ALASKA BAR ASSOCIATION
ETHICS OPINION 98-2

Communication By Electronic Mail

Electronic mail (e-mail) is fast becoming the accepted and preferred method for attorneys to communicate with their clients, and vice versa. It has the obvious advantages of speed, efficiency and cost to commend its application, and it will likely follow the path of the fax machine and soon become an everyday mainstream business tool. Its rapid rise in currency raises a number of thorny ethical issues,[1] but the Committee has chosen to address probably the most fundamental concern: Is it ethical for an attorney to use e-mail as a means of communicating with a client when such communications may involve the disclosure of client confidences, privileged communications or work-product?

In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software,[2] attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, *i.e.,* a communication that the attorney would hesitate to communicate by phone or by fax.

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[1] See generally, ABA/BNA Lawyers' Manual on Professional Conduct Practice Guide Dealing with Electronic Communication, under the heading "Confidentiality", No. 170; ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, March 6, 1996, an article by Joan C. Rogers, Staff Editor, entitled "Ethics Malpractice Concerns Closed E-Mail, On-Line Advice"; the ethics article entitled "The Perils of Office Tech" by Joanne Pitulla, Assistant Ethics Counsel, in the October 1991 issue of the "ABA Journal"; "Confidentiality and Privilege in High-Tech Communications" by David Hricick appearing in the February 1997 issue of the "Professional Lawyer"; the 1996 Symposium issue of the "Professional Lawyer" comprised of papers presented at the 22nd National Conference on Professional Responsibility, which took place in Chicago. Several articles dealing with the subject matter are printed in the Symposium issue including "High Tech Ethics and Malpractice Issues", "Spinning an Ethical Web: Rules of Lawyer Marketing in the Computer Age", and "Can the Decrepit Encrypt: Do we Need the Cone of Silence, or is "Pretty Good" Good Enough?".

[2] Encrypted e-mail has been electronically locked to prevent anyone but the intended recipient from reading it, using a "lock and key" technology. Simply stated, such messages are "locked" by the sender, making them unreadable except by the intended recipient, who has a "key" in the form of an electronic password to decode the message.

DISCUSSION

The lawyer's duty to preserve confidences is codified in Alaska Rules of Professional Conduct 1.6. The duty extends not only to confidential communications, but to "information relating to representation of a client."

While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms[3] is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. See 18 U.S.C. § 2510 et. seq. The Act also provides that "[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). Accordingly, interception will not, in most cases, result in a waiver of the attorney-client privilege. This is in accord with the prevailing view, though the answer in each specific case may depend, at least in part, on the circumstances of whether the disclosure is viewed as "intentional" or "inadvertent." See Shubert v. Metrophone, Inc., 898 F.2d 401 (3rd Cir. 1990). See also ABA Formal Ethics Ops. 92-368 and 94-382.

The Committee's view generally comports with the majority of jurisdictions that have considered this issue. See Arizona Advisory Op. 97-04 (lawyers may want to have e-mail encrypted with a password known only to the lawyer and the client but lawyers may still communicate with existing clients via e-mail about confidential matters); South Carolina Advisory Bar Op. 97-08 (finding a reasonable expectation of privacy when sending confidential information through electronic mail; the use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6); Vermont Op. 97-5 (a lawyer may communicate with a client by e-mail, including the Internet, without encryption); Illinois State Bar Assoc. Op. 93-12 (lawyer does not violate Rule 1.6 by communicating with a

[3] Speaking generally, electronic mail is a message sent from one user's computer to another user's computer via a host computer on a network, or via a private or local area network (i.e., a network wholly owned by one company or person which is available only to those persons employed by the owner or to whom the owner has granted legal access). In addition, there are commercial electronic mail services (America On-Line, CompuServe), or messages may be sent via the Internet, or by any combination of these methods.

client using electronic mail services, including the Internet, without encryption).

The only dissonant view has been expressed by the Iowa Bar, which suggests that, without encryption, confidential communications should not be sent by e-mail absent an express waiver by the client. See Iowa Advisory Op. 95-30.

In conclusion, an attorney is free to communicate using e-mail on any matters with a client that the attorney would otherwise feel free to discuss over the telephone or via fax transmission. The expectation of privacy is no less, and these communications are protected by law. While it is not necessary to seek specific client consent to the use of unencrypted e-mail, clients should nonetheless be advised, and cautioned, that the communications are not absolutely secure. The Committee recognizes that there may be circumstances involving an extraordinary sensitive matter that might require enhanced security measures, like encryption. Attorneys should take those precautions when the communication is of such a nature that normal means of communication would be deemed inadequate.

Approved by the Alaska Bar Association Ethics Committee on January 8, 1998.

Adopted by the Board of Governors on January 16, 1998.

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