

# Litigation Ethics in the Modern Age

By Thomas E. Spahn

**N**umerous articles have explored changes in our profession caused by technology, specifically, the use of computers, e-mail, cell phones, and other communication tools of the “information age.” Many of these articles have brought to light a world of legal and ethical issues that may arise from using electronic programs and devices—given that they give us the ability to practice law “virtually” anywhere. This article focuses on ethics issues implicated whenever litigators communicate—with clients, non-clients, and adversaries.

## Communicating with Clients

Lawyers’ use of modern means to communicate with their clients can raise at least three issues.

**1. Duty of confidentiality.** As lawyers began working with e-mail in the early 1990s, courts and (especially) state bar committees had to decide whether the use of unencrypted e-mail violated the ethical duty of confidentiality.<sup>1</sup> This analysis involved a number of novel issues that did not fit well into traditional ethics notions. For instance, e-mail communications may “reside” for a time on a stranger’s server while the electronic bits of communication find their way through various paths from sender to receiver. Apparently worried that someone might view the content of the e-mails as they scurried through various wires, the first state bar to address the issue found the use of inadvertent e-mails unethical.<sup>2</sup>

Interestingly, the first discus-

sions of this issue focused on the technological aspect of the debate—the possibility that e-mail communications might be intercepted by third parties. This represents an odd approach. If the technological ability to intercept a privileged communication determined the ethical propriety of using that communication, then lawyers could never use the U.S. Postal System—even anyone with no clue about “technology” would presumably be able to rip open an envelope left in someone’s mailbox.

The debate eventually moved from the technological to the legal as bars focused less on the technological ability to intercept and more on the criminal penalties assessed on those who intercepted. This afforded e-mail senders the same expectation of confidentiality enjoyed by senders of first-class mail. The state bar that initially condemned the use of unencrypted e-mail changed its mind barely three months later,<sup>3</sup> and every bar now permits the use of unencrypted e-mail to send privileged communications<sup>4</sup> (although some still require lawyers to warn their clients about the dangers of interception<sup>5</sup>).

Debate on the ethical propriety of cell phone communications has taken essentially the same path.<sup>6</sup> Courts and bars presumably would apply the same approach even to cordless phones, although the privacy technology for that type of communication probably lags behind the other forms.

So lawyers may ethically communicate with their clients via e-mail. Still, wise lawyers often save the most sensitive client discussions for tele-

phone or face-to-face conversations, not because of the process involved but because of the substance.

**2. Content.** What special dangers exist for the substance of e-mail communications? Psychologists may be able to explain exactly why people communicate differently in e-mail than they do in more formal writings such as letters, typed memoranda, etc., but they clearly do. E-mails thus represent a litigator’s nightmare. They combine the often stupid and regrettable informality of telephone calls with the permanence of the Dead Sea Scrolls. It is not surprising that most of the recent important trials involving corporations and their executives (Microsoft, Andersen, Frank Quattrone, etc.) have focused on e-mail evidence.

Even worse, e-mails sent or received on company computers belong to the company. A recent *Wall Street Journal* article reported that the federal government has posted thousands of Enron employees’ e-mails on the Internet to make them available for public scrutiny. These include the ones discussing mothers-in-law, “one night stands,” and so on.

Lawyers’ ethical duty of diligent representation may someday require them to train their clients not to write stupid things in their e-mails. At the least, lawyers should encourage their clients to conduct telephone or in-person communications when the stakes are high.

**3. Increased risk.** Do e-mails pose a greater risk than other communication methods of waiving available protections? Emphatically, yes. This highlights what is perhaps

the most pernicious aspect of e-mail: It is just as easy to send an e-mail to 50 people as it is to one. Apart from the danger of inadvertent transmission, the ease of sharing e-mails creates enormous risks of waiving the attorney-client privilege and the work product protection. A lawyer's indiscriminate sharing creates ethics and liability issues. A client's overly wide distribution reflects poorly on the lawyer's ability to educate the client, creates the logistics headache of sorting out e-mail chains for a privilege log, and often results in a waiver of the attorney-client privilege and the work product doctrine.

Ironically, some of e-mail's advantages create the greatest danger of waiver. For instance, the efficiency of e-mail "address lists" can backfire if an outdated list includes people whose receipt of a privileged communication would waive the protection. Some commentators advise against using any address lists. This may go too far, but clients and lawyers should be very wary of such shortcuts.

To make matters much worse, the rise of such technologically sloppy forms of communication as e-mail has paralleled courts' increasingly unforgiving approach to waiver. In addressing communications outside the corporation, prestigious courts recently found a waiver when companies or their lawyers disclose privileged communications or work product to the government (even under strict confidentiality agreements<sup>7</sup>), to outside auditors,<sup>8</sup> or to participants in settlement negotiations.<sup>9</sup> Of course, even sharing privileged communications within a company can cause a waiver if it involves corporate employees beyond those with a "need to know." One recent decision found a waiver based on this

practice with mail copied to one company's executive vice president, who was not involved in the particular personnel matter at issue.<sup>10</sup>

But it gets even worse. Recent decisions have tended to expand the severity of the "subject matter waiver" that can occur when a client or lawyer discloses protected communications. Courts are finding such a subject matter waiver even in cases of inadvertent disclosure.<sup>11</sup>

The ease of sharing e-mails, the increasing likelihood that a court will find a waiver, and the apparent expansion of such waivers' scope create a frightening trifecta that all litigators must face.

### Communicating with Nonclients

Lawyers' communications with nonclients raise distinct but related concerns.

**1. Relationship issues.** E-mail can turn a nonclient into a client (at least for confidentiality and conflicts of interest purposes) when the lawyer did not intend to create such a relationship. The law always has recognized that a lawyer's communication with a prospective client who has a reasonable expectation of confidentiality creates a duty on the lawyer's part to keep the communication secret, and may prevent the lawyer from taking positions adverse to the prospective client on matters relating to the discussion. The rule did not seem so unreasonable when a lawyer meeting a prospective client in person could quickly cut off the conversation, or insist during a phone call that the prospective client provide information required for a conflicts check before revealing any substantive confidences. Many lawyers, however, receive so many e-mails each day that they may not stop reading one before it is too late. In addition, law firm websites justifiably encourage (if not actively invite) prospective clients

to send e-mail queries. All of this increases the risk that a lawyer will stumble into an attorney-client relationship without intending it.

Perhaps as a result of such possibilities, the ABA recently added a Model Rule related to acquired information from prospective clients, limiting disqualification of lawyers to only those who received information that "could be significantly harmful" to the prospective client.<sup>12</sup> Even more significantly, the rule allows a lawyer's firm to avoid imputed disqualification by screening an individually disqualified lawyer.<sup>13</sup> If adopted by state bars, this new ABA approach should make lawyers feel more comfortable in speaking with prospective clients, and may help avoid the possibility that clever litigants could "knock off" skillful lawyers who might otherwise represent an adversary by disclosing confidential information during an interview.

ABA Model Rule changes always take time to gain a foothold in states' ethics rules. In the meantime, lawyers are taking technical steps to avoid stumbling into an attorney-client relationship.

Many commentators suggest employing solutions such as click-through disclaimers on law firm websites or initiating elaborate procedures to screen incoming e-mails, etc. Many of these suggestions would reduce or perhaps even eliminate the risks but would also make a law firm's website so user unfriendly as to defeat its purpose.

Fortunately, there appears to be no upsurge in liability or disqualification cases finding inadvertent attorney-client relationships generated by hastily read e-mails. Still, law firms would be wise to add disclaimers to their websites, at the very least advising the public not to send confidential information and disclaiming any attorney-client relationship absent mutual agreement. Lawyers receiving unsolicited legal questions would be wise to respond

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with a polite refusal to represent the questioner. If the lawyer recognizes that the sender is a current client's would-be adversary, he or she should stop reading the e-mail immediately, respond with a polite refusal, prepare a contemporaneous memorandum describing the incident, and perhaps even create a formal "ethics screen" that might later provide protection from disqualification for colleagues representing the client.

**2. Disclaimers.** Most lawyers take great (and occasionally humorous) pains to protect their outgoing e-mails, especially to prevent inadvertent sharing with a nonclient that might create the horrifying waiver ramifications mentioned above.

One way to get some levity out of our high-stress profession is to remember to actually read lawyers' e-mail disclaimers. Most lawyers include the disclaimer at the end of their e-mails, thus ensuring that an unintended recipient will have to read the entire e-mail before getting to it. Many lawyers proclaim that all of their e-mails are privileged and confidential—presumably including those sent to adversaries or to their daughter's soccer league in the event of a rainout. Some lawyers predict dire consequences for inadvertent recipients who read or use the e-mail (although no one seems to have ever been punished for it). A few lawyers even direct such recipients to advise the sloppy sender, print the e-mail, and return it via "U.S. mail" (apparently hoping to deter the sender from using some other country's mail system).

Do these disclaimers do any good? There seems to be very little case law. One court pointed to such a disclaimer as triggering a lawyer's ethical duty to return inadvertently transmitted confidential information,<sup>14</sup> but no court seems to have issued a helpful analysis that might guide lawyers' decisions about such disclaimers.

**3. Unauthorized access.** Some lawyers who seem obsessed with adding just the right threatening language to their e-mail disclaimers overlook a confidentiality threat much closer to home. Most (if not all) lawyers rely at least in part on outside consultants to install software, keep their computers running properly, repair or replace server connections, and the like. But when asked whether they took steps to ensure such strangers do not use the confidential information to which they have been given access, the same lawyer threatening bodily harm to anyone using inadvertently transmitted information will not have a clue whether or not the stranger was required to sign a confidentiality agreement.

The ABA has warned lawyers to arrange confidentiality agreements with all third parties given access to their clients' or their own privileged or confidential information.<sup>15</sup> Lawyers would be wise to take such steps with everyone from office trash collectors to computer service company representatives.

Lawyers must also take care when they discard their old computers. How lawyers handle electronic client files can have ethics implications because of the continuing duty to preserve client confidentiality. On a more practical level, discarding client files can have dramatic waiver effects. One fairly old case found that a company had waived its attorney-client privilege by throwing out records rather than having them shredded.<sup>16</sup> Fortunately, a more recent case held that a company did not waive the privilege protecting a document that its employee tore into 16 pieces and threw in the trash—explaining that such steps were "sufficient to preserve the attorney-client privilege against the clandestine assault by [an adversary's] 'dumpster diver.'"<sup>17</sup>

### Communicating with Adversaries

Ethics (and privilege) issues become most acute when lawyers communicate with a particular type of nonclient: a litigation or transactional adversary.

**1. Ex parte contact.** E-mail communications (like other communications) may be forbidden by the prohibition on certain ex parte communications with employees of a corporate adversary. The rules governing such communications can be very complicated. Courts and bars can choose from a number of approaches, ranging from prohibiting ex parte communications with any employees of a corporate adversary to placing off limits only those employees within a corporate adversary's "control group." A recent Nevada Supreme Court case provides an excellent analysis of all the options.<sup>18</sup>

The ABA recently changed its approach to this issue. The old approach included a prohibition on ex parte contacts with employees of a corporate adversary whose statements "may constitute an admission on the part of the organization." The recent change deleted that phrase, thus making such employees fair game for ex parte contacts.<sup>19</sup>

To make matters more complicated, courts and bars within the same state sometimes take different approaches. For instance, the Virginia ethics rules allow more ex parte contacts with a corporate adversary's employees than do the ABA Model Rules.<sup>20</sup> But Virginia federal courts inexplicably follow the ABA Model Rules rather than the state's.<sup>21</sup> In addressing ex parte contacts with former employees of a corporate adversary, both Virginia<sup>22</sup> and the ABA<sup>23</sup> permit such contacts. However, in the Western District of Virginia, the federal court forbids such contacts.<sup>24</sup> Any lawyer attempting to communicate with employees of a corporate adversary should carefully check both applicable ethics rules and decisional law.

Even when permissible under

the ex parte contact rule, e-mails might still run afoul of limits that courts and bars place on deceptive conduct. Most states' ethics rules bar lawyers from engaging in any deceptive conduct.<sup>25</sup> Some courts take a strict approach to lawyers participating in any investigations involving deception.<sup>26</sup> On the other hand, some courts have permitted lawyers to arrange for private investigators to portray themselves as consumers when investigating "palming off" or other intellectual property misconduct.<sup>27</sup>

E-mails easily lend themselves to such mildly (and perhaps permissibly) deceptive conduct. Lawyers considering such activities must consider both the ex parte contact and the deceptive conduct ethics rules.

**2. Metadata.** Even intentional sharing of electronic documents with an adversary can raise ethics issues. Although many lawyers do not realize it, electronic documents sometimes allow recipients to essentially "look behind" the document and access the document's history, when it was altered, and even specific changes that were made. This information is included in the term "metadata," which is data about data. Never transmit a document without reviewing and disabling tracking software.

The New York State Bar has held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "looking behind" electronic documents sent by adversaries who failed to disable the software.<sup>28</sup> Despite this helpful ethics opinion, wise law firms are now installing "scrubbing" software that prevents the transmission of such information.

The intentional transmission of a document that contains a drafting error might require disclosure to the adversary who made the mistake. The ABA indicates that lawyers whose adversaries have forgotten to make some change agreed upon by

the parties should disclose the mistake to the adversary.<sup>29</sup> Interestingly, the ABA indicated that lawyers in this position do not need to advise their clients of their good deed. To the extent that states follow this approach, lawyers will not have to place such an awkward call to clients who undoubtedly would not understand the "professional courtesy" being afforded the adversary. All the same, the lawyer may take comfort in knowing that the adversary will be obligated to return the favor if the situation is reversed.

**3. Inadvertent transmission.** E-mail and other electronic communications may be sent inadvertently to an adversary. This triggers an analysis that also applies to misdirected faxes, misaddressed regular mail, and so on. However, e-mails seem to create a greater problem than more traditional forms of communication, primarily because e-mails can inadvertently be sent to a much larger number of people and because lawyers are more likely to make this mistake themselves. (Lawyers play a much more active role in e-mail communications than in earlier forms of communication.)

The bar's approach to the inadvertent transmission of privileged or confidential information provides an interesting history. Starting in 1992, the ABA recognized a duty (which it had great difficulty finding in the Model Rules) to return privileged or confidential communications received inadvertently.<sup>30</sup> As a corollary duty in a slightly different situation, the ABA later held that lawyers should allow the court to decide the fate of privileged or confidential information received from a party not authorized to have it (such as a disloyal employee, a "whistle-blower," etc.).<sup>31</sup>

Following this lead, courts and state bars began to recognize similar duties.<sup>32</sup> However, some did not apply the ABA approach to privileged documents inadvertently included in a litigation document

production,<sup>33</sup> and others rejected it altogether, in favor of the traditional approach that allowed lawyers to take advantage of such a mistake by an adversary.<sup>34</sup>

The Ethics 2000 changes to the ABA Model Rules retrenched a bit, finding that lawyers who had inadvertently received confidential or privileged information (either in document production or elsewhere) simply should alert the sender rather than automatically follow the sender's instructions.<sup>35</sup> The ABA's explanation of this change indicates that the law (rather than the ethics rules) covers such issues as the possible duty to return the document, and that ethically the receiving party simply must "notify the sender in order to permit that person to take protective measures."<sup>36</sup> It will be interesting to see whether courts and other bars also back away from the strict "return it" approach.

Some lawyers involved in litigation enter into nonwaiver agreements with their adversaries, under which both parties agree to return privileged documents that they accidentally produce to the other. One recent decision involving two sophisticated companies with such an agreement (covering privileged documents "inadvertently" produced to the other) held that the company receiving privileged documents from the other during a production need not return them because the producing company had acted with "gross negligence" rather than inadvertence in producing them.<sup>37</sup> The court warned litigants to define exactly what conduct they wanted to forgive in such nonwaiver agreements. In a frightening postscript, the court found the unintentional production of some privileged documents created a subject matter waiver, thus presumably requiring the production of additional documents on the same subject.

Although this decision seems to have broken new ground in finding the common form of nonwaiver agreement inapplicable, it followed the traditional approach of blaming legal assistants for the mistaken production.<sup>38</sup>

### Conclusion

Although the use of e-mail and other forms of electronic communications may have a more dramatic effect on such issues as lawyer marketing and discovery, lawyers should become familiar with the other ways in which their ethics duties might be affected by such new forms of communication. ■

### Notes

1. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 1.6.

2. Iowa LEO 95-30 (May 16, 1996).

3. *Id.* # 96-01 (Aug. 29, 1996).

4. *See, e.g.*, ABA LEO 99-413 (Mar. 10, 1999).

5. *See, e.g.*, MO. INFORMAL OP. 970161 (1997).

6. *See, e.g.*, DEL. LEO 2001-2 (2001).

7. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

8. *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002).

9. *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474 (N.D. Ill. 2002).

10. *Ashkinazi v. Sapir*, No. 02 Civ. 0002 (RCC) (MHD), 2003

U.S. Dist. LEXIS 230, at \*3 (S.D.N.Y. Jan. 8, 2003).

11. *VLT, Inc. v. Lucent Technologies, Inc.*, 54 Fed. R. Serv. 3d (Callaghan) 1319, 2003 U.S. Dist. LEXIS 723 (D. Mass. 2003).

12. ABA MODEL RULES OF PROF'L CONDUCT R. 1.18(c).

13. *Id.* R. 1.18(d)(2).

14. *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 362 (M.D. Pa. 2001), *aff'd.*, 55 Fed. Appx. 87 (3d Cir. 2003).

15. ABA LEO 95-398 (Oct. 27, 1995).

16. *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981).

17. *McCafferty's Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 169-70 (D. Md. 1998).

18. *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237 (Nev. 2002).

19. ABA MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [7].

20. VA. RULE 4.2 cmt. [4] (prohibiting ex parte contacts only with a corporate adversary's: (1) "control group" (defined as those with "authority to bind the corporation"); and (2) "persons who may be regarded as the 'alter ego' of the organization").

21. *See, e.g.*, *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096, 1098 (E.D. Va. 1994).

22. VA. RULE 4.2 cmt. [4].

23. ABA LEO 95-396 (July 28, 1995).

24. *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569 (W.D.

Va. 1998).

25. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

26. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, No. 01-2292, 2003 U.S. App. LEXIS 21188 (8th Cir. Oct. 20, 2003).

27. *See, e.g.*, *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999); *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998).

28. N.Y. LEO 749 (Dec. 14, 2001).

29. ABA Informal LEO 86-1518 (Feb. 9, 1986).

30. ABA LEO 92-368 (Nov. 10, 1992).

31. ABA LEO 94-382 (July 5, 1994).

32. *See, e.g.*, Ky. LEO E-374 (Nov. 1995); *Weeks v. Samsung Heavy Indus, Ltd.*, No. 93 C 4899, 1996 WL 288511 (N.D. Ill. May 30, 1996).

33. *See, e.g.*, VA. LEO 1702 (Nov. 24, 1997).

34. *See, e.g.*, DC LEO 256 (May 16, 1995).

35. ABA MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

36. *Id.* R. 4.4(b) cmt. [2].

37. *VLT, Inc. v. Lucent Technologies, Inc.*, 54 Fed. R. Serv. 3d (Callaghan) 1319, 2003 U.S. Dist. LEXIS 723 (D. Mass. 2003).

38. The court cited the legal assistant's "significant emotional difficulties," absenteeism, and subsequent mental breakdown "possibly caused by alcoholism." *Id.* at \*9.