INTRODUCING STUDENTS TO ETHICS AND PROFESSIONALISM CHALLENGES IN VIRTUAL COMMUNICATION

Katherine M. Koops,[*] James E. Moliterno,[**] Carol E. Morgan[***] & Carol D. Newman[****]

As the practice of law, and the conduct of business generally, focuses increasingly on virtual communication, the ethics and professionalism challenges inherent in email, videoconference, text, and telephone communication continue to evolve. These challenges are particularly prevalent in transactional practice, which involves frequent communication with a variety of parties through a variety of communication channels. Exposing law students to these challenges through exercises and simulations contributes to the continued development of their professional identity as lawyers.

This article presents a variety of exercises that introduce students to client confidentiality, inadvertent disclosure, and other ethical issues that often arise in the context of virtual communication during a transaction. They also introduce professionalism issues common to transactional practice and explore the relationship between professionalism and ethical duties in transactional practice.[1]

I. INTRODUCTION

During the pandemic, the world changed for all of us, including our students and the legal profession. What lessons can we take forward and apply to our changed world, rather than heedlessly return to the same practices as before?

The legal profession adjusted in order to remain viable during the pandemic. Courts operated remotely, although jury trials were largely curtailed. Mediations, arbitrations, negotiations, and all manner of meetings to plan and make deals continued in virtual formats. A complete return to previous practices is not feasible. Clients are asking: "if we could

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[*] Assistant Director, Center for Transactional Law and Practice and Adjunct Professor, Emory University School of Law.

[**] Vincent Bradford Professor of Law, Washington and Lee University School of Law.

[***] Clinical Professor and Director, Business Law and Ethics Program, University of Georgia School of Law.

[****] Transactional Professor of Law and Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri School of Law.

[1] For a discussion of teaching written and oral communication skills in the context of transactional practice, see Eric J. Gouvin, Katherine M. Koops, James E. Moliterno, Carol E. Morgan & Carol D. Newman, *Teaching Communication Skills in Transactional Simulations*, 20 TENN. J. BUS. L. 429 (2019).

manage to have that mediation remotely, without the necessity of travel, why not continue in that same way now?" The enormous cost savings in airline travel, hotels, meals, and lawyer travel-time has not gone unnoticed by clients paying the bills. Not all meetings previously held in-person will continue in-person moving forward.

In truth, the legal profession and business world, especially on the transactional side, was always conducting a significant amount of work remotely. Although Zoom meetings were not the norm in the 1990s, conference calls were. From the 1990s on, with the legal profession trailing behind business, e-communication became the norm. For the most part, we have been teaching our entire careers (even those of us who started teaching in the 1980s) as if every meeting between lawyer and client, or among negotiating parties, were held in a room around a table, when in fact, that was already far from the exclusive way of conducting business (and perhaps was not even the norm).

As educators responsible for preparing our students, we should also learn and adjust based on our remote teaching experiences and effectuate a renewed understanding of how our students will lead lives as professionals. In short, we need to focus more of our teaching on electronic communications and videoconference communications in the context of transactional practice. Even as we return to classrooms, we should add teaching about remote lawyer activities to our repertoire.

II. BRIDGING THE GAP BETWEEN PHYSICAL AND VIRTUAL COMMUNICATION

As transactional lawyers have used both physical and virtual communication in their practice, they have learned how the general challenges of communication are easily magnified by the choice of media. Today, we can choose among in-person meetings, telephone calls (including conference calls), written letters and memoranda delivered physically or electronically, and video conferences and meetings. In counseling students regarding options in choosing communications media, we often ask them to consider the audience being addressed, the tone, style, and format of the medium, and the substance of the communication. For example, even though telephonic negotiations enable real-time conversation, they remove physical cues, such as smiles, looks of concern, gestures, and other nonverbal methods of communication. When both sides of a transaction engage in a conference call, all parties must be especially sensitive to the protection of confidential information, and they

should consider prearranging ways to "step out" of the conference call if confidential conversations are needed during the conference call.

Furthermore, negotiations that are conducted by email can easily become more protracted because email does not provide the sender and recipient with the opportunity to interrupt and clarify or discuss the facts or feelings under consideration. By the time the recipient has read an entire email communication with which the recipient disagrees, the recipient not only faces the weighty perception of a need to reply with an extended "rebuttal," but the recipient might also respond defensively with a desire to "set the record straight." A real-time conversation, with a real-time opportunity to interrupt each other to clarify or redirect the conversation, can have very different results in transactional discussions and negotiations. In addition, emailed communications often express or evoke feelings that are easy to misunderstand without the nuance of tone of voice, especially with no opportunity to react, acknowledge, interrupt, or clarify. When email is not the preferred method of communication, but must be used anyway, we must also determine whether to adapt a formal email to a more conversational style, or to keep a formal style to convey the business and legal concepts.

With the addition of video opportunities for communication, we now have additional choices of when and how to communicate with written and spoken language. In our experience, video communications avoid some of the asynchronous issues in email communication, but also raise the following issues:

- At the time of this writing, most video transmissions have a transmission delay.[2] Even though the delay is short and the communication is often described as synchronous, video transmissions are not simultaneous.
- These very brief transmission delays lead to delays in our perceiving each other's video and audio cues, such as pausing to breathe while speaking. During in-person conversations, we often use these pauses to breathe as cues for us to answer, or even to interrupt, without talking over others.[3]

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[2] *See, e.g.,* Matt Binder, *How to Reduce Lag While Livestreaming Video*, MASHABLE (Aug. 30, 2021), https://mashable.com/article/how-to-reduce-lag-while-livestreaming-video.
[3] *See, e.g.,* Jeremy N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue*, AM. PSYCH. ASS'N, 2 TECH., MIND, & BEHAV., no. 1 (Feb. 23, 2021) for sources of fatigue and distraction in online meetings.

- Fluid conversation is even further delayed as participants delay a conversation to unmute microphones and videos.
- Chat communication has the potential of becoming the new equivalent of writing and passing notes while someone is speaking. Although chat communication is advantageous in bridging the gap of not being in person, sharing helpful references and cites, and making multiple means of communication more accessible to all participants in a video conference, adding written communication contemporaneously with oral communication can add distraction to both the audio and video portions of the meeting.
- Follow-up communications to video conferences tend to be written, through meeting chat, or by post-video email or text. Despite the indisputable convenience of virtual meetings, we have also lost some of the ease and spontaneity of initiating the pre-meeting and post-meeting conversation that we once relied on to build relationships while talking one-on-one before meetings begin, as well as when we enter or leave a physical room. As we conduct more meetings virtually, we must find additional avenues of developing spontaneous new connections that often establish themselves in unscheduled conversations, unexpected serendipitous elevator rides, and walks to meals between meetings.

In contrast with some of the timing issues discussed above, remote video communication enables—and often strengthens—planned, scheduled collaborations. To name a few features, the ability to see and speak with each other in (almost) real-time, to share screens, to use breakout rooms, to poll the group, and to exchange information with chat features are all technologies that have already made our lives easier in effectively teaching and practicing law remotely. To the extent that these technologies require a host, we must teach our students to be sensitive to potential confidentiality issues in these new opportunities, and, as mentioned above, we need to teach our students to look for opportunities to encourage appropriately spontaneous communications that characterize unplanned meetings.

In sum, we need to teach our students to value these real-time video technologies, to add them to their menus of considerations for appropriate communications media, to be sensitive to adapting

communications styles when the first choice of media is not available, and to find new ways to encourage and develop the spontaneous communications that characterize unplanned and chance in-person meetings.

III. EXERCISES INVOLVING ETHICS AND PROFESSIONALISM CHALLENGES IN VIRTUAL COMMUNICATION

The remainder of this article describes exercises that can be adapted for use in highlighting ethics and professionalism issues, especially in the context of virtual communications. We will first consider the challenges of writing emailed cover memos to clients, and will then discuss client confidentiality issues and other communication channels and concerns.

A. Informal Written Communication with Clients

One of the challenges of using email as a method of delivering legal documents is the lawyer's temptation to try to write the client an email in a conversational style while attempting to deliver careful legal advice. Lawyers (and law students) sometimes try to make emailed cover memos sound less "legal" than carefully written cover letters on formal stationery. The challenge is to write clear descriptions without "legalese," but to avoid casual assurances that might raise ethical or professionalism issues.[4]

A Potentially Problematic Cover Letter: Practical Exercise

The following exercise is a useful classroom shortcut to help students learn how to avoid statements that might have the potential of creating ethical issues instead of delivering the conversational assurance that the author intended. Students are asked to review a flawed cover memo regarding a draft acquisition agreement that has been emailed to a hypothetical client.[5] The instructions contain specific prompts to identify sentences that might raise issues of ethics and professionalism in

[4] *See* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 537–42 (Wolters Kluwer 2d ed. 2013) (providing guidance on drafting client memoranda in transactional representation).

[5] The sample sentences can be adapted, as needed for use in any transactional course, to describe any type of attached draft agreement.

transactional representations. After the students identify and discuss the potential issues, it is helpful to emphasize the increased likelihood of casual, over assuring sentences in emails (where senders often try to be less formal in their communications). Finally, each set of statements provides examples for discussion of potentially problematic ethical issues regarding client communications under relevant American Bar Association Model Rules of Professional Conduct ("Model Rules").

Instructions for Students—Part I:

The following sample cover letter contains sentences that attempt to reassure the client, but have the potential of creating problems. Can you spot one or more sentences that might:

- *Overstate or promise results?*
- *Describe agreements for which the client has not had an opportunity to make its own decision?*
- *Create confusion in the client's understanding of the transaction?*
- *Suggest actions that might not be in the client's best interests?*
- *Suggest actions that might create ethical issues regarding the attorney's role in the transaction?*

Instructions for Students—Part 2:

In these potentially problematic sentences:

- *What are your concerns?*
- *What would you change?*
  - *Changes in actions?*
  - *Changes in promises?*
  - *Changes in wording?*

Discussion of Selected Sample Sentences:

The following sentences prompt identification as sentences that "*overstate or promise results*:"

- "*Indemnification. This new section ensures that the seller will pay you damages if you find that it has not told you the truth about anything before the closing.*"
- "*Conditions to Close. You now have the right to call off the closing if you are not satisfied with the due diligence regarding the office building to be leased. I*

have drafted the 'condition to closing' regarding this lease to make sure that this decision is at your complete discretion."

- "*Closing. I hope you are pleased with the Agreement, for I have worked very hard on it to make sure that it gives you everything you need.*"

Discussion: In discussing these sentences, students quickly note the potentially overstated words of "*ensures*," "*will pay you*" (instead of "*promises to pay you*"), "*has not told you the truth about anything*," "*to make sure that*," and "*it gives you everything you need*." In this exercise, we then discuss Model Rule ("MR") 1.4 (Communications)[6] regarding the lawyer's responsibilities in communicating and explaining relevant information to the client.

The following sentences could indicate "*agreements for which the client has not had an opportunity to make its own decision*:"

- "*Deductible Basket; No Cap. The seller's attorney and I agreed that you would not make a claim until your total losses exceed $50,000. We picked $50,000, because this would keep you from 'nickel and diming' the seller, but you would be protected for losses greater than $50,000. I agreed that this would be fair to both parties, and it would be especially fair to you because there is no 'cap' on the bigger losses. It is important that you notify the seller of the smaller losses, so that you can fill up the 'basket.'*"

Discussion: This paragraph prompts a more careful consideration of MR 1.4[7] regarding client communication, together with MR 1.2 (Scope of Representation & Allocation of Authority Between Client and Lawyer)[8] regarding the client-lawyer relationship and the scope of the lawyer's role in the representation. For example, in addition to the potentially over assuring language of "you would be protected," the first two sentences describe a process in which the attorneys for both sides have apparently made decisions regarding the business details that the client should ultimately determine. This leads to a discussion of the business client's role. The client might have told the attorney to consider and make these decisions, but it is also possible that the attorney made the decisions without client consultation. We can then discuss the words that transactional attorneys regularly use during

[6] MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N. 2020).
[7] *Id.*
[8] *Id.* r. 1.2.

negotiations to move a deal forward while reserving the right of the client to make the ultimate decision.

The third sentence, "*I agreed that this would be fair to both parties…*" enables an additional conversation about the lawyer's role as an advocate for the client, which is not consistent with the role of determining "fairness" between parties.

The last sentence of the "*Deductible Basket; No Cap*" example leads us into the next question, which asks students to identify sentences that might "*create confusion in the client's understanding of the transaction*:"

- "*Deductible Basket; No Cap.*" – *See Paragraph above*. The last sentence—"*It is important that you notify the seller of the smaller losses, so that you can fill up the 'basket.'*"—presumes that the client knows what the terminology and the process means. If not, the lawyer needs to fully communicate with the client while explaining and reviewing the client's agreement before moving forward with this language.
- "*Limited Time. The seller's owner is planning to retire after the closing, and the company will go away after one year. Accordingly, we agreed that the indemnification promise will be valid for one year. You will need to make sure that you make all your claims by the end of the first year. I know you want to get this behind you, too, so I think it will work for both parties in providing more certainty.*"

Discussion: Examples of statements for which it is not clear whether the client has had an opportunity to make its own decision lead to further discussion of MR 1.2(a)[9] regarding the lawyer-client relationship and MR 1.4(b),[10] which requires the lawyer to explain matters "to the extent reasonably necessary to permit the client to make [an] informed decision . . . ." The "*Limited Time*" paragraph contains several examples of potentially over assuring language, particularly in the last sentence. It is important for students to think carefully about the client's decision process and the client's need for a clear understanding of both the business and legal risks that inform the client's decisions.

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[9] *Id.* r. 1.2(a).
[10] *Id.* r. 1.4(b).

An additional example of over assuring statements regarding actions the client might not have approved focuses on a statement that further "*suggests actions that might not be in the client's best interests*:"

- "*Signature. Please let me know if you will be in town for the closing. If not, we will prepare resolutions that let any officer of your company sign and make any necessary changes to the Agreement and all other closing documents. We will not let the closing interfere with your schedule!*"

Discussion: In the "*Signature*" paragraph, the sender offers to "*prepare resolutions that let any officer of your company sign and make any necessary changes to the Agreement and all other closing documents*." The attorney should make it clear that these resolutions would need to be approved by the board of directors, and the directors might not determine it to be in the best interests of the company to give all company officers the authority to sign and make further changes to documents.[11]

Finally, the discussion of the "*Signature*" paragraph naturally leads into another provision that might "*suggest actions that might create ethical issues regarding the attorney's role in the transaction*:"

- "*Seller's Understanding. Finally, have you confirmed whether the seller is prepared to sign this? If not, I will be glad to send them a copy with an explanation of these changes.*"

Discussion: The "friendly" offer to send the other side a copy of the attachment with an explanation of the changes is undoubtedly problematic from an ethics perspective. Students should be encouraged to review both MR 4.2 (Communication with Person Represented by Counsel)[12] and MR 4.3 (Dealing with Unrepresented Person),[13] regarding responsibilities to non-clients, to make sure they understand the analytical process that they must follow in every transactional representation.

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[11] Although such global resolutions are often prepared from "form" documents, they might not be in the best interests of the company. Such decisions are board decisions that should not be taken lightly. Indeed, if the company is the client, the representing attorney should make it clear that the personal wishes of an individual officer cannot supersede the decision of the client (*i.e.,* the company).

[12] MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N. 2020).

[13] *Id.* r. 4.3.

B. Inadvertent Disclosure in Virtual Communication

As lawyers send more communications via electronic means, more mistakes are likely to be made. We all have experienced this in some way or another. For example, as we type a recipient into the "to" line of any electronic communication, our software helps us by auto-filling the rest of the recipient's name. Sometimes the autofill fails to read our mind and the address filled in is not the address of our intended recipient, but, rather, someone with a similar name or email address.

These mistakes have ethics consequences. Determining the ethical responsibilities of the sending lawyer is relatively easy: he or she has risked client information and often will have breached the duty of confidentiality.[14] But determining the ethical responsibilities of the recipient lawyer has so far proven challenging for bar authorities and courts.[15]

The exercise described below introduces students to the ethical rules relating to inadvertent email disclosure in the context of a transaction. It also asks students to consider the tension between a lawyer's duty to convey relevant information to a client and that lawyer's professionalism obligations with respect to a third party—in this case, counsel for the other side.

Inadvertent Disclosure in Email Correspondence: Practical Exercise

This exercise addresses inadvertent disclosure issues in the context of a shopping center lease renewal. It includes two parts that can be used independently or together. Part I is a series of questions that introduce students to relevant Model Rules and their counterparts in particular states. Guidance for responses to each question is provided for convenience of reference and should be omitted from any handout provided to students. Part II adds facts presenting new issues and an opportunity to use polls in class discussion.[16]

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[14] *Id.* r. 1.6(c).

[15] C. Evan Stewart, *Ethics Corner: Inadvertant Disclosure–Traps Await the Unwary*, AM. BAR ASS'N (Apr. 27, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/04/ethics_corner.

[16] This exercise can be taught in a variety of ways. Options include assigning groups to research rules in jurisdictions with different rules before class and report their findings in class; convening a panel of practitioners to engage with students on the questions

The Scenario:

Your client is a locally based restaurant that leases space in a shopping center which serves as the main retail presence in a rural area of your state. The main, or "anchor," tenant of the shopping center is a large grocery retail chain ("Anchor"). Most of your client's revenue is tied directly to Anchor customer traffic.

Your client has asked you to handle its lease renewal with the owner of the shopping center ("Landlord"). Landlord is represented by Oliver Overworked, with whom you have worked on other shopping center leases in the past. You and Oliver have spent a lot of time in negotiations, have developed an easy rapport, and are able to get deals done very efficiently for your respective clients. You anticipate that this lease renewal will be straightforward and contact Oliver to initiate the transaction. You need to work quickly because the deadline for your client's renewal is approaching.

After you have talked with Oliver, you receive an email for which the subject line is "Lease Renewal." You open the email, which is addressed to you and attaches a file entitled "Lease Renewal." When you open the attachment, however, it is a document indicating that Anchor is not interested in renewing its lease. You know your client would reconsider renewing its lease if it were aware of Anchor's intent to leave the shopping center. On the other hand, Anchor might negotiate a renewal after all, and even if it doesn't, a new tenant with a similar or better market presence might replace Anchor. You review your client's lease, and it does not include any notice or other provisions relating to Anchor's non-renewal.

Part I: General Discussion Questions:

Please refer to the American Bar Association Model Rules of Professional Conduct unless directed otherwise.

1. *What ethical rule(s) is/are implicated by Oliver's transmission of the unintended attachment?*

This question focuses on the sender and asks students to identify the Model Rules applicable to his conduct. MR 1.1 requires that lawyers provide competent representation.[17] While the sender in this scenario is presumably competent to handle a lease renewal, Comment 8 to MR 1.1

presented; and a simulation in which students are assigned the role of one of the parties and discuss their responsibilities from that point of view.

[17] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N. 2020).

mentions specifically competence in the area of technology, which include risks inherent in the use of email.[18]

Additionally, MR 1.6 requires reasonable efforts to prevent inadvertent disclosure of confidential client information.[19] Specifically, MR 1.6(c) requires reasonable efforts to prevent, among other things, the inadvertent disclosure of information relating to the representation of a client.[20] What is deemed "reasonable" will depend on the nature and sensitivity of the information, whether the information is otherwise protected by law or contract (as in the case of personally identifiable information), and the extent to which safeguards against inadvertent disclosure can effectively be employed.[21]

2. *If Oliver didn't send the email personally, but an associate or staff member he supervises did, does he face potential consequences under the Model Rules?*

This question also focuses on the sender, but shifts the action to someone Oliver supervises. It reminds students that as attorneys they will also be functioning in a supervisory role and need to ensure compliance with ethical standards by others in that capacity.

Under MR 5.1(c)(1), which requires direction or knowing ratification of the associate's conduct, Oliver would have no liability unless he reviewed the email before it was sent and noticed but failed to substitute the correct attachment.[22] Under MR 5.1(c)(2), Oliver would be responsible if he "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[23] Corrective or mitigating action would likely consist of a call to the recipient to request that the unintended attachment be deleted without review.

MR 5.1 addresses supervisory responsibility for the conduct of lawyers, but not of non-lawyer staff. Under MR 8.4(a), professional misconduct includes violations that are attempted, knowingly assisted or induced, or accomplished through the acts of another.[24] More than negligent supervision is required.[25]

[18] *Id.* r. 1.1 cmt. 8.
[19] *Id.* r. 1.6(c).
[20] *Id.*
[21] *Id.* r. 1.6 cmts. 18–19.
[22] *Id.* r. 5.1(c)(1).
[23] *Id.* r. 5.1(c)(2).
[24] *Id.* r. 8.4(a).
[25] *See id.* r. 8.4 cmt. 1 (describing a violation through the acts of another as instructing an agent to act on the lawyer's behalf).

3. *What ethical rule(s) is/are relevant to your action as the receiver of the unintended attachment?*

Question 3 shifts the focus to the receiver of the inadvertent disclosure and asks students to identify the relevant Model Rules. In this case, two rules are relevant: MR 1.4, which addresses the duty to communicate relevant information to a client[26] and MR 4.4(b), which covers responsibilities to non-clients (in this case, the sender of the email).[27] These responsibilities are discussed in Questions 4-7, but can trigger professionalism concerns, as will be discussed in Question 8.

4. *Are you required to notify Oliver that you received the unintended attachment?*

MR 4.4(b) requires the recipient to promptly notify the sender of a document or electronically stored information relating to representation of the recipient's client if the recipient knows or reasonably should know that the document or information was sent inadvertently.[28] This action is intended to allow the sender to take protective measures.[29] For example, in this scenario, Oliver would have an opportunity to advise his client that the tenant's counsel, and potentially the tenant, were aware of Anchor's expressed intent not to renew its lease. This would in turn enable Oliver's client to plan its negotiation or other strategy with the tenant in light of this information.

5. *Are you required, permitted, or not permitted to disclose the content of the attachment to your client?*

Rules regarding the recipient's conduct vary by jurisdiction.[30] Some states have adopted MR 4.4(b), which requires that the recipient promptly notify the sender of the mistake, but makes no mention of using the

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[26] *Id.* r. 1.4.
[27] *Id.* r. 4.4(b).
[28] *Id.*
[29] *Id.* r. 4.4(b) cmt. 2.
[30] For a compilation of jurisdictional variations in Rule 4.4 (and other Model Rules), *see* AM. BAR ASS'N., CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2018).

mistakenly sent information.[31] In other words, a quick call to say, "I am so pleased to tell you that you just mistakenly sent me the information with which I will destroy you" is not prohibited. Comment 3 to MR 4.4(b) does indicate that a lawyer's choice to return or delete an inadvertently received document before reading it is a matter of that lawyer's professional judgment.[32]

In contrast, Arizona requires that the recipient "promptly notify the sender *and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures*."[33] Comment 2 to the rule states that the recipient is required to stop reading the document, make no use of it, and promptly notify the sender.[34] Tennessee requires that the recipient immediately terminate review of the mistakenly sent information, notify the sender, and either abide by the sender's instructions regarding disposition of the material or refrain from using it until obtaining a definitive court ruling on the issue.[35]

This question also gives rise to a discussion of the recipient's professionalism obligations and the tension between what the recipient is *required* to do vs. what he or she s*hould* do. The discussion under Question 8 addresses these issues.

6. *Comments to ethical rules often indicate that the rules are subject to matters of law that are beyond the scope of the rules. What else do you need to consider before deciding on a course of action?*

The recipient's duties in a case of inadvertent disclosure will depend on the nature and context of the disclosure. For example, is litigation pending? Do laws or regulations apply specifically to the information in question, as in the case of personally identifiable

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[31] *See*, *e.g.*, ARK. RULES OF PRO. CONDUCT r. 4.4(b) (2005); CONN. RULES OF PRO. CONDUCT r. 4.4(b) (2021); DEL. RULES OF PRO. CONDUCT r. 4.4(b) (2013); IOWA RULES OF PRO. CONDUCT r. 32:4.4(b) (2021); MASS. RULES OF PRO. CONDUCT r. 4.4(b) (2015); MINN. RULES OF PRO. CONDUCT r. 4.4(b) (2015); MONT. RULES OF PRO. CONDUCT r. 4.4(b) (2003); NEV. RULES OF PRO. CONDUCT r. 4.4(b) (2019); UTAH RULES OF PRO. CONDUCT r. 4.4(b) (2021); WASH. RULES OF PRO. CONDUCT r. 4.4(b) (2016); W. VA. RULES OF PRO. CONDUCT r. 4.4(b) (2015); WYO. RULES OF PRO. CONDUCT r. 4.4(b) (2014).

[32] MODEL RULES OF PRO. CONDUCT r. 4.4(b) cmt. 3 (AM. BAR ASS'N. 2020).

[33] ARIZ. RULES OF PRO. CONDUCT r. 4.4(b) (2015) (emphasis added).

[34] *Id.* cmt. 2.

[35] TENN. RULES OF PRO. CONDUCT r. 4.4(b) (2017).

information? Aside from the ethics implications, should the mistakenly sent information still be subject to the lawyer-client privilege?

With respect to privilege, courts have struggled to provide a cohesive rule for when the protection arises. Even Federal Rule of Evidence 502,[36] which emerged after years of study, is far from conclusive and clear. First, remember that the privilege belongs to the client and that it ordinarily requires an act by the client to waive it.[37] Here, the lawyer has performed the act and it was by no means intending to waive the privilege. So, doctrinally, the privilege should withstand the inadvertent lawyer disclosure. But the practical consequences take hold. The recipient now has the private information. Can a court actually expect the recipient to cabin the information and not use it? This practicality has caused some courts to disqualify the recipient from pending litigation involving the matter disclosed.[38]

Some courts, notwithstanding the doctrine regarding client ownership of the privilege, have ruled that a lawyer's inadvertent disclosure waived the privilege.[39] Still other courts have simply said, consistent with the doctrine, that the disclosure did not waive the privilege.[40] But that means the court must vigilantly police any use of the material that was disclosed, even in the process of crafting discovery questions that have become better informed by the disclosed material.

Finally, the Federal Rule of Evidence solution essentially asks just how careless was the sending lawyer: the more careless, the more likely the court will be to say the privilege has been waived.[41] This may have a fairness attraction, but it pays no attention to privilege or waiver doctrine.

In general, the law is extremely slow in keeping up with rapid change, such as that which attends technology.[42]

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[36] *See* FED. R. EVID. 502.

[37] JAMES E. MOLITERNO, PROFESSIONAL RESPONSIBILITY 77 (Wolters Kluwer 6th ed. 2019).

[38] *See, e.g.*, Martha Neil, *Seeing Other Side's Docs Knocks Miami Law Firm Off of $100M Case,* A.B.A. J. (Sept. 23, 2008).

[39] *See, e.g.*, Debra Cassens Weiss, *E-Discovery Disclosure Goof Waived Attorney-Client Privilege, Judge Rules,* A.B.A. J. (June 4, 2008, 11:12 AM).

[40] *See, e.g.*, Rhoads Indus. Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 218 (E.D. Pa. 2008).

[41] *See* FED. R. EVID. 502(b).

[42] JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS 178 (Oxford Univ. Press 2013).

7. *If the sender, recipient, and their respective clients are located in different jurisdictions, how do you decide which jurisdiction's rules will apply?*

As if knowing what to do as the mistaken recipient were not challenging enough because of the mixed, inconsistent messages delivered by the law, the choice of law rules add complexity. In general, choice of law is a quagmire legal topic, as attested to by torts-god William Prosser and leading lawyer ethics scholar Charles Wolfram. Prosser famously described choice of law issues as "quaking quagmires" that "engulf and entangle[]" lawyers and courts, a field "inhabited by learned but eccentric professors."[43] Wolfram referred to it as the "Dismal Swamp" (quoting Prosser).[44]

Choice of law on lawyer discipline cases is an ever-present but too often ignored layer of analysis. Lawyers cross borders about as easily as they breathe. The mere presence of the internet means that representing even a small-town seller of homemade jewelry can give rise to choice of law issues. Trasactions that occur across state or other lines means that the lawyer's representation crosses borders as well. And, of course, this border crossing is not just going from Ohio to Pennsylvania. It is from any starting point to everywhere.

The first instinct is that crossing borders may not matter; after all, the lawyer's license is at issue in lawyer discipline matters, and the license is controlled by the state of licensure.[45] But every state has adopted some version of MR 8.5.[46] MR 8.5 directs the adopting jurisdiction to use the law of another jurisdiction (whether U.S. state or another country) when either (1) the lawyer's conduct is connected with litigation in that other state or country[47] or (2) the misconduct either occurs in that other state or country or the "predominant effect" of the lawyer's misconduct will be felt in that other state or country.[48]

Unless the matter involved in the mistakenly sent message is self-contained in the lawyer's state of licensure, there is a good chance that another state's lawyer ethics law will govern the mistaken recipient's conduct. Harm to an out-of-state opposing party, the most likely

[43] William Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953).
[44] Charles W. Wolfram, *Choice of Law in Lawyer Discipline: Excursions into the Dismal Swamp*, 49 U. S.F. L. REV. 267, 267 (2015).
[45] *Lawyer Licensing*, A.B.A., https://www.americanbar.org/groups/legal_services/flh-home/flh-lawyer-licensing (last visited Oct. 7, 2021).
[46] MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N. 2020).
[47] *Id.* r. 8.5(b)(1).
[48] *Id.* r. 8.5(b)(2).

consequence of the mistaken recipient's use of the information sent, would be enough to trigger at least a careful analysis of the choice of law question. Because various states have given conflicting answers regarding what the mistaken recipient should do about reading the message,[49] confusion may well ensue.

8. *How do your ethical obligations compare to your professionalism obligations?*

Ethics rules are prescriptive (what *must* you do?), while professionalism standards are aspirational (what *should* you do?). Regardless of what the ethics rules in a given jurisdiction may require, *should* the recipient read the unintended attachment after realizing it was not meant to be sent? *Should* the recipient then use that information to its client's advantage? Bar authorities issuing guidance in the form of bar ethics opinions are not in agreement. Some suggest the receiving lawyer owes it to his or her client to learn what has been mistakenly sent,[50] while others suggest a lawyer who reads the material has committed an ethics violation.[51] The American Bar Association so far has no better answer: MR 4.4(b) merely commands that the receiving lawyer promptly notify the sender of the mistake.[52] But there is no mention of using the mistakenly sent information and there is no bar on gloating.

In continuing legal education ("CLE") sessions with practicing lawyers, a pattern develops. Most older lawyers tend to say they would stop reading a mistakenly sent message as soon as they realize it was not meant for them; younger lawyers tend to say they would read it. This phenomenon, played out in conference groups often in the hundreds, causes some of the older lawyers to decry the moral values of the younger. Perhaps it is so. But more likely, the younger lawyers have grown up communicating in electronic forms and the older lawyers are still relatively steeped in physical snail-mail etiquette. Reading an electronic message that has appeared on your screen without any act on the recipient's part other than clicking an innocent-looking message or attachment feels different

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[49] *See supra* notes 30–40 and accompanying text.

[50] *See, e.g.*, Pa. Bar Ass'n Comm. on Legal Ethics and Pro. Resp., Formal Op. 2009–100 (2009); Md. State Bar Ass'n Comm. on Ethics, Op. 2007–09 (2007).

[51] *See, e.g.*, State Bar of Ariz., Ethics Comm., Op. 07-03 (2007); Ala. State Bar Off. of Gen. Couns., Ethics Op. 2007-02 (2007); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. No. 749 (2001); N.H. Bar Ass'n, Ethics Comm., Advisory Op. 2008-2009/4 (2009).

[52] MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2020).

from seeing another's address on a physical envelope and tearing it open nonetheless. Without judging moral values, perhaps the forms of communication most familiar to individuals affects the value-judgment about reading what was not intended to be sent.

In 2019, the New York City Bar Association's Committee on Professional Ethics addressed the tension between "professional conscience" and the ethical duty to disclose relevant information to a client.[53] It noted that a lawyer who receives inadvertently sent information may not be inclined to use it, even if it could reasonably be useful to the client and the law permits its use, as a matter of professional courtesy or a higher professional duty to support principles of client confidentiality.[54] In such a case, the lawyer is required to consult with the client as to the risks and benefits of using the information.[55] The lawyer is not required to defer to the client's instruction to use the information, but should do so if otherwise the lawyer would fail to seek the client's objectives through reasonably available permitted means or otherwise prejudice the rights of the client.[56] If the lawyer reasonably determines that ethics rules do not require using the information, then the lawyer may refrain from doing so, provided that he or she "is not acting solely out of self-interest but is undertaking a competent and diligent means of achieving the client's objectives of the representation."[57]

Part II: Role-Playing Exercise with Supplemental Materials:

An engaging way to present inadvertent disclosure issues to students is to make them face the issues in real time by placing them in the role of the lawyer who has become the mistaken recipient. This also facilitates the continued development of their professional identity.

You can use Part II as a follow-on to Part I[58] or present it independently with a short background lecture about the challenges posed by inadvertent disclosure, without the detail that exists in MR 4.4(b), bar

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[53] N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2019-3, at 6 (2019).
[54] *Id.*; *see also* James M. Altman, *Model Rule 4.4(b) Should Be Amended*, 21 THE PRO. LAW., no. 1, 2011, at 16.
[55] N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2019-3, at 7–8 (2019).
[56] *Id.* at 8–9.
[57] *Id.* at 1.
[58] Note that the email in Part II, which reaches an unintended recipient with an intended attachment, differs from the email referenced in Part I, which is sent to an intended recipient with an unintended attachment. These situations illustrate two common inadvertent disclosure scenarios.

association opinions, court opinions, or evidentiary rules. A summary of the challenges is enough.

Next, present the hypothetical background. The students represent a tenant in a shopping center, and at present they are negotiating a possible lease renewal. Each student is assigned the role of Val Scalian (tenant's counsel) and the landlord is represented by Oliver Overworked. Critical to the value of the lease is the continued presence of tenant Anchor Grocery in the shopping center. Anchor Grocery is represented by Val *Scanlon*, an attorney who is different from the tenant's counsel, Val *Scalian*.

In their role as tenant's counsel, the students see a new email pop up from Oliver Overworked. Naturally, they open the email, which is attached as Appendix A-1. Ask them to read until they think they would stop. The discussion of who read how far and why can become a very rich conversation. Ask, too, among those who read the entire email, how many would open and read the attachment referred to in the email. Show the attachment and continue the discussion.[59]

C. Other Communication Channels and Concerns

In addition to potential ethical issues in email communications as described above, other ethical and professional issues arise in virtual practice and in other forms of virtual communication, such as conference calls and videoconferences. The practical exercises described below can be incorporated into existing transactional law classes to help students recognize and personally relate to: (1) ethical issues in a virtual work setting, and (2) professionalism issues on conference calls and videoconferences. The goal of these exercises is for students to turn abstract ideas about ethics and professionalism into real and meaningful constructs for their careers.

Ethical Issues in Virtual Work Settings: Practical Exercise

The American Bar Association defines virtual practice as "technologically enabled law practice beyond the traditional brick-and-mortar law firm."[60] Virtual practice was already prevalent before the COVID-19 pandemic due to enhanced technology.[61] However, the

[59] *See* Appendix A-2 for questions that can be adapted as a basis for an in-class poll.
[60] ABA Comm. on Ethics & Pro. Resp., Formal Op. 498, at 1 (2021).
[61] *Id.* at 2.

COVID-19 pandemic, which caused many lawyers to close their offices temporarily for health and safety reasons, has accelerated the pace of virtual practice.[62]

In a post-COVID-19 world, virtual practice (even if done sporadically) will likely continue to be a reality. Students need to be aware of ethical issues that can arise in a virtual work setting.

The exercise described below can be used on its own in a transactional law class or in connection with a simulated transaction where students will perform work on the transaction at home. Instead of lecturing to students about ethical issues in virtual practice or assigning an article for students to read, a professor can engage students in active learning and create a scenario where students imagine every possible ethical issue that could arise in a virtual work setting, particularly in the context of the duty of confidentiality. Students can work individually or as teams.

This exercise presents a perfect opportunity for students to review the attorney's professional duty of confidentiality under MR 1.6[63] and consider its practical application to virtual practice. If necessary, a professor can prod and guide the discussion by asking questions to address key points. Then a professor can have students consider solutions for the issues they have identified.

After students have identified issues and solutions on their own, they can do additional research about ethical issues in virtual practice, including a review of ABA Formal Opinion 495[64] and ABA Formal Opinion 498[65] which address attorneys' ethical obligations in virtual practice. Following this research, students can reinforce their knowledge and present all of the issues and solutions they have identified by (1) preparing a short, concise memo summarizing all of the issues and solutions, or (2) preparing and presenting a graphic depiction of the issues and solutions (with more focus on pictures than words) using PowerPoint or another presentation method. Students will have the added benefit of practicing their written or oral communication skills, which are essential for law practice.

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[62] *See* Anne G. Crisp et. al., *Business Law and Lawyering in the Wake of Covid-19*, 22 TENN. J. BUS. L. 365, 374–75 (2021).

[63] *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

[64] *See generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 495 (2020) (discussing lawyers remotely practicing law in the jurisdictions in which they are licensed).

[65] *See generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 (2021) (discussing ethical duties implicated by a lawyer's use of technology in virtual practice).

Finally, each student can design a specific plan for virtual practice based on the student's current living arrangement, taking into account the ethical issues and solutions identified by the class. By personalizing and applying their knowledge, students will be better prepared to recognize issues that they need to address in a simulated transaction as well as actual practice if they work virtually in the future.

The ethical issues and solutions identified by students may include the following:

- Commingling work and home life:
  - Have a dedicated work space that is as private and distraction-free as possible, even if part of another room.

- Keeping virtual documents secure:
  - Protect documents from unauthorized access by such means as encryption, anti-virus software, security updates, secure routers, and virtual private network ("VPN");
  - Have a secure and reliable back-up system for documents.

- Leaving a laptop open:
  - Use a screensaver and restrict access to laptop.

- Having others overhear conversations or meetings:
  - Talk quietly in a private area and avoid public spaces;
  - Use headphones;
  - Close doors if others are working nearby.

- Having secure videoconferences:
  - Use a reliable videoconference service;
  - Use strong passwords;
  - Only record if everyone on videoconference consents;
  - Avoid others overhearing conversation (see above).

- Having a smart speaker with listening device (such as Alexa) in the room:
  - Remove or turn off the smart speaker.

- Leaving papers where others can see them:
  - Print documents minimally;

- Follow the "clean desk" policy.

- Leaving a laptop or papers in a car:
    - Avoid leaving a laptop or papers visible and unattended in a car.

Professionalism on Conference Calls and Videoconferences: Practical Exercise

Conference calls and videoconferences, which were popular in law practice before the COVID-19 pandemic, have increased exponentially during the COVID-19 pandemic.[66] They will likely continue to be the method of choice for many attorneys due to the significant savings in time and expense as compared to face-to-face negotiations and in-person meetings.[67]

Law students who did not work before law school may not have had much experience with conference calls. Due to the COVID-19 pandemic and the proliferation of online classes, students have gained significant experience with videoconferences; however, they may not have thought consciously about the professionalism aspects of videoconferences or conducted negotiations on a videoconference. Because students will likely engage in conference calls and videoconferences in their careers, they need to be aware of professionalism issues in these types of virtual communication.

Professionalism is a concept that law students need to identify and practice as often as possible as they prepare for their careers and develop their professional identity. Transactional law simulation courses provide a ripe opportunity for students to study and practice professionalism. Many of these courses have a negotiation component or team meeting, either of which can easily be conducted on a conference call or videoconference. The exercise described below will help students mirror actual practice and learn about and practice professionalism.

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[66] *See* John McCurley, *Effects of COVID-19 on Legal Practice: How to Communicate with Your Lawyer*, NOLO, https://www.nolo.com/legal-encyclopedia/effects-of-covid-19-on-legal-practice-how-to-communicate-with-your-lawyer.html (last visited Oct. 13, 2021); Hank Stout, *Will Zoom Win the Video Conferencing Wars?*, L. TECH. TODAY (June 9, 2020), https://www.lawtechnologytoday.org/2020/06/will-zoom-win-the-videoconferencing-wars/.

[67] Lawyers also conduct transactional negotiations via email; however, the scope of this presentation will be limited to the use of conference calls and videoconferences.

First, the students will conduct a negotiation or team meeting that is part of a simulated transaction on a conference call or videoconference. Before participating in the conference call or videoconference, the students should consider ways to demonstrate professionalism on a conference call or videoconference.

Instead of reciting a litany of professionalism tips for conference calls and videoconferences, a professor can have students, either individually or in teams, prepare guidelines based on their own personal experience and research. Students will find an abundance of resources on the internet. One teaching method is to show students a video of a flawed conference call.[68]

After identifying guidelines for conference calls or videoconferences, students can reinforce their knowledge and present their guidelines by (1) preparing written guidelines for professionalism in conference calls or videoconferences or (2) preparing and presenting a graphic depiction of the guidelines (with more focus on pictures than words) using PowerPoint or another presentation method. Students will have the added benefit of practicing their written or oral communication skills, which are essential for law practice.

With these guidelines in place, students will be ready to practice what they have learned by engaging in a negotiation or team meeting on a conference call or videoconference as part of a transactional law simulation course. Afterwards, a professor can encourage students to reflect on their experience either orally or in writing by identifying what went well and what can be improved in a future conference call or videoconference. Students may also want to tweak the guidelines they previously prepared based on their actual experience.

Examples of guidelines for conference calls and videoconferences that students may suggest can be found below.[69]

Examples – Guidelines for Conference Calls and Videoconferences

[68] *See* Tripp and Tyler, *A Conference Call in Real Life*, YOUTUBE (Jan. 22, 2014), https://www.youtube.com/watch?v=DYu_bGbZiiQ for a humorous example of a conference call.

[69] *See, e.g.*, NICK MORGAN, CAN YOU HEAR ME? HOW TO CONNECT WITH PEOPLE IN A VIRTUAL WORLD ch. 9 (Harvard Bus. Rev. Press 2018); Hal Movius, *How to Negotiate — Virtually*, HARV. BUS. REV. (June 10, 2020), https://hbr.org/2020/06/how-to-negotiate-virtually; Kevin Bartley, *Conference Call Etiquette: 10 Tips for Having a Smoother Meeting*, ONSIP, https://www.onsip.com/voip-resources/smb-tips/conference-call-etiquette-10-tips-for-having-a-smoother-meeting (last visited Oct. 11, 2021).

- How to show respect and consideration for others:
  - Be on the call a few minutes early to address any technical difficulties so the meeting can start on time;
  - Find a quiet place; avoid areas where dogs are barking or other people are talking;
  - Always introduce yourself when you arrive on the call (if conference call);
  - Give a heads-up about possible disruptions to avoid surprises (e.g., acknowledge background noise if you need to take the call outside); let others know if you need to leave the meeting early;
  - If you are leading the call, at the beginning:
    - Try to make personal connections with others;
    - Start on time;
    - Acknowledge and take roll of everyone on the call;
    - Review the agenda/goals for the call.
  - Be on mute unless you are speaking.

- How to stay engaged:
  - Avoid multi-tasking or distractions with games, texts, social media, emails, etc.;
  - Practice active, generous listening:
    - Be present and focused when someone is talking;
    - Take notes;
    - Ask questions.

- How to communicate effectively and avoid talking over others:
  - Speak clearly and make sure you are off mute;
  - Pause to avoid speaking over others:
    - If two persons try to speak at the same time and you speak first, make sure to invite the other person to speak when you finish speaking;
    - Be sensitive to the challenge for people with quieter voices to speak over louder voices and encourage all to speak.
  - On a conference call in a large meeting, identify yourself each time you speak (or at least the first few times you speak);
  - On a videoconference, when you are ready to speak, lean in and turn your mute off to signal to others that you have

something to say, or use the hand-raising feature in a meeting;
  - In a negotiation with a partner, discuss how you will manage the negotiation to present a united front and how you will communicate with each other discreetly and securely during the negotiation;
  - If you are leading the call, before the call ends:
    - Make sure everyone has had a chance to speak (particularly if some are participating in person and some are on conference call);
    - Review what was accomplished and identify action items and responsible parties.

<u>Examples – Additional Guidelines for Videoconferences</u>

- How to Avoid Technical Disruptions:
  - Use a laptop (rather than a smartphone or tablet) for better quality;
  - Ensure a stable and reliable internet connection;
  - Know how to adjust quickly if the internet connection becomes spotty;
  - Switch to audio phone, hotspot, or ethernet;
  - Turn phone on "Do Not Disturb" and close out other windows on laptop (or at least turn off notifications);
  - Practice how to share screen and make presentations or show documents efficiently.

- How to Maximize Professional Demeanor:
  - Have a professional background;
  - Avoid bright lights, uncovered windows, distracting pictures, and moving fans behind you;
  - Have a good light source on your face;
  - Dress appropriately;
  - Have your full name (first and last names) on your image on the screen;
  - Look directly into the camera at eye level when you are speaking (adjust the height of your laptop if necessary);
  - Avoid eating and chewing gum while your video is on;
  - Avoid distraction by hiding self-view.

IV. CONCLUSION

Virtual modes of communication present special issues that are increasingly common in the practice of transactional law. The exercises described above represent potential approaches a professor can use to introduce ethics and professionalism concepts in the context of virtual communication in transactional law. In particular, role-playing exercises enhance students' professional identity development and provide valuable context to the ethics rules and professionalism issues that often arise in the context of a transaction.

APPENDIX A-1

From: Oliver Overworked
Sent: [Date/time]
To: Val Scalian
Subj: Lease Renewal

I am sorry to hear that your client, Anchor Grocery, will likely not renew its lease at the Rural Acres Shopping Center. I do hope we can persuade your client to reconsider, perhaps with some rent concessions in a renewed lease.

I am attaching a letter I received from Sam Watershed, the property manager for Rural Acres, indicating that he is amenable to concession discussions. We should discuss this as soon as possible, before any other current tenants learn of Anchor's possible departure. I am currently in negotiations with representatives of two such current tenants regarding lease renewals. In particular, I am concerned about a locally owned restaurant that is represented by Val Scalian.

Best regards,

Oliver Overworked
Partner
Slicem & Dicem, LLC

To comply with IRS regulations, we advise you that any discussion of Federal tax issues in this email was not intended or written to be used, and cannot be used by you, (i) to avoid any penalties imposed under the Internal Revenue Code or (ii) to promote, marked, or recommend to another party any transaction or matter addressed herein.

For more information, please go to http://www.lw.com/docs/irs.pdf.

This email may contain material that is confidential, privileged, and/or attorney work product for the sole use of the intended recipient. Any review, reliance, or distribution by others, or forwarding without express

permission, is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

APPENDIX A-1 (CONT.)

[RURAL ACRES SHOPPING CENTER LETTERHEAD]

[Date]

CONFIDENTIAL LAWYER-CLIENT COMMUNICATION

Oliver Overworked
Slicem & Dicem, LLC
[Address]

Dear Oliver:

Thanks for your careful work on the various lease renewals. This situation with Anchor could be a disaster. There could easily be a domino effect on other tenants who are in renewal discussions at this time. I am especially concerned about the restaurant tenant—I have repeatedly had bad dealings with its lawyers.

All that makes it especially important to retain Anchor. I wish it were not so, but in the current market conditions, I will have to be open to possible lease renewal concessions with Anchor. And, obviously, if other tenants learn what is going on, I will have to negotiate concessions there as well.

By the way, it was a treat to meet you and your colleagues at the annual property management party last week. You sure know how to party! I know you were on the tipsy side by then, but I appreciated what you said about your willingness to help me hide some of the income I receive from some of the side-deal weekend parking lot rentals I manage that are separate from the shopping center itself. I know I can always count on you to take good care of my personal interests. We need more good lawyers like you.

Sam Watershed

Sam Watershed
Property Manager

APPENDIX A-2

Possible Poll Questions for Inadvertent Disclosure Practical Exercise – Part II

Question 1(a): At which point, if any, would you stop reading Oliver's email?

- As soon as I saw a different name in the email address.
- As soon as I saw the reference to "your client, Anchor…"
- After the first paragraph about the rent concessions.
- I would read the entire thing.

Question 1(b): Would you read the letter from Sam Watershed, the Landlord's property manager, that is attached to the email?

- Yes
- No

Question 2. What, if anything, would you do about the information regarding potential rent concessions?

- Nothing – I would delete the email as soon as I saw it was not addressed to me.
- I would let Oliver know that I received the email in error, but that I did not read it.
- I would let Oliver know that I received the email in error, but would not say or do more.
- I would let Oliver know that I received the email in error and then tell my client about Landlord's openness to rent concessions.
- I would let Oliver know that I received the email in error and give him a heads-up that I am going to tell my client about Landlord's openness to rent concessions.
- Other

Question 3. What, if anything, would you do about the information regarding Sam's side business?

- Nothing, I would not have read that far.
- Nothing because the communication between Sam and Oliver is privileged.
- I would let Oliver know that I received the attachment in error, but that I did not read it.
- I would let Oliver know that I received the attachment in error but would not say or do more.
- I would let Oliver know that I received the attachment in error and then share the information with my client so it can use it as leverage in negotiations.
- I would let Oliver know that I received the attachment in error and give him a heads-up that I am going to share the information with my client.
- Other