

Of Mice and Metadata–

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

Bernard E. (“Barney”) Jones

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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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