

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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