

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 97-09
September 4, 1997

The Ethics Committee has received a request for an opinion from an attorney on the following question:

Is Rule 1.6 of the North Dakota Rules of Professional Conduct violated by a lawyer who communicates routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services (such as America Online or MCI Mail) or the Internet?

The attorney who submitted the question specifically limited the question to "routine matters"; but suggested that in situations requiring the utmost secrecy the use of any means short of scrambling or encryption may violate Rule 1.6.

FACTS

The attorney who submitted the question has not presented any facts beyond those which are set forth or implied in the question.

DISCUSSION

RULE 1.6 provides, in relevant part, as follows:

"A lawyer shall not reveal, or use to the disadvantage of a client, information relating to the representation of the client unless required or permitted to do so by this rule. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. ..."

The Committee first concludes that it is implicit in Rule 1.6 that, in the course of undertaking communications of such "information", an attorney must have some certainty or reasonable expectation that a means of communication will remain confidential. The increased use of electronic mail, especially via the Internet,

has caused concerns about whether those methods provide sufficient security to maintain client confidentiality.

Determining whether communication of such information via unencrypted electronic mail over commercial services or the Internet provides sufficient certainty or reasonable expectation of confidentiality requires some understanding and discussion of some of the applicable terms. For purposes of this Opinion, the following terms are defined as follow:

"Electronic mail" (e-mail) is a message sent from one user's computer to another user's computer via a host computer on a network, or via a private or local area network (which we define to mean a network wholly owned by one company or person which is available only to those persons employed by the owners or to whom the owner has granted legal access) or via an electronic mail service such as America Online (a "public network"), via the Internet, or by a combination of these methods.

"Encrypted e-mail" is e-mail that has been electronically locked to prevent anyone but the intended recipient from reading it using a "lock and key" technology. ...

The "internet" is a world wide super network of computers consisting of individual computers and private and public networks owned by various persons and entities including business, schools, governments, and non-secure military computers. Individual users connect to the Internet through a local "host" computer. The local host computer communicates with other computers throughout the world over the phone lines or privately owned high speed fiber optic lines using a collection of well defined common protocols.

(Vermont Advisory Ethics Opinion 97-5)

The Committee notes that a number of other jurisdictions have addressed the issue presented herein. However, this issue apparently has not yet been addressed by the ethics panel of the American Bar Association.

Some of the earlier opinions which addressed the issue

concluded that a lawyer who communicated via unencrypted electronic mail (e-mail) without first discussing the risks of disclosure with, and obtaining consent from, the client violated this rule or substantially similar rules. See, for instance, Iowa Supreme Court Board of Professional Ethics Opinion No. 96-1(Aug. 29, 1996); North Carolina State Bar Ethics Opinion No RPC 215(July 21, 1995); South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion No. 94-27(Jan.1995); and Colorado Ethics Opinion 90(11/14/92). In at least one of those instances, ie. North Carolina State Bar ethics Opinion No. RPC 215(July 1995), it appears that such was an extension of that body's conclusion that communications via cordless or cellular telephones may constitute a violation of such rules absent disclosure and consent based upon the susceptibility of such communications to interception or access by third parties. In all or most of those instances it appears that such is based upon the concern that such means of communication did not provide sufficient assurances of confidentiality.

More recent and, in the view of this Committee, more reasoned opinions, have concluded that a lawyer may communicate routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services (such as America Online or MCI Mail) or the Internet without violating the aforesaid rule unless unusual circumstances require enhanced security measures. See, for instance, Illinois State Bar Association Advisory Opinion on Professional Conduct No. 96-10(May 16, 1997); Arizona State Bar

Association Formal Opinion No. 97-04(April 4, 1997);South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion No. 97-08(June 1997); and Vermont Advisory Ethics Opinion 97-5.

To the extent that they address the issue presented herein, the Committee concurs with and, in drafting this opinion, has utilized significant portions of, the conclusions and reasoning set forth in Illinois State Bar Association Advisory Opinion on Professional Conduct No. 96-10(May 16, 1997); South Carolina Bar Ethics Advisory Committee Ethics Advisory Opinion No. 97-08(June 1997); and Vermont Advisory Ethics Opinion 97-5.

The Committee concludes, as have some or all of the foregoing committees, that due in large part because of improvements in technology and changes in the law, there now exists a reasonable certainty and expectation that such communications may be regarded as confidential.

There appears to be a clear consensus that, although interception of electronic messages is possible, it is certainly no less difficult than intercepting an ordinary telephone call; and, furthermore, that intercepting an electronic mail message is illegal under the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq.

As stated in the Illinois State Bar Association Advisory Opinion on Professional Conduct No. 96-10(May 16, 1997):

"Courts and ethics committees have uniformly held that persons using ordinary telephones for confidential communications have a reasonable expectation of privacy. The three common types of electronic mail messages appear no less secure."

Even though the request refers to only two, there are

essentially three means of transmitting e-mail: private networks operating on a system accessible only by computers on the same system(e.g. within the same office); semi-public networks such as the commercial services offered by America On-Line and CompuServe; and the Internet.

Since the private networks referred to are basically "closed" systems(used by attorneys and their employees), any interception or access would be by persons who already owe a duty of confidentiality to all firm clients. The aforementioned South Carolina Opinion notes that at least one court has held that use of this means of communication carries a reasonable expectation of privacy, citing United States v. Keystone Sanitation Co., 903 F.Supp. 803(M.D. Pa. 1995).

E-mail messages sent using semi-public or commercial services are typically sent using ordinary telephone lines from one computer to such service, where they are electronically stored in some sort of "mail box" until accessed, usually through use of a password, by another user of such service. While it is possible that e-mail messages can be accessed or intercepted by dishonest or careless personnel of such semi-public or commercial services, the Committee is of the opinion that such opportunity does not render an expectation of privacy unreasonable. Again, the South Carolina Opinion notes that it has been held that e-mail stored on such a commercial network is subject to a reasonable expectation of privacy, citing United States v. Maxwell, 43 Fed.R.Serv. 24(U.S.A.F. Ct. Crim. App. 1995).

Internet e-mail travels to its destination differently. E-mail sent over the Internet does not go directly from the sender's computer over a land-based line to a password-protected "mail box". The message is broken into two or more "packets" of information by the sending computer or host computer, which are then sent individually over the lines and ultimately reassembled back into the complete message, at the recipient's "mail box". The mail boxes may exist on the recipient's computer or may exist on the host computer the recipient uses to connect to the internet. These information packets must pass through and be temporarily stored in other computers called "routers", operated by different firms known as "internet service providers" which assist in distributing e-mail over the internet. Again, while it is possible that e-mail messages can be accessed or intercepted by dishonest or careless personnel of such internet service providers, the Committee is of the opinion that such opportunity does not render an expectation of privacy unreasonable. Furthermore, the interception or monitoring of e-mail communications for purposes other than assuring quality of service or maintenance is illegal under the Electronic Communications Privacy Act of 1986 as amended in 1994. See 18 U.S.C. § 2511(2)(a)(i).

The Committee views as particularly significant the provisions of 18 U.S.C. § 2517(4), as amended, wherein Congress provided that:

"No otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

Such clearly indicates that Congress intended that Internet

messages should be considered privileged communications just as ordinary phone calls.

For the aforementioned reasons, the Committee is of the view that communication of routine matters with clients and/or other lawyers jointly representing clients via unencrypted e-mail carries adequate assurances, and/or a reasonable expectation, of confidentiality.

However, this Committee, like others mentioned above, recognizes that there may be circumstances where, because of the extraordinarily sensitive nature of the communications, transmission without additional security measures such as encryption may not be appropriate, just as it may not be appropriate in all situations to use an ordinary telephone.

CONCLUSION

It is the opinion of the Committee that Rule 1.6 of the North Dakota Rules of Professional Conduct is not violated by a lawyer who communicates routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services (such as America Online or MCI Mail) or the Internet unless unusual circumstances require enhanced security measures.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This Rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Dann Greenwood and was approved by the unanimous vote of the Committee on September 4, 1997.

A handwritten signature in cursive script, reading "Alice R. Senechal", is written over a horizontal line.

Alice R. Senechal, Chair

[REDACTED]

July 23, 1997

Ms. Sandi Tabor
Executive Director, SBAND
P.O. Box 2136
Bismarck, ND 58502

Re: Request for Ethics Opinion

I request an opinion from the SBAND Ethics Committee on the following question:

Is Rule 1.6 of the North Dakota Rules of Professional Conduct violated by a lawyer who communicates routine matters¹ with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services (such as America Online or MCI Mail) or the Internet?

To assist in your research, I enclose Illinois Ethics Opinion 96-10 and North Carolina Ethics Opinion RPC 215. Upon review, you will see that Illinois concluded that use of e-mail did not violate Rule 1.6, while North Carolina reached a contrary result. Please note that the Illinois Opinion contains some detail about how e-mail is actually transmitted. I am looking for additional information and I will provide that to the Committee if and when located.

I also enclose an article from *The Bench*, which is a national publication of the American Inns of Court. That article cites an Arizona Ethics Opinion holding in accord with Illinois, and Opinions from Iowa and South Carolina siding with North Carolina. I was unable to locate the Arizona, Iowa, and South Carolina Opinions, but trust that the Ethics Committee has those resources.

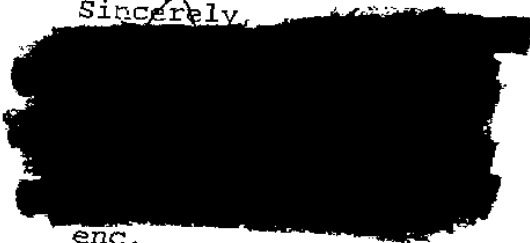
¹ This request involves communications of "routine matters" because I am aware of situations arising during attorney-client relationships that require the utmost secrecy. In those circumstances the use of any means short of scrambling or encryption may violate Rule 1.6. However, those special cases are not within the scope of this request.

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Sandi Tabor Letter
July 23, 1997
Page 2

Thank you for your assistance, and that of the Committee. Please
contact me if anything further is required regarding my request.

Sincerely,



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