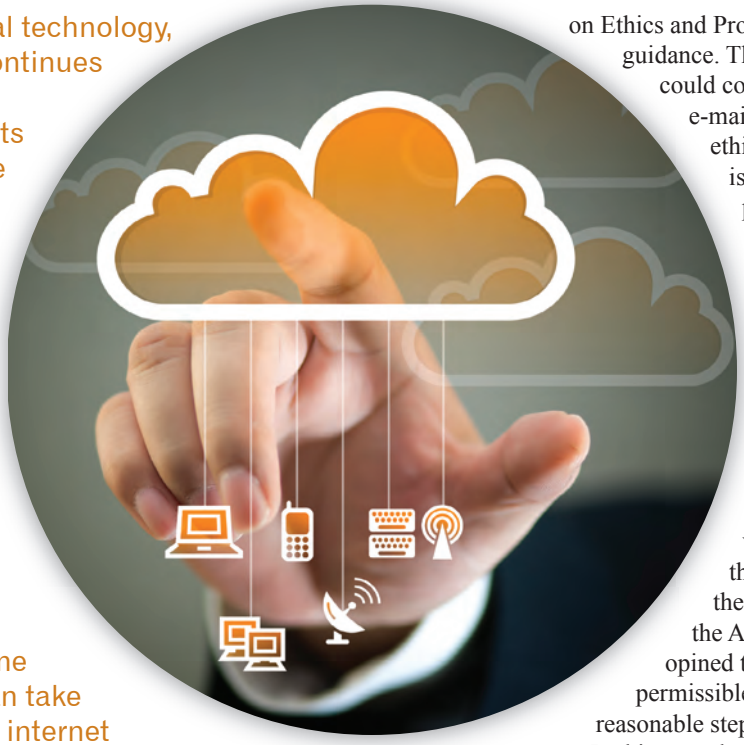
ONE HOUR CLE ETHICS CREDIT

STAYING ETHICAL IN THE DIGITAL AGE:

A PRIMER FOR TAKING ADVANTAGE OF TECHNOLOGY WITHIN ETHICAL GUIDELINES

BY JENNIFER LEWKOWSKI, ESQ.

With the advent of digital technology, the ethical landscape continues to evolve. Attorneys can communicate with clients and work on cases while outside the office. They can reach prospective clients in a variety of different ways. In fact, clients now expect to be able to research prospective law firms on the internet, through Facebook and Twitter and for counsel to be accessible, even while out of the office, via cell phone or e-mail. This article explores some of the ways attorneys can take advantage of e-mail, the internet and social media, while continuing to meet their ethical obligations.



E-mail

The use of e-mail has now become the norm, and clients expect attorneys to be familiar with e-mail. Many clients have multiple e-mail accounts, including personal, work and (sometimes) shared accounts. In addition, clients generally have access to computers at home, at work and in public places such as libraries, hotels or internet cafes. Therefore, attorneys must be able to advise clients regarding the ramifications of communicating with counsel from different accounts or computers. For this reason, attorneys should educate themselves about the possible breaches of client confidentiality which could arise from the use of e-mail.

Rule 1.6 of the Nevada Rules of Professional Conduct requires counsel to protect confidential client information. Attorneys should understand the potential risks in communicating with clients via e-mail and should take steps to ensure that their e-mail use complies with this rule. In this regard, Formal Opinion 99-413 by the American Bar Association Standing Committee on Ethics and Professional Responsibility offers guidance. The opinion held that attorneys could communicate with clients through e-mail without compromising their ethical obligations, "because there is a reasonable expectation of privacy in its use," as with other standard means of communication, such as regular mail, facsimile and telephones.[1] However, none of these means of communication guarantees absolute security. For example, mail can be intercepted, just as a facsimile sent to a shared machine can be viewed by someone other than the intended recipient. Despite the risk of inadvertent disclosure, the ABA standing committee opined that the utilization of e-mail is permissible, provided the attorney takes reasonable steps to protect client confidences.[2] In this regard, although e-mail use is a common means of communication, counsel has an obligation to advise clients about the potential consequences of utilizing a work e-mail account or work computer, or of using an employer-issued cellphone or tablet for attorney-client communications. These consequences include the possibility that the employer can access e-mails or texts sent to counsel from such accounts. Many employers have policies which permit employer access to e-mail sent by an employee from a work computer or e-mail account. Some policies may also include communications sent from a personal e-mail account via a device provided by the employer, such as a cellular phone or tablet. Courts are divided as to whether an employer should be able to access attorney-client communications sent by an employee under these circumstances.[3] Accordingly, attorneys should advise clients that there may not be a reasonable expectation of privacy in such e-mail communications,[4] Attorneys should recommend that clients familiarize themselves with their employer's policies and should stress that no messages should be sent to counsel from a work e-mail address or computer.

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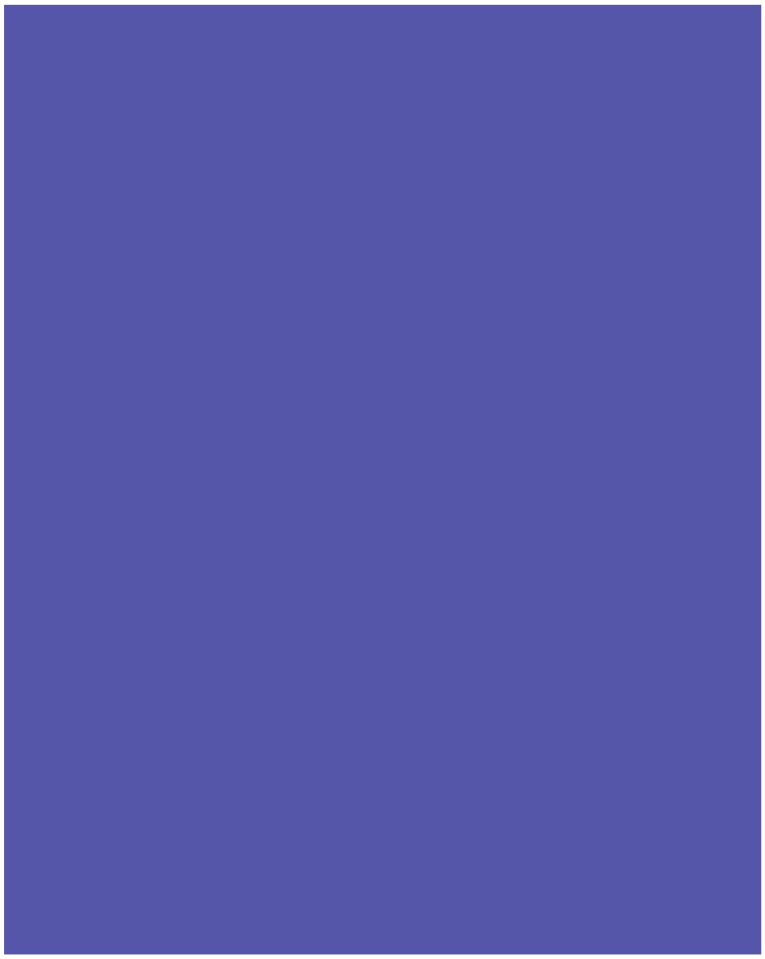
Attorneys should also advise clients of issues that might arise from a client's use of a public computer (such as in libraries or coffee shops), or a shared computer to communicate with counsel, due to the possibility that a third party could access the communication. Counsel should advise clients not only that others may be able to access e-mail sent from such computers, but also that these communications may not be considered privileged, because there may not be a reasonable expectation of privacy for communications sent from a shared computer.[5]

Attorney Advertising

Attorneys and law firms are increasingly reaching out to prospective clients through websites and social media. Accordingly, confusion has arisen as to what constitutes attorney advertising and what is permissible when using this technology. Nevada attorneys should look to Rule 7.2 of the Nevada Rules of Professional Conduct for guidance.[6] ABA Model Rule 8.4 also provides direction.

At the outset, attorneys should ensure that information included on their firm website is accurate and not misleading.[7] Attorneys should regularly review or update their website to ensure accuracy. They should also obtain the consent of former or current clients before posting identifying client information (such as a client list), information regarding the scope of the representation and client testimonials.[8]

The Nevada Supreme Court recently approved changes to Rule 7.2, including a detailed new section (i) governing the inclusion of statements regarding results in prior cases in attorney advertisements. While attorneys are still permitted to include such statements, they must be made by the attorney or member of the firm who "served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict." In addition, the advertisement must include a disclaimer stating that past results do not guarantee future success. If the statement includes the monetary amount obtained for a past client, the listed amount must be what the client *actually received*. In particular, if the advertisement includes the gross amount of monetary damages recovered, it must also include the amount of fees and litigation expenses paid to counsel. Finally, the statement must include "adequate" information regarding the type of case and the damages at issue, although the new rule includes no guidance as to what constitutes "adequate" information. At a minimum, the advertisement should provide a description which includes an overview of the claims and injuries involved, as well as the resolution.



Websites and the Attorney-Client Relationship

Clients are now able to research potential attorneys and law firms on the internet, and to contact counsel directly through e-mail links on law firm web pages or through social media. When utilizing this technology, attorneys must ensure that they are mindful of when an attorney-client relationship may be formed. This is often dependent on the type of information posted on the website and whether the website invites direct client communication, such as through a direct e-mail link on the site.

Many law firms offer legal information on their websites, such as background on a specific area of the law, blogs written by firm attorneys and links to other resources. The ABA has recommended that law firm websites providing such information include a disclaimer, in order to avoid the risk that a prospective client will believe that an attorney-client relationship has been formed.[9] The disclaimer should indicate that the mere provision of legal information "does not constitute legal advice."[10] Nevada counsel should also be mindful that new Rule 7.2(j) provides that required disclosures or disclaimers "be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the intended viewer." The disclaimer must appear on the same web page as the statement triggering the disclaimer. In addition, Rule 7.2(h) now provides that all required statements or disclaimers be made in each language utilized in the advertisement itself. Therefore, if the website includes information in Spanish, disclaimers must also appear in Spanish.

Attorneys who invite or respond to inquiries posed through their website should understand that such communications may result in the creation of an attorney-client relationship or an understanding by the client that such a relationship has been created.[11] For example, a response to a question which appears tailored to the prospective client's personal situation can be characterized as offering legal advice, while a response to a general hypothetical likely will not be so construed.[12]

E-mail, the internet and social media have provided attorneys with new ways to reach prospective clients and to communicate with existing clients. Attorneys should certainly take advantage of such technology, while recognizing their ethical obligations. In this regard, attorneys should advise clients of the risks inherent in using certain technology. Moreover, attorneys who maintain websites or social media accounts should ensure that they are familiar with the applicable rules regarding attorney advertising and the formation of an attorney-client relationship. ■

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1 ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999).
2 *Id*. Note that ABA Model Rule 1.6, upon which this opinion is based, includes a provision requiring an attorney to take reasonable steps to prevent the unauthorized disclosure of confidential client information. While the comparable Nevada rule does not include this same language, the Model Rule provides useful guidance.
3 *Id*. For example, courts in New York, New Jersey and California have found that communications sent from an employer's computer are not privileged, while courts in Washington and Massachusetts have found that such communications are privileged in certain circumstances.
4 ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 11-459 (2011).
5 *Id*.
6 This article refers to the amendments to Rule 7.2 of the Nevada Rules of Professional Conduct, as approved by the Nevada Supreme Court on November 13, 2012.
7 *See* Model Rule 8.4.
8 ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 10-457 (2011).
9 *Id*.
10 *Id*.
11 *See* Formal Opinion10-457, *supra*.
12 *Id*.

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