

Inadvertent Disclosure of Confidential E-Mails: Ethical and Privilege Considerations

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Over the past decade, e-mail has, for many people, replaced the telefax and the telephone as the preferred means for instantaneous lawyer/client communication on confidential client matters. The development and widespread use of this new technology has raised ethical, privilege and risk management challenges for the bar. This Advisory reviews three related issues: the ethics of e-mail usage for sensitive client materials; whether inadvertent disclosure of confidential transmissions will constitute a waiver of the privilege; and the ethical obligations of the lawyer who receives privileged material, by mistake, from the opposition.

1. **Does the Use of Unencrypted E-Mail Violate Confidentiality Rules?** The ethical implications of e-mail communications - - analyzed primarily under the confidentiality provisions of Model Rule 1.6 and similar state provisions - - has now been addressed by many states as well as the American Bar Association (ABA) Committee on Ethics and Professional Responsibility.

In 1999, the ABA issued a formal ethics opinion that a lawyer may transmit confidential information by e-mail without running afoul of the Model Rules of Professional Conduct. ABA Comm. on Ethics and Prof'l Responsibility, *Protecting the Confidentiality of Unencrypted E-mail*, Formal Op. 99-413 (1999). The opinion found that lawyers have a reasonable expectation of privacy in e-mail communications with a client despite some risk of interception or disclosure. As such, the use of e-mail is consistent with the basic professional obligation to use reasonable means to maintain client confidences. *Id.* The ABA opinion goes on to warn, however, that if attorneys are sending highly sensitive client information that warrants extraordinary security measures, the attorneys should consult with their clients as to the mode of

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delivery to be used. *Id.* The attorneys must then abide by their client's instructions as to the mode of transmission. See Model Rule 1.2(a).

The New Hampshire Bar Association's Ethics Committee has not addressed the ethics of e-mail communication (although in 1992, in an opinion that most may feel has been overtaken by today's ubiquitous use of cell phones, the Ethics Committee opined that a lawyer may not discuss client confidences by mobile communication devices without prior informed client consent or the use of scramblers. NHBA Adv. Ethics Op. 1991-92/6.)

Other states have consistently determined that in the absence of circumstances warranting unusual security precautions, the use of e-mail will generally not raise concerns under professional responsibility rules. See, e.g., Minn. Bar Ass'n Op. 19 (1999) (lawyers may use technological means such as e-mail to communicate confidential client information without violating Rule 1.6 of the Minnesota Rules of Professional Conduct); Ohio Bd. of Comm. on Grievances and Discipline Op. 99-2 (1999) (lawyers do not violate their ethical duty to preserve confidences and secrets by communicating with clients through e-mail, though they must use their own reasonable judgment in choosing the appropriate method of communication); D.C. Bar Ass'n Op. 281 (1998) (transmission of confidential information by e-mail is not a per se violation of the confidentiality rules, although individual circumstances may require greater means of security); Vt. Adv. Ethics Op. 97-5 (1997) (lawyers may use e-mail to transmit confidential information without breaching the duty of confidentiality under Rule 1.6 of Vermont Rules of Professional Conduct); Alaska Bar Ass'n Ethics Comm. Op. 98-2 (1998); Ill. State Bar Ass'n Op. 96-10 (1997); and S.C. Bar Ethics Adv. Comm. Op. 97-08 (1997). But see Iowa Ethics Op. 96-1 (1996) as amended by Iowa Ethics Op. 97-1 (1997) (lawyer must obtain client's advance written consent for use of e-mail to transmit sensitive materials).

- 2. Will Inadvertent Disclosure of Confidential E-Mail Waive the Privilege?** While the use of e-mail for attorney/client communications has received widespread acceptance, the speed of e-mail communication and the shortcuts offered by most computer programs increase the potential for inadvertent disclosure of confidential client matters. Erroneous use of the "reply all" option is one example. Most computers are also programmed to "auto fill," producing lists

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of potential recipients as soon as the first letters of a name are typed. In a fast-moving practice, it is all too easy to enter the wrong name, or choose the wrong response option, and forward client communications to an unrelated third party - - or worse still the opposition. In these situations, has the privilege been waived?

While courts are frequently reluctant to find waiver based on mere inadvertence, the voluntary disclosure of confidential information can constitute a waiver even when a waiver was not intended. Section 79 of The Restatement Third of the Law Governing Lawyers, Comment h, summarizes the factors that will typically govern this determination:

Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances, including: the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures); the efficacy of precautions taken and of additional precautions that might have been taken; whether there were externally imposed pressures of time or in the volume of required disclosure; whether disclosure was by act of the client or lawyer or by a third person; and the degree of disclosure to nonprivileged persons.

The Restatement also emphasizes, however, that upon discovery of the mistake, the client must take “prompt and reasonable” steps to recover the communication - - or lose forever the ability to re-establish its protected status. Id. The position set forth in the Restatement is similar to that found in ABA Formal Opinion 92-368 (1992), *Inadvertent Disclosure of Confidential Materials*. See also New Hampshire Rule of Evidence 511 (“A claim of privilege is not defeated . . . by a disclosure that was made inadvertently during the course of discovery”).

Other jurisdictions, including the First Circuit Court of Appeals, are quicker to find waiver in inadvertent disclosure situations. See, e.g., *Texaco Puerto Rico v. Department of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995) (inadvertent disclosure of four documents in discovery results in waiver of privilege for 18 related documents); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (short of court compelled disclosure, or equally

extraordinary circumstances, the court will not distinguish between various degrees of voluntariness in waivers of the attorney-client privilege); *U.S. v. Keystone Sanitation Co.*, 903 F.Supp. 803, 807-808 (M.D. Pa. 1995) (defendants waived all privileges because of inadvertent disclosure).

3. **What are the Ethical Obligations of the Recipient**

Lawyer? The erroneous transmission of confidential information to the opposition raises the related question of whether opposing counsel acts under any ethical constraints in the review and use of the unsolicited, privileged materials. Many state ethics panels have concluded that an attorney who receives confidential information by mistake has an obligation, at a minimum, to notify opposing counsel. Florida Ethics Op. 93-3 (1994); Maine Ethics Op. 146 (1994); Ohio Ethics Opinion 93-11 (1993).

In ABA Formal Opinion 92-368 (1992), *Inadvertent Disclosure of Confidential Information*, the Committee on Ethics and Professional Responsibility, noting the “proliferation of e-mail” and resulting increased likelihood of inadvertent disclosure, set the ethical bar higher:

A lawyer who receives materials that on their face appear to be subject to the 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 sending lawyer’s instructions as to their disposition.
Id.

The New Hampshire’s Ethics Committee analyzed this opinion in a June 23, 1994 Practical Ethics Article entitled “*Inadvertent Disclosure of Confidential Information.*” The same year, however, the ABA revisited this issue and was less definitive about the lawyer’s obligation to abide by the instructions of the sending lawyer. Rather, the attorney was advised to “refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.” ABA Comm. on Ethics and Prof’l Responsibility, *Unsolicited Receipt of Privileged or Confidential Materials*, Formal Op. 94-382 (1994).

Last year, in the 2004 revisions to the Model Rules of Professional Conduct, the ABA added a new Rule 4.4(b) that states:

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment to the new rule, which references e-mail communication specifically, clarifies that "(w)hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of the document has been waived." The comment also anticipates the potential for disagreement between lawyers and their clients over the proper course of action, and notes that where there is no controlling law, the decision whether to read the document or return it to the sender is a matter of professional judgment "ordinarily reserved to the lawyer."

Devine Millimet's Attorney Conduct & Liability Practice Group offers this free E-Mail Advisory to members of the New Hampshire Bar Association to provide information and discuss recent developments in the fields of professional liability, professional ethics and risk management. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.