



## PRIVACY RIGHTS AND ETHICAL PROVISIONS

BY EDWARD J. CLEARY

*The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives should become public and which parts we shall hold close.<sup>1</sup>*

In the months since the Minnesota Supreme Court issued its decision in the case of *Lake v. Wal-Mart Stores, Inc.*, there has been a great deal of discussion in the legal community regarding the right to privacy. In that case, you may recall, the Court recognized three of the four common law torts related to the right to privacy, thus making Minnesota the 48th state to recognize at least one of the four privacy torts. Some saw the decision as "due, in part, to a backlash against media behavior"<sup>2</sup> since this group stands to be the most affected, as it has traditionally provided the largest group of defendants in privacy lawsuits. Others noted "fears of a chilling effect upon First Amendment rights."<sup>3</sup> While many hailed the decision, a number agreed with the dissenting justices that unless a constitutional basis was articulated for such a change, such an outcome was better left to the Legislature.

From an ethical perspective, several of the recognized privacy torts have counterparts among the Minnesota Rules of Professional Conduct (MRPC) and the Opinions issued by the Lawyers Professional Responsibility Board. When it comes to the privacy rights of others, lawyers are held to a higher standard than members of the public; in some privacy areas, what is legal for all is nevertheless unethical for an attorney.

### INTRUSION

Intrusion "occurs when one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."<sup>4</sup>

Minn. Stat. § 626A.02 allows the taping of telephone conversations under certain circumstances, such as where "one of the parties to the communication has

given prior consent to such interception." Lawyers, however, are subject to Opinion 18 which, in most instances, makes it professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation.<sup>5</sup>

In a recent case that resulted in the issuance of an admonition, an attorney for several potential plaintiffs in a federal case, prior to commencing a lawsuit, called two supervisors of the plaintiffs' and without their knowledge or consent recorded the conversation. While acknowledging that she did not tell the supervisors that the conversations were being taped, the attorney indicated that she had done nothing to hide the fact that she was taping the conversations. She stated that the conversations occurred while she was on speakerphone, and that she changed a tape during one conversation, which she believed to be an "audible event." However, an attorney's duty under Opinion 18 is more explicit; the attorney must confirm that all parties to the conversation have knowledge that the matter is being recorded.

Opinion 18 is not the only provision that addresses intrusive conduct on the part of an attorney. MRPC 7.3 states:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

This provision has withstood constitutional challenge at both the federal and state levels<sup>6</sup> and addresses perhaps the most unpleasant of lawyer stereotypes—the "ambulance chaser." Unfortunately, as with many stereotypes, there is some basis in fact for the use of such offensive imagery. Every generation of lawyers has been forced to address those within the profession who allow greed to overcome any semblance of professionalism. Solicitation, whether by phone, or worse yet, in person, is in its purest form the ultimate invasion of privacy, often resulting in the manipulation and

exploitation of the unsophisticated at their most vulnerable. With the outlet of advertising available, which, unlike solicitation, can be monitored with a record kept, the intrusive act of solicitation is even less defensible. Maintaining a successful practice as an attorney is difficult enough without being forced to practice at a disadvantage by respecting rules others flaunt. There is, and there always will be, a discernable line between "rainmaking" (business development) and "ambulance chasing" (solicitation).

### PUBLICATION OF PRIVATE FACTS

Publication of private facts "is an invasion of privacy when one 'gives publicity to a matter concerning the private life of another if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.'"<sup>7</sup>

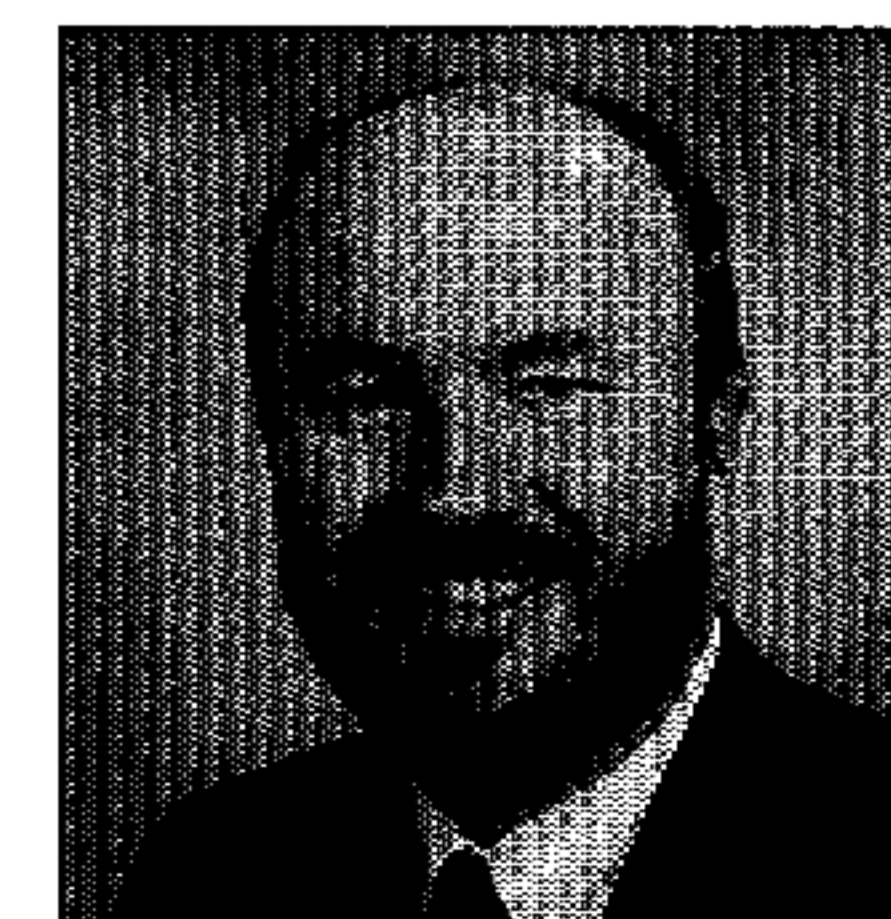
Lawyers "giving publicity" of the kind mentioned might do so in the traditional method (releasing it to the media) or in a more limited manner (using it tactically, if unethically, for advantage in a lawsuit). Both types of publication of private facts run afoul of MRPC 4.4 which states as follows:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Some cases involve the use of information calculated to embarrass a third person,

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often the opposing client. In one such case, an attorney represented a plaintiff who had been paid an agreed amount to settle an alleged breach of a confidentiality agreement. Nevertheless, the attorney continued to demand further sums from the defendant and the contents of the unfiled complaint were reported by local television stations that received the information from an unnamed source, leading to intense media coverage. The judge sanctioned the attorney finding that "it is apparent that this lawsuit was started for the purpose of obtaining a monetary award from the defendant utilizing his position as a public figure and attempting to use the media as an aid in accomplishing this end."<sup>8</sup>

Other examples involve the obtaining of confidential evidence without adequate respect for the legal rights of others. A number of admonitions have been issued for the improper acquisition of confidential records resulting in a privacy violation for the opposing party. In one such case, a plaintiff received an order for protection based on an alleged injury requiring medical attention resulting from a domestic assault. The attorney for the defendant personally served a subpoena *duces tecum* upon the records custodian at the plaintiff's clinic but did not notify either plaintiff or her attorney prior to serving the subpoena. In lieu of appearing at the hearing, the clinic's medical records custodian released the records directly to the respondent. The respondent did not inform the custodian that such a release of information was not necessary and was possibly in violation of complainant's rights. Respondent received an admonition for obtaining and reviewing confidential medical records without adequate notice to the opposing party or counsel and for using those records with a petition for a writ of prohibition in violation of Rule 4.4.

Finally, in January of this year, the Lawyers Professional Responsibility Board issued Opinion 19, addressing the use of technology in communicating confidential information to clients.<sup>9</sup> While this office has not received many complaints in this area, both the Board and the office believe that we should attempt to stay "ahead of the curve" by giving direction in this area before problems arise. This Opinion is directed to issues of confidentiality of information, as outlined in MRPC 1.6. While the focus is on duties to clients, rather than on obligations to third parties, the issue of recognizing and respecting the privacy rights of others remains.

## PROFESSIONAL RESPONSIBILITY

### CONCLUSION

With the recent focus on privacy issues in this state, it is an opportune time to be reminded that the privacy rights of others, including those of opposing counsel, opposing parties, potential clients, clients, witnesses and other third parties should be respected by members of the bar. Before there were recognized privacy torts in Minnesota, our profession recognized an ethical duty to temper zealous advocacy (and attempts to increase business) when such conduct resulted in an invasion of the privacy rights of another. It is a duty that continues to evolve. □

### NOTES

1. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).
2. Lucy Dalglish, "So the right to privacy has come to Minnesota: Now what?," *Minnesota Lawyer*, 8/7/98, p. 2.
3. Marshall H. Tanick, "Lake v. Wal-Mart reflects Supreme Court's new found judicial activism," *Minnesota Lawyer*, 9/18/98, p. 2.
4. 582 N.W.2d 233.
5. *The opinion allows a lawyer to record a threat to engage in criminal conduct; allows a prosecutor or defense attorney to record conversations related to a criminal matter; allows government lawyers to record certain conversations or direct others to do so (i.e., consumer fraud, etc.); and provides that a lawyer may give legal advice about the legality of recording a conversation.*
6. *State*: See *In re Charges of Unprofessional Conduct against 97-29*, 581 N.W.2d 347 (Minn. 1998); *Federal*: See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).
7. 582 N.W.2d 233.
8. See *In re Peterson*, 584 N.W.2d 773 (Minn. 1998).
9. *The text of Opinion No. 19 is as follows:*  
A lawyer may use technological means such as electronic mail (e-mail) and cordless and cellular telephones to communicate confidential client information without violating Rule 1.6, Minnesota Rules of Professional Conduct (MRPC). Such use is subject to the following conditions:
  1. E-mail without encryption may be used to transmit and receive confidential client information;
  2. Digital cordless and cellular telephones may be used by a lawyer to transmit and receive confidential client information when used within a digital service area;
  3. Analog cordless and cellular telephones may be used by a lawyer to transmit and receive confidential client information only if the lawyer obtains client consent after consultation with the client about the confidentiality risks associated with inadvertent interception;
  4. When the lawyer knows, or reasonably should know, that a client or other person is using an insecure means, such as an analog cordless or cellular telephone, to communicate with the lawyer about confidential client information, the lawyer shall consult with the client about the confidentiality risks associated with inadvertent interception and obtain the client's consent. □



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