

Board Adopts an E-Mail and Cell-Phone Use Opinion

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On January 22, 1999, the Lawyers Professional Responsibility Board adopted Opinion No. 19 concerning use of e-mail and cell phones to transmit confidential client information. The opinion was adopted in response to concerns expressed by the bar about confidentiality issues associated with use of e-mail and cell phones.

Opinion No. 19 provides guidance about when client consent is necessary before using e-mail, cell phones or cordless phones to transmit confidential client information.

In addressing the confidentiality concerns, the Lawyers Board determined that e-mail was sufficiently secure without encryption to be used for communicating confidential client information. The Board also concluded that cordless and cellular phones employing digital technology are secure, provided they are being used within a digital service area. On the other hand, the risk of inadvertent interception caused the Board to authorize use of an analog cordless or cell phone only after the client has been made aware of the risk and consented to its use.

The opinion's comment also alerts lawyers to the fact that some digital cell phones automatically switch to analog signal when taken outside of a digital service area. Consequently, the opinion reminds lawyers that disclosure and client consent is also required when a digital phone is being used outside of a digital service area to communicate confidential information. The opinion and its comment are set forth below.

OPINION NO. 19

USING TECHNOLOGY TO COMMUNICATE

CONFIDENTIAL INFORMATION TO CLIENTS

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.

A lawyer may not knowingly reveal a confidence or secret of a client. Rule 1.6(a)(1). A lawyer should exercise care to prevent unintended disclosure. *See* Comment to Rule 1.6. For example, the lawyer should avoid professional discussions in the company of persons to whom the attorney-client privilege does not extend. *Id.* Similarly, a lawyer should take reasonable steps to prevent interception or unintended disclosure of confidential communications. All communication carries with it some such risk, for example by eavesdropping, wiretapping, or theft of mail. The precautions to be taken by a lawyer depend on the circumstances, including the sensitivity of the information, the manner of communication, the apparent risks of interception or unintended disclosure, and the client's wishes.

The purpose of this opinion is to address concerns that certain devices or methods may not be used by lawyers to communicate client confidences or secrets because they do not guarantee security. The committee believes absolute security is not required, and that the use of new technology is subject to the same analysis as the use of more traditional methods of communication.

This opinion reflects the prevalent view of other states and technology experts, that communications by facsimile, e-mail, and digital cordless or cellular phones, like those by mail and conventional corded telephone, generally are considered secure; their interception involves intent, expertise, and violation of federal law.

Some states have required client consent or encryption for the use of e-mail, but the majority of recent state ethics opinions sanction the use of e-mail without such requirements.

The committee finds the reasoning of the latter opinions persuasive. Communications by analog cordless or cellular phones generally are considered insecure; they may be intercepted intentionally or inadvertently with unsophisticated and readily available equipment, such as other similar phones or scanners. This opinion presumes that the digital telephone is being used in a location where digital service is available.

Some digital cell telephones are programmed to convert automatically to analog service when brought into a location where digital service is not available. When this is the case, the precautions for analog cellular telephones apply.

The opinion intentionally omits facsimile machines, which typically transmit data over conventional telephone lines. With facsimile machines, the concerns are less with interception than with unintended dissemination of the communication at its destination, where the communication may be received in a common area of the workplace or home and may be read by persons other than the intended recipient. The director has received client complaints involving such situations and cautions lawyers to take reasonable precautions to prevent unintended dissemination. Similar concerns may be raised by voice-mail and answering machine messages.