

Of Mice and Metadata–

Ethics, Client Confidentiality,
and the
Duty of Competence in the
Digital Age

Bernard E. (“Barney”) Jones

1

I. Introduction; Scope of Presentation

A *focused* study of the electronic communication of Confidential Client Information, including privileged information (collectively, “**CCI**”)

2

II. The Rules

ABA Formal Opinion 477R
Texas "Metadata" Opinion 665
Texas Opinion 648; When to Encrypt

3

A. ABA Formal Opinion 477R, 5-22-2017

- It's OK to Communicate CCI Via the Internet IF You're Reasonably Careful
 - So ...
 - Emailing CCI is OK
 - Texting CCI is OK
 - Online file sharing of CCI is OK

That is, *it can be*

4

A. ABA Formal Opinion 477R (cont'd)

- It's OK to Communicate CCI Via the Internet IF You're Reasonably Careful
 - "Reasonable Efforts" to Protect CCI Are *Always Required*

In *all* communications by *any* means the lawyer must always take "reasonable efforts to prevent inadvertent or unauthorized access."

I.e., the duty regarding electronic communications is same as for the duty regarding non-electronic communications – no more, no less.

5

A. ABA Formal Opinion 477R (cont'd)

- It's OK to Communicate CCI Via the Internet IF You're Reasonably Careful
 - "Reasonable Efforts" Means "Extraordinary Efforts" in Certain Cases

"*Special security precautions*" may be required—

- By agreement with the client
- By law
- If "the nature of the information requires a higher degree of security" ... Or ...
- If the circumstances of the client require a higher degree of security

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Of Mice and Metadata: Ethics, Client Confidentiality, and the Duty of Competence in the Digital Age

Also available as part of the eCourse

[2018 Stanley M. Johanson Estate Planning eConference](#)

First appeared as part of the conference materials for the
2018 Stanley M. Johanson Estate Planning Workshop session

"Of Mice and Metadata: Ethics, Client Confidentiality, and the Duty of Competence in the Digital Age"