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ETHICAL ISSUES SURROUNDING ELECTRONIC COMMUNICATION AND DISCOVERY

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I. ELECTRONIC COMMUNICATIONS GENERALLY

Advances in technology have brought new methods of communication and information storage to the practice of law, including e-mail, mobile telephones, facsimile machines, digital document creation and storage, electronic bulletin boards, chatrooms, and listservs.

A lawyer's duties with respect to protecting the confidentiality of client information—whether under the ethics rules or the evidentiary attorney-client privilege—remain the same regardless of the method by which the information is communicated or stored. However, the unique features of electronic communication and storage require that special attention be paid to (1) the specific precautions necessary to protect client information; and (2) the possibility of triggering a duty of confidentiality by unintentionally forming a lawyer-client relationship—or, more likely, a lawyer-“prospective client” relationship.

When a lawyer sends, receives, or stores client information in electronic form, the lawyer's duty to protect that information from disclosure to unauthorized individuals is the same as it is for information communicated or kept in any other form. However, electronic information has features that affect both the means required to protect client information and the manner in which the duty is triggered in the first place.

Those features include:

- A. ***Decreased control over the nature and amount of information received from others***, as well as a decreased ability to identify the sender prior to opening an e-mail. This creates the possibility that by merely opening an e-mail, the lawyer may create a lawyer-“prospective client” relationship with the sender (whose identity might have been previously unknown), triggering a number of professional obligations, including the duty of confidentiality.
- B. ***Greater susceptibility to unauthorized access***. Electronic communications may be more susceptible to interception by unauthorized or unknown persons than are other forms of communication. Creation and storage of client information in electronic form via outside service providers also heighten the risk of unauthorized disclosure.
- C. ***The existence of metadata*** (embedded information about a document, such as when it was created, who has worked on it, and how it has been changed), which creates a greater risk of unknown or inadvertent disclosure. Many electronic documents contain metadata that is usually hidden from users' view and that may include protected information. Its invisibility creates a heightened risk that the information won't be removed before the electronic documents are turned over to others.