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**Internet Ethics: Complications of the
Digital Age and Web Sites to Help You
Untangle Them**

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CONTENTS

I. INTRODUCTION.....	1
II. PROFESSIONAL ETHICS IN AN AGE OF DIGITAL INFORMATION AND COMMUNICATION	2
A. Overview of Ethical Concerns that Arise	2
B. A Lawyer Shall Provide Competent Representation and Shall Act with Reasonable Diligence . . . (Rules 1.1 and 1.3)	3
C. A Lawyer Shall Maintain in Confidence all Information Gained in the Professional Relationship with a Client . . . (Rule 1.6) ...	5
D. A Lawyer Shall not Knowingly: Fail to Disclose Legal Authority or a Material Fact to a Tribunal	7
E. A Lawyer Shall Not Practice Law in a Jurisdiction in Violation of the Regulation of the Legal Profession in that Jurisdiction	8
F. The Advertising Rules	9
III. USEFUL INTERNET SITES FOR KEEPING UP WITH THE CHANGING UNIVERSE OF PROFESSIONAL ETHICS	10
A. American Legal Ethics Library - http://www.law.cornell.edu/ethics	10
B. Center for Professional Responsibility - http://www.abanet.org/cpr	10
C. f/k/a - http://blogs.law.harvard.edu/ethicalesq	10
D. LegalEthics.com - http://www.legalethics.com	11
E. Legal Ethics Forum - http://legalethicsforum.typepad.com	11
F. Legal Profession -http://lawprofessors.typepad.com/legal_profession	11
G. SunEthics - http://www.sunethics.com	12

H. Texas Center for Legal Ethics and Professionalism -
<http://txethics.org> 12

I. INTRODUCTION

Computers and the Internet have profoundly changed at least the mechanics of the practice of law. Client communication, legal research, document drafting and transmittal, and record storage are increasingly paper free undertakings. As someone who began the practice of law long before the advent of the personal computer or the Internet, I can attest that the shift to computers and the Internet has greatly increased efficiency, productivity and convenience. At the same time, these tools can greatly complicate many traditional ethical considerations.

For example, notions of competence and diligence (Georgia Rules of Professional Conduct 1.1 and 1.3) now require sophisticated knowledge of electronic research tools and methods, a full understanding of the hidden information contained in many electronic documents, and complete appreciation of the security risks posed by electronic communications and digital storage of records, just to name a few of the skills required of today's attorney. Maintaining confidentiality of information (Rule 1.6) not only requires the knowledge of software, computer and Internet security mentioned above but may impact an attorney's use of social media like Facebook, and the design and content of her Web page.

Other Rules of Professional Conduct, such as the requirements of candor toward the tribunal (Rule 3.3), and fairness to opposing party and counsel (Rule 3.4) are also impacted by the complexities of the Internet age. However the two areas of legal ethics that may be most impacted by electronic communications are

those that forbid the unauthorized practice of law (Rule 5.5) and those that govern the manner in which lawyers may disseminate information about their services (Rules 7.1 - 7.5).

In the first portion of this paper, I will try to give you an idea of a few of the specific ethical complications that have arisen or are anticipated because of electronic information production, storage, and communication. My search of the Georgia ethics decisions and opinions did not turn up instances where the Georgia Supreme Court or the State Disciplinary Board (which issued opinions prior to 1986) have ruled explicitly on any of these issues, but in today's climate it is only a matter of time before at least some of these questions come up in Georgia. I will summarize what some other jurisdictions have decided when confronted with some of the complications of electronic information. The second part of the paper is an annotated list of some of the Internet resources that will help you stay up to date on the latest wrinkles in professional ethics.

II. PROFESSIONAL ETHICS IN AN AGE OF DIGITAL INFORMATION AND COMMUNICATION

A. Overview of Ethical Concerns that Arise

What duty does an attorney have to ensure the confidentiality of an electronically transmitted document? Can you rely solely on paper research tools? If you decide to digitize your files, do you have an obligation to retain any paper documents? What safeguards would you have to put in place if you

outsourced the electronic conversion and storage of your files? Can a lawyer utilize the standard services of cloud computing (in which data and perhaps software is housed not on computers and servers belonging to the user, but on huge server banks owned and controlled by the service provider)? Can you make use of information you discover by viewing the metadata associated with an electronic document sent to you by opposing counsel? Do you have a duty to strip out all metadata associated with documents you create that could possibly be shared with opposing counsel? Can you participate in Internet discussion groups that address legal issues? If you do, what dangers must you stay alert to? What are the possible complications of inviting potential clients to contact you using email?

These are only a few of the novel issues that are arising because of the intersection of electronic data and the practice of law. In the paragraphs that follow, I will run through the Rules of Professional Conduct that I cited above and give examples of issues that have arisen within the scope of those rules. In addition, I will try to show how some jurisdictions have resolved these issues. However, please keep in mind that the positions of many jurisdictions on these issues have altered, sometimes rapidly. As both technology and our understanding of its capacities change, the response of bodies governing the conduct of lawyers will remain fluid. Never rely on what you knew was the rule last year; both the rule and the technology probably will have changed.

B. A Lawyer Shall Provide Competent Representation and Shall Act with Reasonable Diligence . . . (Rules 1.1 and 1.3)

Every advance in technology that impacts the practice of law stretches the definitions of competence and diligence. At a minimum, a lawyer today must master the basics of online research so that he has access to developments and changes in the law at the first possible moment. In addition, if he utilizes Internet resources for research, he is also responsible for evaluating both the reliability and currency of the information he finds.

Further, if an attorney uses electronic means to transfer information (through e-mail or file transfer protocol) she must research and respond to security concerns, and make informed choices about whether or not to encrypt electronic communications. He must also understand the hidden data stored with most documents created electronically (metadata) and keep abreast of the most efficient ways to erase it.

Within the last five years, changes in the Federal Rules of Civil Procedure underscore a developing avenue in which attorneys owe their clients competence and diligence. These changes impose on parties an obligation to preserve and disclose electronically stored information. Increasingly, attorneys must be able to competently advise their clients on the ways in which the client creates, stores and preserves electronic communications and data. This may require an understanding of information architecture and retrieval. These changes also document ways in which electronic data is expanding notions of candor and fairness. (Rules 3.3, and 3.4)

C. A Lawyer Shall Maintain in Confidence all Information Gained in the Professional Relationship with a Client . . .

(Rule 1.6)

E-mail communication with a client is permissible in all states. However, many states initially required encryption of confidential e-mail communications, and changed their requirements only when it was decided that the Electronic Communications Privacy Act makes interception of e-mail a criminal offense. Still, many commentators warn that the use of wireless networks, and the advanced skills of hackers place a duty on attorneys to be knowledgeable about advances in security technology. Some experts argue states should go back to requiring encrypting because improved and less expensive encryption methods are now available.

Computer and Internet security concerns must also influence the decisions that an attorney makes about storing client files and information. These concerns are obvious when a lawyer decides to convert old files to electronic format and hires an outside firm to scan and organize the data. Clearly, there must be a strong confidentiality agreement included in the contract for this work. Similarly, an attorney should plainly think about the security implications of choosing cloud computing, where her files are stored on a bank of servers under someone else's control. Less evident, but no less important, every attorney should devote careful attention to deciding whether or not he stores client communications and documents on computers that are connected to the Internet.

When a potential client uses the email address provided on an attorney's Web site to send the attorney a message with detailed information about his or her legal situation, there is at least the possibility that that communication must be afforded the protections of confidentiality. Several states have ruled that "unsolicited" e-mails do not create an attorney-client relationship. Nonetheless, there are many questions and varying answers about when such an e-mail truly is unsolicited. Some states take the view that an attorney Web site that makes it clear that the attorney is soliciting clients, may very well be inviting email contact from prospective clients. Increasingly, states are requiring attorneys who maintain Web pages that provide e-mail contact information to include an explicit disclaimer of confidentiality of e-mail sent to them by visitors to the site. Such a disclaimer should clearly warn prospective clients not to send any confidential information in response to the Web site and directly state that no information will be treated as confidential and no attorney client relationship will be established until the sender has spoken with the attorney and a conflict check has been completed.

Any document created with Microsoft Word, Excel, or Powerpoint or with Wordperfect contains hidden data about the manner in which the document was made. In its simplest form, this *metadata* just shows the date and time the document was created or modified, the size of the document, and the location of the document. If the author of a Word document uses the 'Track Changes' function, every change made to the document is recorded and can be made visible by selecting 'Highlight Changes' while viewing the document. This means that a settlement offer which has been changed in significant ways could still contain

damaging comments or deleted admissions which the adverse party could access.

States have come down on different sides of the ethical issues inherent in this. Some states say that the duty falls on counsel creating documents to find techniques to erase metadata. (There are software programs that wipe out metadata.) These states find that an attorney who receives a document with useful metadata may actually have a duty to utilize that information. Other states hold that it is unethical for a lawyer to examine and use metadata that opposing counsel failed to remove from a document.

D. A Lawyer Shall not Knowingly: Fail to Disclose Legal Authority or a Material Fact to a Tribunal

Electronic databases and the Internet have made it possible for the rulings of courts and agencies to be made public within moments of the time they are handed down. The duty of lawyers to disclose controlling, adverse authority has not changed; but, because there is a wide variety of methods by which these rulings can be made public, it is increasingly likely that counsel on one side of a dispute will discover authority that may not be known to the court or to the opposing side.

As noted above, discovery rules governing electronic information put a new wrinkle in an attorney's duty of candor with regard to material facts. Many attorneys now must advise clients in identifying and preserving electronic information. On the other side, when faced with conducting discovery of electronic material, lawyers may need to develop additional search skills to aid in culling through material produced by the opposing party.

E. A Lawyer Shall Not Practice Law in a Jurisdiction in Violation of the Regulation of the Legal Profession in that Jurisdiction . . .

States have differing definitions of what actions constitute the “practice of law”. Consequently, communications that would not constitute the unauthorized practice of law in one jurisdiction may do so in another. This can become problematic for an attorney who participates in an Internet chat room and offers information in response to a question about a legal matter. If the questioner is in a jurisdiction with a broad definition of ‘practice of law’ and the attorney is not admitted in that state, even a relatively general response could be in violation of this rule. The same can even be true when a visitor to an attorney’s Web site reads information provided at the site about the law and relies upon it.

Anytime an attorney participates in an Internet forum or chat room open to the public that involves discussion of legal issues, he or she should keep in mind that at least one study shows that most individuals asking legal questions in such settings are not making theoretical queries. They are asking for advice about real legal issues that they confront. To such an individual, even general information is often viewed as specific legal advice. A lawyer who publishes a Web site that includes a newsletter about legal issues or essays on legal topics should have the same understanding of the site’s potential readers. All attorney Web sites should include disclaimers that the information they contain is not legal advice. In addition, the Web site should prominently declare the jurisdictions in which the attorney is admitted to practice.

F. The Advertising Rules

Firm Web pages and Facebook profiles, and traditional ads placed on the Web sites of other entities all fall within the realm of advertising and are subject to the rules governing information about legal services. Those basic rules are that: the information must not be false or misleading; if the communication has been paid for, that must be clear; and the communication must include the name of at least one attorney who is responsible for the content.

Advertising on the Web also creates new ethical issues. For one, anything on the Internet is available to readers worldwide, and certainly to consumers in states in which an attorney is not licensed to practice. This may expose an attorney to claims of unauthorized practice, and also to rules governing advertising in jurisdictions other than his own. At the very least, any Internet advertising must include a prominent and clear statement of the states in which the attorney is licensed to practice.

Another problem was discussed in a previous section: the inadvertent creation of an attorney client relationship. Absolutely any advertisement that offers the means for a potential client to contact the attorney by means of email must include a disclaimer.

III. USEFUL INTERNET SITES FOR KEEPING UP WITH THE CHANGING UNIVERSE OF PROFESSIONAL ETHICS

A. American Legal Ethics Library -

<http://www.law.cornell.edu/ethics>

This topical library on the Web includes links to the rules of professional conduct in most states and many countries. In addition, for twenty two states (not including Georgia), the site offers a narrative by attorneys at a major firm or an academic about the law of the profession in that state. The Georgia links include the pre-2001 Canons, the current Rules of Conduct, the formal advisory opinions of the Supreme Court and the State Disciplinary Board (pre-1986), and the topical index of advisory opinions.

B. Center for Professional Responsibility -

<http://www.abanet.org/cpr>

The ABA Center for Professional Responsibility is responsible for drafting and revising the Model Rules of Professional Conduct (the basis for Georgia's rules). Its Web site includes the text of the Model Rules, information about what states have adopted them, comparisons between the Model Rules and the Restatement of the Law Governing Lawyers, summaries of ABA formal ethics opinions (full opinions can be purchased through the site) and links to the rules of professional conduct in every state.

C. f/k/a - <http://blogs.law.harvard.edu/ethicalesq/>

Although this blog covered a wide range of political and cultural issues in its last years, it began in 2003 as “ethicalesq?” (f/k/a stands for, of course, formally known as) and became a well known site for commentary on legal ethics and clients rights. It continued covering those issues until last year when the authors offering new posts. The archives of the site are still on the Web, and many of the posts on legal ethics are still very useful.

D. LegalEthics.com - <http://www.legalethics.com>

This great site is maintained by Professor David Hricik of Mercer. Its home page is a running list of summaries of ethics opinions (with links to the full text, where possible) from around the country. The right hand side bar offers links to all the posts on a variety of ethics topics, such as advertising, attorney client privilege, conflicts, lawyer referral services, and more. The site also offers links to the ethics rules and opinions of each of the states.

E. Legal Ethics Forum - <http://legalethicsforum.typepad.com/>

This is a blog which includes commentary on legal ethics from a collection of law professors from around the country. The sidebar to the right also offers links to the sites of organizations and centers whose work focuses on legal ethics, and to other blogs on a variety of legal topics.

F. Legal Profession Blog -

http://lawprofessors.typepad.com/legal_profession/

Another blog - this one also featuring commentary by law professors. Its sidebar is on the left and offers links to most resources available on the Web about legal ethics.

G. SunEthics - <http://www.sunethics.com>

This site offers summaries of decisions on professional ethics in the state of Florida. It also provides links to rules of conduct and decisions in other states. Florida's Bar Ethics Department has been very active issuing advice and rulings on issues arising because of the intersection of technology and the practice of law.

H. The Texas Center for Legal Ethics and Professionalism - <http://txethics.org>

The Center was founded to promote and enhance professionalism and ethics. It's Web site offers all of the publications of the Center, links to other legal and ethics sites, links to law schools and bar associations, Texas Disciplinary Rules and Ethics Opinions. One unique feature of the site is a bibliography of articles on ethics topics found in law journals and law reviews.

