


Ethics and Malpractice Issues of Electronic Information
Tennessee
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THE QUIZ



 1. Family's Lawyer (FL) drafts an estate plan for a family with several businesses. Unbeknownst to FL, Father obtains a second opinion of FL's plan from Lawyer X, sent in an email. Father inadvertently sends that email to Sister, who forwards it to FL, who ignores it. Litigation ensues over FL's plan that Father loses. Father sues FL for malpractice. You are assigned as defense counsel to FL. While reviewing the file you come upon and read the email. You later attempt to use the email during Father's deposition. Father's lawyer files a DQ motion against you. The court should:

A. Dismiss the motion because Father waived A/C privilege when he sent the email to Sister.
B. Dismiss the motion because Sister waived the A/C privilege when she forwarded the email to FL.
C. Dismiss the motion because you could not know nor reasonably should have known that Father inadvertently sent the email.
D. Disqualify you.

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2. You have been a lawyer for sixteen years. Prior to that you worked as a police officer for twelve years. Your website bio claims you have “28 years experience both as a lawyer and former law enforcement officer.” This claim:

A. Is false and misleading.

B. Is truthful and accurate because you were in fact a police officer for twelve years before becoming a lawyer sixteen years ago.

C. Is truthful and accurate because everyone knows that 16 + 12 = 28.

D. Is truthful and accurate because you have in fact been both a police officer and lawyer.

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3. Your new client asks to pay your retainer fee with Bitcoin. Payment in Bitcoin is:

A. Ethical.

B. Probably Ethical

C. Probably Unethical.

D. Unethical

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4. Your new client (who is a roofer) offers to pay your fee for his dissolution representation by reroofing your house. Bartering services for fee payment is:

A. Ethical.

B. Ethical, maybe.

C. Probably Unethical.

D. Unethical.

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5. Your client asks that you communicate with her through her Facebook account. During the course of the representation you regularly respond to her inquiries in a “Facebook-ey” sort of way, using brief replies of, “relax”, “we are fine”, “we won” and “u realize we sued the wrong company right?”. These responses:

A. Comply with TRPC 1.4 COMMENT [4]’s requirement to “acknowledge receipt of the request and advise the client when a response may be expected.”

B. Violate TRPC 1.4.

C. Are false and misleading.

D. Comply with TRPC 1.3’s requirement to “act with reasonable diligence and promptness in representing a client.”

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6. You are in Hicksville, OH (a few miles east of Fort Wayne) to take depositions in a client matter. Driving to your hotel from dinner one night you are stopped at a Border Patrol Inspection Checkpoint. Because your name matches a person of interest in one of the government’s enforcement databases you are detained and your cell phone seized. You ask to see the Border Patrol Agent’s badge. He replies, “Bodges? We’re within 100 miles of a U.S. international border. I don’t have to show you any stinkin’ bodges!” You:

A. Knew border checkpoint authority extended 100 miles from the border but thought Hicksville was 101 miles from Canada.

B. Are happy your firm requires lawyers to travel with burner phones.

C. Are happy your firm requires lawyers to travel with encrypted burner phones.

D. Can’t believe someone finally got the last line of the Alfonso Bedoya quote right.

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7. Your website is really pretty, but the content merely describes the firm’s lawyers’ education, experience, areas of practice, and contact information. One morning you receive an email from “anonymous@gmail.com”. You open it to find a statement recounting Anonymous’ personal injury accident which is several paragraphs long. The facts seem vaguely familiar so you run them past the PI partner who confirms the firm does in fact have a client on the opposite side of Anonymous. A Facebook search reveals posts by Anonymous indicating she was sending the “jerk law firm” an email with a lot of confidential information to disqualify it. You and the firm are:

A. Disqualified because having your email address on the website is a specific request for information.

B. Disqualified because you failed to limit the initial “consultation” to only such information as necessary to decide to undertake the matter.

C. Disqualified because the website does not have clear and reasonably understandable warnings and cautionary statements limiting your obligation.

D. Not disqualified.

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8. You are contacted by an on-line legal marketplace which posts descriptions from potential clients of their legal issues and allows participating layers to quote fees for the representation. Such on-line legal marketplaces:

A. Are ethical

B. Could be ethical

C. Can't ever be ethical

D. Demonstrate why the Tennessee Rules of Professional Conduct need to be overhauled and brought into the current technological age.

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9. Your fee agreement contains a clause stating: "Client consents to Lawyer retaining other co-counsel as Lawyer determines is reasonably necessary. The association with co-counsel will not increase the fee to Client." This clause:

A. Permits you to associate with co-counsel without further consultation with the client.

B. Permits you to associate with co-counsel without further consultation with the client so long as the requirements of TRPC 1.5(e) are met.

C. Permits you to associate with co-counsel without further consultation with the client so long as the requirements of TRPC 5.5(a) are met.

D. Isn't worth the paper it's printed on.

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10. You represent a spouse in a dissolution action who has dual U.S./German citizenship. At the conclusion of the representation your client contact asks you for the file, and further demands you permanently delete all other electronic data and files created as part of the representation. You:

A. Have a duty per TRPC 1.16 to maintain your own complete copy of the file.

B. Have a duty per TRPC 1.15(b) to preserve complete records of Trust Account funds and other property for a period of five years after termination of the representation.

C. Because the information in the file is no longer necessary in relation to the purpose for which it was collected, have an obligation to comply with the destruction request per the EU's General Data Protection Regulation (GDPR) Chapter 3, Article 17(1)(a).

D. Have to comply with both B & C.


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Ethics and Malpractice Issues of Electronic Information
TRPC 1.6 Confidentiality of Information

TRPC 1.6(a) - A lawyer shall not reveal information relating to the representation of a client unless:
(1) the client gives informed consent;
(2) the disclosure is impliedly authorized in order to carry out the representation; or
(3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

COMMENT [3] The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.


Ethics and Malpractice Issues of Electronic Information
TRPC 1.6 Confidentiality of Information

TRPC 1.6(d) - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Acting Competently to Preserve Confidentiality
[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
 [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

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Ethics and Malpractice Issues of Electronic Information

TRPC 1.6 Confidentiality of Information

Acting Competently to Preserve Confidentiality COMMENT [18]

Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See RPCs 1.1, 5.1, and 5.3.

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see RPC 5.3, Comments [3]-[4].

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Acting Competently to Preserve Confidentiality "reasonable precautions"

ABA Formal Opinion 477R - May 11, 2017, Revised May 22, 2017 - Securing Communication of Protected Client Information

Therefore, in an environment of increasing cyber threats...the reasonable efforts standard...rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

- Understand the Nature of the Threat
- Understand How Client Confidential Information is Transmitted and Where It Is Stored
- Understand and Use Reasonable Electronic Security Measures
- Determine How Electronic Communications About Clients Matters Should Be Protected
- Label Client Confidential Information
- Train Lawyers and Nonlawyer Assistants in Technology and Information Security
- Conduct Due Diligence on Vendors Providing Communication Technology

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Acting Competently to Preserve Confidentiality "reasonable precautions"

ABA Formal Opinion 477R - May 11, 2017, Revised May 22, 2017 - Securing Communication of Protected Client Information

- Understand the Nature of the Threat
 - Consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion.
 - Proprietary information in highly sensitive industries may present a higher risk of theft.
 - "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted
- Understand How Client Confidential Information is Transmitted and Where It Is Stored
 - How firm's electronic communications are created, where client data resides, and what avenues exist to access that information.
 - Every access point is a potential entry point for a data loss or disclosure.
 - Each access point, and each device, should be evaluated for security compliance.
- Understand and Use Reasonable Electronic Security Measures
- Determine How Electronic Communications About Clients Matters Should Be Protected
- Label Client Confidential Information
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TRPC 1.1 Competence & Technology

Basic Communication Competence

Does Client Have a Social Media Page (Facebook, Twitter, Blog)

Yes: _____ No: _____

Information currently on your social media site may potentially have an impact on your case, either positively or negatively. Information you place on your social media site in the future may also potentially affect your case. Generally, it is advisable NOT to discuss the merits or details, the opposing party, counsel, judge, witnesses, etc., of your case in any open forum. NEVER discuss with ANYONE, or disclose in any manner, discussions we have with you regarding your case, whether on a social media site or any setting. Please review your social media sites promptly. If you have any questions regarding how a prior entry or posting may potentially affect your case, please feel free to discuss the issue with us.

After consultation, client acknowledges potential issues of client's Social Media use during the pendency of the representation _____

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Ethics and Malpractice Issues of Electronic Information

TRPC 1.1 Competence & Technology

Basic Communication Competence

Email - Consult with the Client about the Client's email usage and setting as part of Standard Intake process.

E-MAIL COMMUNICATION
 Many e-mail attorney-client communications involve relatively innocuous information and do not present a great concern even if they are intercepted. On the other hand, any communication from an attorney that can be accessed by others may be of concern in some situations. Please think carefully about your email process. Do other persons, who are not parties to this matter, have access to the email? For example, if e-mailing from home, does your spouse or other family also have access to the computer and e-mail program? If e-mailing from work, does your company reserve the right to view all e-mail traffic on their servers? By and large, most do. Any unprotected access to our e-mail communications may raise issues of whether the attorney-client privilege was waived, and if so, the communication may be available for review and use by the adverse party.

Anytime you communicate with your attorney, include only the attorney in the communication. DO NOT "cc" or "bcc" other parties to the action, adverse counsel, judges, family, friends, relatives, or ANYONE else.

Where is the computer you use for e-mail :
 Does anyone else use or have the ability to use that computer:
 Is that computer connected to a network: _____

After consultation it is/is not appropriate to communicate with the client by email.
 E-mail Address: _____

"Web bugs" unethical, say opinions in Alaska, Pennsylvania, Illinois ("read receipts" are ok) & New York (100% of opinions issued)

Stealth tracking software can track when and who opened an email, for how long, whether and how long any attachments were opened or reopened, whether the email and/or attachments were forwarded and to whom, and the general geographic location of the recipient(s).

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Ethics and Malpractice Issues of Electronic Information

TRPC 1.1 Competence & Technology

Basic Research Competence

"Knows how to appropriately use available resources to research and understands the relative advantages of different methods of finding information.

Differentiates among various available online search platforms to employ those that are best suited to the task at hand, and

Understands the operation of both free and subscription search platforms to skillfully craft appropriate search queries."

"An information-literate legal professional understands that research skills are among the set of professional skills that are continuously learned and re-learned throughout one's professional life.

Understands local requirements for continuing legal education.

Affirmatively undertakes training on research platforms as new iterations reach the market.

Comprehends that legal research skills, like legal standards, are 'moving targets' subject to further refinement and development as the universe of legal knowledge (and legal research tools) expands.

Principles and Standards for Legal Research; American Association of Law Libraries, Principle II(B)(3) & V(C).

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TRPC 5.3

Missouri Informal Opinion 2017-02

Question: What are Attorney's ethical duties upon learning that a nonlawyer assistant who was under Attorney's supervision disclosed client confidences to third parties and possibly to opposing parties, and how can Attorney prevent future breaches of confidentiality?

Answer: Pursuant to Rule 1.4, Attorney must disclose the confidentiality breach to all affected clients and explain the matter to the extent reasonably necessary to permit the client(s) to make informed decisions about the representation(s).

TRPC 5.3 COMMENT [2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. **A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.** The measures employed in supervising nonlawyer assistants should take account of the fact that they do not have legal training and are not subject to professional discipline. (Emphasis added)

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Ethics and Malpractice Issues of Electronic Information

TRPC 1.1 Competence & Technology

If the Worst Happens - T. C. A. § 47-18-2107

(e) For purposes of this section, notice may be provided by one (1) of the following methods:

(1) Written notice;

(2) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in [15 U.S.C. § 2001](#); or

(3) Substitute notice, if the information holder demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars (\$250,000), or that the affected class of subject persons to be notified exceeds five hundred thousand (500,000), or the information holder does not have sufficient contact information. Substitute notice shall consist of all of the following:

(A) E-mail notice, when the information holder has an e-mail address for the subject persons;

(B) Conspicuous posting of the notice on the information holder's internet website page, if the information holder maintains such website page; and

(C) Notification to major statewide media.

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TRPC 1.1 Competence & Technology

The Bar Plan Is Enhancing Our Cyber Liability Coverage

A ransomware attack occurs every 40 seconds in the United States. The leading causes of data breaches in 2016 were email hacking scams, employer error, and accidental exposure.*

When these events occur, law firms may face certain costs and expenses related to addressing the cyber event itself, such as repair costs to computer systems, notice requirements, credit monitoring costs, etc. The Bar Plan is adding coverage for these expenses on all Lawyer Professional Liability Policies with an effective date on or after January 1, 2018. **We are pleased to offer this coverage at no additional premium.**

You do not need to do anything for this coverage to take effect!

Our Cyber Liability Coverage Includes:
 Privacy Regulatory Defense & Penalties
 Privacy Breach Response Costs, Notification Expenses, & Breach Support & Credit Monitoring Expenses
 Network Asset Protection
 Cyber Extortion
 Cyber Terrorism

For firms who do not want to wait until their 2018 Policy incept, you may purchase this extra coverage on your 2017 Policy on or after January 1, 2018.

Contact The Bar Plan at 1-800-843-2277 and ask to speak to one of our Agents, email us at info@thebarplan.com, or visit our website for more information on the coverage.


Thank You

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