

YOURS, MINE AND THEIRS – THE DOCUMENT DILEMMA

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INTRODUCTION

This paper addresses a recent, growing trend of individual clients impermissibly taking documents from their employers, either in paper format or electronically. It also considers the criminal liability involved, along with practice procedures on handling same.

SUMMARY

Florida's trade secrets (Florida Statute §812.081) and computer crimes (Florida Statute §815.01, et seq.) both criminalize a person's unauthorized taking of an employer's confidential documents and computer data. Appendices A and B, respectively. An unauthorized taking under either statute constitutes a third degree felony punishable by either up to five years of imprisonment or fine up to \$5,000. In addition, Florida Ethics Opinion 07-1 prohibits an attorney from reviewing, retaining or using documents wrongfully obtained by his or her client without informing the opposing party both that an attorney and he/she have such documents. Appendix C. The attorney must withdraw from representation if the client refuses to return the documents. The attorney should inform such a client that they may need to consult with a criminal attorney. Finally, many employees may be governed by employer confidentiality/non-compete agreements which prohibit them from taking and disclosing confidential company information.

ANALYSIS

Both Florida's trade secrets and computer crimes statutes prohibit individuals from engaging in unauthorized takings of an employer's confidential documents or computer data and impose

criminal penalties.

FLORIDA TRADE SECRETS LAW

The Florida trade secrets law provides that:

"[a]ny person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree..." punishable by up to five years of imprisonment or a fine up to \$5,000. (Fla. Stat. § 812.081 (2), 775.082 and 775.084)

In order to constitute a "trade secret", information must be (1) secret, (2) of value, (3) for use or in use by the business; and (4) of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it." (Id. (1) (c)). A wide variety of information can be considered a "trade secret." Scientific, technical or commercial information, lists of suppliers or customers, business codes can all constitute a "trade secret". The trade secrets law primarily covers physical items such as documents, writings, recordings, drawings, samples, prototypes and models, but could interpreted to cover electronic copies of such items as well. However, electronic copies would most likely be covered by Florida computer crimes statute described in the next section.

The intent of the person is key to determining whether a person has violated the trade secrets law. Arguably, if an employee takes trade secrets from the employer to establish an employment law claim with no intent to deprive or withhold, embezzle or use such information except to establish an employment law claim, he or she may not have committed a felony. Of course, such an individual would have to show that his or her taking was not done with such criminal intent which may be difficult to prove.

FLORIDA COMPUTER CRIMES LAW

Unlike the trade secrets law, Florida's computer crimes law does not have an intent requirement in order for criminal liability to attach. Rather, an individual can be found guilty of a third degree felony with the punishments set forth above for committing an offense against intellectual property if he or she simply:

"willfully, knowingly, and without authorization discloses or takes data, programs or supporting documentation which is a trade secret as defined by § 812.081 or is confidential as provided by law residing or existing internal or external to a computer, computer system, or computer network.." (Fla. Stat. § 815.04(3)(b)).

So long as a person willfully and knowingly removes or discloses such information, then he/she has possibly violated this statute and committed a third degree felony.

FLORIDA ETHICS OPINION 07-1

Florida bar ethics opinion 07-01 reads as follows:

"A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring and client have the documents at issue. If the client refuses to consent to the disclosure, the inquiring attorney must withdraw from the representation."

This ethics opinion dealt with an attorney representing a wife in a divorce action against her husband. The wife and husband had shared professional space within an office prior to their separation and had shared printing, copying and computer use. The attorney discovered the wife had impermissibly: (1) removed documents from the husband's office prior to and after separation; (2) accessed the husband's computer and printed off documents including financial statements and e-mails to third parties; (3) removed attorney-client privileged documents from her husband's care; and (4) accessed the husband's personal e-mail from her own home computer and printed and download privileged and confidential documents.

The Ethics Advisory Board advised the attorney to take the actions set forth in the block quote with respect to all of the above-described items.

PRECAUTIONS TO TAKE DURING INITIAL CONSULTATIONS AND OVER THE COURSE OF REPRESENTATION

Many employees facing difficulties at work may either take physical documents or e-mail themselves company information to bolster potential discrimination and/or wrongful termination claims. Such actions have the potential of violating both the Florida trade secrets and computer crimes statutes if such information constitutes a trade secret and/or confidential information, subjecting the employee to criminal charges as set forth above. Even if information is not a trade secret, many employers have their employees sign confidentiality/non-compete agreements which prohibit them from taking and/or disclosing the company confidential and proprietary information. Violations of such agreements may entitle the employer to seek temporary restraining orders and injunctive relief against such employees. In all likelihood, employers will use their former employees' violations of these statutes and/or agreements as leverage to have them either drop their claims or accept a much lower settlement amount.

In order to avoid having to deal such issues, the following precautions should be taking during initial consultations and over the course of representation:

- Ask the client if he/she have signed a confidentiality and/or non-compete agreement. Where available, ask the client to provide a copy for the attorney's review;

- If the client presents or states he/she possesses documents/data that could potentially be company trade secrets or confidential information (such as customer lists, pricing information, financial documents, etc.), ask why he/she has it and where he/she obtained it to see if there is a potential violation of Florida's trade secret or computer crimes statute or any applicable confidentiality/non-compete agreement;
- If it appears the client's possession of such documents/data is a violation of Florida's trade secret or computer crimes statutes, advise the client he/she should seek the advice of a criminal defense attorney. Let the client know he/she could also be subject to a temporary restraining order or injunctive relief if possession of such documents/data is a violation of a confidentiality/non-compete agreement;
- In light of Florida Ethics Opinion 07-1, attorneys cannot review, use or even retain such documents/data without informing the opposing party of their possession of them;
- If this issue is discovered during an initial consultation, the potential client should be advised that should representation occur, in light of the potential criminal liability for the unauthorized taking of such items, the attorney would be unable to retain, review, or use them during representation of the client, and even if the information/data was retained by the law firm, the ethical obligations governing attorneys would obligate their attorney to inform the opposing party of such possession. Should the client refuse to consent to such disclosure, they should be informed that under those circumstances the attorney would have to withdraw from representation of the client;
- If this issue is discovered during the course of representation after such documents/data are already in the possession of the attorney, the client must be advised of the attorney's ethical obligation to inform the opposing party of such possession and withdrawal of legal representation if the client is unwilling to consent to the disclosure; and
- If the client consents to disclosure, it needs to be documented and both sides need to agree on how the matter should be handled, especially in the case of electronic documents. See Appendices D, E, F and G for samples of how such matters can be handled.

APPENDIX A



LEXSTAT FLA. STAT. § 812.081

LexisNexis (R) Florida Annotated Statutes
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*** This document is current through Ch. 2009-17 (End) ***

*** of 2009 Special Session "A" ***

*** Annotations are current through January 22, 2009 ***

TITLE 46. CRIMES (Chs. 775-896)
CHAPTER 812. THEFT, ROBBERY, AND RELATED CRIMES

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 812.081 (2009)

§ 812.081. Trade secrets; theft, embezzlement; unlawful copying; definitions; penalty

(1) As used in this section:

(a) "Article" means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype model, photograph, microorganism, blueprint, map, or copy thereof.

(b) "Representing" means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.

(c) "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;

3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) "Copy" means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied.

HISTORY: ss. 1, 2, 3, ch. 74-136; s. 1, ch. 85-34; s. 1240, ch. 97-102.

LexisNexis (R) Notes:

CASE NOTES

1. Failure to identify information furnished to a State agency as putatively exempt from public disclosure effectively destroys any confidential character it might otherwise have enjoyed as a trade secret under *Fla. Stat. chs. 688.002(4)(b)* and *812.081(1)(c)*. *SePRO Corp. v. Fla. Dep't of Env'tl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

2. Trial court's finding that all of the documents, including electronic mail, that a corporation had designated confidential fell within the criteria for trade secrets set out in *Fla. Stat. ch. 812.081* was supported by competent, substantial evidence. *SePRO Corp. v. Fla. Dep't of Env'tl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

3. Pursuant to *Fla. Stat. ch. 119.01(1)*, the failure to identify information furnished to a state agency as putatively exempt from public disclosure effectively destroys any confidential character it might otherwise have enjoyed as a trade secret as it is defined by *Fla. Stat. ch. 812.081(1)(c)* and *Fla. Stat. ch. 688.002(4)*. Furthermore, just because a document is stamped confidential does not mean that such documents are confidential and exempt from the public disclosure mandate of *Fla. Stat. ch. 119.07(1)*. *SePRO Corp. v. Fla. Dep't of Env'tl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

4. Where the state subpoenaed numerous records from defendant's attorney in connection with its investigation of defendant for a violation of Florida's Trade Secrets Act, *Fla. Stat. ch. 812.081*, the court found that production of the records would be testimonial, in that it would concede the existence of a customer list and defendant's possession of it; the *U.S. Const. amend. V* prohibited forcing defendant to produce any such document, and the attorney-client privilege shielded any such document defendant gave his attorney in the course of seeking legal advice. *Heddon v. State*, 786 So. 2d 1262, 2001 Fla. App. LEXIS 8093, 26 Fla. L. Weekly D 1513 (Fla. Dist. Ct. App. 2d Dist. 2001).

5. Where the state subpoenaed numerous records from defendant's attorney in connection with its investigation of defendant for a violation of Florida's Trade Secrets Act, *Fla. Stat. ch. 812.081*, the court found that production of the records would be testimonial, in that it would concede the existence of a customer list and defendant's possession of it; the *U.S. Const. amend. V* prohibited forcing defendant to produce any such document, and the attorney-client privilege shielded any such document defendant gave his attorney in the course of seeking legal advice. *Heddon v. State*, 786 So. 2d 1262, 2001 Fla. App. LEXIS 8093, 26 Fla. L. Weekly D 1513 (Fla. Dist. Ct. App. 2d Dist. 2001).

6. Where the state subpoenaed numerous records from defendant's attorney in connection with its investigation of defendant for a violation of Florida's Trade Secrets Act, *Fla. Stat. ch. 812.081*, the court found that production of the records would be testimonial, in that it would concede the existence of a customer list and defendant's possession of it; the *U.S. Const. amend. V* prohibited forcing defendant to produce any such document, and the attorney-client privilege shielded any such document defendant gave his attorney in the course of seeking legal advice. *Heddon v. State*, 786 So. 2d 1262, 2001 Fla. App. LEXIS 8093, 26 Fla. L. Weekly D 1513 (Fla. Dist. Ct. App. 2d Dist. 2001).

7. Corporation failed adequately to protect an alleged trade secrets claim from the effect of the Public Records Act by taking efforts that were reasonable under the circumstances to maintain the documents' secrecy under *Fla. Stat. ch. 688.002(4)(b)* and *Fla. Stat. ch. 812.081(1)(c)*; the corporation failed to mark the documents in question as "confidential" and continued to supply them, without asserting even a (legally ineffectual) post-delivery claim to confidentiality for some 30 days after it had once attempted to do so by so informing the county staff. *Cubic Transp. Sys. v. Miami-Dade County*, 899 So. 2d 453, 2005 Fla. App. LEXIS 4647, 30 Fla. L. Weekly D 921 (Fla. Dist. Ct. App. 3d Dist. 2005).

8. Pursuant to *Fla. Stat. ch. 119.01(1)*, the failure to identify information furnished to a state agency as putatively exempt from public disclosure effectively destroys any confidential character it might otherwise have enjoyed as a trade secret as it is defined by *Fla. Stat. ch. 812.081(1)(c)* and *Fla. Stat. ch. 688.002(4)*. Furthermore, just because a document is stamped confidential does not mean that such documents are confidential and exempt from the public disclosure mandate of *Fla. Stat. ch. 119.07(1)*. *SePRO Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

9. What is now codified as *Fla. Stat. ch. 815.045* was originally codified as part of the Public Records Law, specifically, *Fla. Stat. ch. 119.165*; the original placement in *Fla. Stat. ch. 119* evinces a contemporaneous view that the exemption from the public records disclosure requirements that

1994 Fla. Laws 100, § 2 enacted applies to more than computer data, programs or supporting documentation, and the language of this provision should be read to exempt from disclosure as public records all trade secrets, as defined in *Fla. Stat. ch. 812.081(1)(c)*, whether or not they are stored on or transmitted by computers. *SePRO Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

10. Defining trade secrets in *Fla. Stat. ch. 815.04(3)(a)* by reference to *Fla. Stat. ch. 812.081(1)(c)*, means that *Fla. Stat. ch. 815.04(3)(a)* plainly covers electronic mail. *SePRO Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

11. That a doctor compiled a list of patients he had treated after he was fired as an independent contractor for a clinic did not constitute a violation of *Fla. Stat. ch. 812.081*, because the names of the clinic's patients were not a trade secret and could be obtained by other means than a customer list. *Blackstone v. Dade City Osteopathic Clinic*, 511 So. 2d 1050, 1987 Fla. App. LEXIS 9769, 12 Fla. L. Weekly 1920 (Fla. Dist. Ct. App. 2d Dist. 1987), review denied by 523 So. 2d 576 (Fla. 1988).

12. Information sheets, did not provide defendant's business an advantage over competitors, were available for inspection and use by outside salespersons, were used at open houses and passed out to prospective buyers pursuant to *Fla. Stat. ch. 812.081* were not secret or confidential, and did not constitute trade secrets, and could not be the basis for a conviction of theft of trade secrets. *Clark v. State*, 670 So. 2d 1056, 1996 Fla. App. LEXIS 2457, 21 Fla. L. Weekly D 669 (Fla. Dist. Ct. App. 2d Dist. 1996).

OPINIONS OF ATTORNEY GENERAL

1. Unless determined to the contrary by a court of competent jurisdiction, in the absence of an express provision of federal law making this type of information confidential, records of the Department of Health and Rehabilitative Services regarding annual amounts of reimbursements paid to Medicaid providers are subject to public inspection and examination under Florida's Public Records Law provided that such information does not name or otherwise identify applicants or recipients of Medicaid benefits. The fact that a Medicaid provider has stamped information submitted to the Department of Health and Rehabilitative Services "trade secrets" does not in itself make such information a trade secret for purposes of s. 812.081, F.S., or exempt such information from the requirements of the Public Records Law. Such a determination must be made by examination of the statute; however, it does not appear that information regarding the extent of services provided or the claims for payment submitted by Medicaid providers would qualify as "trade secrets" within the meaning of s. 812.081., 080-31, 1980 Fla. AG LEXIS 72; 1980 Op. Atty Gen. Fla. 810.

TREATISES AND ANALYTICAL MATERIALS

1. 1-14 *Florida Forms of Jury Instruction* § 14.21, PART B. LIABILITY FOR THE ACTS OF OTHERS, Damages for Malicious or Willful Destruction or Theft of Property by Child.

2. *3-65 Florida Forms of Jury Instruction § 65.110*, PART B. SPECIFIC TORT ACTIONS, Elements of Cause of Action for Misappropriation of Trade Secret.
3. *3-65 Florida Forms of Jury Instruction § 65.116*, PART B. SPECIFIC TORT ACTIONS, Improper Conduct--Secret Acquired Directly From Plaintiff.
4. *2-31 Florida Torts § 31.53*, CHAPTER 31 UNFAIR COMPETITION, Rights, Remedies, and Causes of Action.
5. *3-110 Florida Torts § 110.06*, CHAPTER 110 DAMAGES, INTEREST, COSTS, AND ATTORNEY'S FEES, Amount of Compensatory Damages.
6. *12-220 Southeast Transaction Guide § 220.02*, Division 3 Business and Consumer Relations, State Statutes.
7. *12-220 Southeast Transaction Guide § 220.22*, Division 3 Business and Consumer Relations, Contractual Business Protection.
8. *70 Fla. Bar J. 52*, COLUMN: ENVIRONMENTAL AND LAND USE LAW: BIOMEDICAL WASTE REGULATION IN FLORIDA, by R. Scott Ruth and Ralph A. DeMeo, July/August, 1996, Copyright (c) 1996 by the Florida BarThe Florida Bar Journal.
9. *72 Fla. Bar J. 34*, FEATURE: CYBERLAW AND COMPUTER TECHNOLOGY: A PRIMER ON THE LAW OF INTELLECTUAL PROPERTY PROTECTION, by David R. Ellis, January, 1998, Copyright (c) 1998 by the Florida BarThe Florida Bar Journal.
10. *76 Fla. Bar J. 36*, COLUMN: ADMINISTRATIVE LAW: CONFLICTS BETWEEN THE SUNSHINE LAW AND TRADE SECRET PROTECTION IN PUBLIC PROCUREMENT, By Andy Bertron, February, 2002, Copyright (c) 2002 by the Florida BarThe Florida Bar Journal.

LAW REVIEWS

1. *14 Fla. St. U.L. Rev. 635*, REVIEW OF FLORIDA LEGISLATION; ARTICLE: IMPACT OF THE INFORMATION AGE ON ACCESS AND DISSEMINATION OF GOVERNMENT INFORMATION IN FLORIDA.
2. *11 U. Miami Bus. L. Rev. 1*, A PRIMER ON FLORIDA TRADE SECRET LAW: UNLOCKING THE "SECRETS" TO "TRADE SECRET" LITIGATION.

APPENDIX B



LEXSTAT FLA. STAT. 815.04

LexisNexis (R) Florida Annotated Statutes
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*** STATUTES AND CONSTITUTION ARE CURRENT THROUGH ACT 2009-18 OF THE
2009 REGULAR SESSION ***

*** Annotations current through May 1, 2009 ***

TITLE 46. CRIMES (Chs. 775-896)
CHAPTER 815. COMPUTER-RELATED CRIMES

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 815.04 (2009)

§ 815.04. Offenses against intellectual property; public records exemption

(1) Whoever willfully, knowingly, and without authorization modifies data, programs, or supporting documentation residing or existing internal or external to a computer, computer system, or computer network commits an offense against intellectual property.

(2) Whoever willfully, knowingly, and without authorization destroys data, programs, or supporting documentation residing or existing internal or external to a computer, computer system, or computer network commits an offense against intellectual property.

(3) (a) Data, programs, or supporting documentation which is a trade secret as defined in *s. 812.081* which resides or exists internal or external to a computer, computer system, or computer network which is held by an agency as defined in chapter 119 is confidential and exempt from the provisions of *s. 119.07(1)* and *s. 24(a), Art. I of the State Constitution*.

(b) Whoever willfully, knowingly, and without authorization discloses or takes data, programs, or supporting documentation which is a trade secret as defined in *s. 812.081* or is confidential as provided by law residing or existing internal or external to a computer, computer system, or computer network commits an offense against intellectual property.

(4) (a) Except as otherwise provided in this subsection, an offense against intellectual property is a felony of the third degree, punishable as provided in *s. 775.082*, *s. 775.083*, or *s. 775.084*.

(b) If the offense is committed for the purpose of devising or executing any scheme or artifice to defraud or to obtain any property, then the offender is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

HISTORY: s. 1, ch. 78-92; s. 1, ch. 94-100; s. 431, ch. 96-406.

LexisNexis (R) Notes:

CASE NOTES

1. Defendant used an existing computer function to bypass the transmission of information from a customer's credit application to a credit bureau; did not change the form or properties of detailed information contained in the computer or the system, but added material to the existing data; the action did not constitute modification of intellectual property under *Fla. Stat. ch. 815.04. Newberger v. State*, 641 So. 2d 419, 1994 Fla. App. LEXIS 7483, 19 Fla. L. Weekly D 1622 (Fla. Dist. Ct. App. 2d Dist. 1994).
2. Defendant used an existing computer function to bypass the transmission of information from a customer's credit application to a credit bureau; did not change the form or properties of detailed information contained in the computer or the system, but added material to the existing data; the action did not constitute modification of intellectual property under *Fla. Stat. ch. 815.04. Newberger v. State*, 641 So. 2d 419, 1994 Fla. App. LEXIS 7483, 19 Fla. L. Weekly D 1622 (Fla. Dist. Ct. App. 2d Dist. 1994).
3. Defendant's conviction for modifying a computer, in violation of *Fla. Stat. ch. 815.04(1)*, was reversed because there was no showing that defendant modified existing data on the computer when defendant procured identification cards for an individual who did not provide sufficient documentation to receive the card. *Garcia v. State*, 939 So. 2d 1082, 2006 Fla. App. LEXIS 13260, 31 Fla. L. Weekly D 2111 (Fla. Dist. Ct. App. 3d Dist. 2006).
4. Conviction of modifying intellectual property under *Fla. Stat. ch. 815.04* was improper because a credit card company employee did not modify the existing data in any way, he merely added additional material to fraudulently obtain a credit card. *Newberger v. State*, 641 So. 2d 419, 1994 Fla. App. LEXIS 7483, 19 Fla. L. Weekly D 1622 (Fla. Dist. Ct. App. 2d Dist. 1994).
5. Defining trade secrets in *Fla. Stat. ch. 815.04(3)(a)* by reference to *Fla. Stat. ch. 812.081(1)(c)*, means that *Fla. Stat. ch. 815.04(3)(a)* plainly covers electronic mail. *SePRO Corp. v. Fla. Dep't of Env'tl. Prot.*, 839 So. 2d 781, 2003 Fla. App. LEXIS 1410, 28 Fla. L. Weekly D 492 (Fla. Dist. Ct. App. 1st Dist. 2003), review denied by 911 So. 2d 792, 2005 Fla. LEXIS 1790 (Fla. 2005).

TREATISES AND ANALYTICAL MATERIALS

1. 72 *Fla. Bar J.* 22, FEATURE: Internet Misuse in the Workplace: A Lawyer's Primer, By James Garrity and Eoghan Casey, November, 1998, Copyright (c) 1998 by the Florida BarThe Florida Bar Journal.

2. 76 *Fla. Bar J.* 36, COLUMN: ADMINISTRATIVE LAW: CONFLICTS BETWEEN THE SUNSHINE LAW AND TRADE SECRET PROTECTION IN PUBLIC PROCUREMENT, By Andy Bertron, February, 2002, Copyright (c) 2002 by the Florida BarThe Florida Bar Journal.

LEXISNEXIS 50 STATE SURVEYS, LEGISLATION & REGULATIONS

Computer Crimes

APPENDIX C

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-1 (September 7, 2007)

A lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.

RPC: 4-1.2(d), 4-1.4, 4-1.6, 4-1.16(a)(1), 4-3.4(a), 4-4.4(a), 4-4.4(b), 4-8.4(a), 4-8.4(c), 4-8.4(d)

Opinions: 93-3; ABA Formal Opinion 94-382; ABA Formal Opinion 06-440; ABA Formal Opinion 05-437; Connecticut Opinion 96-4; New Jersey Opinion 680; New York City Opinion 1989-1

Cases: *Anderson v. State*, 297 So.2d 871 (Fla. 2d DCA 1974); *Florida Bar v. Hmielewski*, 702 So.2d 218 (Fla. 1997); *Moldonado v. New Jersey, Administrative Office of the Courts - Probation Division*, 225 F.R.D. 120 (D. N.J. 2004); *Perna v. Electronic Data Systems, Corporation*, 916 F.Supp. 388 (D.N.J. 1995); *Quinones v. State*, 766 So.2d 1165 (Fla. 3d DCA 1974)

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are as follows:

I represent the petitioner/wife in a dissolution of action currently pending in [local county], Florida. Wife maintains a small professional space within an office owned by a company in which her husband is a 50% shareholder. Prior to separation of the parties, wife frequently utilized husband's corporate office space for printing, copying, computer use, etc. Since separation, wife is no longer welcome to use these amenities unsupervised or after hours. It has come to my attention that my client has done the following: (1) Removed documents from husband's office prior to and after separation; (2) Figured out husband's computer and e-mail password and, at his office, printed off certain documents, including financial documents of the corporation, husband's personal documents and e-mails with third parties of a personal nature, and documents or e-mails authored by husband's attorney in this action; (3) Accessed husband's personal e-mail from wife's home computer, and printed and downloaded confidential or privileged documents; and (4) despite repeated warning of the wrongfulness of wife's past conduct by this office, removed documents from husband's car which are believed to be attorney-client privileged.

Wife has produced to my office certain documents listed in 1-3 above, which production alerted me to this issue. This office has not reviewed those documents believed to contain attorney-client privileged information and immediately segregated those documents and any copies in a sealed envelope. Wife claims that she is not in possession of any other documents subject to 1-3 above, and that she did not review those that contain reference to husband's attorney.

I believe documents removed from husband's car referenced in 4 above, which may be attorney-client privileged, are in the custody of wife, who claims she has not reviewed the document, but contacted counsel upon discovery of potentially confidential material.

I have reviewed the Florida and ABA opinions and contacted the Florida Bar Hotline. It does not appear that any cases specifically address obligations of disclosure to opposing counsel wherein one party obtained the documents in a potentially illegal manner. The cases appear to be limited to cases of inadvertent disclosure by the revealing party. I am unsure of my obligation of disclosure and/or to return the documents to husband's counsel without violating my obligation of confidentiality and representation to my client, and request a written staff opinion regarding same.

Discussion

Rule 4-4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." In an opinion predating the adoption of Rule 4-4.4(b), Florida Ethics Opinion 93-3, this committee came to the same conclusion.

However, the instant facts are distinguishable from the typical scenario involving inadvertent disclosure of privileged documents. There was no inadvertent disclosure. Rather, the materials were deliberately obtained by inquiring attorney's client without the permission of the opposing party. The comment to Rule 4-4.4(b) mentions such situations, but does not provide substantial guidance:

Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. *Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.* For purposes of this rule,

"document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

(emphasis added).

The American Bar Association formerly had an ethics opinion addressing a lawyer's duties when the lawyer receives confidential information from someone who is not authorized to release the information. In Formal Opinion 94-382, the ABA Standing Committee on Ethics and Professional Responsibility determined that an attorney who receives an adverse party's confidential materials from someone who is not authorized to disclose them should refrain from reviewing the materials and either contact opposing counsel for instructions or seek a court order allowing the recipient to use them. The ABA recently withdrew that opinion in Formal Opinion 06-440, deciding that Opinion 94-382 was not supported by the rules, especially ABA Model Rule 4.4(b) which is the equivalent of Florida Rule 4-4.4(b). Specifically, the ABA committee stated:

As was noted in Formal Opinion 05-437, Rule 4.4(b) requires only that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. The Rule does not require refraining from reviewing the materials or abiding by instructions of the sender. Thus, even assuming that the materials sent intentionally but without authorization could be deemed "inadvertently sent" so that the subject is one addressed by Rule 4.4(b), the instructions of Formal Opinion 94-382 are not supported by the Rule.

It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply to the factual situation addressed in Formal Opinion 94-382. A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules. Whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).

Accordingly, because the advice presented in Formal Opinion 94-382 is not supported by the Rules, the opinion is withdrawn in its entirety.

Therefore, neither Rule 4-4.4(b) nor Opinion 93-3 directly govern the inquiring attorney's situation.

The Comment to Rule 4-4.4(b) states that the rule does not address the legal duties of a lawyer who receives documents that were wrongfully obtained. Similarly, under the Florida Bar Procedures For Ruling on Questions of Ethics it is beyond the scope of an advisory ethics opinion for

this committee to resolve legal issues, such as whether the inquiring attorney has a legal duty (independent of any duty the client may have) to return the documents to their owner. Nor can this opinion resolve the legal question of whether the client's conduct violated any criminal laws. However, to merely refer the inquiring attorney to the comment to Rule 4-4.4(b) and point out that there are legal issues to be resolved does a disservice to the inquiring attorney. While there are legal issues that this committee cannot resolve, there is ethical guidance that can be provided. Further, for the purposes of this guidance, it will be presumed that, whether or not the client's conduct was illegal, it was improper. If the client's conduct was rightful and proper the inquiring attorney would not be seeking guidance.

While Rule 4-4.4(b) does not govern the inquiring attorney's quandary, other rules are applicable. One such rule is Rule 4-1.6, the ethical duty of confidentiality. This rule states, in part:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

The confidentiality rule makes any information relating to the representation of a client confidential, *whatever the source*. Comment, Rule 4-1.6. It is broader than the attorney-client privilege. Thus, under the rule, an attorney cannot voluntarily reveal any information relating to the representation of a client unless the client consents or an exception to the rule is applicable.

Another rule that is applicable to the inquiring attorney's situation is Rule 4-3.4(a). This rule states:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

Still other rules are applicable. Rule 4-4.4(a) prohibits a lawyer from knowingly using “methods of obtaining evidence that violate the legal rights” of third persons. Rule 4-1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. Rule 4-1.4 requires lawyers to fully advise clients. Rule 4-8.4(d) prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Rule 4-8.4(a) prohibits a lawyer from violating the rules through the acts of another.

Additionally, while there is no formal opinion in Florida providing guidance in a situation such as that facing the inquiring attorney, there is at least one disciplinary case that touches on the issues presented by the inquiring attorney. In *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997) an attorney represented a client in a wrongful death claim alleging medical malpractice arising from the death of the client’s father. After the attorney was retained, but before suit was filed, the client told the attorney that he had taken some of his father’s medical records from the hospital involved and showed the attorney the records. In discovery, the attorney asked the hospital to produce the records, which it could not. The hospital, in its own discovery request, asked for the production of any medical records the client had. The attorney did not disclose the records. The attorney stated to the court that one of the issues in the case was the hospital’s failure to maintain the records, the attorney submitted an expert report that the hospital tampered with its medical records even though the attorney knew the expert’s opinion was based on the expert’s belief that the hospital failed to maintain the records, and made other misrepresentations. After the fact that the client took the records came out during the client’s deposition, the court sanctioned the client and the attorney and filed a bar complaint against the attorney.

The Florida Supreme Court upheld the referee’s findings based on the above facts:

The referee recommended that Hmielewski be found guilty of violating the following Rules Regulating The Florida Bar: (1) rule 3-4.3, which proscribes conduct that is unlawful or contrary to honesty or justice; (2) rule 4-3.3(a)(1), which prohibits knowingly making false statements of material fact or law to a tribunal; (3) rule 4-3.3(a)(2), which prohibits failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (4) rule 4-3.4(a), which prohibits both the unlawful obstruction of another party's access to evidence and the unlawful altering, destruction or concealment of a document or other material that the lawyer knows or reasonably should know is relevant to a pending or reasonably foreseeable proceeding, or counseling or assisting another person to do such an act; (5) rule 4-3.4(d), which prohibits the intentional failure to comply with legally proper discovery requests; (6) rule 4-4.1(a), which mandates that lawyers not make false statements of material fact or law to third persons while representing a client; (7) rule 4-4.4, which prohibits the use of methods of obtaining evidence that violate the rights of third persons; and (8) rule 4-8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

The referee recommended that Hmielewski be suspended from the practice of law for one year followed by two years of probation, noting that the character and reputation testimony presented on Hmielewski's behalf was the primary mitigating factor that saved Hmielewski from disbarment.

"A referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Florida Bar v. Berman*, 659 So.2d 1049, 1050 (Fla.1995). We find support in the record for the referee's factual findings. These findings establish that Hmielewski improperly allowed what he perceived as his duty to his client to overshadow his duty to the justice system when he made deliberate misrepresentations of material fact to the Mayo Clinic and the Minnesota trial court. Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a member of The Florida Bar.

702 So. 2d at 220. The court suspended the attorney for three years.

Clearly, under *Hmielewski*, the inquiring attorney cannot make any misrepresentations about the documents, including in response to any discovery requests regarding the documents. Nor can the inquiring attorney make the documents, including the opponent's failure to produce them or have them in his custody, a feature of the case without disclosing that the inquirer has the documents. However, *Hmielewski* did not address what the attorney should have done when the attorney first learned that the client obtained the documents.

Other jurisdictions also have addressed the issue of a lawyer's responsibilities when the lawyer's client improperly gets confidential or privileged documents of the opposing party. Connecticut Opinion 96-4 states that an attorney whose client improperly obtained a release of the client's spouse's medical records may not permit the client to copy or view the records and must return the records to the records custodian unless a proper release is signed. New Jersey Opinion 680 (1995) dealt with a situation where opposing counsel came to the work place of another attorney's clients to examine documents during discovery. When both opposing counsel and the client's own attorney took a lunch break, the client went through a stack of the opposing attorney's papers and made copies of them. When the attorney was told of the client's action, he sought the ethics opinion. The attorney did not come into possession of any of the documents. As stated in the New Jersey opinion:

The nub of the problem posed by the inquiry lies with the fact that the clients gained access, without permission, to private, confidential documents of adversaries in litigation. Two of the principals of the client are not in accord as to the precise circumstances by which this access was gained, but in any event it was unauthorized.

No Rule of Professional Conduct directly deals with this specific situation, nor does any prior opinion of this Committee. Neither RPC 3.4 (Fairness to Opposing Party and Counsel) nor RPC 4.1 (Truthfulness in Statements to Others) clearly and directly reaches the situation posed by the inquirer. Further, while under RPC 4.1(a)(2) in

some circumstances a client's seizure of evidence in the hands of an adversary certainly could constitute "a criminal or fraudulent act," we do not have enough evidence to draw such a conclusion here. Similarly, on the facts presented, the lawyer did not "use methods of obtaining evidence that violate the legal rights of such a [third] person," under RPC 4.4, as the actions were taken by a client.

Nonetheless, the client's reading of the adversary's documents was distinctly inappropriate and improper, constituting a clear invasion of privacy at the very least. If the lawyer had committed the acts ascribed to the clients, and items of evidence were involved, it would constitute a violation of RPC 4.4. It is well established that an attorney may not do indirectly that which is prohibited directly (see RPC 8.4(a)), and consequently the lawyer cannot be involved in the subsequent review of evidence obtained improperly by the client. Furthermore, the conduct of inquirer's client may have been of benefit to that client in the litigation. For a lawyer to allow a client's improper actions taken in the context of litigation to benefit that client in such litigation would constitute "conduct that is prejudicial to the administration of justice" under RPC 8.4(d). Only disclosure to the adversary will avoid the prejudicial effect proscribed by this rule, and thus this situation falls within those in which disclosure of confidential information is permitted by RPC 1.6(c)(3) in order "to comply with other law." Mere withdrawal from representation, without disclosure, will not reverse the prejudicial conduct.

The incident that formed the basis of New Jersey Opinion 680 is also the subject of *Perna v. Electronic Data Systems, Corporation*, 916 F. Supp 388 (D. N.J. 1995). In that case, the court sanctioned the partner who viewed and copied the opposing parties documents by dismissing the partner's individual claims. Of the conduct of the partner's attorneys, the Court noted that the attorneys did not engage in any misconduct and applauded their decision to seek ethical guidance. 916 F.Supp at 394, footnote 5.

In another case from New Jersey, *Maldonado v. New Jersey, Administrative Office of the Courts – Probation Division*, 225 F.R.D. 120 (D. N.J. 2004), a plaintiff who was employed as a probation officer filed a discrimination lawsuit against his employer and two individual probation officers. Prior to the lawsuit, the plaintiff filed an administrative claim with the New Jersey Division on Civil Rights (NJDCR). The NJDCR proceeding resulted in a finding of probable cause. The two individual probation officers named wrote a letter on October 7, 2001 to their attorney regarding the credibility of the witnesses interviewed in the NJDCR matter. At a later date in 2001, a copy of the letter came into the possession of the plaintiff. The plaintiff claimed someone put it in his workplace mailbox. The defendants suspected that the plaintiff took it from one of the individual defendant's office, but were unable to prove this. The plaintiff gave the copy of the letter to his attorneys. Information from the letter was used by the attorneys in the original civil complaint filed in October 2003. However, defense counsel did not notice this until the amended complaint was reviewed in a meeting between plaintiff and defense counsel in the spring of 2004. Defense counsel then filed a motion for protective order, to dismiss the plaintiff's complaint as a sanction or alternatively to disqualify the plaintiff's attorneys.

The court found that under the circumstances, the attorney client and work product privileges were not waived. The court further declined to dismiss the plaintiff's case, in part because it was not proven that the plaintiff intentionally took the letter. However, the Court did order the disqualification of the plaintiff's attorneys:

In sum, the record before the Court shows the following: 1) Maldonado's present counsel had access to privileged material since at least October 3, 2003; 2) counsel reviewed and relied on the October 7th letter in formulating Maldonado's case; 3) the letter was highly relevant and prejudicial to Defendants' case; 4) counsel did not adequately notify opposing counsel of their possession of the material; 5) Defendants took reasonable precautions to protect the letter and cannot be found at fault for the disclosure; and 6) Maldonado would not be severely prejudiced by the loss of his counsel of choice.

* * *

Both Matos and Hodulik did not adhere to the "cease, notify, and return" mandate of the New Jersey Supreme Court's Advisory Committee on Professional Ethics [Opinion 680] and the New Jersey Rules of Professional Conduct. The Court's decision, however, rests more appropriately on the prejudicial effect that the disclosure of the October 7th letter has on Defendants' case. This sanction is drastic; yet, in disqualification situations any doubt is to be resolved in favor of disqualification. Therefore, the Court finds that the appropriate remedy to mitigate the prejudicial effects of counsels' possession, review,*142 and use of the letter is the disqualification of Matos and Hodulik.

225 F.R.D. at 141-142.

The Association of the Bar of the City of New York in its Ethics Opinion 1989-1 addressed the issue of an attorney's obligations when a spouse in a matrimonial case intercepted communications between the other spouse and that spouse's attorney. The New York Committee came to a somewhat different conclusion than New Jersey, based on the duty of confidentiality to the client:

Where the inquirer has not suggested or initiated the practice in any way, the question to be resolved is whether any ethical obligations or prohibitions constrain the inquiring attorney's use of the copied communications. The Committee concludes that, regardless of whether the lawyer counseled the client to engage in this conduct or even knew that the client was so engaged, it would be unethical for the lawyer to use any intercepted communications to advance the client's position unless and until the lawyer (i) has disclosed to adversary counsel the fact that the documents have come into the lawyer's possession and (ii) has provided copies to adversary counsel. Even if the lawyer does not intend to make affirmative use of the documents, the

lawyer must promptly disclose his possession of the documents and return them or copies of them. *Because the intercepted communications were received by the lawyer in the course of the professional relationship, however, the lawyer may not make such disclosure without the consent of the client. DR 4-101(B). If the client refuses to permit disclosure or the return of the documents to the adversary, the lawyer must withdraw from the representation. DR 2-110(B).*

(Emphasis added).

Application to the Inquiring Attorney's Query

The inquiring attorney is in possession of certain categories of documents that the client either (1) removed from the husband's office, (2) printed from the husband's computer, including financial documents and emails, or (3) accessed on her own computer with the husband's password. The inquiring attorney segregated and has not reviewed any documents that the inquirer believes contain attorney-client privileged information. By implication, this means the inquiring attorney has reviewed documents that the inquirer believed not to be privileged.

Additionally, the inquiring attorney also states that the client removed documents from the husband's vehicle, and that the inquiring attorney believes these documents are privileged. The inquiring attorney is not in possession of this latter category of documents. Rather, the client has them and says she has not reviewed the documents.

As noted earlier in the opinion, this Committee is not authorized to decide questions of law, including whether the inquiring attorney has a duty to return or disclose the documents in the inquirer's possession. However, there can be circumstances where a lawyer would have an obligation under the law to return or disclose the documents. For instance, a lawyer would have to produce the documents in response to a valid discovery request for the documents. *See* Rule 4-3.4(d) (prohibits intentional failure to comply with legally proper discovery requests) and *The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). If the documents themselves were stolen property, the lawyer may also have an obligation under substantive law to turn over the documents. *See Quinones v. State*, 766 So. 2d 1165, 1172 n.8 (Fla. 3d DCA 2000) ("The overwhelming authority in the nation concludes that an attorney may not accept evidence of a crime unless he or she makes the same available to the prosecutor or the investigating law enforcement agency.") and *Anderson v. State*, 297 So. 2d 871, 875 (Fla. 2d DCA 1974) (lawyer acted properly by surrendering evidence of a crime to police, and state cannot disclose circumstances in court).

Even if there is no duty under substantive law to disclose or return the documents, the inquiring attorney still has ethical obligations. The inquiring attorney owes the client the duty of confidentiality under Rule 4-1.6. Under this rule, a lawyer may not voluntarily reveal information relating to the representation of a client without the client's consent. Therefore, information which the inquiring attorney learns through the representation of the client is confidential under Rule 4-1.6, and cannot be revealed without the client's consent. There are exceptions to the duty of confidentiality. However, none seem to be applicable under the facts presented, as any criminal act

that the client may have been involved in is a past act and disclosure would not prevent a future crime.

On the other hand, the inquiring attorney cannot assist the client in conduct that the inquiring attorney knows or reasonably should know is criminal or fraudulent under Rule 4-1.2(d). Additionally, the inquiring attorney cannot engage in conduct involving dishonesty or that is considered prejudicial to the administration of justice under Rules 4-8.4 (c) and (d) and cannot violate the ethics rules through the acts of another, including the client, under Rule 4-8.4(a). Furthermore, Rule 4-3.4(a) provides that a lawyer must not “unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.”

The inquiring attorney needs to discuss the situation, including the ethical dilemma presented due to the client's actions, with the client. If the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law. The inquiring attorney should advise the client that the inquiring attorney is subject to disqualification by the court as courts, exercising their supervisory power, may disqualify lawyers who receive or review materials from the other side that are improperly obtained. *See, e.g., Maldonado v. New Jersey, Administrative Office of the Courts –Probation Division*, 225 F.R.D. 120 (D. N.J. 2004). The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct. *See Perna v. Electronic Data Systems, Corporation*, 916 F. Supp 388 (D. N.J. 1995).

Finally, the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. *See The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997). If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation. *See* Rule 4-1.16(a)(1).

[Revised: 06-23-2009]

APPENDIX D

AGREEMENT FOR INSPECTION OF EMPLOYEE'S PERSONAL COMPUTER

[NAME OF COMPUTER INSPECTION COMPANY], its parent corporation, affiliates, subsidiaries, divisions, predecessors, successors and assigns, attorneys and/or agents (collectively referred to as "Inspection Company") and [NAME OF EMPLOYEE], his/her heirs, executors, administrators, successors and assigns (collectively "Employee") execute this Agreement For Inspection of Employee's Personal Computer ("Agreement"), and agree as follows:

1. **Inspection Governed By Stipulation Governing Inspection Of Computer Between Employee and Employer.** The Inspection Company shall perform the inspection of Employee's [DESCRIPTION OF COMPUTER – Model ____] and its hard drive(s) at the [NAME AND ADDRESS OF INSPECTION SITE] pursuant to the terms set forth in Employee and [NAME OF EMPLOYER]'s ("Employer") Stipulation Governing Inspection of Computer ("Stipulation"), an executed copy of which is attached hereto as Exhibit A

2. **Consideration.** The Inspection Company and Employee agree that Employee's granting the Inspection Company permission to access to the "Computer" (as defined in the Stipulation) pursuant the terms of the Stipulation shall constitute adequate consideration to the Inspection Company to be bound by the terms of this Agreement.

3. **Breach of Agreement.** The Inspection Company acknowledges that its failure to abide by any and all terms of the Stipulation regarding the inspection of the Computer shall constitute a breach of this Agreement and entitle Employee to file a breach of contract claim against the Inspection Company in the Circuit Court of the _____ Judicial Circuit in and for _____

County, Florida. The Inspection Company further acknowledges that Employee will suffer irreparable harm if the Inspection Company breaches this Agreement which cannot be fully and adequately remedied at law. Therefore, the Inspection Company acknowledges that Employee may also seek injunctive relief against the Inspection Company for its breach of this Agreement. The prevailing party shall be awarded its attorneys' fees and costs regarding any such breach of contract claim and/or action seeking injunctive relief.

4. **Affidavit.** At the conclusion of the inspection process described in the Stipulation, the Inspection Company agrees to provide an Affidavit to counsel for both Employee and Employer stating that the Inspection Company has not produced any privileged, confidential and/or otherwise unrelated files and/or documents retrieved in the inspection from the Computer to Employer or Employer's counsel. A copy of the Affidavit to be completed by the Inspection Company is attached hereto as Exhibit B.

The parties knowingly and voluntarily sign this Agreement as of the dates set forth below:
[NAME OF INSPECTION COMPANY]

By: _____
Name: _____
Title: _____
Date: _____

[NAME OF EMPLOYEE]
Date: _____

APPENDIX E

STIPULATION GOVERNING INSPECTION OF COMPUTER AND RECOVERY OF INFORMATION

[NAME OF EMPLOYEE], his/her heirs, executors, administrators, successors and assigns (collectively "Employee") and [NAME OF EMPLOYER], its parent corporation, affiliates, subsidiaries, divisions, predecessors, successors and assigns, attorneys and/or agents (collectively referred to as "Employer") execute this Stipulation Governing Inspection of Computer and Recovery of Information ("Stipulation") and agree as follows:

1. **Inspection and Examination.** Employee shall permit Employer's designated agent, [NAME OF COMPUTER COMPANY ("Inspection Company"), to inspect and examine Employee's [DESCRIPTION OF COMPUTER Model # _____] and its hard drive(s) (the "Computer"). The Computer shall be brought by Employee to the [NAME AND ADDRESS OF INSPECTION SITE] ("Inspection Site") for inspection and examination.

2. **Scope of Inspection and Examination.** The purpose of the inspection and examination shall be for Employer to identify and retrieve the following data it claims constitutes proprietary information pursuant to the Employment Agreement, dated _____, 20____, between Employee and Employer ("Proprietary Information"):

a. [LIST EMPLOYER'S PROPRIETARY INFORMATION FROM
EMPLOYMENT CONTRACT, SUCH AS]

b. Employer's customers, along with the products and/or services Employer sold to them;

c. Employer's confidential pricing information;

- d. Employer's customers' preferences;
- e. Employer's customer usage and related information;
- f. Employer's customer contact information; and
- g. Any and all additional information related to Employer' information regarding research, development, manufacture, purchasing, accounting, engineering, marketing and selling.

Additionally, the purpose of the inspection is to determine, if possible, whether any of the Proprietary Information has been disseminated beyond the Computer, whether by printing or by faxing or electronically mailing the Proprietary Information to a third party. In the event that such dissemination has occurred, the Inspection Company shall use its best efforts to determine the date, time and type of each instance where such transmission occurred, and, if directed to a third party, the identity, fax number, and/or e-mail address of the third party.

In order to facilitate the Inspection Company's inspection and examination of the Computer and to minimize the instances of identifying information which is not Proprietary Information, the parties agree that the list of key words attached hereto as Exhibit A (the "Key Words") shall be utilized by the Inspection Company in its performance of the inspection and examination. Additional root and/or search words may be added upon consent of counsel for both parties. Such consent must be in writing, which may include e-mail messages from counsel.

This Scope of Inspection and Examination may be modified and/or amended only by written stipulation signed by both of the parties.

3. **Procedure for Inspection and Examination.** Employee shall permit the Inspection Company access to the Computer, which shall be located at the Inspection Site, to inspect the

Computer and to make an exact copy or clone of any hard drives, memory, programs, or data contained on the Computer (such exact copy or clone hereinafter referred to as the "Clone"). Employee and one representative from Employer, as well as one attorney or paralegal for each party, shall have the right to be present during the Inspection Company's inspection and retrieval of the Clone from the Computer, but shall not interfere with the inspection or retrieval in any way. The Inspection Company shall not use any inspection or retrieval methods that result in the removal or destruction of any information contained on the Computer until notified to do so by counsel for both parties.

The Inspection Company shall be permitted to take the Clone back to its place of business for further testing and examination limited to and utilizing the Root and Search Words List to search for and retrieve the information described in Paragraph 2, Scope of Inspection and Examination and no other information. The Inspection Company shall be permitted to perform any forensic tests necessary to obtain and retrieve the information described in the Paragraph 2, Scope of Inspection and Examination herein. The Computer shall remain at the Inspection Site, in trust of _____ [IDEALLY EMPLOYEE'S COUNSEL], until it is released by consent of Employer's counsel.

4. Restrictions on Disclosure by the Inspection Company. The parties agree that the Inspection Company shall be instructed to strictly observe the procedures described in this paragraph, and shall not transmit to or discuss with Employer, Employer's counsel, or any other third party the information obtained or copied from the Computer, until after the Inspection Company has complied with all of the requirements of this paragraph.

a. Once the Inspection Company completes its inspection and examination of the

Clone, the Inspection Company shall provide counsel for both Employer and Employee with a written listing of all information that the Inspection Company identifies as potentially being responsive to the Scope of Inspection and Examination set out above (this listing hereinafter referred to as “the Inspection Company’s Listing”). The Inspection Company’s Listing shall be provided simultaneously via e-mail to counsel for both parties no later than 5:00 p.m. on the third business day after the on-site inspection. Counsel are responsible for providing the Inspection Company with e-mail addresses to be utilized by the Inspection Company in communicating with counsel.

b. Within four business days after the Inspection Company’s Listing, counsel for Employee shall give written notice to counsel for Employer and to the Inspection Company of all items or information that Employee objects to the Inspection Company producing to Employer. Such objections shall be limited to the following grounds:

- i. attorney-client privilege;
- ii. work-product protection; or
- iii. not within the designated Scope of Inspection and Examination.

c. Any such objections must:

- i. Identify the specific document or category of information for which protection is sought;
- ii. Specify the nature of the document or category of information, and
- iii. State specifically for each document or category of information the foundation for the claim of privilege or protection.

d. If Employee’s counsel provides no objections by 5:00 p.m. on the fourth

business day following Employee's counsel's receipt of the Inspection Company's Listing, any available objections shall be deemed waived. The Inspection Company may then provide Employer's counsel with any information within the Scope of Inspection and Examination. If some objections have been made, after 5:00 p.m. on the fourth business day the Inspection Company may provide Employer's counsel with any information within the Scope of Inspection and Examination to which Employee's counsel has not objected. In no event shall the Inspection Company provide to Employer or its counsel information that is the subject of Employee's counsel's objections unless and until authorized to do so by court order or by written stipulation of the parties' counsel.

e. If objections are made, both parties' counsel shall have a duty to promptly meet and confer to attempt to resolve any disputed objections (such meeting hereinafter referred to as "Counsel's Meeting"). Counsel's Meeting may take place telephonically, but must occur by 5:00 p.m. on the sixth business day following receipt of the Inspection Company's Listing.

f. The parties agree that any remaining unresolved objections shall be presented within three business days after Counsel's Meeting to the [NAME OF COURT], Florida (the "Court") by Employee in the form of a Motion for Protective Order (the "Motion"). Employee and his/her attorneys shall not, at any time, disclose and/or specifically name or identify any of Employer's Proprietary Information, including, but not limited to, the information set forth in paragraph 2 above. The Motion shall be served on Employer's counsel by facsimile and U.S. Mail. Employer shall file its Response to the Motion, if any, within three business days of Employee's service of the Motion. Employer's Response shall

be served upon Employee's counsel by facsimile and U.S. Mail. Employee's counsel shall then be responsible for setting a hearing on the Motion for the earliest possible hearing time.

Such hearing shall not be set without determining Employer's counsel's availability. At the hearing, the Court will review Employee's objections and determine whether there is a need for protection. The parties shall each be responsible for their own attorneys' fees and costs regarding any such Motion.

g. Within three business days after the Court executes an Order ruling on the Motion, Employee's counsel shall forward, via e-mail with a copy to Employer's counsel, a copy of the executed Order. Any information which has not been protected by the Court may then be disclosed to Employer's counsel.

5. **Confidentiality.** Other than as specified in this Stipulation, the Inspection Company shall be instructed not to provide, discuss, or disclose information derived from the Computer, or in any way reveal the nature of information derived from the Computer, to anyone other than a party to this Stipulation (or that party's counsel). The Inspection Company may produce information that falls within the Scope of Inspection and Examination described in Paragraph 2 to Employer or Employer's counsel only after the Inspection Company has complied with the notice process described in Paragraph 4 above. The Inspection Company is prohibited from producing to Employer or Employer's counsel any information obtained during the inspection or examination that does not fall within the Scope of Inspection or Examination described in Paragraph 2. Within ten business days of the entry of final judgment in the lawsuit currently pending in the Court styled [NAME OF PLAINTIFF v. NAME OF DEFENDANT], Case No.: _____, the Inspection Company shall destroy any and all copies of the Clone it made from the Computer and confirm the destruction

of any and all copies of the Clone in writing via e-mail to Employee's counsel.

6. **The Inspection Company's Fees and Expenses.** Any costs related to the hiring of the Inspection Company or its participation in this matter shall be borne by Employer. All expenses incurred by the Inspection Company in connection with carrying out forensic data recovery pursuant to this Stipulation shall payable by Employer.

7. **Non-Related Information.** Employer and its counsel have developed the Root and Search Words List for the express purpose of minimizing the chance that any of Employee's personal or private information will be flagged as potentially being Proprietary Information. Employer represents and warrants that the Inspection Company has not been asked to produce to Employer or its counsel any documents, data or files that are unrelated to its Proprietary Information or outside of the Scope of Inspection or Examination described in Paragraph 2.

8. **No other devices.** Employee represents and warrants that the Computer is the only computer he/she uses and that he/she did not transfer any information within the Scope of Inspection or Examination from the Computer to another any other computer(s), hard drive(s), flash drive(s), thumb drive(s), or portable data storage device(s) of any kind within his/her care, custody or control.

9. **Breach of Warranties.** The parties agree that breach of the warranties made and given in Paragraphs 7 and 8 above by one party will cause injury to the other in an amount that is uncertain or difficult to quantify. In the event that a party breaches the warranty it has made and given in Paragraph 7 or 8, the other party shall be entitled to liquidated damages in the sum of \$100.00 for each instance of breach and shall receive such liquidated damages if the Court determines that a breach of the warranty occurred, and shall pay the non-breaching party's reasonable attorneys' fees and costs in any action at equity to seek relief from the breaching party's use of

information gathered in the course of such breach.

The parties knowingly and voluntarily sign this Stipulation as of the dates set forth below:

[NAME OF EMPLOYER]

By: _____

Name: _____

Title: _____

Date: _____

[NAME OF EMPLOYEE]

Date: _____

APPENDIX F

AFFIDAVIT OF [COMPUTER EXPERT]

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, this day personally appeared [COMPUTER EXPERT], who being duly sworn, deposes and says:

1. I am over the age of 18 and am competent to make this Affidavit.
2. My name is [COMPUTER EXPERT] and I am a principal with [NAME OF FORENSIC COMPUTER COMPANY] ("Inspection Company"), [ADDRESS OF COMPUTER COMPANY].
3. I have personal knowledge of the facts recited in this Affidavit.
4. I am an expert in information security and computer forensics.
5. [NAME OF EMPLOYER] ("Employer") and [NAME OF EMPLOYEE] ("Employee") agreed that the Inspection Company would conduct an inspection of Employee's [DESCRIPTION OF COMPUTER Model # ____] which Employee shall bring to the [NAME AND ADDRESS OF INSPECTION SITE] for the purpose of allowing the Inspection Company to inspect said Computer pursuant to the terms of their Stipulation Governing Inspection of Computer ("Stipulation"), a copy of which is attached to this Affidavit as Exhibit 1.
6. The Inspection Company entered into an Agreement with Employee pursuant to which the Inspection Company agreed to conduct the inspection of the "Computer" (as that term is

defined in the Stipulation) in compliance with the terms of the Stipulation. A copy of Inspection Company's Agreement with Employee is attached to this Affidavit as Exhibit 2.

7. I conducted the inspection the Computer described above on behalf of the Inspection Company on _____, 20__.

8. The inspection process regarding the Computer has concluded as of _____, 20__.

9. Pursuant to the terms of the Stipulation and Inspection Company's Agreement with Employee, I hereby affirmatively state that the Inspection Company has not produced to Employer or Employer's counsel or any third party any information from the Computer that was protected by the attorney-client privilege, protected as attorney work-product, or was outside of the designated Scope of Investigation as that term was defined in the Stipulation.

FURTHER AFFIANT SAYETH NAUGHT.

[COMPUTER EXPERT]

BEFORE ME, the undersigned authority, personally appeared [COMPUTER EXPERT], who is personally known to me or who has produced _____ as identification.

SWORN TO and subscribed before me this _____ day of _____, 20__.

Notary Public, State of Florida

Print Name: _____

My Commission Expires: _____

My Commission Number: _____

APPENDIX G

**[DESCRIPTION OF COURT]
CIVIL DIVISION**

[NAME OF PLAINTIFF],

Plaintiff,

vs.

Case No.: _____

[NAME OF DEFENDANT],

Defendant.

AGREED ORDER GRANTING PRELIMINARY INJUNCTION

THIS CAUSE came before the Court on Plaintiff's [NAME OF PLAINTIFF] ("Plaintiff") application for injunctive relief, set forth in Count ____ of its Complaint, and the Court, having reviewed the Complaint, having reviewed the Court file, having been advised of an agreement among the parties to the relief sought in the Complaint, and being otherwise fully advised in the premises, find that:

1. The Court has jurisdiction over the parties in this matter.
2. The Court has jurisdiction of the subject matter of this action.
3. Venue is proper in this Court.
4. Defendant [NAME OF DEFENDANT] ("Defendant") is a former employee of Plaintiff.
5. As a condition to and in consideration of Plaintiff's employment, on June 12, 2006, Defendant executed an Employment Agreement, a copy of which is attached to the Complaint as Exhibit A. The definition of "proprietary information" in the Employment

Agreement is contained in Paragraph (B) of the Employment Agreement, and is set forth in full as follows:

PROPRIETARY INFORMATION

6. The Employment Agreement also contains a Non-Disclosure provision at Paragraph (4), which is set forth in full as follows:

NON-DISCLOSURE:

7. Plaintiff, as the lawful owner of the proprietary and other information covered by the Employment Agreement, has the right, pursuant to Florida Statute §542.33, to request relief from this Court to specifically enjoin Defendant's continuing breach of the Employment Agreement.

8. The parties agree that there is no adequate remedy at law to prevent Defendant's disclosure of Plaintiff's information to a third party.

9. Defendant does not oppose the Court granting this preliminary injunction.

10. The parties agree that, particularly in light of the potential loss of goodwill and disruption of customer relations that Defendant's conduct threatens, injunctive relief against Defendant is warranted.

11. The parties agree that injunctive relief will not harm Defendant, whereas the absence of injunctive relief could result in irreparable harm to Plaintiff.

12. The granting of a temporary injunction will not interfere with the public interest.

Therefore, it is **ORDERED AND ADJUDGED** that:

A. Plaintiff's application for Preliminary Injunctive Relief is hereby GRANTED;

B. Defendant and his/her agents, servants, employees, attorneys, and other persons in

active concert or participation with his/her who receive actual notice of this order by personal service or otherwise are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for Plaintiff all documents, whether originals or copies, of each document and tangible thing, in any form or medium, that Defendant or anyone acting in conjunction with or at his/her request or instruction, downloaded, copied, took or transferred from the premises, files, records or systems of Plaintiff, except that Defendant and/or his/her agents servants, employees, attorneys and other persons may retain a copy of the Separation Agreement and Release provided to Defendant on _____, 20__.

- C. Defendant and his/her agents, servants, employees, attorneys, and other persons in active concert or participation with him/her who receive actual notice of this order by personal service or otherwise, are further MANDATORILY ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph, except the Separation Agreement and Release provided to Defendant on _____, 20__.
- D. This preliminary injunction shall become effective upon the posting by Plaintiff of an injunction bond in the amount of Fifty Dollars (\$50.00), to assure the payment of such costs and damages as may be suffered by Defendant or entities found to have been wrongfully enjoined. The said bond shall be in a form, and with a corporate surety, approved by the Clerk.
- E. The parties shall each be responsible for their own attorneys' fees and costs regarding this Agreed Upon Order Granting Preliminary Injunction.

DONE AND ORDERED in Chambers this _____ day of _____, 20 ____.

Civil Court Judge

Copies furnished to:
Attorney for Plaintiff
Attorney for Defendant