

Ethical Traps With Electronic Communications

CLE Webcast

February 3, 2010

VIP GlobalNet, LLC

Sean P. Healy

Healy, Milne & Associates, P.C.

313 E. Charnwood St.

Tyler, Texas 75701-1744

TEL: (903) 592-7566

FAX: (903) 593-9325

www.HealyMilneLaw.com

genghis@healylaw.com

I. INTRODUCTION

This webinar is an introduction to some of the ethical issues facing attorneys who communicate electronically

The objective is to “brainstorm,” not to explore them in depth

If we are successful, when you approach one of these traps, a “red flag” will pop up in your mind so you can proceed with caution.

Overview: The ethical rules are the same, but new methods of communicating can create new ways of breaking them.

Agenda

Specific ethical rules that may apply, such as:

Privilege and confidentiality

Conflicts of interest

Advertising

Use of specific media and equipment, such as:

E-mail

Social networking

Listservs

II. ETHICAL RULES

47 states - ABA’s Disciplinary Rules of Professional Conduct

California - California Rules of Professional Conduct

Maine - Maine Rules of Professional Conduct

New York - Model Code of Professional Responsibility

Disclaimer

This seminar will assume you are governed by the DR’s

Most of the discussion should apply to all jurisdictions, BUT:

The *rules* in your state may differ

The *interpretations* of those rules by courts and your bar may

differ
Your bar's *policies on enforcement* may differ

Attorney-Client Privilege

To be protected by attorney-client privilege, these are the requirements:

Communication
Between attorney and client
For purposes of legal representation
Made under conditions of confidentiality

Confidentiality

DR 1.05: "Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), *a lawyer shall not knowingly*:

- 1) *Reveal confidential information* of a client or former client *to*:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) *anyone else*, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."

Breaching Privilege/Confidentiality

A communication is not privileged if it's not made under conditions of confidentiality, for example:

Third party present when attorney and client meet
Failure to take reasonable steps to keep it confidential

ABA Formal Opinion 99-413: Using unencrypted e-mail does not violate confidentiality requirement

Key: Is there a reasonable expectation of privacy?

Privilege can be waived by:

Disclosure to opposing party or counsel
Disclosure to public and third parties

Areas of concern: attorney blogs, listservs and similar media

Ex Parte Contact - Opposing Parties

DR 4.02 prohibits communication with a person whom the lawyer knows is represented by counsel, or causing or encouraging another person to do so.

Oregon ethics opinion says lawyers can view the opposing party's publicly accessible website, comparing it to a book or article the party wrote. Lawyer is not communicating with the party.

Direct electronic communications with represented parties (e-mail, chats, etc.) are still prohibited.

Can't use deception to gain access, regardless of whether the person is represented.

Ex Parte Contact - Tribunal

DR 3.05(b): Can't communicate *ex parte* with tribunal for purposes of influencing it regarding a pending matter

Judges on social networking sites:

Florida ethics opinion: Judges can't "friend" lawyers who practice before them - appearance of impropriety

South Carolina: It's okay but don't discuss official matters

Georgia: Judge resigned when personal relationship with defendant was discovered using Facebook

Most judges will be very careful about this

Be careful with blogs, listservs, "friending," etc.

Conflicts of Interest

DR 1.06: Can't represent opposing parties

Disclosure of confidential info by potential client, even if lawyer is not hired, can trigger a conflict

Normally can't represent multiple clients in a "substantially related matter" if interests are "materially and directly adverse"

Normally can't represent client if representation will be "adversely limited" by other responsibilities

Exception - informed consent from all parties

DQ of one lawyer DQ's the whole firm

There are other types of conflicts

Conflicts: Former Clients

DR 1.09(a)(3): Can't represent new client in "same or substantially related matter" if interests are adverse to former client

DR 1.09(a)(2): Can't represent another person if in reasonable probability it would involve a breach of confidentiality

DQ of one lawyer DQ's the whole firm, and can follow lawyers to other firms

Confidentiality and Disclosure

DR 1.03(a) requires you to keep client "reasonably informed" of the matter

DR 1.05 prohibits disclosing confidential info

What if one client discloses confidential or privileged info that could help another client?

You owe one client a duty to disclose the info, and owe another client a duty not to do so

Communicating with unidentified persons:

Allowing the person to disclose confidential info can form an attorney-client relationship and thus create conflicts

Advising the person can create conflicts

Unauthorized Practice of Law

DR 5.05(a): A lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction . . .”

Where is the client?

What law applies?

Are you admitted to practice there?

Are you qualified to advise the client on the applicable law?

Giving Good Advice

Rule 1.03 Communication: Lawyers must keep clients reasonably informed, give prompt responses, and explain the matter so the client can make informed decisions

Rule 2.01 Advisor: “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

Giving advice without a reasonable investigation of the facts and law can be an ethical violation, constitute malpractice, and incur sanctions

Garbage in, garbage out

Talk show hosts (such as psychologists) often give advice based on cursory information

Smart lawyers don't do that. Before giving advice:

Determine who the *client and other parties* are

Obtain *relevant info* including *documents*

Determine client's *location, law, and forum*

Determine client's *goals* and *intentions*

Consider the *consequences* if you're wrong

Sign a *contract* and charge an appropriate *fee*

Make sure you're competent and informed

THEN give the client your best advice

Deception

Several rules prohibit deception

DR 4.01 - can't knowingly make a false statement of material fact or law to a third person, or fail to disclose material fact to avoid being a party to a crime or fraud

8.04(a)(3) - can't engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Issues:

Social media sites are rich sources of info

“Pretexting” - using false info (ex. - fake Facebook account) to gain access to info

Keylogging and similar electronic surveillance

Undercover agents - using investigators or agents to obtain information using deception

Solicitation and advertising

- Firm names and letterhead

- Fictitious names

- Advertising and filing requirements

- Solicitation and filing requirements

- Attorney referral services - must register and comply with DR 7.03, Occ. Code Chap. 952

Firm Names and Letterhead

Rule 7.01(a): “(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm . . .”

Rule 7.01(e): “A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name . . .”

Legit or not:

- TylerLawyer.com

- BestTylerLawyer.com

Advertising and Solicitations

Whether a communication is an ad or solicitation depends on the lawyer’s motive, not the media

Requirements for electronic ads and solicitations are similar to others - submission to Ad Review Committee, marked “Advertisement,” etc.

Pre-approval: Submit your ad/solicitation for review before disseminating it

Approval: You must submit your ad/solicitation for review no later than the first dissemination

Submitting one that is disapproved gives the Bar proof of a violation of the rules, and they may forward it as a grievance

- “Tombstone Ads”

7.07(e) exempts “Tombstone Ads” from filing

Info allowed in a “Tombstone Ad”:

- Firm and lawyers’ names and contact info

- Board certifications, areas of concentration, areas of practice

- Licenses and dates of admission

- Memberships in legal service plans, acceptance of credit cards, fee info

- Articles and web links

- Sponsorships of charitable events and programs

- Required disclosures, and other info exempted by the state supreme court.

Supervision of attorneys

DR 5.01

Partner or supervisory lawyer is vicariously liable if he orders, encourages, or knowingly permits a violation, or . . .
. . . he is a partner or direct supervisor, and knows of the violation and knowingly fails to take reasonable remedial action

Supervision of Nonlawyers

DR 5.03: Lawyer with supervisory authority shall make reasonable efforts to ensure nonlawyer's conduct is compliant

Lawyer is liable if he orders, encourages, or permits the conduct, or . . .
. . . partner or direct supervisor knows of misconduct and knowingly fails to act to avoid or mitigate consequences of violation

Common violation: giving legal advice

Train and explain

Establish and use policies to address ethical issues

III. SPECIFIC MEDIA

E-mail

Electronic transactions

Cell phones and Laptops

Social Networking/Blogs/Chatrooms/Listservs

Metadata

Miscellaneous issues

Poll Question

Which of the following methods have you used to try to bring in new clients for your law practice?

Traditional website for your law practice

Page for your law practice on social networking sites such as Facebook, MySpace, Twitter, LinkedIn, and Flickr

Attorney locator websites such as Lawyers.com

Internet advertisements on other websites, such as banner ads

Search engine optimization

E-mail

E-mail is transmitted via other computers

It's remotely possible to intercept it en route

It's very possible to intercept it when it's on the recipient's server (requires only the password)

It's very possible to intercept it using the recipient's computer (often requires only physical access)

Employers' policies often give them full access to e-mails stored on work computers

Spouses often have full access

Federal law: illegal to intercept electronic comms

Misdirected E-mails

Eli Lilly story

Lawyer accidentally e-mailed confidential info to NY Times reporter instead of co-counsel

Everyone read about the negotiations on the Times' website and front page of the paper

Apparently the firm kept the client. No word on what happened to the lawyer.

State Farm lawsuit re: Katrina claims

Lawyer intended to send a "venting" e-mail about the Mississippi AG within the firm

Mistakenly sent it to about a dozen reporters

Other e-mail problems

Failing to warn of the dangers of using e-mail

"Reply to all," pull-down menus, auto completion -makes it easy to misdirect e-mails

Possible consequences of problems with e-mail:

Waiver of privilege

Disclosure to opposing party

Sanctions; exclusion of evidence

Civil lawsuits and damages

Ethical violation and/or malpractice

Criminal prosecution

My e-mail header

THE INFORMATION CONTAINED IN THIS MESSAGE IS PERSONAL, SECRET, PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF INDIVIDUAL OR ENTITY NAMED BELOW. DO NOT COPY OR FORWARD THIS MESSAGE. IF YOU ARE NOT THE PERSON TO WHOM THE MESSAGE IS ADDRESSED, PLEASE DO NOT READ ANY FURTHER.

Put it at the top of any confidential e-mail

Make the subject "Confidential Legal Matter"

Tax advice: Circular 230 disclaimer

Answering unsolicited e-mails

My generic response includes these things:

I need to know who you are, who the opposing party is, and where you are

Make your message look legit so I don't delete it or consider it "spam" (include your real name, make the subject say something like "legal matter")

E-mail can be intercepted; that may waive privilege; you decide whether to use it

I'm not your lawyer just because I e-mail you
E-mail me if you want my entire generic response

Electronic transactions

Uniform Electronic Transactions Act

Adopted by 47 states and D.C.

This is why banks can use electronic copies of checks instead of the original

“If a law requires a record to be in writing, an electronic record satisfies the law.”

“If a law requires a signature, an electronic signature satisfies the law.”

Cell phones and laptops

Info stored on phones:

Text messages and e-mails

Contacts

Call history

Photos

Web history, cookies, passwords

Client billing info (Quickbooks, etc.)

Passwords, access to social media sites, access to accounts such as Amazon and eBay

Info stored on laptops:

Same plus virtually all electronic info on a client/case

Do you want some outsider to have all this?

Social Networking/ Blogs/Chatrooms/Listservs

Florida ethics opinion equates chatrooms and other realtime media with in-person solicitations, prohibits lawyers from using them to solicit clients

Terms of service often grant broad licenses

Ex. - Facebook's previous agreement gave it a virtually unlimited license to publish all content posted by users

Privacy settings are critical

Cautious approach - don't use them for confidential info

Warn clients and potential clients

Lawyer posted question to listserv, opposing counsel read it and recognized case

Australian court allowed substituted service using Facebook

Metadata

Definition: “Data about data.” In this context, info embedded in a file like revision history, undo/redo, ID of drafter, comments, and hidden text.

Present in many files, including:

Microsoft Word, Outlook, Excel, Powerpoint, Access

Adobe Acrobat (.PDF) documents

WordPerfect documents

Example: Lawyer sends draft contract, client adds clause and comments, then forwards it to other side. Other side sees the changes in the revision history.

Can lead to surprises, both pleasant and unpleasant, because most people don't know it's there.

TSA Blunder

Transportation Security Authority published its airport security operating manual

They redacted sensitive parts using blackout tool

Readers exposed them by cutting and pasting into another document

This revealed highly sensitive info about methods and procedures

Metart.com arbitration

WIPO Arbitration over ownership of Metart.com

Claim was "domain name parking" - registering URL similar to existing site, profiting from visits

Respondent denied knowing of Complainant's site

Complainant claimed Respondent was owned by a well-known publisher of adult material who must have been aware of its site; Respondent carefully denied that publisher was involved

Complainant learned through metadata in PDF file that the publisher negotiated purchase of domain

Arbitrators ruled for Complainant

Metadata - Issues and Solutions

Issues:

Confidentiality/Privilege: "Scrub" files when appropriate

Discovery:

Viewing metadata may be perfectly legitimate

Finding metadata may trigger "inadvertent disclosure" requirements

Spoliation: Metadata can be discoverable, deleting it may be illegal

Solutions - removing metadata:

Word: Turn off "Track Changes," turn on "Markup"

WordPerfect: "save without metadata"

Scan or save in non-native format such as .PDF

Use software designed to remove metadata

Educate staff and attorneys regarding metadata

Miscellaneous issues

Remote backup/client access to files - Arizona Ethics Opinion 09-04 - must take reasonable steps

Search Engine Optimization/Metatags

Client info on computers connected to the Internet/confidentiality and

hacking

Document assembly

By clients - assembled and delivered without review by lawyer -
risk of UPL and malpractice

By lawyer - risk of documents filed in bad faith

Protect computers/client info from hacking, etc.

Use passwords on computers, wireless routers, flash drives, phones

IV. CONCLUSION

Know the ethical rules

Know how your communications methods work

Think about possible consequences of a particular communication

Keep copies of all important communications

Watch out for traps!

More Information

Legalethics.com

<http://www.abanet.org/cpr/home.html>

<http://www.llrx.com/features/pretexting.htm>

State Bar Site

State Bar Ethics Hotline if you have one

Texas Center for Legal Ethics and Professionalism

Your state's DR's, ethics opinions, and case law

E-mail me for specific links or references

Ethical Traps With Electronic Communications

CLE Webcast

February 3, 2010

VIP GlobalNet, LLC

Sean P. Healy

Healy, Milne & Associates, P.C.

313 E. Charnwood St.

Tyler, Texas 75701-1744

TEL: (903) 592-7566

FAX: (903) 593-9325

www.HealyMilneLaw.com

genghis@healylaw.com