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Ethics in an e-Environment

BY STUDENT SERVICES LIBRARIAN MAUREEN A. CAHILL (J.D.'79)

Computers and the Internet have profoundly changed the mechanics of the practice of law. Client communication; legal research; and document drafting, storage and transmittal are increasingly paper free.

This electronic revolution has greatly increased efficiency, productivity and convenience in law offices. However, at the same time, this shift to digital tools has also complicated many traditional ethical considerations for those in the legal profession, and these advances in technology give rise to several issues that may be governed by rules of professional conduct.

While the Supreme Court of Georgia has not explicitly ruled on a case involving any of these emerging issues, several other jurisdictions have.

As is often the case with novel ethical questions, different jurisdictions have taken nearly opposite positions on some of these issues.

The following paragraphs list a few of the rules impacted by advances in electronic technology and some of the issues that have been identified.

> "Every advance in technology that affects the practice of law stretches the definitions of competence and diligence."

Georgia Rules of Professional Conduct 1.1 and 1.3 – A Lawyer Shall Provide Competent Representation . . . and Shall Act with Reasonable Diligence . . .

Every advance in technology that affects 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 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 the 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.

She must also understand the hidden data stored with most documents created electronically and keep abreast of the most efficient ways to erase it.

Moreover, the discovery rules governing the preservation and disclosure of digitally created documents require attorneys to develop a working knowledge of information architecture and retrieval so they can advise clients on the policies governing the creation and storage of electronic communications and data.

The same understanding is crucial to crafting effective discovery requests for digital information.

Georgia Rule of Professional Conduct 1.6 – A Lawyer Shall Maintain in Confidence All Information Gained in the Professional Relationship with a Client . . .

E-mail communication with a client is permissible in all states.

However, many states initially required encryption of confidential e-mail communications and changed requirements only when it was decided the Electronic Communications Privacy Act makes the interception of e-mail a criminal offense.

Still, many commentators warn that the use of wireless networks and mobile devices, coupled with 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 encryption because improved and inexpensive methods are now easily available.

Computer and Internet security concerns must also influence the decisions an attorney makes about storing client files and information.

These concerns are obvious when a lawyer decides to convert old files to an 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.

Security implications may make the choice of cloud computing (where files and even software are stored on a bank of servers under someone else's control) impossible for attorneys, since the firms that offer these services often have standardized

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agreements with only the most general assurances of security and confidentiality.

Hackers today are so adept that every lawyer should give careful consideration when deciding whether or not to store client communications and documents on computers that are connected to the Internet.

When a potential client uses the e-mail address provided on an attorney's website to send the attorney a message with detailed information about his or her legal situation, there is at least the possibility that this 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.

Increasingly, states require attorneys who maintain Web pages that provide e-mail contact information to include an explicit disclaimer of confidentiality for e-mail sent to the attorneys by visitors to the site.

Georgia Rule of Professional Responsibility 5.5 – 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 be considered the unauthorized practice of law in one jurisdiction may be so considered 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 the "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 website reads information provided on the site about the law and relies upon it.

Attorneys who participate in Internet chat rooms where the topics touch on the law and those who publish a website that includes a newsletter about legal issues or essays on legal topics should ensure they clearly articulate in a disclaimer that their comments or writings do not contain legal advice.

In addition, these communications should include a declaration of the jurisdictions in which the attorney is admitted to practice.

[INTERNET RESOURCES]

Stay Up to Date on the Latest Wrinkles in Professional Ethics

American Legal Ethics Library

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 22 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 state Supreme Court and the State Disciplinary Board (pre-1986) as well as the topical index of advisory opinions.

Center for Professional Responsibility

www.abanet.org/cpr

The ABA Center for Professional Responsibility is in charge of drafting and revising the Model Rules of Professional Conduct (the basis for Georgia's rules). Its website 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.

E-Lawyering Blog

www.elawyeringredux.com/articles/elawyering-ethical-issues

One of the co-chairs of the E-Lawyering Taskforce of the ABA Law Practice Management Section maintains this active and informative blog. It defines e-lawyering as "all the ways in which lawyers can do their work using the Web and associated technologies."

LegalEthics.com

www.legalethics.com

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

Legal Ethics Forum

www.legalethicsforum.typepad.com

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

Legal Profession Blog

www.lawprofessors.typepad.com/legal_profession

This forum features commentary by legal academics. Its sidebar is on the left and offers links to most resources available on the Web about legal ethics.

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