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ETHICS WARNINGS ON CONFIDENTIALITY IN EMAIL, CYBERSPACE, AND CHANGING FEES

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The shoals among which the estate planning, trust, and probate lawyer must navigate are ever-shifting. It is a dangerous ethical world, and technology makes it even more difficult for lawyers to stay abreast of what we need to do.

DUTY TO PRESERVE CONFIDENTIALITY OF EMAIL (AMERICAN BAR ASSOCIATION FORMAL OPINION 11-459)

Just when we have mastered our typing skills and the art of e-mail correspondence and put away our postage stamps, the ABA tells us that we may not be ethically permitted to correspond by email with our clients on their "work emails." These addresses are actually on servers owned by non-clients, that is our individual clients' employers. ABA Formal Opinion 11-459 now warns that a lawyer must disclose to a client the risks inherent in using third-party email addresses and equipment for attorney-client communications. These duties arise under the Model Rules of Professional Conduct, which are adopted by the Supreme Court of Ohio with some changes, effective February 1, 2007. Specifically, Rule 1.6 governs the confidentiality of information, both that subject to the attorney-client privilege, as well as other client information.

Ohio Rule 1.6(a) provides:

> A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

Rule 1.1 provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

ABA Formal Opinion 11-459 suggests that Rule 1.1 imposes the duty of competent representation on the maintaining of confidences under Rule 1.6. Thus, maintaining confidences includes all "information relating to the representation of a client. . . unless the client gives informed consent. . . ." The Comments 16 and 17 to Rule 1.6 cross-reference to Rule 1.1 and state that the lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons. . . ." Comment 17 provides that "the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

The ABA Opinion is specific in its advice:

> In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

The Opinion extends to all communications, not just those that might involve the employer. The Opinion applies to all e-mail servers that are not controlled by the client, and so would include any server that may be accessed by third-parties, such as libraries, hotels, and borrowed computers. This might even apply to home computers if they are shared with non-clients.

Even more concerning is the suggestion in the ABA Opinion that the lawyer may breach confidentiality by corresponding with clients who, while using non-secure access, use a personal e-mail account but through an employer's or other third-party's computer system. Given the ubiquity of client email correspondence from sources that might not even be clear to the lawyer, the lawyer must address this issue early in the attorney-client relationship.

Individual clients, such as those doing estate planning, are especially vulnerable to breach of confidentiality. Lawyers know clients regularly use their "work emails" for personal communication. The problem for the Bar is that we cannot know how secure are the computer connections of our clients. It behooves us, therefore, to include in our engagement letters a disclosure something like this:

> As a client of our firm you own and control the privilege of confidentiality and the information that prohibits your lawyer and law firm from disclosing your confidences or secrets to anyone without your permission unless specifically provided by law. This applies even to our communications with your other family members and your advisors. You can waive this privilege and secrecy by disclosing the confidences and secrets yourself, or you can give your lawyers permission to make disclosures if you wish. You should inform us if there are any unusual limitations on our communications and correspondence with you such as telephone numbers, mailing or, especially, email addresses. If you use your employer's email system or any other third-party system to communicate with your lawyers, you do not have an expectation of privacy in those email messages, and third parties may have lawful access to the information. Furthermore, your employer may have a policy that does not permit you to use company email for your personal use. Moreover, by using your employer's or another third-party's email system, you may be considered to have waived your confidentiality with your lawyer. While use of your employer's email system and perhaps other third-party systems is your choice and may be convenient, we recommend against it. However, we understand that such email use may be the most convenient method of communication for you, and if you give us your employer's email to use, or if you use any other third-party email system, you will be giving us your permission to use it as well.

The author would appreciate readers' suggestions for improvements to this disclosure provision.

DUTY TO PROTECT CLOUD COMPUTING

Although not yet subject to opinions in Ohio or at the American Bar Association, other states are, one by one, ruling on so-called "cloud computing," and eventually the ABA and Ohio are likely to address it. Cloud computing is the storage of client information on computer servers maintained by a third-party and which use the internet to access the servers. This technology has gained significant interest by and use among lawyers and our clients. Two states, Iowa and Pennsylvania, have now opined that lawyers are permitted to store client information "in the cloud" provided certain conditions are met. Because of the security risks to client confidentiality inherent in cloud computing, these opinions give guidance to the Bar.

In Iowa Opinion 11-01 (September 9, 2011), the Iowa ethics authorities concluded that Comment 17 to its version of Rule 1.6 provides a reasonable approach for lawyers' management of cloud computing. That Comment, as quoted above, requires that lawyers take "reasonable precautions to preserve confidentiality." These precautions may vary from circumstance to circumstance. The Iowa Opinion offers basic analysis on the standard outlined in Comment 17 and suggests that, when using cloud computing, lawyers should assure that they retain unfettered access to the information and that the degree of protection afforded the information is "reasonable." The Opinion suggests questions that lawyers should ask to evaluate the accessibility and protection of the information to be stored. In particular, the Opinion suggests that because of the technical nature of cloud computing, the inquiry necessary to assure accessibility and confidentiality should be done by someone on behalf of the lawyer who has special skill and knowledge to evaluate the security of cloud computing in light of the Rules of Professional Conduct.

In Pennsylvania Opinion 2011-200 (undated),

the Pennsylvania ethics authorities, like Iowa, concluded the lawyers may store client information "in the cloud" provided that the lawyer takes reasonable precautions to ensure that the information is protected against disclosure, loss, and similar risks. The Opinion discusses the benefits and advantages of cloud computing, cites relative opinions from other jurisdictions, and suggests factors that are relevant to the standard of reasonable care. The Opinion also notes that because cloud computing is an internet-based type of outsourcing, it is subject to Model Rules 5.1 and 5.3 governing a lawyer's duty to supervise those who perform work for the lawyer. The Opinion specifically determines that a lawyer must assure that any cloud computing service provider can maintain the confidentiality and the accessibility of the data and assure that the provider's personnel will have only the absolute bare minimum of access to the information necessary to conduct the service. The information "in the cloud" must also be reasonably available to the lawyer and safe from unauthorized access.

DUTY TO DISCLOSE CHANGING FEES (AMERICAN BAR ASSOCIATION FORMAL OPINION 11-458)

Lawyers hate keeping time records, hate billing, and hate most of the administrative burdens that interfere with our love of the law and our affection for our clients. Therefore, billing and timekeeping are special traps for inadvertent ethical breaches. Now, the ABA has given guidance on the manner in which lawyers should communicate with clients about changing the ways fees are calculated, such as changes in "hourly rates." The Opinion focuses on the fundamental fairness of the attorney's engagement agreement with the client. This underscores the importance of having such an agreement, which preferably should be in writing (as is sometimes mandatory under the Ohio Rules).

The ABA Opinion makes the following key points:

1. Change in a fee agreement during the course of a representation is permissible if it is fair and reasonable to the client at the time of the change and if it is adequately communicated to the client. (Ohio Rule of Professional Conduct 1.5.)

2. Increases in the lawyer's hourly rates are permissible if the practice is clearly communicated to the client at the time the representation begins and at the time the increase occurs, if the practice is acceptable to the client, and if the increases are reasonable under all of the circumstances.

3. Any change in the fee arrangement that involves acquisition by the lawyer of an interest in the client's property is a business contract governed by Rule 1.8, which must be analyzed to assure compliance. These circumstances include clear communication to the client, advice to the client that he or she should seek the advice of another lawyer, reasonableness of the transaction, and consent in writing.

Thus, changes in the fees, as well as other details of the representation, should be undertaken only with great care. The initial engagement letter with each client should anticipate the possibility of such changes, particularly if lawyer's hourly rates are increased periodically, and make clear disclosure that such is the lawyer's practice. As is always the case with all engagements with clients, the lawyer must be careful to navigate the requirements of Rule 1.7 governing conflicts of interest. The following is a suggested provision that might be included in a lawyer's engagement letter to address this issue:

> We do not determine the value of our legal services for our clients only by hourly rates or by the time spent on your matters, although rates and time are a major factor that we consider in

calculating reasonable fees and are an accurate measure of the value of our services in many circumstances. Where hourly rates are used is a factor in calculating compensation, the firm adjusts the hourly rates assigned to each lawyer on a periodic basis, ordinarily annually. We charge our fees in minimum time increments [of a quarter-hour]. Upon receiving a fee statement from our firm that displays an increase in hourly rates as determined by the firm, we will expect you to contact us within thirty days if you have any objections or concerns about such changes.

The author would appreciate comments or suggestions for improvement in the language of such a disclosure.

As always, the law of lawyering is complicated, demanding, and, in the computer age, ever more complex.