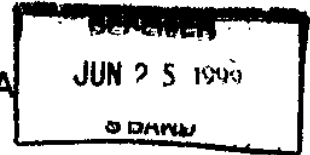


**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**



**Opinion No. 99-03
June 21, 1999**

The Ethics Committee received a request for an opinion concerning the confidentiality of a firm's records. The request stated:

There are [several] attorneys in our law firm. We have a total of [several] computers we use in our legal work. We are interested in subscribing to an online data backup service. The service provides us a confidential password allowing us to retrieve our data from their storage units. They store the data on computers and on hard disks that are regularly backed up. Our question is whether we may participate in such a service without violating any confidentiality requirements.

Additional Facts

The law firm has contacted several companies about the proposed online data backup service. Generally, the law firm's computer server would periodically transfer data to the service's server, which would also transfer the data to disk or tape that would be stored offsite. Accordingly, the law firm is concerned about the confidentiality of records on the service's server and the confidentiality of records on the disk or tape stored offsite.

Discussion

A lawyer is obligated to protect the confidentiality of information provided by a client. Rule 1.6, North Dakota Rules of Professional Conduct, states, in part: "A lawyer shall not reveal...information relating to representation of the client unless required or permitted to do so..." The accompanying comment states: "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation."

The inquiry raises two separate confidentiality issues: the transmission of data over the internet and the storage of electronic data.

This committee addressed the first issue in Opinion 97-09. The question was: "Is Rule 1.6 of the North Dakota Rules of Professional Conduct violated by a lawyer who communicates routine matters with clients, and 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?" This committee unanimously concluded that communication by e-

mail did not violate Rule 1.6 "unless unusual circumstances require enhanced security measures."

Similarly the ABA addressed the issue in Formal Opinion No. 99-413, when applying the Model Rules of Professional Conduct (1998). The opinion stated:

The Committee believes that e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy. The level of legal protection accorded e-mail transmissions, like that accorded other modes of electronic communication, also supports the reasonableness of an expectation of privacy for unencrypted e-mail transmission. The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or dissemination of the information is a violation of law.

The Committee concludes, based upon current technology and law as we are informed of it, that a lawyer sending confidential information by unencrypted e-mail does not violate Model Rule 1.6(a) in choosing that mode to communicate. This is principally because there is a reasonable expectation of privacy in its use.

The conclusions reached in this opinion do not, however, diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated medium of communication. Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail, just as they would warrant the avoidance of the telephone, fax, and mail.

The storage of electronic records and paper records raises similar questions. Who has access to the records? What are the security measures in place to prevent access by unauthorized personnel? Are there special security measures for highly sensitive documents?

The committee is unaware of any opinions governing a lawyer's storage of electronic records. Accordingly, the committee believes that the law firm should, as it would for paper documents, ensure that the security measures are adequate for the sensitivity of the stored documents. At a minimum, the law firm must limit the access only to authorized personnel, usually by disclosing the password only

to properly authorized personnel (as the law firm would control the access of keys to a room storing paper records).

Conclusion

The committee concludes that a law firm does not violate Rule 1.6 if it subscribes to an online data backup service, provided the law firm ensures that the security of the data transmission and the security of the data storage are adequate for the sensitivity of the records that are to be transmitted and stored.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules of 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 Murray G. Sagsveen and unanimously approved by the Ethics Committee on June 21, 1999.


Alice R. Senechal
Chairperson

99-02

[REDACTED]

May 24, 1999

MAY 26 1999
D. DAVIS

ND Bar Association
Attn: Sandi Tabor
P.O. Box 2136
Bismarck, ND 58502-2136

Re: Ethics Question

Dear Sandi:

I am requesting an ethics opinion pertaining to the following:

There are three attorneys in our law firm. We have a total of five computers we use in our legal work. We are interested in subscribing to an online data backup service. The service provides us a confidential password allowing us to retrieve our data from their storage units. They store the data on computers and on hard disks that are regularly backed up. Our question is whether we may participate in such a service without violating any confidentiality requirements.

I look forward to hearing from you.

Sincerely,

[REDACTED]