

**ETHICAL RISKS OF  
ONLINE COMMUNICATIONS  
BY ATTORNEYS:  
*Email Communications***

**Strafford Publications National Webinar  
December 1, 2009**

**Mark J. Fucile  
Fucile & Reising LLP  
mark@frllp.com  
503.224.4895  
www.frllp.com**

fucile  reising | LLP

# INTRODUCTION

- 1. Protecting confidentiality  
when communicating  
electronically**
- 2. Avoiding “unintended” clients**

# **PROTECTING CONFIDENTIALITY**

- ▶ **Ethical Framework**
- ▶ **Practical Solutions**
- ▶ **Practical Consequences**

# ETHICAL FRAMEWORK

- ▶ ***Competency***—ABA Model Rule 1.1
- ▶ ***Confidentiality***—ABA Model Rule 1.6

# EVOLUTION OF THE LAW

- ▶ **1999: ABA Formal Ethics Op. 99-413**
- ▶ **2002/03: ABA Updates Model Rules**
- ▶ **Today: State adoption of Model Rules**

# **ABA FORMAL ETHICS OPINION**

## **99-413**

- ▶ **Emphasized federal law:**
  - ◆ **Electronic Communications Privacy Act**
- ▶ **Need to balance means with security**

# **ABA UPDATES MODEL RULES**

- ▶ **Model Rule 1.6: Comments 16 & 17**
- ▶ **Emphasize duties of competency and confidentiality**
- ▶ **Need to balance means with security**

# **COMMENTS 16-17 TO ABA MODEL RULE 1.6**

## **Acting Competently to Preserve Confidentiality**

**[16]** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

**[17]** When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.



# STATE ADOPTION

- ▶ **Most states have adopted ABA Model Rules and comments**
- ▶ **Updated list available on ABA Center for Professional Responsibility's web site at *[www.abanet.org/cpr](http://www.abanet.org/cpr)***

# PRACTICAL SOLUTIONS

- ▶ **Focus on protecting confidentiality**
- ▶ **Measures have to correspond to the circumstances and the information involved**
- ▶ **Some solutions are technological**
- ▶ **Many solutions rely on judgment & communication**

# **PRACTICAL CONSEQUENCES**

▶ **Issues for bar discipline**

▶ **Civil claims**

- ◆ **Claims for breach of fiduciary duty**
- ◆ **Legal malpractice**
- ◆ **Fee forfeiture**

# **AVOIDING “UNINTENDED” CLIENTS**

- ▶ **ABA Model Rule 1.18:  
Duties to Prospective Clients**
- ▶ **Comment 2:  
Unsolicited Communications**

## **COMMENT 2 TO ABA MODEL RULE 1.18**

**[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. 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 paragraph (a).**

# STATE LAW CONTROLS

- ▶ **RPCs don't control whether an attorney-client relationship exists**
- ▶ **Controlled by state law**
- ▶ **Most require subjective belief by the client and objective reasonableness of that belief**

# PRACTICAL SOLUTIONS

- ▶ **Technological**
  - ◆ **“Pop-up” warnings**
  - ◆ **Web site disclaimers**
- ▶ **Common sense communications**

# PRACTICAL CONSEQUENCES

▶ **Conflicts**

▶ **Duties to nonclients**

▶ **Example:**

*Barton v. U.S. District Court,*  
410 F.3d 1104 (9th Cir. 2005)