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‘Return to Sender’ Won't Cut It: Although privileged, misdirected e-mail on the Internet poses risks

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The explosion of electronic mail on the Internet has hit lawyers, among others, with its fallout.

As with any new technology, e-mail comes with many advantages but also with risks, including potential new ways for lawyers to encounter malpractice liability.

Is e-mail easily subject to interception, eavesdropping and misdirection? Does using e-mail violate the lawyer's duty of confidentiality? Does using e-mail waive the attorney-client privilege or fail to establish the privilege at all?

And does a misdirected e-mail, disclosing client secrets, subject the lawyer to malpractice liability?

Without doubt, electronic mail has become an important medium for attorney-client communications. The ABA's 1997 Law Firm Technology Survey reported that 91 percent of firms with more than 20 lawyers and 44 percent of firms with 20 or fewer lawyers already are using the Internet to communicate with clients.

Along with its increased use, e-mail is undergoing the same kind of scrutiny as an appropriate form of attorney-client communication to which its electronic predecessors--the telephone, the cordless phone, the cellular phone and the fax machine--were subjected.

In each instance, questions were raised about whether the new-fangled contraption was secure enough to transmit confidential or privileged communications between lawyers and their clients.

Over time, each of those mechanisms received, to varying degrees, some form of statutory or common law protection for attorney-client communications. Sometimes, however, the protections were long in coming. It was not until 1967 that the U.S. Supreme Court recognized, in Katz v. United States, a reasonable expectation of privacy in a telephone conversation.

But an early consensus already has emerged regarding electronic mail over the Internet. Bar associations in a number of states, including Arizona, Illinois and South Carolina, have issued opinions that lawyers may send unencrypted e-mail messages to clients without breaching the ethical duty of confidentiality.

In addition to the bar association opinions, Congress and several state legislatures have acted to protect the privileged status of electronic communications.

California, for instance, in 1994 adopted a law providing that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."

In their opinions, several bar ethics committees have concluded that the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls.
They also have concluded that, because the unauthorized interception of an electronic message is illegal under federal law (and some state laws), such interception cannot constitute a waiver.

The opinions also caution, however, that electronic mail is still susceptible to interception, misdirection and attorney error that could give rise to malpractice liability.

Bar Opinions Clear

For lawyers to protect themselves from these potential risks, the opinions suggest that lawyers take these additional cautionary measures:

* Advise the client concerning the risks associated with the use of e-mail and obtain the client's consent to its use.

* Do not use the Internet for communications involving extraordinarily sensitive matters that would be damaging to the client if disclosed to any outside party.

* State on e-mail messages that they are privileged communications. (Many lawyers already include such messages when sending faxes.)

* Consider using encryption when working with clients who are comfortable with it.

In addition to the risk of interception, lawyers face the risk of their own negligent use of e-mail, including the possibility of misdirection.

By its very nature, e-mail often demands that lawyers act quickly, which can be another source of trouble. Consider what happened last year in Arizona:

A confidential FBI memorandum identifying a possible suspect in a fatal train derailment that was intended for the U.S. attorney's office instead was sent by mistake to news organizations throughout the state. The blunder occurred when someone accidentally dialed a fax number programmed to send out news releases.

Although that particular example involved a fax, it could happen even more easily with e-mail, given the speed and ease of transmission. Once the user has clicked “Send,” mistakes in content and in destination cannot be undone.

The FBI, however, is shielded by governmental immunity. Had a law firm made this kind of mistake, its next call undoubtedly would have been to its malpractice insurance carrier.

To avoid malpractice claims for misdirected communications, lawyers must use common sense and care, particularly in addressing e-mails and reviewing the contents of the communication. Both should be carefully reviewed before the "Send" button is pressed.