

E-mail, Metadata, and Clouds, Oh My!

Recent Changes to the Model Rules of Professional Conduct

by Joyce M. Janto

In 1982, when the Model Rules of Professional Conduct were developed, the personal computer industry and the Internet were toddlers.¹ There was no cloud computing or e-mail, no concerns about metadata. So it's not surprising the drafters of the Model Rules of Professional Conduct (MRPC) didn't consider the ethical implications of using these technologies in the practice of law.

Early Days

Opinions about using e-mail, even unencrypted e-mail, for client communications began appearing in 1997.² At its August 2001 Annual Meeting, the American Bar Association adopted the recommendations of the Ethics 2000 Commission. The ethical burden for inadvertent e-mail was placed on the recipient.³ Senders were instructed to include disclosures, either in the subject line or in the body of the e-mail, stating it contained confidential information. An unintended recipient was instructed to return the e-mail unread.⁴ This attitude could be summed up as "caveat recipient."

The issue of metadata wasn't addressed until 2004.⁵ In keeping with the "caveat recipient" attitude, the opinions focused on the actions of the recipient.⁶ Senders were admonished to take reasonable care; recipients were given detailed instructions as to how to behave. Recipients were not to look for metadata and they had to notify the sender if it were inadvertently discovered.

Confidentiality and E-mail

In August 2009 the ABA created the Commission on Ethics 20/20. One

purpose of the commission was to review the MRPC with an emphasis on how technology had affected legal practice. In August 2012 the changes recommended by the commission were adopted at the ABA Annual Meeting.

The most striking feature of these recommendations was the revision of the comments to Model Rule 1.1. Formerly, comments to this rule emphasized a lawyer's need for competence in legal matters and the duty to keep abreast of changes in the law. Language was added stating lawyers had an ethical duty to keep up with changes to the law and its practice "*including the benefits and risks associated with relevant technology.*"⁷ The use of technology by lawyers was no longer seen as a novelty where even a careful lawyer might make an unwitting error. The standard shifted to one of "caveat sender" with the ethical responsibility now on the lawyer who carelessly revealed a client confidence.

This is emphasized by the new Model Rule 1.6(c) which mandates reasonable efforts to prevent inadvertent or unauthorized disclosure of client confidences.⁸ Five factors a lawyer should consider to preserve client confidences in order to meet the test of "reasonableness" are listed.⁹ This list is not exhaustive: common practice and client requirements will still be considered in determining if a breach of confidentiality rises to the level of an ethical violation. This is not to say that encryption of e-mail is now mandated. If the cost and difficulty of using a specific technology outweighs the probability sensitive information will be revealed, its use is unnecessary.¹⁰

Metadata and Cloud Computing

Revisions to Model Rule 4.4(b) and its comments make it clear that metadata is included when talking about electronically stored information. In the wake of differing state ethics opinions, what it means to "inadvertently send" electronically stored information is now clearly defined. An inadvertent transmission now includes information accidentally included or attached to information that was intentionally transmitted.¹¹ When metadata is discovered, the receiving lawyer merely needs to notify the sender so that corrective measures can be taken, but there is nothing in the rules or comments to prevent a lawyer from reading the metadata. The only action prohibited is a routine search for metadata using software designed to recover information "scrubbed" from electronic documents.¹²

Even prior to their formal adoption, state bars began issuing ethics opinions endorsing the principles laid out in the Ethics 20/20 recommendations dealing with cloud computing. Alabama bluntly stated that a lawyer using cloud computing needed to understand how that technology operated.¹³ Other states listed the actions lawyers needed to take to ensure the confidentiality of client information when storing documents with a cloud-based server. This includes not only assuring the lawyer's understanding of cloud computing but also that the service provider understands the confidential nature of the material stored and is prepared to notify the lawyer whenever unauthorized access occurs. Lawyers are

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also advised that clients should be informed when their information is entrusted to what is essentially a third party.¹⁴

Conclusion

These changes are a welcome update to the model rules. They allow lawyers to be confident they are upholding ethical standards while at the same time allowing them to adopt the latest technology in the practice of law. One can only hope that the drafters of the rules will continue to keep abreast of the changes in technology in the coming years.

Endnotes:

- 1 While “personal computers” were around since the late 1950s, the first commercially successful PCs were marketed in 1977. The Advance Research Projects Agency, the forerunner to the Defense Advance Research Projects Agency, sent out an RFP to computer science companies to build a network in 1968. The first commercial use of what would become the Internet was in 1981.
- 2 N.D. Ethics Op. 97-09 (9-4-1997); Pa. Ethics Op. 97-103 (9-26-1997); S.C.

- Ethics Op. 97-08 (6-1997); Vt. Ethics Op. 97-5 (undated)
- 3 ABA Formal Ethics Op. 92-368 (Nov. 10, 1992); Assoc. of the Bar of N.Y. City Ethics Op. 2003-4 (Dec. 2003).
- 4 A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013 43 (Art Garwin, Ed. 2013).
- 5 N.Y. State Bar Ass’n. Ethics Op. 782 (Dec. 8, 2004)
- 6 ABA Formal Ethics Op. 06-442 (Aug. 6, 2006); Ala. Ethics Op. 2007-02 (Mar. 14, 2007); Ariz. Ethics Op. 07-03 (Nov. 2007); D.C. Bar Ass’n. Ethics Op. 341 (Sept. 2007); Md. Ethics Op. 2007-08 (Oct. 19, 2006); Me. Ethics Op. 196 (Oct. 21, 2008); Minn. Ethics Op. 22 (Mar. 26, 2010); N.Y. County, N.Y. Ethics Op. 738 (Mar. 28, 2008); N.H. Ethics Op. 2008-09 (Apr. 16, 2009); N.C. Ethics Op. 2009-02 (Jan. 15, 2010); Pa. Formal Ethics Op. 2009-100 (undated); Vt. Ethics Op. 2009-01 (xxx); W.Va. Ethics Op. 2009-02 (xxx)
- 7 Model Rules of Prof’l. Conduct 1.1, Comment 8.
- 8 A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013 143 (Art Garwin, Ed. 2013).
- 9 Model Rules of Pro’l. Conduct 1.6, Comment 18.

- 10 Model Rules of Prof’l. Conduct 1.6, Comment 18.
- 11 Model Rules of Prof’l. Conduct 4.4, Comment 2.
- 12 Miss. Ethics Op. 259 (Nov. 29, 2012); Ore. Ethics Op. 2011-87 (November 2011); Wash. Informal Op. 2216 (2012); Wis. EF-1201 (June 16, 2012).
- 13 Ala. Ethics Op. 2010-02 (undated).
- 14 Me. Ethics Op. 207 (Jan. 8, 2013); Mass. Ethics Op. 12003 (May 7, 2012); N.H. Ethics Op. 2012-13/14 (Feb. 21, 2013); N.Y. State Ethics Op. 842 (Sept. 10, 2010); Oh. Ethics Op. 2013-03 (July 25, 2013); Ore. Ethics Op. 2010-6 (undated); Pa. Ethics Op. 2011-200 (undated); Vt. Ethics Op. 2010-6 (undated).



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