

The LAW REVIEW

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WITH THE RAPID development of technology, the field of legal ethics has grown by leaps and bounds; blurring old distinctions of propriety and opening up whole new areas of ethically ambiguous practices. Among these, the question of electronic mail and its impact on the confidentiality of lawyer-client communication predominates.

E-mail is mail transmitted electronically rather than being handwritten or typed onto a piece of paper, placed in envelope and entrusted to a mail service for delivery into the intended recipient. With e-mail, the communication is created electronically on a computer and is delivered by means of an electronic transmission to the intended recipient. This transmission can take within an office, on the office's internal computer network (a local area network or LAN), outside an office through a telephone line directly linked to another computer (a direct dial-up connection), through a proprietary network such as America On-Line or MCI mail, or through a series of interconnected computers called servers or network hubs operated by independent third parties (the Internet), and delivered to the intended recipient's computer. E-mail is like a letter or a fax and that it is written and thus there

is a persistent record of the communication. However, e-mail is also like a telephone call because of the mode of transmission. E-mail shares characteristics of both, but it also has unique characteristics, which distinguishes it from either of these common forms of communication (French, K.M., Pennsylvania Ethics Resources, Opinion 97130, 26 September 1997).

The recent explosion in the use of e-mail as a mode of communication between lawyer and client has raised the question of whether or not the lawyer is acting responsibly to protect his client's confidences when he transmits them electronically. Otherwise stated, is the use of e-mail incompatible with Canon 21 of the Code of Professional Responsibility?

Canon 21 of the Code of Professional Responsibility provides "A lawyer shall preserve the confidences and secrets of his client even after the attorney-client relation is terminated". Under this umbrella injunction can be read the duty of the lawyer to preserve, among other things, the confidentiality of virtually all communications with his client — communications which may take any of a significant number of forms, from handwritten letters delivered through the Postal Service, to personal conversa-

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tions, to messages transmitted through facsimile machines. In all these forms, however, the communications susceptibilities to interception — and thus, to the violation of its confidentiality — have been well identified and, while not totally eliminated have at least been brought down to acceptable levels where the lawyer is said to have a reasonable expectation of privacy. On the other hand, as expressed in the American Bar Association's Formal Opinion No. 99-413: "The prohibition in Model 1.6(a) against revealing confidential client information absent client consent after consultation imposes a duty on a lawyer to take reasonable steps in the circumstances to protect such information against unauthorized use or disclosure. Reasonable steps include choosing a means of communication in which the lawyer has a reasonable expectation of privacy." However, it remain unsettled, thus, creating a substantial gray area in matters of professional ethics, whether or not the lawyer has the same reasonable expectation of privacy with regard to e-mail so as to allow its use without the need for special measures to be taken to preserve confidentiality.

The reasonableness of the lawyer's use of any medium to communicate with or about clients depends both on the objective level of security it affords and the existence of laws intended to protect the privacy of information communicated. In case of direct e-

mail, lawyers may e-mail their clients directly by programming their computer's modem to dial their client's. The modem simply converts the e-mail into digital information that is carried on land-based phone lines to the recipient's modem, where it is reassembled back into the message. Because the information travels in digital form, tapping a telephone line to intercept e-mail message would require more effort and technical sophistication. As to "private system" e-mail where one internal system directly dials another private system, there is greater risk of misdirected e-mails throughout a law firm or to unintended recipients within the client's organization. However, all members of the firm owe a duty of confidentiality to each of the firm's client and unintended disclosures to individuals within the client's private e-mail network are unlikely to be harmful to client. Third-party on-line service providers or OSPs may also provide E-mail. Through the OSPs, user's are usually provided with password-protected mailboxes from which the may send and retrieve e-mail. However, user mailboxes, though private exist in a public forum consisting of other fee-paying users, thus, the risk of misdirection of e-mail to unknown users which does not owe a duty of confidentiality like the employees in a law firm. Moreover, the security and confidentiality of e-mail largely depends on the adequacy of the OSP's security

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as to limitation of external access and its policy regarding confidentiality of user e-mail. Finally, e-mail may be sent over the Internet between service users without interposition of OSPs. Internet e-mail uses land-based phone lines and a number of intermediate computers randomly selected to travel from sender to recipient. The intermediate computers consist of various Internet service providers or "routers" that maintain software designed to help the message reach its final destination. Here, confidentiality may be compromised through the right of the Internet Service Providers (ISP) to monitor e-mail passing through or temporarily stored in its network or the illegal interception of e-mail by the ISPs (ABA Opinion). Under the Department of Science and Technology Guidelines on Networking it merely provided therein that network services must come up with procedures to protect confidentiality one of which is to require PC's connected to network screensavers with password to prevent passerby from unauthorized access to the network and that sensitive data should not be placed in directories on the file server that can be accessed by unauthorized persons. Moreover it provided that users are responsible for safeguarding their computer account. Because of the scarcity of rules regarding the practices of ISPs and OSPs, there is a resultant lack of regulation and oversight mechanisms, which further compromises the

security of electronic communication.

The American Bar Association has presented its official stand on the confidentiality of unencrypted e-mails. In its Formal Opinion No. 99-413, released on March 10, 1999, it states: "A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of professional Conduct because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded US and commercial mail, landline telephonic transmissions and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation." Indeed, lawyers are dutibound to preserve the confidences and secrets of his client and to adopt measures pertinent to it, nevertheless, they are not insurers of such confidentiality.

Considering the fact that we are in the Computer Age, when electronic communications is the fastest and most convenient way of transmitting messages, what then are the lawyer's ethical obligations concerning the use of e-mail? This question can be answered definitively only by the Ethics Committee. Unfortunately, they have not done so yet. Perhaps, it is now the proper time to address the issue.