ETHICAL RISKS OF ONLINE COMMUNICATIONS BY LAW FIRMS

Section III

Email: Same Ethical Duties, New Electronic Challenges

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I. Introduction

For many lawyers, a typical day includes sending and receiving emails from both their office computers and wirelessly, carrying confidential documents on “memory keys” or on laptops, exchanging documents in electronic form with opposing parties and using law firm web sites for both advertising their firms and inbound communications with prospective clients. These electronic tools allow us to be more efficient and to be more responsive to our clients. At the same time, they also present new and evolving concerns for law firm risk management. These concerns are not solely regulatory in terms of potential bar discipline. Particularly as they relate to our fiduciary duties of competence, client confidentiality and loyalty, they also present the specter of civil liability claims with attendant fee forfeiture and other damages if client confidences are compromised or conflicts arise.

This paper and the accompanying presentation focuses on two areas of electronic communications in particular as they relate to law firm risk management: (1) the duty of confidentiality as communications with clients have increasingly moved to electronic form; and (2) duties to prospective clients who communicate with lawyers using either email or law firm web sites.

II. Client Confidentiality in Electronic Times

In 1999, the American Bar Association issued a comprehensive ethics opinion on the use of email and cell phones for confidential communications with clients. ABA Formal Ethics Opinion 99-413 generally approved both the use of unencrypted email and cell phones for client communications because federal

law makes the unauthorized interception of those communications illegal, and, therefore, a reasonable expectation of privacy attaches to communications in those forms. The federal statutory protections, most of which fall under the Electronic Communications Privacy Act and apply broadly to "any wire, oral, or electronic communication,"[1] should extend to newer variants of both email and voice technologies such as wireless email devices and Internet telephones. At the same time, 99-413 emphasized that lawyers need to weigh the sensitivity of the information with the means used to communicate.

Since 99-413 was issued, the ABA updated its influential Model Rules of Professional Conduct in 2002 and 2003. Those updates included two comments relevant to electronic communications. The first, Comment 16 to Model Rule 1.6 on confidentiality, stresses that a central element in the duty of competent representation is safeguarding client confidentiality. The second, Comment 17 to Model Rule 1.6, reinforces the preceding point by observing that lawyers must take reasonable precautions to avoid confidential information being transmitted to unintended recipients. Comment 17 notes, however, that lawyers do not normally need to use "special security measures if the method of communication affords a reasonable expectation of privacy." The reference to the "reasonable expectation of privacy" echoes the logic of 99-413 and its focus on the federal statutes making the unauthorized interception of electronic communications illegal. But, Comment 17 cautions, again like 99-413, that the level of security must be commensurate with sensitivity of the information and also notes that

[1] *See* 18 U.S.C. §§ 2510-2522. The Stored Communications Act, 18 U.S.C. §§2701-2712, also applies to some categories of stored electronic communications, such as email stored with an Internet service provider. *See Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004).

clients may require lawyers to take special measures beyond what is otherwise required by the RPCs.

Both 99-413 and the comments to Model Rule 1.6 are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr. The versions of RPCs 1.1 on competent representation and 1.6 on confidentiality adopted in most states draw their central elements from their ABA Model Rule counterparts. (For links to the ethics rules around the country and charts summarizing state adoption of the ABA Model Rules, see the ABA Center for Professional Responsibility's web site.) Therefore, ABA 99-413 and the ABA Model Rules and comments should offer useful guidance on both the duties involved and the means lawyers can reasonably use to communicate confidentially with their clients.[2]

III. Duties to Prospective Clients

Inbound communications from prospective clients by either email or law firm web sites can trigger duties of confidentiality to those prospective clients even if they never become firm clients. ABA Model Rule 1.18 outlines the duties involved:

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information

[2] A separate issue on the client-side of the attorney-client relationship is whether the client has maintained the confidentiality of the communications involved, especially if the client used a third party's computer to send or receive otherwise confidential communications. *See generally In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (discussing this aspect of the attorney-client privilege).

learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Firms can insulate themselves from these duties if they adequately advise prospective clients not to provide them with information the prospective clients regard as confidential until the firm has run a conflict check and determined that further conversations can take place. Many law firms also include a disclaimer to the effect that no attorney-client relationship will be formed simply by communicating or supplying information to the firm via its web site. The practical importance of both kinds of disclaimers was illustrated in *Barton v. U.S. District Court for the Central District of California*, 410 F.3d 1104 (9th Cir. 2005). In *Barton*, a plaintiffs' personal injury firm invited prospective clients to complete an

on-line questionnaire about a prescription drug involved in litigation the firm was handling. The questionnaire included a disclaimer that no attorney-client relationship was formed by completing the questionnaire but did not include a disclaimer on confidentiality. The Ninth Circuit held that absent a clear disclaimer, the firm would still have a duty of confidentiality under California law (analogous to ABA Model Rule RPC 1.18) to those who submitted the questionnaires. The California State Bar in Formal Ethics Opinion 2005-168 later emphasized that such disclaimers of confidentiality need to be in sufficiently plain terms to be understood by prospective clients.[3]

It is important to note that prospective clients cannot generally establish an attorney-client relationship by unilaterally sending an electronic communication to a lawyer.[4] Comment 2 to ABA Model Rule 1.18 notes in this regard: "A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [this rule]." Therefore, a prospective client who simply obtains a lawyer's email address from a law firm web site and then sends the lawyer an email should not be considered to have unilaterally created an attorney-client relationship. However, if a law firm web site invites inbound

[3] California State Bar Formal Ethics Opinion 2005-168 is available on the California State Bar's web site at www.calbar.org.

[4] Whether an attorney-client relationship has been formed is a question of state substantive law rather than one controlled by the professional rules. ABA Model Rules, Scope, ¶ 17 ("[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."). In most states, for an attorney-client relationship to be formed the client must subjectively believe that it exists and that subjective belief must be objectively reasonable under the circumstances. *See generally* Restatement (Third) of the Law Governing Lawyers (2000), § 14 (addressing formation of the attorney-client relationship).

communication and supplies prospective clients with the technical means to do so via its web site, then the law firm should take reasonable steps to inform those submitting the information about the conditions under which an attorney-client relationship will be formed and whether the information will be treated as confidential. If not, then (at minimum) ABA Model Rule 1.18 will supply the "default" result.

IV. Conclusion

The duties of competence, confidentiality and loyalty that have long been bedrock principles for lawyers continue to apply with equal measure as our communications with clients—both current and prospective—have moved increasingly to electronic form.