Marquette Elder's Advisor

Volume 1
Issue 4 *Spring*

Article 16

Spring August 2012

E-Ethics

Michael K. McChrystal
Marquette University Law School

ETHICS CONSULT

E-Ethics

The fit between laws regulating professional ethics and the means of conducting business, particularly telecommunications and computer technology, has become tenuous. Is electronic transmission of information less secure than time-tried telephone or written communication? Is there less privacy? Is attorney-client privilege endangered by use of the messages sent over the Internet or e-mail? Recent legal decisions concerning these issues are examined here, which may provide guidance on liability of professionals and regulation of their behavior.

By Michael K. McChrystal

Michael K. McChrystal is a professor of law at Marquette University Law School, Milwaukee, Wisconsin, and a consultant on legal ethics to law firms, corporations, and government agencies.

The law of professional ethics, like much of the law generally, has not been updated to reflect technological advances of the information age. A recent unpublished decision by the Wisconsin Court of Appeals illustrates the problem well. In *Walgreen Co. v. Wisconsin Pharmacy Examining Board*,[1] a pharmacy was censured for accepting prescriptions by e-mail. The governing Wisconsin statute permits pharmacies to accept prescriptions from physicians in a writing signed by the physician or orally over the phone. The pharmacy board concluded that an e-mail transmission of a prescription is a writing and therefore must be signed. The court of appeals disagreed, based on the "simple facts of computer transmission." The court characterized the computer communication this way: "The prescription is put into a computer as text and the message is then electronically transmitted to the pharmacy's terminal, much as a telephone call—or a facsimile—would be."[2]

As such, it is more akin to a telephoned prescription and need not be signed. The court even noted the superiority of sending in prescriptions by e-mail: "[C]omputer transmission presents an advantage over an oral prescription order—where the listener must record the order on paper—by greatly reducing the risk of misunderstanding because the prescription appears in written form on the pharmacy's terminal."[3]

Wisconsin Statutes Section 450.11(1) provides: "Dispensing. No person may dispense any prescribed drug or device except upon the prescription order of a [physician]. All prescription orders shall specify the date of issue, the name and address of the patient, the name and address of the [physician], the name and quantity of the drug prescribed, directions for the use of the drug and, if the order is written by the [physician], the signature of the [physician]. Any oral prescription order shall be immediately reduced to writing by the pharmacist and filed."

New technologies fit more or less uneasily into legal rules designed for traditional forms of communication, as the court of appeals decision in *Walgreen* shows. E-mail is neither a telephone/voice communication nor a written (and signed) communication, although it shares features with each. Yet the *Walgreen* court was forced by the statute before it to decide the case on the basis of which of these two different forms of communication e-mail resembled more.

Confidentiality, E-Mail, Cordless Phones, and Other Methods of Communication

The law of legal ethics has begun to grapple with a number of technology-related issues. Considerable attention has been given to the newer modes of communication, including cell phones and e-mail. A recent ethics opinion from the American Bar Association[4] (ABA) puts the efficacy of these newer modes of communication in context.

The ABA opinion notes that all methods of communication are vulnerable, in some measure, to misdirection, interception, theft, or eavesdropping. After considering the relative vulnerability of mail service, telephone communication, facsimile transmission, and e-mail, the committee concluded that e-mail compares very favorably to the other methods, even when it is not encrypted and is sent over the Internet.

The ABA suggests greatest caution in the use of cellular and cordless telephones, which rely on radio waves that can be easily intercepted. When an attorney uses an insecure form of communication, there may be a breach of the duty of confidentiality. In extreme cases, the attorney-client privilege may even be at risk.[5]

In deciding what form of communication to use, the ABA opinion suggests that the attorney should consult with the client and take into consideration the relative sensitivity of the information to be communicated and the relative security and efficiency of the various alternatives available.

For each method of communication, the risks should be considered. For example, facsimiles can be misdirected by the slip of a finger in dialing a 10-digit number. Moreover, in many settings, facsimiles are delivered by secretaries, mailroom workers, or other intermediaries who have an opportunity to learn their contents. Telephone calls are vulnerable to eavesdropping and low-tech (though illegal) mechanical interception. Mail services occasionally lose or misdirect a package, and some commercial services reserve the right to inspect packages under certain circumstances.

In other words, every method of communication has its risks, and these risks should be considered, in light of the specific circumstances of the parties, when sensitive information is being communicated between attorney and client. Consideration of risks may be especially important with older clients who receive communications in circumstances that afford little privacy. If a client's mail routinely is read by others and if telephone conversations rarely afford the client privacy, special steps, such as a personal visit in the home or office, may be required when sensitive information must be communicated.

When a Communication Goes Astray

With so many communications being sent to and from law offices by so many means, some are bound to go astray. The traditional rule is that once the contents of a document become public, the document's confidentiali-

ty and privilege are destroyed.[6] The trend, however, is to protect the confidentiality of a document, even if it has somehow reached an unintended recipient, when it is shown that reasonable precautions were taken to protect the secrecy of the document.[7] This newer rule reduces the incentive for a third party to secure or disclose another's confidential document in bad faith.

Of course, negligent disclosure of a confidential communication generally destroys the communication's confidentiality. In *Joyner v. Southeastern Penn. Transp. Authority*,[8] a personal injury plaintiff who was intending to call his own lawyer inadvertently dialed defense counsel's number instead. When the client got the opposing counsel's voice mail, he left the following message:

> Brad, this is William Joyner, Jean Joyner's husband. . . . Call me and let me know can I sing with my group again. If I can sing, call and let me know. If I can't sing, call me and let me know, okay? I don't want to make no more mistakes, cause they're gonna be following me now. So if I can sing, call me let me know. If I can't sing, call me let me know, okay? . . . Thank you.[9]

The court determined that the client did not take reasonable steps to ensure that he was communicating with his own attorney, and the communication was held to be outside the attorney-client privilege.

Lawyer Liability for Invasions of Privacy

Lawyers are information gatherers, among many other things. Information gathering increasingly has risks of liability, probably because it is done more pervasively and profitably than ever before. Privacy claims are sometimes available to persons who feel aggrieved by information about them becoming known.

A smattering of cases has begun to appear in which lawyers may be liable to nonclients for invading their privacy in the course of gathering information in aid of their clients. Two recent cases involved lawyers who improperly secured a third party's medical records, in each case involving mental health treatment. In *Mandziara v. Canulli*,[10] an Illinois lawyer failed to follow the statutorily prescribed procedure for subpoenas of mental health records. The records, which concerned the opposing party in a custody dispute, were subpoenaed for delivery directly to the court with jurisdiction in the case. The applicable statute[11] requires a court order *before* mental health records may be subpoenaed. The statute provides a cause of action for persons harmed by a violation of the statute, and a viable claim was therefore stated against the lawyer involved.

Susan S. v. Israels[12] is similar in that a valid claim for damages was asserted against a California criminal lawyer for improperly viewing the mental health records of the complaining witness in a sexual battery case. The victim's treatment facility mistakenly delivered her records to defense counsel rather than to the court. Defense counsel read the records, transmitted them to the defense psychiatrist, and used them in cross-examining the witness. The court held that the lawyer acted tortiously in continuing to view the records once he knew what they were.

Valid privacy claims also have been asserted against lawyers who improperly secure consumer credit reports involving nonclients in violation of the Fair Credit Reporting Act.[13] *Bakker v. McKinnon*,[14] a recent Eighth Circuit decision, involved a personal injury plaintiff's lawyer in a dental malpractice action who secured consumer credit reports concerning the defendant in the action. In the resulting invasion-of-privacy suit against the lawyer, a valid claim was stated because the lawyer did not secure the report for one of the limited number of purposes permissible under the statute. Generally, the statute permits consumer credit reports only in relation to consumer transactions.

In elder law practice, most information gathering probably will concern the elder whose affairs are at issue. Generally, the elder will be the client who has consented to the information being gathered. If someone other than the elder is the client, however—for example, if the lawyer represents family members rather than the elder—the risk of wrongfully invading the elder's privacy is greater, and greater caution should be used.

Advertising Legal Services on the Internet

Ethics law regulates lawyer advertising and solicitation of clients, irrespective of the advertising medium used. The Internet is, of course, a rapidly growing medium of commerce, for lawyers as well as others. Although few cases have been decided, bar association ethics opinions are virtually unanimous in finding that efforts to attract clients on the Internet are subject to the usual advertising and solicitation regulation.

Having said that, it should be noted that regulations contemplating different media are often a poor fit for the Internet. This is highlighted by an extensive analysis by the American Bar Association Commission on Advertising, which issued its "White Paper on Internet" advertising in the summer of 1998.

One of the problems in applying general regulations to Internet advertising is the assumption that the ad will be in a fixed form on paper, videotape, or cassette. Web sites often have a more fluid quality, with frequent changes both on-site and to linked sites. To illustrate the problem, ABA Model Rules of Professional Conduct, Rule 7.2, requires lawyers to retain copies of their advertisements for two years, along with a record of their dissemination. While this requirement may not be too burdensome for print advertising, it poses a host of problems for advertising through a constantly changing Web site with links to other constantly changing Web sites.

An example of another problem can be found in the Model Rules distinction between in-person and live telephone solicitation of business, on the one hand, and written or recorded solicitation, on the other.[15] How does this play out in the context of interactive Web sites, linked discussion groups, and chat rooms?

The ABA Commission White Paper calls for further study and possible rule revision to clarify how advertising regulations should apply to new electronic media.

Other Postings on the Internet

The Internet is not solely commercial in its content, which can be clearly seen from the many lawyer and law firm Web sites that provide a wealth of information and commentary about the law. Elder law associations and elder lawyers have joined in making these important contributions.[16] Noncommercial postings on the Internet are probably not subject to regulations governing lawyer advertising. Other issues may arise, however.

In *Seidl v. Greentree Mortgage Co.*,[17] counsel in a business tort case published statements about the case on its Web site. In addressing the resulting defamation claim and the law firm's assertion that its publication of defamatory statements in the context of a judicial proceeding is privileged, the court held:

> These communications were made for the express purpose of publicizing the lawsuit. Their dissemination via the Internet created a worldwide audience. There is no evidence that any of the viewers had any connection to the proceeding, except as potentially concerned observers. . . . As was stated in *Kennedy v. Cannon*, 229 Md. 92, 182 A.2d 54 (Md. Ct. App. 1962): "An attorney who wishes to litigate his case in the press will do so at his own risk. We hold that [the attorney] had no absolute privilege in regard to the statement made by him to the newspaper." Similarly, in this case, an attorney who wishes to litigate her case in the press and via the Internet does so at her own risk. There is no absolute privilege under Colorado law for statements by an attorney or by a party made to the press or gratuitous statements posted on the Internet for the purpose of publicizing the case to persons who have no connection to the proceeding except as potentially interested observers.[18]

Practicing Law Beyond Jurisdictional Boundaries

Lawyers increasingly discover that their law practice has a multistate dimension to it, even if that is not their goal. In an elder law practice, this can come about because clients divide their time between seasonal homes or retire to different states. Or it may result from the lawyer's reputation for excellence in handling a particular type of problem, which results in consultations or referrals from various jurisdictions.

The law governing multistate practice has never been very clear, except in the limited context of *pro hac vice* admission in

litigated matters. A recent California case has engendered concern about the implications when legal matters draw a lawyer's attention across state lines.

In *Birbrower, Montalbano, Condon & Frank v. Superior Court*,[19] the California Supreme Court held that a New York law firm could not recover fees from a California client for work performed in California that amounted to the unauthorized practice of law in that state. The court looked to a host of factors in concluding that the law firm's work constituted the unauthorized practice of law in California, including that the client was a California resident, much of the work was physically performed in California, and California law applied to the matter. The court offered the following observations in assessing whether a representation will involve "sufficient contact" to render it unauthorized practice in California:

> [O]ne may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite.[20]

Unfortunately, the California court establishes that there is a real possibility that non-California attorneys are engaging in unethical and unlawful conduct when they practice law in the state, without offering meaningful guidance as to what activities that includes. Clarity on this issue, in California and elsewhere, is long overdue.[21]

Conclusion

The complex of technological and social developments we call "The Information Age" leads to constantly evolving tools and strategies for delivering legal services. The field of elder law is itself an example of this evolution—it is a reorganization of the way people think about the need for and delivery of legal services. Profound changes in the ways that legal services are performed create an enormous challenge for the legal regime that regulates lawyer conduct. Good minds are addressing these issues throughout the country, but much uncharted water remains.

Endnotes

1. No. 97-1513, 1998 WL 6551 (Wis. Ct. App. Feb. 19, 1998).
2. *Walgreen Co.*, No. 97-1513, WL 6551, at 4.
3. *Id.*
4. *See* AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINION 99-413 (1999).
5. *See* McKarney v. Roach, 55 F.3d 1236, 1238–39 (6th Cir. 1995), *cert. denied*, 576 U.S. 944 (1995); *see also* Askin v. United States, 47 F.3d 100, 103–104 (4th Cir. 1995).
6. *See In re* Reorganization of Elec. Mut. Liab. Ins. Co., 681 N.E.2d 838 (Mass. 1997).
7. *Id.*
8. 736 A.2d 35 (Pa. Commw. Ct. 1999).
9. *Id.* at 36.
10. 701 N.E.2d 127 (Ill. App. Ct. 1998).
11. 740 ILL. COMP. STAT. 110/10 (West 1994).
12. 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997).
13. *See* 15 U.S.C. § 1681.
14. 152 F.3d 1007 (8th Cir. 1998).
15. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3.
16. *See, e.g., National Academy of Elder Law Attorneys* at <http://www.naela.com> and *Goldfarb & Abrandt, NY* at <http://www.seniorlaw.com>.
17. 30 F. Supp. 1292 (D. Colo. 1998).
18. *Id.* at 1315.
19. 949 P.2d 1 (Cal. 1998).
20. *Id.* at 5.

21. *See generally* Michael K. McChrystal, *Legitimizing Realities: State-Based Bar Admission, National Standards, and Multistate Practice,* 3 GEO. J. LEGAL ETHICS 533 (1990).