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Impact of E-mail on Attorney Practice and Ethics, The

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Note

The Impact of E-mail on Attorney Practice and Ethics

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I. INTRODUCTION

Most people are very comfortable using electronic mail; they say things in e-mail that they would never admit through other media.[1] In fact, many peoples' comfort level is approaching obsession; they have an extremely difficult time letting their e-mail go unchecked.[2] E-mail is fully integrated into the lives of most Americans as evidenced by myriad instances of e-mail romances, e-mail fights, e-business, and even e-crime.[3] What makes e-mail such a popular form of communication? People enjoy sending messages by e-mail because it is convenient and informal. Of course, this same informality has been identified by some as the principal disadvantage of e-mail.[4] If an e-mailer is not careful, he can cause substantial confusion, particularly if the recipient fails to understand what the sender meant to be a joke or sarcastic remark.[5] And there is even a minority that insists that confusion is the least of our worries. One critic described e-mail as "a steady drip of dubious prose, bad jokes[,] and impatient requests . . . that brings rot and ruin to society's delicate underpinnings."[6]

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1. *See* Marc Peyser & Steve Rhodes, *When E-mail is Oops-mail*, NEWSWEEK, Oct. 16, 1995, at 82 ("E-mail is like having a video camera running all the time, . . . [i]t has an almost truth-serum-like quality." (quoting attorney and author Michael Patrick)); Adair Lara, *Mom, You've Got Mail: Families Find Trying to Connect Has Become Quick and Easy with E-mail*, S.F. CHRON., Apr. 7, 2002, at E4 (stating that "people are confessing to the blue screen things they'd never told each other before.") "Just as many men will reveal feelings in drips and drabs while riding in the car or doing something, which they'd never talk about sitting face to face, . . . so they will say things in e-mail." *Id.* (quoting Deborah Tannen, professor of linguistics at Georgetown University).

2. *See* Chris Taylor, *12 Steps for E-Mail Addicts*, TIME, June 10, 2002, at 71 (noting that forty-two percent of the more than one hundred million e-mail users in the United States check their e-mail on vacation).

3. *See generally* Suzanne Perez Tobias, *Cell phones, E-mail and Other High-Tech Help for Long-Distance Romance*, THE KANSAS CITY STAR, Aug. 8, 2002; *E-mail: The Future of the Family Feud?*, NEWSWEEK, Dec. 18, 2000, at 14; John F. Rudin, *E-Business, E-Commerce & The Law*, 7 RICH. J.L. & TECH. 2 (2000); *Networks—Losing the Battle with E-Crime*, PC DEALER, July 18, 2001.

4. *See* MICHAEL R. OVERLY, CALIFORNIA TRANSACTIONS FORMS: BUSINESS TRANSACTIONS § 8:55 (2002) [OVERLY I] (stating that "[t]he informality of E-mail induces employees to drop the usual circumspection and reserve normally used in business communications . . . [which] has been the cause of millions of dollars in liability for businesses.").

5. *See* Kaitlin Duck Sherwood, *A Beginner's Guide to Effective Email*, *at* http://www.webfoot.com/advice/email.top.html (last visited Feb. 24, 2003) (copy on file with the *McGeorge Law Review*) (explaining that because e-mail "lacks vocal inflection, gestures, and a shared environment. . . . [a] correspondent may have difficulty telling if you are serious or kidding, happy or sad, frustrated or euphoric.").

6. Seth Shostak, *You Call This Progress?*, NEWSWEEK, Jan. 18, 1999.

In the legal world, e-mail is an indispensable tool for both attorneys and their clients. Two years ago the American Bar Association (ABA) conducted a modest study of e-mail usage by attorneys and found that seventy-one percent use e-mail directly with their clients.[7] A "majority of [American] law firms provide their attorneys with e-mail capabilities."[8] There is no doubt that this statistic is even greater today because the popularity of e-mail continues to increase and many clients are demanding that their attorneys have e-mail capability too.[9] One of the benefits to the client is twenty-four hour access to his attorney. These days people probably check their e-mail more often than they check their voicemail. If a client cannot get through to his attorney by telephone, e-mail is the next best thing. Another benefit to the client is that electronic communication tends to level the playing field.[10] Granted, attorneys are supposed to be the client's advocate, and attorneys should always be aware of the client's needs. But for people who do not have a lot of contact with attorneys, e-mail communication may seem a little less daunting than a face-to-face interview. E-mail may also save clients money because it tends to streamline communication and it costs less than a telephone call.[11]

E-mail is a vital part of modern legal practice; it benefits attorneys in a variety of ways. Recently, many high-profile cases have relied to some extent on discovery of e-mail messages with important evidentiary value.[12] When the phone rings, you typically have to drop what you are doing to field the call. E-mail, however, allows attorneys to read clients' inquiries on their own time and respond to them in a more calculated fashion. It creates an automatic permanent record of correspondences,[13] which can be stored and retrieved with little effort.[14]

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7. ABA Legal Technology Resource Center, *June 2000 Telephone Survey: How Attorneys Use Email, at* http://www.abanet.org/tech/ltrc/surveys/june2000.html (last visited Feb. 24, 2003) (copy on file with the *McGeorge Law Review*).

8. *See* Craig D. Tindall, *E-Mail E-thics: Privileged and Confidential Internet Communications*, ARIZ. ATT'Y, Mar. 2000, at 10.

9. *See* Brett R. Harris, *Counseling Clients Over the Internet*, 18 COMPUTER & INTERNET LAW. 4 (2001) [hereinafter *Counseling*] ("The practice of law is a service industry and lawyers are compelled to take action to best adapt their services to their clients' businesses.").

10. *See* Sherwood, *supra* note 5 ("Email [may lead] to a more egalitarian information structure.").

11. *Counseling, supra* note 9.

12. *See* Valeria Godines & Teri Sforza, *Church E-mails Differ from Statement*, ORANGE COUNTY REGISTER, Apr. 9, 2002 (Catholic diocese sexual abuse scandal); Robert Salladay, *Information Withheld in Oracle Deal, Official Says*, S.F. CHRON., May 15, 2002, at A1 (case of the software licensing contract between Oracle and the State of California); Edward Epstein, *U.S. Probes Leak in Lindh Case: Justice Department E-mails Show Strength of Defense Argument*, S.F. CHRON., July 11, 2002, at A7 (case of the American Taliban, John Walker Lindh); *Stewart's Lawyers Hand Over E-mail, Phone Records to Panel*, SAN JOSE MERCURY NEWS, Aug. 21, 2002 (Martha Stewart insider trading investigation).

13. *See* OVERLY I, *supra* note 4 (stating that "[t]he primary danger of [e]-mail lies in its perceived impermanence. . . . Contrary to popular belief, E-mail is far more permanent than the traditional writing. An [e]-mail can be recovered using commercial software long after the message was thought to be 'deleted.'").

14. Robert L. Jones, *Client Confidentiality: A Lawyer's Duties with Regard to Internet E-Mail, at* http://www.kuesterlaw.com/netethics/bjones.htm (Aug. 16, 1995) (copy on file with the *McGeorge Law Review*).

E-mail may even facilitate an attorney's duty to keep his client reasonably informed.[15] In short, "[e]mail is cheaper and faster than a letter, less intrusive than a phone call, [and] less hassle than a [fax]."[16]

So why should lawyers be concerned with this extraordinary technology? When it comes to e-mail, the risks lawyers face go beyond vague societal musings that e-mail has corrupted the art of communication. Foremost among these risks is the chance that a confidential communication sent in an e-mail will fall into the wrong hands.[17] There is also the danger that an attorney will be liable for falling below the professional standard of care and other reasonableness standards articulated in the ethical rules should he fail to use e-mail in his practice generally or on a particular occasion.[18] Another risk has to do with the inappropriate use of e-mail and the Internet in the marketing of legal services.[19] Finally, there is the concern underlying each of these areas that an attorney who uses e-mail in his practice makes himself more likely to violate various ethical rules simply because of the nature of the medium itself.[20] To date, privacy and confidentiality issues have been the focus of scholarly writing on the subject of attorney e-mail usage. But the more subtle concern, the one that has not received sufficient scholarly attention, involves the inherent difficulties in communicating through this relatively new medium and how that affects attorney practice. Accordingly, this essay also addresses some of the practical concerns posed by e-mail and offers some common-sense ways for attorneys to deal with them.

II. CONCERNS POSED BY E-MAIL

A. How is E-mail Different than Other Forms of Written Communication?

One author suggests that the "e" in e-mail might appropriately stand for "emotional."[21] But there is an interesting paradox in this observation. While e-mail does tend to draw out emotions like no other form of communication, it is also notorious for its inability to appropriately convey emotions.[22] Even handwritten communication tends to be more conducive of emotions because one can see how quickly a particular message was written or how hard the writing utensil was

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15. *See infra* Part II.C (discussing the implications e-mail has on the scope of this duty).

16. Sherwood, *supra* note 5.

17. *See infra* Part II.B; IAN C. BALLON, E-COMMERCE AND INTERNET LAW, 7-19 to 7-20 (2001) ("The problems posed by electronic communications are not dramatically different on *terra firma*, except that email messages are easier to forward inadvertently beyond a 'control group' . . . than similar communications memorialized on paper.").

18. *Infra* Part II.C.

19. *Infra* Part II.D.

20. *See infra* Part II.A; *Counseling*, *supra* note 9 ("The spontaneity of the process should not interfere with deliberateness required in counseling clients.").

21. Lara, *supra* note 1.

22. Sherwood, *supra* note 5.

pressed against the page. Simple things like mindless doodling or sketches, handwritten signatures, crossed out words or other corrections add intimacy to the message. E-mail messages, on the other hand, almost always look the same no matter who sends them. Aside from emoticons or other symbols, most of the visual cues that convey emotions must be written into e-mail messages, increasing the importance of a strong vocabulary.[23] Attorneys probably have less of a need to convey emotions to their clients than other people. They do, however, need to know how to communicate a sense of urgency or disapproval at times, and it would be helpful for an attorney to be able to infer from e-mail the emotions of their clients. It is important for the modern lawyer to understand, for purposes of both reading and drafting e-mail messages, that this curious form of communication tends to draw out the emotions without providing an adequate way to express them.

Another difficulty people face when they use e-mail is lack of context.[24] It is far too easy for the sender of an e-mail to assume that the recipient is in the same frame of mind as he. It is easy to forget that the recipient may be many miles away and may not have been exposed to the same information as the sender during that same day, or even in his lifetime. A subject line should be used to put the recipient "on the same page," and prepare him for what is to follow.[25] It is also important to avoid vague comments and overuse of pronouns.[26] In short, just do not assume the recipient knows what you know. A good rule of thumb is if the e-mail you send out generates more questions concerning context than content, then you would probably save your client time and money by just using the phone.

E-mail lacks the "second-thought protections" inherent in other forms of written communication.[27] For example, sending a letter or fax message involves several steps which delay the transmission and allow the sender to ponder what was included in the message. Good practice, therefore, might be to write out responses in a word-processing program and then attach them to an e-mail.[28] This adds a step to the process and allows the attorney-sender to run a spell-check and otherwise revise the message as needed. It would probably not be efficient for an attorney to employ this practice for each and every e-mail he receives. But it would be especially wise to do so if the e-mail he is responding to contains a question of law that should not be answered without sufficient research and analysis.

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23. *See* Computer User.com, *Emoticons, at* http://www.computeruser.com/resources/dictionary/emoticons.html (last visited Feb. 24, 2003) (copy on file with the *McGeorge Law Review*) (defining emoticons as "facial expressions made by a certain series of keystrokes . . . [m]ost often producing an image of a face sideways.").

24. Sherwood, *supra* note 5.

25. *Id.*

26. *Id.*

27. Jim Britell, *Avoiding the Dark Side of Email, at* http://www.britell.com/use/use19.html (1996) (copy on file with the *McGeorge Law Review*).

28. *Advice for Communications in Cyberspace*, 18 COMPUTER & INTERNET LAW. 6 (2001) [hereinafter *Advice*].

The practical concern of formality also has a bearing on attorney practice.[29] Some people have found that more formal e-mail messages tend to generate less responses from recipients.[30] Less formal e-mails set the recipient at ease and often produce a higher response rate or more complete responses by those that do respond. An attorney must balance the need to keep the tone fairly serious and professional and the desire to be amicable and make the client feel comfortable.

Related to the issue of formality is the "boy-who-cried-wolf" phenomenon. An attorney who allows the formality of his e-mail messages to slip so low that he is forwarding his clients jokes or amusing news stories runs the risk that the client will no longer believe that he has anything important to say.[31] If an attorney does not avoid indiscriminate use or simple overuse of e-mail, his client might trash an important message without reading it.

E-mail is often more conversational than traditional paper-based media because the response time is generally quicker.[32] Of course, "while email sometimes feels like speech, and may be used as a real-time substitute for speech, it lacks most of the feedback present in face-to-face and phone conversations."[33] Also, people generally send e-mail messages with the expectation that they will get a fairly prompt response and, in turn, will be able to follow up on any questions or misunderstandings the recipient might have with regard to the initial message. For this reason, the initial sender is less concerned with complete accuracy and detail.[34]

This sloppiness, however, is in direct conflict with the practice of good lawyers, who pride themselves on precision and clarity.[35] And, unfortunately, it is probably unreasonable to expect lay people to treat attorney e-mail any differently than other e-mail messages they receive on a daily basis. This is at the root of the problem. Attorney-client communications are different than ordinary communications regardless of the medium used for transmission. But when a person is in "e-mail mode," he generally does not adapt the way he reads them and the way he responds to them to conform to the particular necessities or status of the person with whom he is communicating. In contrast, this transition tends to be pretty fluid in face-

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29. Sherwood, *supra* note 5. *But see Counseling*, *supra* note 9 (indicating that sloppy e-mails may get attorneys into trouble, but they also give attorneys plenty of work: "The informality of email as a mode of communicating often contributes to the incriminating nature of such messages. Emails thus may not only be of evidentiary value in a litigation but at times are the vehicle for the actions giving rise to the litigation itself.").

30. Sherwood, *supra* note 5.

31. *See* Britell, *supra* note 27 ("Some people create so much email that it begins to border on spamming and their email credibility deteriorates.").

32. Sherwood, *supra* note 5.

33. Britell, *supra* note 27 (noting that spoken words enjoy the benefit of "inflection . . . , stress, accent, and pauses").

34. *See* Sherwood, *supra* note 5 ("In a paper document, it is absolutely essential to make everything completely clear and unambiguous because your audience may not have a chance to ask for clarification.").

35. *See id.* ("You need to be aware of when you can be sloppy and when you have to be meticulous.").

to-face communications.[36] Since attorneys are more familiar with the precautions that need to be taken with regard to attorney-client communications, and since it is the attorneys who will be primarily responsible for inaccurate, delayed, or misdirected communications, it follows that they should carry the burden of "adjust[ing] their communication styles to this new medium."[37] It would also be wise to sit down with a new client and discuss whether and how e-mail will be used during the representation so as to avoid the common pitfalls associated with this unique medium.[38] Whether succumbing to these traps may result in an ethical violation or simply added expense to a client, it behooves every lawyer to learn how to communicate effectively and ethically through e-mail.

B. *Confidential Communications*

1. *Defining the Attorney-Client Relationship*

Protecting confidential communications is a manageable task when it is clear to both parties that a confidential relationship exists. However, this is not always the case because the rule that defines the beginning of the relationship gives particular deference to the client's perceptions.[39] An attorney-client relationship can be established even prior to a formal retainer agreement and no money need change hands. The relationship is implied where a person reasonably believes that he is obtaining legal advice or that he is being represented.[40] An "exploratory conversation with a view toward representation" will generally constitute the beginning of an attorney-client relationship and, thus, the beginning of potential liability for the attorney if the attorney does nothing to manifest lack of consent to the representation.[41]

It is important in this respect to guard against inadvertent creation of the attorney-client relationship. Because e-mail is simple (and even sometimes fun) to use, attorneys need to be particularly careful when they give out advice. Since giving a person specific advice will often be deemed the beginning of the

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36. *See* ROBERT J. STERNBERG, IN SEARCH OF THE HUMAN MIND 315 (1995) (outlining the fields of pragmatics and sociolinguistics which study how humans change their use of language in different contexts).

37. Sherwood, *supra* note 5.

38. *Advice*, *supra* note 28.

39. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000).

> A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.

Id.

40. *Id.*

41. Professor John Sims, Professional Responsibility Lecture, McGeorge School of Law (Aug. 2002).

attorney-client relationship, an attorney should forebear or at least preface the advice with a disclaimer if he wishes to avoid the relationship.[42] Even if he does not wish to avoid the relationship and the responsibilities that accompany it, it is probably wise for him to expressly define the beginning of the representation on his own terms rather than allow it to be implied. This way an attorney can be more confident about the scope of his duties, and he can understand more clearly how he ought to communicate with the client or potential client.

Inadvertent formation issues commonly arise in the context of law firm websites. Some attorney websites invite visitors to e-mail their legal questions.[43] The risk of inadvertent formation is far greater with interactive websites than it is with passive sites.[44] Interactive websites might incorporate characteristics of chat-rooms or electronic bulletin boards.[45] Websites that charge a fee or ask the visitor to fill out a form or application that requires disclosure of personal information may be sufficiently interactive to imply formation of an attorney-client relationship.[46] The relationship may also be implied in situations where the attorney, through his website, gives specific advice to visitors even where no specific questions were asked.[47]

"Unbundling of legal services is especially suitable for the Internet."[48] This is a service offered by some firms whereby specific legal services are offered to clients who would ordinarily not be able to afford representation.[49] "Unbundling" is also known as "discrete task representation," and it might "include helping clients prepare . . . legal documents, conducting legal research on a single issue, and limited court or administrative appearances."[50] An attorney who offers this kind of legal service on the Internet can protect himself by clearly limiting the scope of representation to specific services listed in a menu on his website.[51]

Recognizing when the relationship has ended may be just as important as identifying when it began. Often it is unclear when an attorney-client relationship

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42. *See* ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 17.01(19)(c) (2d ed. 2002) (noting that a disclaimer might include language telling prospective clients that they are not yet clients, that the information being given is general information and not legal advice, that the reader should not rely on the information, or that the reader should consult independent counsel).

43. For a comprehensive legal resource and search engine run by the California firm Eslamboly & Barlavi, see, e.g., *www.lawguru.com.*

44. Mark L. Tuft, *Legal Ethics and the Internet, in* PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 881, 888-89 (July 2001).

45. Stewart S. Manela, *What Employers and Attorneys Need to Know About Online Liability*, 48 PRAC. LAW. 11, 20 (July 2002).

46. PAUL W. VAPNEK ET AL., *Professional Responsibility, in* CALIFORNIA PRACTICE GUIDE 3:61.6 (The Rutter Group 2002).

47. Candy M. Kern-Fuller, Doe v. Condon*: Lawyers Beware—This Unauthorized-Practice-of-Law Case May Affect You!*, 53 S.C. L. REV. 661, 671 (2002).

48. VAPNEK, *supra* note 46, at 3:33.5.

49. *Id.* at 3:33.6.

50. *Id.* at 3:33.5.

51. *Id.*

is over because most attorneys like to leave open the possibility that the relationship will continue and the client will use their services for all his legal issues. But there are instances when a lawyer is retained for only one specific matter. Sometimes letters of disengagement are necessary, particularly if friendly e-mail correspondences continue beyond the end of the confidential relationship.[52] It may also be wise to confirm a rejection in writing.[53]

2. *Security of E-mail Communications: Encryption*

During the 1990s, encryption of confidential e-mail was a big debate among legal scholars.[54] Some commentators had very little faith in the security of electronic communications.[55] But a general consensus eventually emerged that encryption of confidential e-mail was not necessary.[56] First, e-mail was not seen as a greater risk than telephone or fax messages.[57] Additional precautions need not be taken in order to protect confidentiality in connection with these modes of communication, so why treat e-mail differently? Second, "intentional interception of an e-mail is illegal" under the Federal Electronic Communications Privacy Act of 1986 (ECPA).[58] The ECPA makes the acquisition of the contents of any electronic communication a felony, and it preserves the attorney-client privilege with regard to e-mail communications that are intercepted.[59] Third, several state ethics committees considered the issue and supported the usage of unencrypted e-mail by attorneys.[60]

In the spring of 1999, the ABA took a formal position on the topic of encryption of confidential e-mail.[61] This opinion clearly stated that failure to encrypt confidential e-mail does not constitute a violation of the Model Rules of Professional Conduct.[62] Just like faxes and telephones, e-mail communication "affords a reasonable expectation of privacy from a technological and legal standpoint."[63] The ABA explained that it is not reasonable to require encryption

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52. *Id.* at 3.83.6.

53. *Id.*

54. Joshua M. Masur, Comment, *Safety in Numbers: Revisiting the Risks to Client Confidences and Attorney-Client Privilege Posed by Internet Electronic Mail*, 14 BERKELEY TECH. L.J. 1117, 1118 (1999); BALLON, *supra* note 17 § 7.05[2].

55. *See, e.g.*, Jones, *supra* note 14 (comparing e-mail to sending a postcard through the mail for every one to see, and urging the "prudent lawyer" to "[place] his messages in the 'envelope' of encryption").

56. *See* Stephen Masciocchi, *Internet E-Mail: Attorney-Client Privilege, Confidentiality, and Malpractice Risks*, 27 COLO. LAW. 61, 63 (1998) (listing various reasons why encryption should not be required).

57. *Id.*

58. *Id.*; 18 U.S.C.A. § 2517(4) (West 2000).

59. 18 U.S.C.A. § 2517(4).

60. Masciocchi, *supra* note 56, at 62.

61. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

62. *Id.*

63. *Id.*

merely because interception of an unencrypted e-mail is technologically possible.[64] The risk of unauthorized interception is not limited to e-mail communications, so e-mail should not be treated differently.[65]

However, in no way did this opinion mark the end of the debate. The topic of encryption and e-mail security is livelier than ever. A Westlaw search in a nationwide law review database using the terms "CONFIDENTIAL! /P SECUR! /P ENCRYPT! /P EMAIL E-MAIL" produces 89 hits prior to the date of the ABA opinion and 162 hits after that date. Several points in the language of the opinion continue to arouse discussion. The ABA stated that "[t]he conclusions reached in this opinion do not . . . diminish a lawyer's obligation to consider with [his] client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated medium of communication."[66] Does this impose an obligation to consider these things with a prospective client? "Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail."[67] The ABA noted that its opinion was "based upon current technology and law as we are informed of it," leaving open the possibility that this opinion would be subject to modification as society obtains new insights about this technology.[68] As encryption technology becomes cheaper and more accessible to the average attorney, states may begin to require them to use it with e-mail and perhaps with all of their confidential communications.[69]

The ABA opinion received substantial and immediate criticism. One commentator, responding in the same year the opinion was published, warned that the ABA was basing its conclusions on "misconceptions about the underlying technology and security of Internet transmitted electronic mail."[70] E-mail, he argued, is not as secure as people think.[71] Another author recently warned against relying on the ABA opinion because it is now outdated and it gives very little guidance to the practicing attorney.[72] He suggests that the idea that encryption is costly and inconvenient is simply not true today.[73] He also suggests that the ABA opinion gives assurance to attorneys who send marginally confidential information via e-

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* Charles R. Merrill, *New Solutions to the Attorney Dilemma of E-mail Confidentiality*, *in* PRACTISING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 943, 951 (June 2000) [hereinafter *New Solutions*] (suggesting that encryption was becoming practical over two years ago even for the "non-technical" attorney).

70. Masur, *supra* note 54, at 1117.

71. *Id.*

72. Charles R. Merrill, *Revisiting the Question of Attorney/Client Internet E-Mail Encryption*, 12 INTERNET NEWSL. 5 (2002).

73. *See id.* (noting that public key encryption is increasingly "becoming user friendly and cost effective enough to be suitable for the larger law firm").

mail, and it is instructive of what steps an attorney should take should he need to e-mail highly confidential information.[74] But the opinion puts the attorney who wished to e-mail moderately sensitive information "between a rock and a hard place."[75] In this situation, the attorney has to decide whether to just send a conventional "snail-mail" letter or risk damage to the client and self should the e-mail be intercepted.[76] The discussion of encryption, therefore, fascinating as it may be, does not get us beyond the standard we began with: "a lawyer's expectation of privacy in a communication medium need not be absolute; it must merely be reasonable."[77]

Some recent developments in this area are noteworthy. One scholar suggests that protection of sensitive e-mail messages should be analyzed through the old Learned Hand formula.[78] This would impose a duty to act only where the burden of implementing the new technology is less than the probability of a breach of confidentiality multiplied by the degree of harm should a breach occur.[79] Another potential solution comes out of a recent agreement between RegistryPro, Inc. and the Internet Corporation for Assigned Names and Numbers (ICANN).[80] Attorneys and other professionals will soon be able to identify themselves as such on the Internet by the ".pro" suffix.[81] This domain will be restricted to professionals; they "will be required to certify their professional credentials and each will be issued a digital certificate."[82] It will facilitate secure attorney-client communications and transactions, thereby increasing the confidence of both. RegistryPro expects to launch the ".pro" domain in early 2003.[83]

3. *Ethical Rule of Confidentiality*

Confidential communications by e-mail present a few overlapping areas of concern: ethical rules, attorney-client privilege, and the work product doctrine.[84] Ethical rules are the most important for two different reasons. First, ethical rules cover a broader range of topics. Second, since ethical rules demand the highest degree of professionalism and candor, compliance with the rules will typically

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74. *Id.*

75. *Id.*

76. *See id.* (stating that the practical effect of the opinion is not to protect clients, but to encourage the usage of boilerplate disclaimers by attorneys to protect themselves in situations where they are unsure whether a confidential communication would be protected without encryption).

77. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

78. *New Solutions*, *supra* note 69, at 948-50.

79. *Id.*

80. *RegistryPro Signs .pro Contract with ICANN, Forming the First Secure Internet Address Exclusively for Professionals*, BUS. WIRE, May 8, 2002, *available at* http://www.businesswire.com.

81. *Id.*

82. *Id.*

83. *Id.*

84. David G. Ries, *Attorney Confidential Communications by E-Mail—Ethical Considerations and Beyond*, 6 CYBERSPACE LAW. 4, 4 (2001).

mean automatic compliance with the other rules as well.[85] According to the ABA Model Rules: "A lawyer shall not reveal information relating to representation of a client."[86] There are a few exceptions to this rule, including instances where the client consents to disclosure after consultation and where disclosure is impliedly authorized by the representation.[87] Also, a lawyer may disclose confidential information in order "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,"[88] or in order to defend himself or plead his own cause in a fee dispute, malpractice suit, or disciplinary proceeding.[89] The duty of confidentiality may attach even if the attorney is not ultimately hired, and it continues beyond the client's death.[90]

The duty of confidentiality is even broader in California. A California attorney has the duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[91] Although this has been described as an absolute rule,[92] there are a few narrowly defined exceptions similar to those spelled out in the Model Rules.

The primary reason for rules of confidentiality and privilege is to foster open and honest communication between attorneys and their clients.[93] E-mail is perhaps the medium of communication that best accomplishes this policy.[94] Yet, confidentiality can probably be waived more easily by e-mail than by other forms of communication. This is so because inadvertent disclosure of a confidential e-mail is more likely than inadvertent disclosure of a confidential letter or fax. Sending a letter or fax involves several steps. The more steps in the process, the more chances there are to catch a technical or stylistic, or worse yet legal, error.[95] But a misdirected e-mail is commonplace because one simple click of the mouse can send it to the wrong person or persons.[96] Failure to take appropriate steps to

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85. *Id.*

86. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1998).

87. *Id.*

88. *Id.* R. 1.6(b)(1).

89. *Id.* R. 1.6(b)(2).

90. *See* MODEL RULES OF PROF'L CONDUCT, ANN. R. 1.6 (noting that the duty of confidentiality may extend to prospective clients and beyond termination of the lawyer-client relationship).

91. CAL. BUS. & PROF. CODE § 6068(e) (West 1990).

92. People v. Singh, 11 P.2d 73, 75 (Cal. 1932).

93. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 4 (stating that the rule encourages clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter").

94. *See supra* Part II.A (discussing the peculiar effect that e-mail has on people and its ability to draw out the truth by setting the writer at ease).

95. *See* Britell, *supra* note 27 (E-mail "does not have the inherent 'second thought' protections automatically provided by the physical preparation, assembly, built-in delay, and cost which postal mail provides.").

96. *See* Alan T. Saracevic, *Muffed E-mail Leaves Wall St. Atwitter*, S.F. CHRON., Sept. 15, 2002, at G2 (describing how an e-mail got sent to the wrong person when sender accidentally clicked on "reply" rather than "forward").

ensure that confidential information is not disclosed may result in waiver if it is actually disclosed.[97]

What are the duties of unintended recipients of confidential e-mail messages? If the unintended recipient is the lawyer on the opposing side, he may face conflicting duties. In this situation, his duty to zealously represent his own client clashes with his duty of fairness to the opposing side.[98]

> A lawyer who [inadvertently] receives materials that on their face appear to be subject to an attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.[99]

The more obvious it is that the e-mail is confidential, the less likely it is that there will be a waiver.

As noted previously, while appropriate in some situations, encryption of confidential e-mails is not required.[100] What *is* required is that the attorney take reasonable precautions.[101] Although reasonableness is a relative concept, it typically involves communicating with and educating clients and support staff about e-mail and confidentiality. It is probably reasonable, if not necessary, in most situations to "[i]mplement a firm-wide policy on appropriate e-mail usage."[102] Such a policy might include usage of an e-mail program that automatically inserts addresses, or it might include restricting use of the "reply to all" function.[103] In either case, all attorneys and support staff should be well versed in the ability to send e-mail messages to only the intended recipients. There should be in place a firm-wide policy that attorneys must talk with new clients about e-mail so that clients are aware of the risks.[104] Attorneys should be sure to include the word "confidential" in the subject line of confidential e-mail messages and consider including a disclaimer in the body if the e-mail program does not include one automatically.[105] A good disclaimer will apprise the unintended recipient that the message is confidential and intended only for the

97. *See* BALLON, *supra* note 17 § 7.02[1] (stating that an attorney may not be able to prevent an e-mail from being produced upon request).

98. *Id.* § 7.05[4].

99. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

100. Encryption is appropriate when dealing with "extra sensitive" information or when the client requests it.

101. BALLON, *supra* note 17 § 7.02[1].

102. *Advice*, *supra* note 28.

103. *Id.*

104. *Id.*

105. *Id.*

person named in the message.[106] It will additionally warn the unintended recipient not to review, disseminate, or copy the message, and will let him know whom he should contact in order to get the message back to the sender.[107]

4. Privilege and Work Product

The attorney-client privilege protects a narrower range of confidences than the ethical rule of confidentiality. It applies to communications made in confidence between an attorney and his client.[108] Also, privilege is an evidentiary rule while confidentiality is a rule of ethics. The relevant question under this rule is whether inadvertent disclosure of privileged information constitutes waiver of the privilege. First, under federal law, no otherwise privileged electronic communication loses its privileged character when it is either intentionally or inadvertently intercepted.[109] So, as long as communications are "otherwise privileged" according to state waiver law, privileged information is safe.

Waiver may be either intentional or inadvertent. But a client cannot waive the privilege if he intends or if he reasonably assumes that the communication will remain confidential. Waiver "occurs when a significant part of the communication is voluntarily disclosed" to a third party.[110] Under a new section of the California Evidence Code, clients are not automatically prevented from asserting privilege just because they communicated with their attorney via e-mail.[111] Although courts have not yet had the opportunity to interpret this rule, waiver not doubt depends upon the intent of the holder of the privilege and the reasonableness of the steps taken to keep waiver from occurring.[112]

Also falling within the category of confidential communications is the related doctrine of work product. It gives the work done by an attorney in anticipation of litigation qualified immunity from discovery.[113] The opposing party in a lawsuit may only have access to such information if he can show that justice requires that he obtain it and he is unable to obtain it through his own efforts.[114] An attorney's opinions, thoughts, and impressions are absolutely immune from discovery under the work-product doctrine. "[W]ork product protections typically are not lost

106. *Id.*

107. *Id.*

108. Jones, *supra* note 14.

109. 18 U.S.C.A. § 2511 (West 2000).

110. MICHAEL R. OVERLY, OVERLY ON ELECTRONIC EVIDENCE IN CALIFORNIA § 5:2 (2002) [hereinafter OVERLY II].

111. *See* CAL. EVID. CODE § 952 (West 1995) ("A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.").

112. OVERLY II, *supra* note 110.

113. BALLON, *supra* note 17, § 7.02[4].

114. *Id.*

unless material is actually released to a client's adversary."[115] Inadvertent disclosure usually does not result in waiver, but when waiver is established, "the scope . . . is limited to the four corners of the document."[116] In the context of e-mail the scope of the work-product doctrine is unclear because its borders are not as clearly delineated as a sheet of paper.

C. *Ethical Rules of Reasonableness*

California attorneys must keep their clients "reasonably informed about significant developments relating to employment or representation, including promptly complying with reasonable requests for information."[117] Whether it is reasonable to inform a client in any given situation will depend on the circumstances, and the rule suggests that prompt compliance with requests for information is reasonable in most situations. The "reasonably informed" language seems to have two components. First, only *significant* developments need to be disclosed.[118] Second, such developments need to be disclosed *promptly*.[119] The rule recognizes that prompt notice of insignificant developments is just as worthless as notice of significant developments that comes too late.[120]

The more commonplace e-mail becomes in the legal world, the more it becomes the reasonable, rather than the extraordinary, mode of communication. There is authority for the proposition that failure to return a telephone call is a violation of an attorney's duty to keep a client reasonably informed.[121] It is not entirely clear that failure to respond to an e-mail would be distinguishable. It is not too difficult to imagine a situation where, in order to meet the "prompt compliance" language, an e-mail notice would be required.[122] Particularly where an attorney discusses with the client that they will communicate by e-mail during the representation, prompt notice of significant developments may need to be sent using that medium.[123] As technology advances, the idea of promptness gradually takes on a new meaning. The United States Postal Service was considered prompt years ago, but today it is often referred to as "snail-mail" when compared to electronic communications.[124]

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115. *Id.* § 7.03[4].

116. *Id.*

117. CAL. RULES OF PROF'L CONDUCT R. 3-500 (1996). *See also* CAL. BUS. & PROF. CODE § 6068(m) (West 1990).

118. CAL. RULES OF PROF'L CONDUCT R. 3-500.

119. *Id.*

120. *Id.*

121. Aronin v. State Bar, 52 Cal. 3d 276 (1990).

122. *See* Tindall, *supra* note 8, at 10 ("At times, e-mail offers the best method to meet [the] obligation [to serve the client with reasonable diligence and promptness].").

123. *But see* Masciocchi, *supra* note 56, at 64 ("Some clients do not check their e-mail 'in box' every day. . . . Under such circumstances, clients could fail to read an important message for several days.").

124. Jones, *supra* note 14.

Related to the duty to keep clients reasonably informed are the duty to expedite litigation,[125] the duty to promptly communicate settlement offers to clients,[126] the duty to give clients prompt notice upon receipt of funds in which they have an interest,[127] and the general duty to act with reasonable diligence and promptness in representing a client.[128] Does e-mail usage impose any greater responsibility on lawyers with regard to these rules?

The California Code of Civil Procedure imposes sanctions on attorneys who purposefully cause unnecessary delay. The pertinent section is as follows: "Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[129] Could we ever reach a point where e-mail technology is so prevalent that failure to use it could subject an attorney to discipline or fines for the unnecessary delay? The definition of "actions or tactics" is not limited to motions and other papers submitted to the court.[130] While this rule is primarily concerned with delays that could set back proceedings by weeks or months,[131] some rules of court have more stringent time requirements where the difference between an e-mail and a slower form of communication could be significant.[132] As e-mail becomes the standard form of communication in the legal world and as courts' dockets continue to fill beyond capacity, it is likely that attorneys will be expected to make more use of e-mail so as to move things along more quickly.[133]

The duty to give clients prompt notice of settlement offers and receipt of funds probably does not impose a duty to give such notice by e-mail in every situation. Sometimes a phone call is quicker than an e-mail because, if the recipient is in his office, he will always know when a phone message is incoming but he may not always know that he has received an e-mail until he checks his in-box. A client could go weeks without checking his e-mail and in such a situation, an attorney could get himself into trouble if he relies solely on e-mail communication. In this context, e-mail notice is probably still only an important supplement to notice given through traditional means.

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125. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2002).

126. CAL. RULES OF PROF'L CONDUCT R. 3-510 (1996).

127. MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2002).

128. *Id.* R. 1.3 (2002).

129. CAL. CIV. PROC. CODE § 128.5(a) (West Supp. 2002).

130. *Id.* § 128.5(b)(1).

131. Rayan v. Dykeman, 274 Cal. Rptr. 672, 676-77 (1990) (imposing sanctions on plaintiff for failure to comply with court order for nearly one year).

132. *In re* Marriage of Quinlan, 257 Cal. Rptr. 850, 852 (1989) (noting that an attorney may be sanctioned for purposely exceeding a court's two-hour time limit in order to get before a different judge).

133. *See* Whirlpool Fin. Corp. v. GN Holdings, Inc. 67 F.3d 605, 610 (7th Cir. 1995) (holding that lawyers cannot ignore technological advancements in the discharge of their duties).

D. Marketing of Legal Services

Both the ABA Model Rules and the California Rules of Professional Conduct generally prohibit communications that amount to solicitation of legal services and generally permit communications that are deemed advertising.[134] Solicitation can be live telephone or in-person contact.[135] This kind of contact is strictly regulated because it is thought that lawyers, who are trained in the art of persuasion, may be tempted to exert undue pressure on the recipient.[136] Such coercion or danger of coercion is less likely, and thus not a breach of ethics, where the person being solicited is a family member, another attorney, or a former client, or where the solicitation is not motivated by the lawyer's desire for pecuniary gain.[137] Direct solicitation is also more difficult to regulate than other more generally observable forms of advertising.[138] Some solicitation, however, is tolerated, like where the recipient is a family member or is a present or former client of the attorney.[139] Solicitation of lawyers and other sophisticated individuals who do not need the protection of the rule is also permissible.[140] It is not solicitation to send a letter to an individual who is known to be in need of legal assistance as long as it is clearly marked on the outside of the envelope "Advertising Material."[141]

Advertising, although permitted, is subject to several important limitations. First, advertising is subject to the general rule regarding all communications: they not be materially false or misleading.[142] Second, attorney advertising must not make any unverifiable comparisons or state anything that is "likely to create an unjustified expectation."[143] Third, attorneys may not pay for referrals and may not receive money for giving referrals.[144] Finally, an attorney should keep copies or recordings of all their advertisements for at least two years.[145]

It appears that the same marketing rules apply in the context of e-mail. The State Bar of California Standing Committee on Professional Responsibility (COPRAC) recently issued an opinion addressing the ethical issues of attorney website usage.[146] COPRAC concluded that a website is a "communication" for

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134. MODEL RULES OF PROF'L CONDUCT R. 7.1-7.3; CAL. RULES OF PROF'L CONDUCT R. 1-400 (1996).

135. MODEL RULES OF PROF'L CONDUCT R. 7.3(a).

136. VAPNEK, *supra* note 46, at 2:216-2:220.

137. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. (2002).

138. *Id.*

139. *Id.*

140. MODEL RULES OF PROF'L CONDUCT R. 7.3(a); Edenfield v. Fane, 507 U.S. 761, 774 (1993).

141. *Id.* R. 7.3(c).

142. *Id.* R. 7.1; CAL. BUS. & PROF. CODE § 6157.1 (West Supp. 2002).

143. MODEL RULES OF PROF'L CONDUCT R. 7.1(b), (c).

144. *Id.* R. 7.2(c).

145. *Id.* R. 7.2(b).

146. Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-155 (2001), *available at* http://calbar.ca.gov/calbar/html_unclassified/ca2001-155.html (copy on file with the *McGeorge Law Review*).

purposes of Rule 7.1 of the California Rules of Professional Conduct; the California ethics rule on solicitation and advertising, even when it allows a client to e-mail a specific attorney from the site.[147] Although the COPRAC opinion does not address attorney usage of e-mail per se, if read in connection with ABA and other state materials, one can get a fairly good idea of what a California court would do when faced with such an issue.[148]

Unlike other areas of computer and Internet law, the conventional rules on advertising seem to apply seamlessly to the new technology. A domain name may constitute an advertisement because it has been deemed a communication in other states.[149] As such, it must conform to the general rule that it cannot be false or misleading. The same rule applies to e-mail addresses and signatures.[150] Each of these qualifies as a communication and, therefore, must comply with the general rules on advertising and solicitation.[151] An attorney cannot imply special expertise through any one of these media, except that which is recognized by special certification authority.[152] An attorney may not guarantee or appear to guarantee an outcome through any one of these media.[153] Fudging on these rules is probably less tempting in the real world because of the negative repercussions on an attorney's reputation. In cyberspace, however, an attorney can reach prospective clients with more anonymity and without making a spectacle of himself in front of the legal community. But the Internet, with its nifty pop-up ads and flashy graphics, is probably not the best place for an ethical lawyer to advertise; at least not much beyond the average law firm website. Attorneys need to include enough information in their advertisements that they make what is being said not materially false or misleading.[154] This is contrary to the style of typical Internet advertising, which thrives on statements that push the limits of truthfulness and one-line attention-grabbers that cannot easily be overlooked by speedy web surfers.

There are a few common sense ways to guard against unintentional violations of the lawyer advertising rules. First, e-mail advertisements should be labeled as such in the subject line.[155] Second, attorneys must not include any untrue or

147. *Id.*

148. *See* Carole Levitt, *Internet Ethics and Netiquette for Attorneys and Law Firms*, 25 L.A. LAW. 62, 62 (2002) (stating that "[t]he principles behind the opinion . . . may be applied to other online forms of communication, including e-mail").

149. *See id.* (noting that other state bars apply the rules of print advertising the online advertising).

150. *Id.* at 64.

151. *See id.* at 62, 64 (noting that it "is probably not a good idea to use [the] signature block 'King of Torts'" or to use the domain name "bestattorney.com" or "paynobills.com").

152. MODEL RULES OF PROF'L CONDUCT R. 7.4(d)(1) (2002).

153. MODEL RULES OF PROF'L CONDUCT R. 7.1; CAL. BUS. & PROF. CODE § 6157.2 (West Supp. 2002); CAL. RULES OF PROF'L CONDUCT R. 3-500 (1996).

154. MODEL RULES OF PROF'L CONDUCT R. 7.1; CAL. BUS. & PROF. CODE § 6157.1 (West Supp. 2002).

155. *Supra* Part II.D.

deceptive statements in their Internet and e-mail advertisements.[156] Third, attorneys must avoid soliciting business through real-time communications on the Internet, such as chat rooms.[157] Finally, attorneys should avoid overly intrusive e-mails and should consider using disclaimers any time they have a presence on the Web.[158]

III. CONCLUSION

The central question when it comes to the law of computers and the Internet is whether new rules will need to be developed to deal with the new technology. The question, however, probably should not be: "Will the old rules still apply?" but should be: "Which old rules will still apply?" E-mail is not so different that it cannot be regulated using the old framework even if new statutes and judicial interpretations will inevitably need to be incorporated therein. The law governing lawyers' use of e-mail is a prime concern because it will probably help shape computer and Internet law in general.

Attorney use of e-mail is a double-edged sword; both the law and the underlying technology are relatively new. How should lawyers respond to this innovation? A radically conservative response would probably mean avoiding the medium entirely. At the other end of the spectrum are the attorneys who use this technology indiscriminately without considering the practical and ethical concerns. A moderately conservative approach, one that lawyers are typically accustomed to anyway, is therefore advisable because just the right amount of skepticism will ensure professionalism without altogether preventing lawyers from participating in the information age.

On one level, an attorney needs to know what is legal. On another, (perhaps higher) level, he needs to know what is ethical. But aside from ethics and the law, there are the practical, service-oriented skills that attorneys should strive to perfect. These skills are not more important than the law itself. However, a knowledge of how to effectively communicate using e-mail can only improve an attorney's understanding of the law and ethics that govern its usage.

156. *Id.*
157. *Id.*
158. *Id.*

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