to properly disclose documentation that would inevitably be discovered. Why do attorneys assume they will not be subject to the same discovery tools as others?

WHERE DO YOU WANT TO E-MAIL TODAY?

E-mail is ubiquitous, and dangerous. Without a doubt, lawyers have used it to make corporate America very uncomfortable the past few years. Of course, by now, everyone knows that their e-mail is going to be requested by lawyers if a lawsuit is filed...and takes cautionary measures. What about lawyers? We know that e-mail is not necessarily secure when transmitted over the Internet, but what about our own office? It's only fitting that occasionally, the duplicitous nature of e-mail should ensnare a few lawyers. And so it did.

In the case of *Koen Book Distributors v. Powell Trachtman Logan Carrle Bowman & Lombardo*, Case No. 02-CV-971, U.S. District Judge Bartle III of the Eastern District of Pennsylvania ordered the turnover of internal e-mails generated among the firm's lawyers and relating to their then present client. The e-mails between the lawyers concerned an ongoing case in which the client's growing dissatisfaction led to a threatened malpractice suit against the law firm.

The firm continued to work for the client on the case even as the threat lingered. The attorneys, concerned about the present case and the threatened malpractice suit, naturally emailed each other about the matter. When the call came to disclose those emails in a later suit against the firm, the firm balked, citing attorney-client and work product privileges. However, as the firm found out, any reliance on the privileged nature of client attorney communications, or even the work product privilege, was misplaced. Judge Bartle made clear that the attorney client and work product privileges exist to protect the client, not the lawyers. In this instance, the e-mails were discoverable, presumably evidencing a knowing conflict of interest and breach of fiduciary duty to the firm's client.

How many attorneys send internal office e-mails from one to another with very little thought of the consequences. For that matter, how many attorneys dictate internal office memorandum on similar subject matter. We have grown accustomed to the idea that communications and internal communications are privileged and not privy to outside inspection. Of course, that is not always the case. Attorneys are well advised to consider the consequences of any e-mail, internal or otherwise, they may send. Once sent, it becomes a permanent record of that attorney's thoughts and mental impressions. E-mails, as has been said many times before, should receive the same careful consideration and attention as any other work reduced to a permanent medium. If you wouldn't put it in a letter, consider whether you really want it in your e-mail.

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