

# Of Mice and Metadata–

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

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## I. Introduction; Scope of Presentation

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

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## II. The Rules

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

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### 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*

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## 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.

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## 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

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