ORANGE COUNTY BAR ASSOCIATION
PROFESSIONALISM AND ETHICS COMMITTEE

FORMAL OPINION NO. 97-002

ETHICAL IMPLICATIONS OF COMMUNICATIONS TECHNOLOGY

STATEMENTS OF FACTS

An attorney who practices both civil and criminal law routinely calls his office for messages upon leaving the courthouse. He then returns telephone calls to his clients from his cellular phone. The lawyer also receives calls from clients both on his cellular phone and from the clients' cellular phones. The same lawyer regularly communicates with clients using email from both a home computer and a computer in the office. The lawyer routinely uses a facsimile machine to transmit documents to clients. All outgoing faxes are sent with a coversheet which contains a statement concerning the confidentiality of the accompanying documents.

APPLICABLE RULES

1. Disciplinary Rule 3-310(A) – "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

2. *Bus. & Prof. Code* § 6068(e) – "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

ISSUES

1. Whether the lawyer may discuss client matters with the client when either party is using a cellular phone.

2. Whether the lawyer may communicate with clients using emails. If so, must the email be encrypted?

3. Whether the lawyer may use a facsimile machine to transmit privileged or confidential documents. If so, what, if any, is the significance of the coversheet?

DEFINITIONS

The following definitions are commonly accepted and were taken from Illinois State Bar Association Opinion No. 96-10 and Vermont Bar Association Opinion 97-5 and other sources.

1. The *Internet* is a supernetwork of computers that links together individual computers and computer networks located at academic, commercial, government and military sites worldwide, generally by ordinary local telephone lines and long-distance transmission facilities. Communications between computers or individual networks on the Internet are achieved through the use of standard, nonproprietary protocols.

2. *Electronic Mail* or *email*, is an electronic message that is sent from one computer to another, usually through a host computer on a network. Email messages can be sent through a private or local area network (within a single firm or organization), through an electronic mail service (such as America Online, CompuServe, or MCI Mail), over the Internet, or through any combination of these methods.

3. *Encrypted email* is email that has been scrambled in a very complicated manner rendering it unreadable to anyone except the intended recipient. The most common form of encryption is public key cryptography. In public key cryptography, each party has two related and complementary keys, a public and a secret key. Each key unlocks the code that the other key makes. The public key is widely disseminated either via the Internet or on a diskette. To send an encrypted message, the sender uses the recipient's public key to encrypt the message. The now encrypted message is sent to the recipient just like any other email message. The recipient uses the secret key to decrypt the message. The only way to decrypt the message is through the use of a digital signature. When using a digital signature, the sender "signs" the message using the sender's secret key. The recipient then uses the sender's public key to "verify" the authenticity of the message. An additional benefit of the digital signature is that the sender may not later deny sending the message.[1]

4. *Bulletin board service* (sometimes called a "BBS") is an electronic bulletin board on a network where the electronic messages may be posted and browsed by users or delivered to email boxes. *A newsgroup* is a type of bulletin board service in which users can exchange information on a particular subject. *A chat group* is a simultaneous or "real time" bulletin board or newsgroup among users who send their questions or comments over the Internet.

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[1] See, PGP Mail reference Manual, Pretty Good Privacy, Inc. 1997.

5. The *Electronic Communications Privacy Act*, 18 USC §§2510, et seq. ("ECPA") is the federal codification of the intrusion arm of the common law tort of invasion of privacy applied to electronic communication and provides criminal and civil penalties for its violation. The ECPA is actually the 1986 revision of the federal wiretap statute originally enacted in 1968, but the term ECPA is now commonly used to refer to the entire statute, as amended.

ANALYSIS

The answer to each of the issues raised in the statement of facts requires a two-step analysis. On the first level, the question is whether the activity in question could result in a loss of attorney-client privilege. The second level of analysis asks whether the activity in question could result in a violation of the client's confidences or secrets.

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege usually arises in the context of an attempt to obtain or use information, over an objection of privilege, in some type of evidentiary proceeding. The issue is whether information first obtained from an intercepted cellular phone call, and email message or from a computer service vendor could be used in evidentiary proceeding against the parties to the communication against their will. To create an attorney-client privileged communication, the communication must be made by a client to a lawyer in confidence during the course of the attorney-client relationship. California Evidence Code § 952. For the purpose of this discussion, the most important element is whether communication was made in confidence.

California Evidence Code § 917 creates a presumption that if a communication is claimed to have been "made in confidence in the course of the lawyer-client… relationship, the communication is presumed to have been made in confidence." In practice, therefore, a party seeking to prevent the use of a particular communication need only assert the attorney-client privilege to shift the burden of avoiding the privilege to the party seeking to use the information in the particular proceeding.

The particular communication is protected if it was intended to be confidential. That is, made with the expectation that it will not be disclosed outside of the attorney-client relationship. California Evidence Code § 952 defines confidential communication to be "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third party persons other than those who are present to further the interests of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." The primary question in a challenge to the privilege therefore, is whether an expectation of privacy existed at the time of the communication.

California Evidence Code § 952 specifically provides protection for electronic communications in that "a communication between a client and his or her attorney is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." The federal government provides similar protection at 18 USCS 2517(4) "No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter [18 USCS §§ 2510 et seq.] shall lose its privileged character."

Therefore, the use of cellular telephones, email or facsimile machines does not, as a means of communication, create any difference in the analysis of the existence or non-existence of the attorney-client privilege. The primary consideration remains whether an expectation of confidentiality existed at the time of the communication.[2]

DUTY OF CONFIDENTIALITY

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*. 1 B.E. Wiltkin *California Procedure* "Attorneys" §118, p. 155(citations omitted.) The public policy underlying the duty of confidentiality is expressed in the comment to ABA Model Rule 1.6: "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." The duty of confidentiality is therefore much broader than the attorney-client privilege. It encompasses the entire attorney-client relationship rather than those matters which might be presented at an evidentiary proceeding.

California Business & Professions Code § 6068(e) requires attorneys "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The statute does not specifically define the terms "confidence" and "secrets." The term "confidence", has, however, been interpreted as requiring the lawyer to avoid doing anything to breach the trust reposed in him or her by the client and is broader than merely not communicating facts learned in the course of professional employment. The Rutter Group, *California Practice Guide Professional Responsibility* §7:39, p. 7-5 (citations omitted). "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. *Id.* The scope of information which is subject to the duty of confidentiality is inclusive rather than exclusive.

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[2] The view that the expectation of privacy is not defeated through the use of unencrypted email is shared in the ethical opinions of the Illinois State Bar Association, Opinion No. 96-10, the South Carolina State Bar Association, Ethics Advisory Opinion 97-08 and the New York State Bar Assn. CPLR 4547 (January 24, 1997).

The harm against which the attorney-client privilege protects is the use of privileged information in any type of evidentiary proceeding. Occasionally, the information in question is known to all parties, yet the attorney-client privilege prevents its use. One of the by-products of an exclusionary rule is that, based upon competing policies, (in this case, pursuit of truth vs. encouraging complete candor between attorney and client) the information will not be allowed to influence the decision of the tribunal. The harm against which the broader duty of confidentiality protects is even the mere disclosure of information which might be embarrassing, detrimental or cause a breach of trust. A breach of the duty of confidentiality may subject the practitioner to both civil claims from the client and disciplinary action by the State Bar of California.

New and advancing technologies do not fundamentally change the standards which the attorney must uphold. Instead, technological advances provide new areas for the application of existing standards. The duty of confidentiality with respect to technology issues, therefore, is satisfied with the application of sound judgment enlightened by the facts and circumstances of the particular case. Applying this conclusion to the technologies in question yields the following conclusions:

1. The use of cellular telephones is not prohibited. The use of cellular telephones should, however, be limited by the sensitivity of the information being discussed due to the danger of being overheard by unauthorized people.[3]

2. The use of encrypted email is encouraged, but not required. The wide availability of commercially unbreakable encryption software at affordable prices dictates that the prudent practitioner will investigate and use this technology.

3. The use of facsimile machines to transmit confidential documents is permitted. The use of a confidentiality statement does not, however, absolve the practitioner from the consequences of a misdirected facsimile transmission. Use of a confidentiality statement and marking each individual page of a privileged or confidential document does serve a useful purpose in that it may alert those handling the documents of the confidential or privileged nature of the information and the accompanying need for increased care in handling.

CAUTIONARY NOTE

Opinions rendered by the Professionalism and ethics Committee are provided as an uncompensated service of the Orange County Bar Association. Opinions are advisory only and no liability whatsoever is assumed by the Committee or the Orange County Bar Association in connection with such opinions. Opinions are relied upon at the risk of the user. Opinions of the Committee are not binding in any manner upon the courts, the State Bar of California, the Board of Governors, any disciplinary committee, the Orange County Bar Association or the individual members of the Committee.

The user of this opinion should be aware that subsequent judicial opinions and revised rules of professional conduct may deal differently with the areas covered.

[3] The view that discretion should be used when discussing client matters is shared by the Arizona State Bar Assn. Opinion 95-11 and the New York City Bar Assn. Opinion 1994-11.