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The Internet: Complicating Legal Ethics, But Full of Resources to Help You Understand the Complications

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**The Internet: Complicating Legal Ethics,
But Full of Resources to Help You
Understand the Complications**

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I. INTRODUCTION

First, it became almost impossible to practice law without a computer. Then, you almost *had* to have email, which meant that you had to have Internet service. Then, some courts began encouraging electronic filing. Then, it was all but malpractice not to use computerized citation checking. And on, and on, and on. . . . Face it, electronic data production, storage, and communication broke the flood gates long ago. Today, many lawyers own domain names, publish a Web page, participate in online forums or chat rooms, use on-line referral services, and transmit and store all documents electronically.

Surely, this monumental shift in the mechanics of law practice has changed all the rules. Not quite; but many of the Rules of Professional Conduct *are* impacted by the use of computers and the Internet. The Georgia rules require competence and diligence (Rules 1.1 and 1.3), confidentiality of information (Rule 1.6), candor toward the tribunal (Rule 3.3), and fairness to opposing party and counsel (Rule 3.4). They forbid the unauthorized practice of law (Rule 5.5). Finally, they govern closely the manner in which lawyers may disseminate information about their services (Rules 7.1 - 7.5). Each and every one of these rules is more complex in the electronic age.

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? 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 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?

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, lawyers today must master the basics of online research so that they have access to developments and changes in the law at the first possible moment. If they use electronic means to transfer information (through e-mail or file transfer protocol) they must research and respond to security concerns. They must understand the hidden data stored with most documents created electronically (metadata) and keep abreast of the most efficient ways to erase it. Attorneys must think about the reach of Internet information (Web pages, discussion groups, and the like) and adjust their use of these tools in ways that avoid inadvertent creation of attorney-client relationships or the unauthorized practice of law in jurisdictions in which they are not admitted.

Recent changes in the Federal Rules of Civil Procedure underscore a new avenue in which attorneys owe their clients competence and diligence. The changes impose on parties an obligation to preserve and disclose electronically stored information. A recently posted article discusses the expanded duties this creates for counsel, who must now understand information architecture, and advise and monitor clients about document

retention and disclosure.¹ 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.

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 is a question about when such an e-mail truly is unsolicited. 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.

¹ Carolyn M. Branthoover & Karen I. Marryshow, *Ethical Considerations in Light of the Recent E-Discovery Amendments to the Federal Rules*, K&L Gates: Newsstand (January 2007), <http://www.klgates.com/newsstand/Detail.aspx?publication=3581>

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.) 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 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.

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 now covers a wide range of political and cultural issues, 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 continues covering those issues today.

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

This great site is maintained by Professor David Hricik of Mercer. It's home page is a running list of summaries of ethics opinions (with links to the full text, where possible) from around the country. 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.

