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# Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication

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**TECHNOLOGY AND CLIENT  
COMMUNICATIONS: PREPARING LAW  
STUDENTS AND NEW LAWYERS TO MAKE  
CHOICES THAT COMPLY WITH THE  
ETHICAL DUTIES OF CONFIDENTIALITY,  
COMPETENCE, AND COMMUNICATION**

*Kristin J. Hazelwood\**

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### INTRODUCTION

That the use of technology has radically changed the legal profession is beyond dispute.<sup>1</sup> Through technology, lawyers can now represent clients in faraway states and countries, and they can represent even local clients through a “virtual law office.”<sup>2</sup> Gone are the times in which the lawyer’s choices for communicating with clients primarily involve preparing formal business letters to convey advice, holding in-person client meetings in the office, or conducting telephone calls with clients on landlines from the confines of the lawyer’s office. Not only do lawyers have choices about how to communicate with their clients, but they also frequently choose electronic modes of communication.<sup>3</sup>

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<sup>1</sup> ABA COMM’N ON ETHICS 20/20, INTRODUCTION & OVERVIEW 3-4 (2012) [hereinafter INTRODUCTION & OVERVIEW], available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf).

<sup>2</sup> For a definition of a “virtual law office,” see Jordana Hausman, *Who’s Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices*, 26 GEO. J. LEGAL ETHICS 575, 577-78 (2012). According to Hausman, a virtual law office differs from a traditional law firm with an Internet presence in that the virtual law office utilizes an on-line portal maintained by a third party and accessed via the Internet to communicate with the client and store the client’s confidential information. *Id.*; see also Letter from ABA Comm’n on Ethics 20/20 Working Grp. on the Implications of New Techs., to ABA Entities, Courts, Bar Ass’ns (state, local, specialty and int’l), Law Schs., Individuals, and Entities (Sept. 20, 2010) [hereinafter Client Confidentiality Issues Paper], available at [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/work\\_product.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html). The on-line portal is often referred to as “cloud computing,” and often uses technology known as “software as a service.” *Id.*

<sup>3</sup> INTRODUCTION & OVERVIEW, *supra* note 1, at 4. The ABA report described the prevalence of technology as follows:

Though using technology for client communications is typically faster and often more convenient than traditional modes of communication, a lawyer's ethical obligations impact whether or how to use technology.<sup>4</sup> The use of technology impacts three of the lawyer's most fundamental obligations—the lawyer's duties to communicate with the client, to protect the confidentiality of that communication, and to provide competent representation.<sup>5</sup> For those reasons, whether a lawyer's use of technology comports with the lawyer's ethical requirements has been the source of numerous ethics committee opinions over the last twenty years,<sup>6</sup> as well as a series of amendments to the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules").<sup>7</sup> Though it is now universally accepted that lawyers can use technology for client communications, the prevalence of technology does not dictate that its use is always appropriate.

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In the past, lawyers communicated with clients by telephone, in person, by facsimile or by letter. Lawyers typically stored client confidences in paper form, often inside locked file cabinets, behind locked office doors or in offsite storage facilities. Even when confidential client information was maintained electronically, the information was stored on desktop computers that remained within the firm or on servers typically located in the same office. Today, lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (i.e., in the "cloud") that are accessible from anywhere.

*Id.*

<sup>4</sup> A lawyer's use of email for client communications potentially impacts both the lawyer's compliance with ethical requirements and ability to assert that the attorney-client privilege protects the communication. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2013). This Article focuses solely on the implications for the lawyer's compliance with ethical requirements.

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.4, 1.6 (2013).

<sup>6</sup> See *infra* notes 10-12, 14-35, 37-40, 48-78, 84-93, 97-109, 111-19, 130-32 and accompanying text. The ethics committee opinions have analyzed issues such as whether a lawyer can use email to communicate with a client, whether a lawyer can use third-party service providers to store client confidential information, and whether a lawyer who receives misdirected or unintended confidential information from opposing counsel can review the information. Part II discusses ethics committee opinions analyzing the use of mobile telephones and email. Issues relating to the use of third-party service providers to store confidential client information and the lawyer's obligations upon receipt of confidential client information from opposing counsel are beyond the scope of this Article.

<sup>7</sup> See *infra* notes 135-65, 167-72 and accompanying text.

Because the majority of today's law students and new lawyers are predisposed to use technology,<sup>8</sup> law professors and supervising lawyers should raise these ethical issues with their students and the new lawyers under their supervision, respectively. This instruction is crucial because law students' and new lawyers' comfort with technology perhaps makes it more difficult for them to anticipate risks associated with it, which ethics opinions and the Model Rules require.

Part I of this Article analyzes state and ABA ethics opinions that consider the propriety of a lawyer's use of technology for client communications. Part II discusses changes to the Model Rules since 2000 relating to the use of technology by lawyers and its impact on the practice of law. Part III proposes that law professors and lawyers charged with instructing or mentoring law students and new lawyers regarding client communications educate them regarding not only the content of those communications, but also how and when to use technology. Perhaps ironically, the additional instruction regarding how and when to use technology is a necessity because of the frequency and ease with which the current generation of law students uses technology.

#### I. ETHICS OPINIONS ANALYZING THE USE OF TECHNOLOGY FOR CLIENT COMMUNICATIONS

Armed with a set of ethical rules drafted during a period well before the rise of smart phones, tablets, and laptop computers, ethics committees in the 1990s began tackling the issue of whether and how lawyers could use technology to communicate with their clients. First, the ethics committees considered whether lawyers could use mobile telephones for conversations with their clients. In the mid-1990s, the focus shifted from mobile telephones to email as its use became more prevalent with practitioners.

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<sup>8</sup> See PEW RESEARCH CTR., *MILLENNIALS: A PORTRAIT OF GENERATION NEXT 25* (2010), available at <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf> ("Millennials [the generation that includes current law students and new lawyers] outpace older Americans in virtually all types of Internet and cell use.").

*A. Mobile Telephones*

Mobile telephones were the first technology to be subject to scrutiny by ethics committees. Specifically, the ethics committees considered the highly debated topic of whether a lawyer could even use either a cordless or a cellular telephone to talk with a client.<sup>9</sup> Questions emerged regarding the use of mobile telephones for conversations with clients because of the concern that a third party could overhear or intercept the conversation.

Conversations using mobile telephones were believed susceptible to interception because of the technology used in transmitting signals: radio waves.<sup>10</sup> The use of radio waves increased the risk of interception of mobile telephone conversations because even unsophisticated devices like baby monitors use radio waves.<sup>11</sup> Specifically, a third party could potentially overhear or intercept a conversation in one of several different ways: intentionally eavesdropping by use of a scanner, “pirating” by an employee of a cellular provider, or unintentionally hearing the conversation because of a cross in radio bands.<sup>12</sup>

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<sup>9</sup> See generally David Hricik, *Lawyers Worry Too Much about Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 481-85 (1997) (describing confidentiality concerns relating to use of cordless and cellular telephones); Peter R. Jarvis & Bradley F. Tellam, *Competence and Confidentiality in the Context of Cellular Telephone, Cordless Telephone, and E-mail Communications*, 33 WILLAMETTE L. REV. 467, 475-78 (1997) (same).

<sup>10</sup> Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 2001-2 (2001), available at <http://www.dsba.org/pdfs/2001-2.pdf>; Iowa Supreme Court Bd. of Prof’l Ethics & Conduct, Op. 90-44 (1991), available at <http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/4764a33e255e9f02862564b2000f5939?OpenDocument>; N.H. Bar Ass’n Ethics Comm., Op. 1991-92/6 (1992), available at <http://www.nhbar.org/pdfs/FO91-92-6.pdf>; N.C. State Bar, Formal Ethics Op. RPC 215 (1995), available at <http://www.ncbar.com/ethics/ethics.asp?page=26&from=1/1995&to=12/1995>. For a discussion of the security of communications transmitted by radio waves, see generally Fred Jay Meyer, Note, *Don’t Touch that Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986*, 63 N.Y.U. L. REV. 416, 418-25 (1988). According to Meyer, communication systems that rely on radio waves are less secure because “they rely upon signals which are dispersed widely into public areas.” *Id.* at 419. Systems such as land-line telephones and fiber optic transmission lines are more secure because of their closed-circuit nature. *Id.* at 418-19.

<sup>11</sup> Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 2001-2 (2001), available at <http://www.dsba.org/pdfs/2001-2.pdf>.

<sup>12</sup> N.H. Bar Ass’n Ethics Comm., Op. 1991-92/6 (1992), available at <http://www.nhbar.org/pdfs/FO91-92-6.pdf>.

Because the primary concern relating to the use of mobile telephones was an overhearing or intercepting third party, the relevant provision in the Model Rules was Rule 1.6. In the early 1990s, the relevant text of Rule 1.6 provided as follows: “A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”<sup>13</sup>

This duty not to disclose a client’s confidential information implied a duty to communicate in a way that would provide a reasonable expectation of privacy.<sup>14</sup> Discharging this duty required a lawyer to exercise professional judgment in choosing the most appropriate method for the communication.<sup>15</sup>

Because of their concerns about confidentiality, some of the first ethics committees to consider the issue required lawyers to obtain express client consent after full disclosure of the risks before using a mobile telephone for client communications.<sup>16</sup> For example, the Ethics Committee of the New Hampshire Bar Association determined that the lawyer and client in a mobile telephone conversation did not have a reasonable expectation of

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<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (1995). Subsection (b) permitted disclosure only to prevent the client from committing a crime likely to cause imminent death or substantial bodily injury or to allow the lawyer to prepare a defense to an action brought by the client or a criminal charge or claim based upon the lawyer’s conduct involving the client. *Id.*

<sup>14</sup> Ill. State Bar Ass’n Comm. on Prof’l Conduct, Advisory Op. 96-10 (1997), available at <http://www.isba.org/sites/default/files/ethicsopinions/96-10.pdf>; Hricik, *supra* note 9, at 478-79; Jarvis & Tellam, *supra* note 9, at 475-78.

<sup>15</sup> Supreme Court of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 99-2 (1999), available at [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/1999/Op%2099-002.doc](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/1999/Op%2099-002.doc) (stating that nature of communication, client preferences, changes in technology, and developments in law guide lawyer’s exercise of professional judgment regarding selection of method of communication).

<sup>16</sup> *E.g.*, Mass. Bar Ass’n, Ethics Op. 94-5 (1994), available at <http://www.massbar.org/publications/ethics-opinions/1990-1999/1994/opinion-no-94-5> (“In our view, lawyers should not discuss confidential information on a cellular telephone if there is any nontrivial risk that such information could be overheard by a third party, whether that third party be involved in the particular matter or not.”); N.H. Bar Ass’n Ethics Comm., Op. 1991-92/6 (1992), available at <http://www.nhbar.org/pdfs/FO91-92-6.pdf>. *But see* Ariz. State Bar Ass’n, Op. 95-11 (1995), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=463> (“However, the time has not yet come when a lawyer’s mere use of a cellular phone to communicate with the client—without resort to a scrambling device or exculpatory language at the call’s beginning—constitutes an ethical breach.”).

privacy because of the possibility of interception by a third party.<sup>17</sup> As support for its position, the Ethics Committee cited federal court decisions finding no expectation of privacy in cellular telephone conversations for purposes of Fourth Amendment analysis.<sup>18</sup> For those reasons, the Ethics Committee advised that lawyers disclose the risk of mobile telephone conversations with their clients and obtain express consent before proceeding.<sup>19</sup> The Ethics Committee did not limit its admonitions about mobile telephone conversations to instances in which the lawyer uses a mobile telephone.<sup>20</sup> Rather, the Ethics Committee opined that a lawyer who knows or has reason to know that the client is using a mobile telephone to talk with the lawyer should warn the client of the risks associated with its use.<sup>21</sup>

That the third party who might overhear the lawyer's conversation with the client would almost never be someone involved in the legal matter did not alter the analysis.<sup>22</sup> The fact scenario proposed to the Massachusetts Bar Association assumed that the mobile telephone conversations would take place in a sparsely populated area with "almost no risk of interception by parties with an interest in the subject matter of the call."<sup>23</sup> The committee required the lawyer to obtain consent before using a mobile telephone for confidential communications, regardless of whether the eavesdropper was involved in the legal matter.<sup>24</sup>

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<sup>17</sup> N.H. Bar Ass'n Ethics Comm., Op. 1991-92/6 (1992), *available at* <http://www.nhbar.org/pdfs/FO91-92-6.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* A one-time disclosure and consent given at the onset of the representation would not have necessarily satisfied the New Hampshire Ethics Committee. Rather, the Ethics Committee instructed lawyers to consider the sophistication of the client and sensitivity of the communication in determining whether to obtain the client's consent before each use of a mobile telephone. *Id.*

<sup>22</sup> Mass. Bar Ass'n, Ethics Op. 94-5 (1994), *available at* <http://www.massbar.org/publications/ethics-opinions/1990-1999/1994/opinion-no-94-5>; *see also* N.H. Bar Ass'n Ethics Comm., Op. 1991-92/6 (1992) *available at* <http://www.nhbar.org/pdfs/FO91-92-6.pdf> (determining that lawyer must obtain client's consent for mobile telephone conversation even when risks of interception were from third party unrelated to subject matter of conversation).

<sup>23</sup> Mass. Bar Ass'n, Ethics Op. 94-5 (1994), *available at* <http://www.massbar.org/publications/ethics-opinions/1990-1999/1994/opinion-no-94-5>.

<sup>24</sup> *Id.*



Not all ethics committees were so quick to limit a lawyer's use of mobile telephones. For example, the Arizona Committee on the Rules of Professional Conduct analyzed a series of cases considering whether a reasonable expectation of privacy exists in mobile telephone conversations for Fourth Amendment purposes.<sup>25</sup> The Arizona committee recognized the risk of interception of the communication, but it refused to conclude that the "mere use of a cellular phone to communicate with the client – without resort to a scrambling device or exculpatory language at the call's beginning – constitutes an ethical breach."<sup>26</sup>

Other ethics committees adopted a more case-by-case approach to mobile telephones.<sup>27</sup> For example, in a November 14, 1992 formal ethics opinion, the Ethics Committee of the Colorado Bar Association analyzed a lawyer's duty to preserve confidential client communications when using technology.<sup>28</sup> Specifically, the committee considered the "[e]ver-increasing varieties of communications products . . . , such as cordless telephones, cellular telephones, facsimile machines, voice messaging and computer modems."<sup>29</sup> Focusing specifically on cordless and cellular telephone communications, the committee recognized the potential that communications made through technology could be intercepted.<sup>30</sup> Because of the risks of interception and misdirected communications, the committee recognized at least three responsibilities for lawyers: (i) a duty to use reasonable care in the selection of the mode of communications, (ii) a duty to use

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<sup>25</sup> See Ariz. State Bar Ass'n, Op. 95-11 (1995).

<sup>26</sup> *Id.*

<sup>27</sup> See Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 90-7 (1990) (withdrawn); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Op. 90-44 (1991), available at <http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/4764a33e255e9f02862564b2000f5939?OpenDocument> (requiring lawyer to warn client that conversations by mobile telephone are not confidential); N.C. State Bar, Op. RPC 215 (1995) (requiring lawyers to minimize risk of disclosure of mobile telephone conversations by using reasonable care in selecting mode of communication and warning client of risk of interception when lawyer has reason to know of risk).

<sup>28</sup> Colo. Bar Ass'n Ethics Comm., Formal Op. 90 (1992), available at [http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion\\_90\\_2011.pdf](http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_90_2011.pdf).

<sup>29</sup> *Id.* The Ethics Committee recognized that advances in technology would continue to make both the communication and the interception of those communications easier. *Id.*

<sup>30</sup> *Id.*

reasonable care in using the technology, and (iii) a duty to warn the client of the potential for interception of the confidential information when an unsecure method is used.<sup>31</sup>

With respect to the use of the technology, the committee provided several instructive examples of ways that even a properly selected mode of communication can threaten the client's confidential information.<sup>32</sup> According to the committee, a lawyer must use reasonable care to avoid the unintended disclosure of confidential information through facsimile or voice mail messages sent to shared machines and voice mail messages left in the incorrect mailbox.<sup>33</sup> Although a still very new technology at the time of the opinion, the committee emphasized that these same risks of disclosure apply to "communications via computer modem or electronic mail."<sup>34</sup> Finally, the committee imposed a duty on the lawyer to warn the client or other parties to the communication when the lawyer or other parties uses a mode of communication that is unsecure or is "subject to relatively easy interception."<sup>35</sup>

Once advances in technology<sup>36</sup> changed the way in which cordless and cellular telephones transmit signals, more ethics committees began permitting the use, without prior client consent, of some mobile telephones for client conversations.<sup>37</sup> According to some ethics committees, use of a cordless telephone still violated the lawyer's ethical obligations because the phones used radio waves to transmit signals and could be intercepted by something

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Derek D. Wood, *The Emergence of Cellular and Cordless Telephones and the Resulting Effect on the Tension Between Privacy and Wiretapping*, 33 GONZ. L. REV. 377, 385-86 (1997).

<sup>37</sup> See generally Minn. Lawyers Prof'l Responsibility Bd., Op. 19 (1999) ("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."). Interestingly, the Minnesota opinion did not include fax machines within its list of approved devices. The Lawyers Professional Responsibility Board opined that facsimiles are problematic because the communication could be viewed by persons other than the intended recipient. *Id.* The Board said the same concerns applied to voice mail messages, but it did not identify any concern with email. *Id.*

as unsophisticated as a baby monitor.<sup>38</sup> Lawyers, however, could use cellular telephones and cordless telephones that relied on digital technology to transmit signals because of the increased difficulty in interception and criminal penalties for interception.<sup>39</sup> Changes in the federal law imposing criminal penalties for interception of cordless telephone conversations eventually led some ethics committees to put cordless telephone conversations on equal footing with digital cellular conversations.<sup>40</sup>

### B. Email

In the mid-1990s, the focus of ethics committee opinions shifted from mobile telephone conversations to unencrypted<sup>41</sup> email.<sup>42</sup> Although the ethics committees' primary emphasis in analyzing email focused on the same confidentiality concerns

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<sup>38</sup> See *id.* (permitting use of analog cordless or cellular telephone for confidential client conversations only with client's express prior consent after consultation); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2001-2 (2001), available at <http://www.dsba.org/pdfs/2001-2.pdf> (describing split of authority regarding propriety of using mobile telephones to communicate with clients); *supra* notes 11-12 and accompanying text. Prior to 1994, the Electronic Communications Privacy Act did not protect conversations using cordless telephones, but it did protect cellular telephone conversations. Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2001-2 (2001) available at <http://www.dsba.org/pdfs/2001-2.pdf>; see Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege*, 39 HOW. L.J. 437, 448-49 (1996). Congress treated cellular telephones differently than cordless telephones because, although both used radio technologies at that time, cellular telephone conversations were considered more difficult to intercept. In part because of this distinction in the legal consequences for interception and because of perceived differences in the likelihood of interception of radio communications used in cordless telephones, many courts found that cordless telephone conversations were not subject to a reasonable expectation of privacy under Fourth Amendment analysis. See *id.* at 448-54 (analyzing treatment of radio communications under case and statutory law).

<sup>39</sup> Minn. Lawyers Prof'l Responsibility Bd., Op. 19 (1999).

<sup>40</sup> Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2001-2 (2001), available at <http://www.dsba.org/pdfs/2001-2.pdf>.

<sup>41</sup> Email messages can be "encrypted" to ensure that only the intended recipient can access the message. To encrypt a message, the sender uses a computer program to scramble the message, "locks" the message, and provides the "key" to the recipient that can be used to "unlock" the message. See generally Hricik, *supra* note 9, at 493-96 (discussing process, merits, and drawbacks of encryption). Encrypted email messages, therefore, do not raise the same confidentiality concerns as unencrypted ones.

<sup>42</sup> The propriety of using email for client communications was a hot topic for legal commentators in the 1990s. See Hricik, *supra* note 9, at 461.

raised with mobile telephones,<sup>43</sup> email posed additional ethical concerns as well. Specifically, the ability to represent a client without (perhaps even ever) meeting the client in person raised concerns about the lawyer's ability to represent competently and to communicate adequately with the client.<sup>44</sup>

As email use became more prevalent and accepted, ethics committees began focusing on how the lawyer and client were using email.<sup>45</sup> Specifically, ethics committees observed that the lawyer's and client's choices regarding when and how to email could impact its confidentiality. Thus, ethics committees began requiring lawyers to consider the day-to-day use of technology in making choices about its appropriateness.

### 1. Duty to Preserve Confidentiality of Client Information

The ethics committees' consideration of email paralleled their consideration of mobile telephones in many ways. Some of the first ethics committees to consider the propriety of using unencrypted email for client communications were hesitant about its use and implemented stringent requirements.<sup>46</sup> Much like with mobile telephones, as the technology and law developed, however, most ethics committees eventually became more permissive regarding its use.<sup>47</sup>

#### *a. Earliest Opinions Limit Use of Email*

In January 1995, the Ethics Advisory Committee of the South Carolina Bar Association issued the first ethics opinion focusing specifically on the use of email to communicate with clients.<sup>48</sup> A physically disabled lawyer who wanted to represent clients via a virtual law office provided the impetus for the committee to consider the propriety of using email for confidential

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<sup>43</sup> See *infra* notes 47-94 and accompanying text.

<sup>44</sup> See *infra* notes 95-114 and accompanying text.

<sup>45</sup> See *infra* notes 115-33 and accompanying text.

<sup>46</sup> See *infra* notes 48-73 and accompanying text.

<sup>47</sup> See *infra* notes 76-94 and accompanying text.

<sup>48</sup> S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 94-27 (1995), available at <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/507/Ethics-Advisory-Opinion-94-27.aspx>.

client information.<sup>49</sup> Specifically, the lawyer proposed establishing an on-line service through which the lawyer would provide general information about legal matters and then represent individual clients met through the on-line service.<sup>50</sup> The lawyer proposed using electronic media exclusively to communicate with the client.<sup>51</sup> The committee found that the use of a virtual law office raised ethical questions with respect to advertising and solicitation, client conflicts, unauthorized practice of law, and client confidentiality.<sup>52</sup>

Considering what it determined to be an issue of first impression, the committee opined as follows with respect to client confidentiality: “Thus, it is the opinion of the committee that unless certainty can be obtained regarding the confidentiality of communications via electronic media, that representation of a client, or communication with a client, via electronic media, may violate Rule 1.6, absent an express waiver by the client.”<sup>53</sup>

In requiring an express waiver from the client for electronic communications, the committee relied on ethics opinions from Massachusetts, New York City, and New Hampshire analyzing communications via cellular telephones and requiring client consent when the conversation could be overheard.<sup>54</sup> The committee determined that email communication posed the same threat of interception by a service provider.<sup>55</sup>

The South Carolina ethics committee was not alone in its early concerns about the confidentiality of unencrypted email. Specifically, the Iowa Supreme Court Board of Professional Ethics and Conduct determined that a lawyer could communicate via unencrypted email with a client with respect to “sensitive

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Three years later, the South Carolina Bar Ethics Advisory Committee determined that “improvements in technology and changes in the law” made a lawyer’s expectation that electronic correspondence would be confidential reasonable and permitted South Carolina lawyers to use email to communicate with clients. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997), *available at* <http://www.sctbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/561/Ethics-Advisory-Opinion-97-08.aspx>.

material” only with the express written consent of the client.<sup>56</sup> The board broadly defined “sensitive material” to include, at a minimum, “information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”<sup>57</sup> The board suggested that this definition be broadly construed to provide the most protection to client communications.<sup>58</sup> This expansive reading of “sensitive information” therefore suggests that the category of communications for which unencrypted email communication would be inappropriate extends beyond what the ethics rules might define as “confidential.”

Other early state bar ethics committees also expressed concern regarding the security of unencrypted email for confidential client communication. For example, a 1995 opinion from the North Carolina State Bar Ethics Committee warned lawyers about the risk of interception of mobile telephone and email communications.<sup>59</sup> According to the opinion, anyone who has access to the lawyer’s computer network (or presumably the client’s computer network) can intercept an email.<sup>60</sup> The opinion instructed North Carolina lawyers to use reasonable care to select the mode of communication that would best protect client confidential information and to warn the other parties to the communication if the lawyer knows or has reason to know of a threat of its interception.<sup>61</sup>

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<sup>56</sup> Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Op. 97-01 (1997), *available at* <http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/290d06050ed025988625651c0050a51c?OpenDocument>. In Opinion 97-01, the Board amended a prior opinion. *Id.*

<sup>57</sup> Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Op. 96-33 (1997), *available at* <http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/29abd3c68930bc03862564f400137b2b?OpenDocument>.

<sup>58</sup> *Id.* (“Certainly this would be a minimal test. Client’s judgment should be augmented by counsel’s independent judgment. The Board believes the best guideline would favor the most strict standards.”).

<sup>59</sup> N.C. State Bar, Formal Ethics Op. RPC 215 (1995), *available at* <http://www.ncbar.com/ethics/ethics.asp?page=26&from=1/1995&to=12/1995>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

The newness of email technology led more than one ethics committee to require consent for its use.<sup>62</sup> In a 1997 informal opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility cautiously approached the use of unencrypted email for communicating with clients.<sup>63</sup> The committee recognized that the threat of interception of email is similar to the threat for other modes of communicating, but determined that the relative newness and differing opinions regarding the security of electronic communication warranted different treatment.<sup>64</sup> Although the committee rejected encryption for most communications, the committee determined that communicating via email with clients necessitated client consent.<sup>65</sup>

Echoing a similar concern about the developing knowledge base for email, a Missouri informal advisory opinion required Missouri lawyers to inform clients of the nature of the risks of unencrypted electronic communication before using it.<sup>66</sup> A later opinion rejected the notion that a standard consent form would be adequate to satisfy the lawyer's consent requirement.<sup>67</sup> According to the opinion, the appropriateness of unencrypted email depends on the setting in which the client sends and receives email as well as the information being communicated.<sup>68</sup> The opinion also described the relevant risks of the communication as extending beyond the concern that the communication could be intercepted and including shared access to the communication through a home

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<sup>62</sup> Mo. Office of Chief Disciplinary Counsel, Informal Advisory Op. 980137 (1998), available at <http://www.mobar.org/ethics/InformalOpinionsSearch.aspx>; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Op. 97-130 (1997).

<sup>63</sup> See Pa. Bar. Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Op. 97-130 (1997).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ("A lawyer has complied with his or her ethical obligations if the risks and benefits associated with the use of email are explained to the client and the client consents. Lawyer and client together can agree to use e-mail for all, some or none of their communications. They can also agree whether or not to use encryption.")

<sup>66</sup> Mo. Office of Chief Disciplinary Counsel, Informal Advisory Op. 980137 (1998), available at <http://www.mobar.org/ethics/InformalOpinionsSearch.aspx>.

<sup>67</sup> Mo. Office of Chief Disciplinary Counsel, Informal Advisory Op. 990007 (1999), available at <http://www.mobar.org/ethics/InformalOpinionsSearch.aspx>.

<sup>68</sup> *Id.*

or work computer and the perpetual life span of electronic documents.<sup>69</sup>

Finally, even some ethics committees that refused to require lawyers to encrypt all client email recommended that lawyers warn their clients about the risk of interception, primarily because of a concern that clients were unaware of the risk associated with email.<sup>70</sup> For example, the Connecticut Committee on Professional Ethics opined as follows:

[The lawyer's] fundamental responsibilities require, at a minimum, that a lawyer (1) consult with the client to ensure that the client is aware of risks involved in using unencrypted email for confidential communications, and (2) use good judgment and discretion in choosing an appropriate method for communicating confidential client information, and counsel his or her client to do likewise.<sup>71</sup>

Because the Model Rules put the burden on the lawyer to use reasonable efforts to protect the client's confidential information, the lawyer is responsible for making certain that the client does not communicate with the lawyer in a way that jeopardizes the confidential information.<sup>72</sup> The Arizona Bar Association went a step further and suggested that Arizona lawyers state in the subject line or in the beginning of the email the privileged nature of the communication.<sup>73</sup>

*b. Majority Approach Permits Use of Email in Most Circumstances*

Like with mobile telephones, ethics committees became more permissive of the use of unencrypted email for client communications over time and eventually developed a majority trend allowing its use under most circumstances. Specifically, the majority of ethics committees that have considered the issue have

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<sup>69</sup> *Id.*

<sup>70</sup> Alaska Bar Ass'n Ethics Comm., Ethics Op. 98-2 (1998), available at [https://www.alaskabar.org/servlet/content/98\\_2.html](https://www.alaskabar.org/servlet/content/98_2.html); Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999).

<sup>71</sup> Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999).

<sup>72</sup> *Id.*

<sup>73</sup> Ariz. State Bar Ass'n, Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480>.



now determined that communicating via unencrypted email does not pose risks that are new or more significant than the risks posed by other modes of communicating that are well-accepted.<sup>74</sup> In addition, those jurisdictions have emphasized that intercepting electronic communications is illegal.<sup>75</sup> For those reasons, the majority of jurisdictions, including the ABA,<sup>76</sup> have permitted lawyers to communicate via email with clients without encryption or prior client consent, unless unusual circumstances exist.<sup>77</sup>

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<sup>74</sup> See *infra* notes 76-87 and accompanying text.

<sup>75</sup> See *infra* note 85 and accompanying text.

<sup>76</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999) ("A lawyer may transmit information relating to the representation of a client by unencrypted email sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint.")

<sup>77</sup> See, e.g., Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998) ("[A]n attorney is free to communicate using e-mail on any matters with a client that the attorney would otherwise feel free to discuss over the telephone or via fax transmission."); Ariz. State Bar Ass'n, Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480> ("[I]t is not unethical to communicate with a client via e-mail even if the e-mail is not encrypted."); Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999) ("Therefore, in the committee's view a lawyer may, under ordinary circumstances, use unencrypted email for communicating matters relating to representation of a client without violating Rule 1.6 of the Rules of Professional Conduct."); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2001-2 (2001), available at <http://www.dsba.org/pdfs/2001-2.pdf> ("The transmission of confidential information by way of e-mail . . . , absent extraordinary circumstances, does not violate Rule 1.6."); D.C. Bar Legal Ethics Comm., Op. 281 (1998), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion281.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion281.cfm) ("We conclude that the use of unencrypted electronic mail is not, by itself, a violation of Rule 1.6."); Fla. Bar Comm. on Prof'l Ethics, Op. 00-4 (2000), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+00-4?opendocument> ("An attorney may communicate with the client using unencrypted e-mail under most circumstances."); Haw. Office of Disciplinary Counsel, Formal Op. 40 (2001), available at [http://www.odchawaii.com/uploads/FO\\_40\\_-\\_E-MAIL\\_SECURITY.pdf](http://www.odchawaii.com/uploads/FO_40_-_E-MAIL_SECURITY.pdf) ("An attorney may transmit information relating to the representation of a client by encrypted or unencrypted e-mail sent over the Internet without violating HRPC 1.6(a)."); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997), available at <http://www.isba.org/sites/default/files/ethicsopinions/96-10.pdf>; Me. Prof'l Ethics Comm'n, Op. 195 (2008), available at [http://www.maine.gov/tools/whatsnew/index.php?topic=mebar\\_overseers\\_ethics\\_opinions&id=63338&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=63338&v=article) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality."); Mass. Bar Ass'n, Ethics Op. 00-1 (2000), available at <http://www.massbar.org/publications/ethics-opinions/2000-2009/2000/opinion-no-00-1> ("A lawyer's use of unencrypted Internet e-mail to engage in confidential communications with his or her client does not violate Massachusetts Rule of

Ethics committees decided that the use of unencrypted email to communicate with a client did not violate the lawyer's obligations under Rule 1.6 not because the use of email did not pose risks of interception, but because those risks were not materially different from older, more established forms of communication. In a 1999 opinion, the Committee on Professional Ethics for the Connecticut Bar Association described the potential ways in which an email might be intercepted.<sup>78</sup> First, although extremely unlikely, one could intercept a particular email in transit from the sender to the recipient.<sup>79</sup> Because of the way email is transmitted via the Internet,<sup>80</sup> the committee determined that it was highly unlikely that an individual could target a particular email and intercept it.<sup>81</sup> Two other scenarios, however, posed more likely examples of interception. Using a software program, one could monitor any email messages that are sent through a certain computer or computer network.<sup>82</sup> In addition, a system administrator could monitor or access emails sent through a computer or computer network.<sup>83</sup>

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Professional Conduct 1.6(a) in usual circumstances.”); Minn. Lawyers Prof'l Responsibility Bd., Op. 19 (1999) (“E-mail without encryption may be used to transmit and receive confidential client information.”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998), *available at* <http://www.nysba.org/CustomTemplates/Content.aspx?id=5550> (“We therefore conclude that lawyers may in ordinary circumstances utilize unencrypted Internet e-mail to transmit confidential information without breaching their duties of confidentiality under Canon 4 to their clients, as the technology is in use today.”); Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 99-2 (1999) (“[A] lawyer does not violate the duty to preserve confidences and secrets under DR 4-101 of the Ohio Code of Professional Responsibility by communicating with clients through electronic mail without encryption.”); Utah State Bar Ethics Advisory Op. Comm., Op. 00-01 (2000), *available at* <http://www.utahbar.org/ethics-advisory-opinions/eaoc-00-01/> (“A lawyer may, in ordinary circumstances, use unencrypted Internet e-mail to transmit client confidential information without violating the Utah Rules of Professional Conduct.”); Vt. Bar Ass'n Comm. on Prof'l Ethics, Advisory Ethics Op. 97-05 (1997), *available at* <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Lawyer%27s%20Duty/97-05.pdf> (“A lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the Internet, without encryption.”).

<sup>78</sup> Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999).

<sup>79</sup> *Id.*

<sup>80</sup> For a helpful description of how the Internet transmits email, see Hrick, *supra* note 9, at 462-69.

<sup>81</sup> Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Even older, established forms of communication such as landline telephone calls, letters through the postal service, or courier deliveries are subject to interception.<sup>84</sup> For example, the Ethics Committee of the Illinois State Bar Association reasoned that Illinois lawyers could communicate via email<sup>85</sup> with clients without encryption or prior consent by analogizing email to a landline telephone call.<sup>86</sup> The committee reasoned that both forms of communication were susceptible to interception but that federal law prohibited that interception.<sup>87</sup> Because a lawyer undoubtedly has a reasonable expectation of privacy in the landline telephone call, the lawyer also has a reasonable expectation of privacy in the email.<sup>88</sup> In addition, the ABA determined that privacy policies governing the lawyer's email account would limit the threat that a system administrator would monitor email.<sup>89</sup>

Ethics committees almost universally recognize a caveat to the general rule: emails of a highly sensitive nature require heightened security measures.<sup>90</sup> These ethics committees have almost universally rejected the notion that all emails should be treated identically. Rather, emails that contain highly sensitive or

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<sup>84</sup> See Hricik, *supra* note 9, at 479-81, 496.

<sup>85</sup> The Illinois opinion describes the different ways that email can be transmitted from the sender to the recipient: "through a private or local area network (within a single firm or organization), through an electronic mail service (such as America Online, CompuServ or MCI Mail), over the Internet, or through any combination of these methods." Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997). Under the majority trend, emails transmitted through any of these methods are subject to a reasonable expectation of privacy. *Id.*; see also Hricik, *supra* note 9, at 485-506.

<sup>86</sup> Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997). Several other state ethics committees have explicitly adopted the rationale of the Illinois opinion. See, e.g., Ky. Bar Ass'n, Formal Op. E-403 (1998), available at [http://www.kybar.org/documents/ethics\\_opinions/kba\\_e-403.pdf](http://www.kybar.org/documents/ethics_opinions/kba_e-403.pdf); State Bar Ass'n of N.D. Ethics Comm., Ethics Op. 97-09 (1997), available at <http://www.sband.org/userfiles/files/pdfs/ethics/97-09.pdf> (relying on Illinois, South Carolina, and Vermont ethics opinions); Vt. Bar Ass'n Comm. of Prof'l Responsibility, Advisory Ethics Op. 97-05 (1997).

<sup>87</sup> Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997).

<sup>88</sup> *Id.*

<sup>89</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

<sup>90</sup> See, e.g., *id.* ("The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption. These situations would, however, be of the nature that ordinary telephones and other normal means of communication would also be deemed inadequate.").

confidential matters require different treatment. Some ethics committees have opined that lawyers in that state should obtain express client consent before emailing regarding highly sensitive or confidential matters.<sup>91</sup> The prevailing wisdom among other ethics committees is that enhanced security measures, like encryption, may be necessary for communications that involve “extraordinarily sensitive matters.”<sup>92</sup>

Though most ethics committees have not required prior client consent or encryption in order for a lawyer to use email to communicate with clients, those ethics committees have emphasized that lawyers have an obligation to follow the client’s instructions with respect to the method of communication.<sup>93</sup> Therefore, regardless of whether that jurisdiction permits the lawyer to use email for client communications, the client’s instructions or preferences for some other form of communication prevail. The Maine Professional Ethics Commission offered the

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<sup>91</sup> Conn. Bar Ass’n Comm. on Prof’l Ethics, Op. 99-52 (1999); Mass. Bar Ass’n, Ethics Op. 00-1 (2000).

<sup>92</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-413 (1999); Alaska Bar Ass’n Ethics Comm., Op. 98-2 (1998); Mass. Bar Ass’n, Op. 00-1 (2000); Me. Prof’l Ethics Comm’n, Op. 195 (2008); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 709 (1998); State Bar Ass’n of N.D. Ethics Comm., Ethics Op. 97-09 (1997), available at <http://www.sband.org/userfiles/files/pdfs/ethics/97-09.pdf>; Utah State Bar Ethics Advisory Op. Comm., Op. 00-01 (2000); Vt. Bar Ass’n Comm. on Prof’l Responsibility, Advisory Ethics Op. 97-05 (1997). The Arizona Bar Association recommended that lawyers encrypt communications that contain “highly sensitive information.” Ariz. State Bar Ass’n, Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480>. Although the North Dakota opinion carved out an exception for “extraordinarily sensitive” communications like the Illinois opinion did, the scope of the question that the committee considered was limited to just “routine matters.” State Bar Ass’n of N.D. Ethics Comm., Ethics Op. 97-09 (1997), available at <http://www.sband.org/userfiles/files/pdfs/ethics/97-09.pdf> (“Is Rule 1.6 . . . violated by a lawyer who communicates routine matters with clients, and/or other lawyers jointly representing clients . . . ?”). The opinion does not make clear whether “routine matters” includes confidential client information that does not meet the threshold for “extraordinarily sensitive.” See *id.* Likewise, the South Carolina Bar Ethics Advisory Committee opined that South Carolina lawyers could communicate with clients via email, but it observed that “A lawyer should discuss with a client such options as encryption in order to safeguard against even inadvertent disclosure of sensitive or privileged information when using e-mail.” S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997), available at <http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/561/Ethics-Advisory-Opinion-97-08.aspx>.

<sup>93</sup> Mass. Bar Ass’n, Op. 00-1 (2000); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 709 (1998); Utah Ethics Advisory Op. Comm., Op. 00-01 (2000).

following general guidance: “[A]ttorneys should discuss with clients their preferred method(s) of communication and follow the client’s wishes, should consider the degree of confidentiality of particular information in determining appropriate means to send it, and should take reasonable precautions to make sure that the address is correct and properly targeted.”<sup>94</sup>

Therefore, by the early 2000s, most jurisdictions permitted lawyers to use unencrypted email for client communications, so long as the communication was not regarding an extraordinarily sensitive matter or contrary to client instructions.

## 2. Duties to Provide Competent Representation and to Communicate with the Client

In analyzing a lawyer’s proposed use of technology to communicate with a client, ethics committees have also stressed the role of the lawyer’s duty of competence and duty to communicate with the client. Rule 1.1 requires that a lawyer “provide competent representation.”<sup>95</sup> It defines “competent representation” as follows: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>96</sup> Rule 1.4 requires the lawyer to keep the client “reasonably informed” about the status of the matter, promptly respond to the client’s inquiries, and explain matters to the client in sufficient detail so that the client can make informed decisions about the representation.<sup>97</sup>

In analyzing a lawyer’s duty of competence, ethics committees have emphasized that the standards that govern a lawyer’s conduct are constant regardless of the method that the lawyer uses to communicate with the client.<sup>98</sup> For example, the

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<sup>94</sup> Me. Prof’l Ethics Comm’n, Op. 195 (2008).

<sup>95</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html).

<sup>96</sup> *Id.*

<sup>97</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4 (2013), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rule\\_s\\_of\\_professional\\_conduct/rule\\_1\\_4\\_communications.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rule_s_of_professional_conduct/rule_1_4_communications.html).

<sup>98</sup> Standing Comm. on Legal Ethics of the Va. State Bar, Op. 1791 (2003), *available at* <http://www.vacle.org/opinions/1791.htm>; *see also* N.C. State Bar, Formal Ethics Op. 10 (2006) (“While the Internet is a tool of convenience and appears to respond to the

Virginia State Bar Standing Committee on Legal Ethics pointed out that the descriptions of the obligations in Rule 1.1 all pertain to the “content” of the representation and do not prescribe a method for delivering that content.<sup>99</sup>

Ethics committees have reasoned similarly with respect to the lawyer’s duty to communicate with the client under Rule 1.4. Like it stated about the lawyer’s duties under Rule 1.1, the Virginia ethics committee explained that Rule 1.4 focuses on the content of the lawyer’s communications with the client rather than the method of delivery.<sup>100</sup> So long as the lawyer communicates the necessary information to the client, the lawyer complies with Rule 1.4 regardless of whether the lawyer meets with the client in-person or uses technology to convey the information.

Using technology, however, can make compliance with the ethical obligations of Rule 1.1 and 1.4 more challenging. For example, with respect to using technology to communicate with clients, the lawyer’s duties to keep client information confidential and to act competently are necessarily intermingled. According to the authorities, a lawyer who does not analyze and minimize the risks associated with using technology to communicate with clients potentially violates the lawyer’s duty of competence.<sup>101</sup> For instance, in its 2011 opinion describing a lawyer’s duty to warn a client about using technology to communicate when the factual context posed an increased risk of access by a third party, the ABA ethics committee relied on both Rule 1.1 and Rule 1.6.<sup>102</sup>

Even beyond the concern about whether the lawyer is giving competent advice to the client with respect to the confidentiality of

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consumer’s need for fast solutions, the cyber lawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law office setting.”).

<sup>99</sup> Standing Comm. on Legal Ethics of the Va. State Bar, Op. 1791 (2003) (“Whether that procedure involves the provision of competent legal services depends on the content, not the method of communication; what does determine competency in this situation is whether the attorney reviews the proper materials and law, imparts to the client all necessary information, receives necessary direction from the client as to the client’s objectives, and provides appropriate legal advice as a result.”).

<sup>100</sup> *Id.*

<sup>101</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-459 (2011).

<sup>102</sup> *Id.*

communication via technology,<sup>103</sup> the lawyer's use of technology can also raise questions about the substance of the representation. Specifically, through using technology, a lawyer can represent a client without ever meeting with the client in-person.<sup>104</sup> Representing a client without in-person contact poses several risks, including that the lawyer lacks a complete understanding of the underlying facts or that the client does not understand the lawyer's advice.

Only communication that is meaningful and capable of being understood by the client satisfies the lawyer's ethical duty to communicate with the client. In addition to arising in the context of virtual law offices, an emphasis on the need for the communication to be meaningful has arisen in the context of lawyers who use a different language to communicate than their clients.<sup>105</sup> For example, according to the California State Bar Standing Committee on Professional Responsibility and Conduct, if the lawyer cannot engage in meaningful communication with

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<sup>103</sup> The use of technology poses other issues relating to the lawyer's provision of competent representation. For example, one ethics committee has pointed out that a lawyer cannot rely on an on-line discussion of a legal issue as a substitute for conducting the necessary legal research. See Ill. State Bar Ass'n Comm'n on Prof'l Conduct, Advisory Op. 12-15 (2012), available at <http://www.isba.org/sites/default/files/ethicsopinions/12-15.pdf>.

<sup>104</sup> See Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 99-9 (1999), available at [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/1999/Op%2099-009.doc](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/1999/Op%2099-009.doc) (considering whether Ohio ethical rules permit lawyer to conduct "on-line representation of clients through email questions and answers"). Ethics committees have considered other instances of representation without in-person contact between the lawyer and the client that do not involve technology. See, e.g., State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Formal Op. RI-349 (2010), available at [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ri-349.cfm?CFID=58744146&CFTOKEN=fc8865fad05127c6-5F49C037-1A4B-3375-E41BF353F0566041](http://www.michbar.org/opinions/ethics/numbered_opinions/ri-349.cfm?CFID=58744146&CFTOKEN=fc8865fad05127c6-5F49C037-1A4B-3375-E41BF353F0566041) (use of non-lawyer assistants); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 05-16 (2005), available at <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/708/Ethics-Advisory-Opinion-05-16.aspx> (real estate closings "by mail"). With respect to conducting real estate closings by mail, the South Carolina ethics committee opined that the lawyer's ethical obligations do not depend on whether the closing is conducted in person or by mail. Rather, in either instance, the lawyer must be accessible to the client "by telephone, facsimile, or electronic transmission." *Id.*

<sup>105</sup> See Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1984-77 (1984), available at [http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=hQaC\\_moHrkc%3d&tabid=841](http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=hQaC_moHrkc%3d&tabid=841) (considering ethical obligations of lawyer who speaks a different language than client).

the client in the lawyer's language, "the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given . . . ." <sup>106</sup> Those steps might include hiring an interpreter or associating a bilingual lawyer. <sup>107</sup>

The lack of in-person communication may make it difficult for the lawyer to determine whether the communication with the client satisfies this standard of "meaningful." In an in-person meeting with the lawyer, the client's non-verbal and verbal cues will help the lawyer determine whether the client understands the information being communicated. <sup>108</sup> In the context of electronic communications like email, however, the lawyer cannot easily gauge the client's understanding and, perhaps even more disconcerting, whether the client is in fact the person with whom the lawyer is communicating. <sup>109</sup> Other technologies, such as video conferencing, perhaps alleviate some of these concerns because they allow the lawyer to see the non-verbal and to hear the verbal cues from the client.

These same concerns arise for clients who might be less familiar with or have less access to technology than the lawyer. Even with the prevalence of technology in today's society, the lawyer cannot assume that the client has access to the technology and the necessary skill set to use it. <sup>110</sup> If the client cannot or does not have access to the technology, no "communication" occurs. Furthermore, even if the communication is accessed, the lawyer has no guarantee that the person accessing the communication is in fact the client. <sup>111</sup>

Because ethics committees have not subjected electronic communications to a different standard than other types of communications, the requirements are neither more nor less stringent for electronic communications than a land-line telephone call or a traditional letter. Thus, the electronic communication, just like the telephone call or letter, must be the product of competent representation and be meaningful communication.

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Draft Formal Op. 2010-0003 (2010).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Hricik, *supra* note 9, at 470.



### 3. Duty to Avoid Using Email in a Way that Compromises Its Confidentiality

Other ethics opinions, notably the most recent ones, identify an additional class of cases in which communication via unencrypted email is problematic: factual contexts involving a heightened risk of interception.

Under certain circumstances, a lawyer's work habits can expose client communications to a heightened risk of interception.<sup>112</sup> For example, in a 2010 opinion, the Standing Committee on Professional Responsibility and Conduct of the California State Bar considered a fact pattern that represents a fairly typical practice model for firm associates: use of a firm laptop to work on client matters at home or in public places.<sup>113</sup> The committee enumerated a list of factors that a lawyer should consider in using any technological device: security risks posed by the particular type of technology, including the availability of reasonable precautions; legal consequences of interfering with the communication; the sensitivity of the particular information; the effect on the client of disclosure of the information; the "urgency of the situation"; and the client's instructions and circumstances.<sup>114</sup> With respect to the lawyer's use of the laptop, the committee opined that the lawyer potentially violates the duties of confidentiality and competence by using public wireless Internet access absent encryption and a personal firewall.<sup>115</sup>

To use technology ethically, a lawyer must also consider how the client uses technology and warn the client of associated risks. In a 2011 Formal Ethics Opinion, the ABA Committee on Ethics and Professional Responsibility recognized that the client's manner of using technology could threaten the security of the

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<sup>112</sup> Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3d&tabid=836>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* ("Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so.").

communication.<sup>116</sup> For example, a client's email correspondence with a lawyer may be accessible by third parties if the client is using the employer's email account, computer, smartphone, or device to email with the lawyer and the employer's policies provide that the employer has a right of access to the account or device.<sup>117</sup> A lawyer or perhaps even a third party who subpoenas the employer's email records could also access the communications.<sup>118</sup> Similarly, other members of the client's household may be able to access the client's communications with the lawyer if the client has a shared email account.<sup>119</sup> According to the ABA committee, if a lawyer has reason to know that the client may use email to communicate in one of these ways, the lawyer has an ethical obligation to warn the client of the risk that a third party will read the communication and to refrain from emailing the client in a way that poses a risk of access by a third party.<sup>120</sup>

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<sup>116</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/11\\_459\\_nm\\_formal\\_opinion.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/11_459_nm_formal_opinion.pdf).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* In *Scott v. Beth Israel Medical Center Inc.*, the court described the effect of the employer's ownership of and right to access email communications as follows: "[T]he effect of an employer email policy, such as that of BI, is to have the employer looking over your shoulder each time you send an email." *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 440 (Sup. Ct. 2007).

<sup>119</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011); see also Del. State Bar Ass'n Comm. on Prof'l. Ethics, Op. 2001-2 (2001) ("Inevitably, circumstances may arise where there is a genuine risk of unauthorized access. For example, a lawyer representing one spouse in a matrimonial proceeding might need to refrain from communicating with the client by way of email if the other spouse shares access to a computer at their shared residence."); Me. Prof'l Ethics Comm'n, Op. 195 (2008) ("When exercising professional judgment in choosing a particular form of communication, lawyers should consider both the content of the communication as well as the security of the email address to which it is being sent. For example, an attorney representing a client in a divorce would generally not send sensitive advice in a letter to a client's home address if the couple had not yet separated. Similarly, lawyers should be sensitive to the fact that others may have access to a client's email address, especially at home. Likewise, some places of business routinely monitor their employees' email and often have access to it."). In a 1998 ethics opinion, the D.C. Bar Association similarly warned lawyers about the risks to confidentiality posed by the client's manner of using technology. Although it used a facsimile delivered to the shared mail room of a client in a dispute with the employer as an example, its emphasis on the particular factual context mirrors that of the ABA. D.C. Bar Legal Ethics Comm., Op. 281 (1998), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion281.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion281.cfm).

<sup>120</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).

Not only do lawyers who communicate with a client when the client is using an employer's email account or device risk an ethical violation, they also risk having to produce the communication in litigation because some courts have found that the attorney-client privilege does not attach or is waived in these circumstances.<sup>121</sup> For example, in *Scott v. Beth Israel Medical Center Inc.*, the court determined that the attorney-client privilege did not apply to email correspondence between a lawyer and client when the client used the employer's email account to communicate with the lawyer and the employer's handbook provided that the employer owned and had a right to access any communications sent through the account or the employer's systems.<sup>122</sup> Similarly, in *Aventa Learning, Inc. v. K12, Inc.*, the United States District Court for the Western District of Washington ruled that a client did not have a reasonable expectation of confidentiality when the client used an employer-issued laptop to create or send communications to the lawyer, even though the client used a web-based email program for the communication.<sup>123</sup> The client did not have a reasonable expectation of confidentiality in the communications because the employer retained the right to access the computer in the employee handbook and the employer could access any communication that was sent through its server.<sup>124</sup> The court found that the client had waived any privilege that might have previously attached to communications between the lawyer

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<sup>121</sup> See, e.g., Michael Z. Green, *Against Employer Dumpster-Diving for Email*, 64 S.C. L. REV. 323, 351-55 (2012); Louise L. Hill, *Personal Use of Workplace Computers: A Threat to Otherwise Privileged Communications*, 15 J. INTERNET L. 20, 20 (2012); Kara R. Williams, Note, *Protecting What You Thought Was Yours: Expanding Employee Privacy to Protect the Attorney-Client Privilege from Employer Computer Monitoring*, 69 OHIO ST. L.J. 347, 365-67 (2008).

<sup>122</sup> 847 N.Y.S.2d at 439-44 (2007). The court described the effect of the employer's ownership of and right to access email communications as follows: "[T]he effect of an employer e-mail policy, such as that of BI, is to have the employer looking over your shoulder each time you send an e-mail." *Id.* at 440. *But see* *Curto v. Med. World Commc'ns, Inc.*, No. 03CV6327, 2006 WL 1318387, at \*8 (E.D.N.Y. May 15, 2006) (finding that employee who used employer-issued laptop to access a web-based email account in her home did not waive any applicable attorney-client or work product privilege that might otherwise apply).

<sup>123</sup> 830 F. Supp. 2d 1083, 1108, 1110 (W.D. Wash. 2011).

<sup>124</sup> *Id.*

and client that the client later saved on the employer-issued laptop.<sup>125</sup>

Personal, password-protected, web-based emails that an employee sends or accesses via the employer's computer fare better in some jurisdictions. For example, in *Stengart v. Loving Care Agency, Inc.*, the New Jersey Supreme Court determined that an employee had a reasonable expectation of privacy in personal, password-protected email that she sent through her web-based account when she did not save the password on the employer's computer and the employer's policy was ambiguous regarding the employer's rights to web-based emails.<sup>126</sup> The *Stengart* court suggested that even a policy in an unambiguous company handbook that "banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's lawyer-client communications" might be unenforceable.<sup>127</sup>

At least one commentator has suggested that this concern about third party access to an email account might extend beyond the employer-employee or domestic dispute contexts.<sup>128</sup> Specifically, when the ABA and the majority of state ethics committees determined that lawyers could use unencrypted email for client communications in the 1990s, they assumed that the service provider would not retain a copy of the email for an extended period of time and that the agreement between the service provider and the customer would protect, rather than limit, the email's confidentiality.<sup>129</sup> Today's more lengthy and complex privacy agreements may not provide the protections that the ABA and other state ethics committees assumed existed or that did exist at that time.<sup>130</sup>

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<sup>125</sup> *Id.* at 1109.

<sup>126</sup> 990 A.2d 650, 663-65 (N.J. 2010).

<sup>127</sup> *Id.* at 665.

<sup>128</sup> Rebecca Bolin, *Risky Mail: Concerns in Confidential Attorney-Client Email*, 81 U. CIN. L. REV. 601, 632-48 (2012).

<sup>129</sup> *Id.* at 640-48.

<sup>130</sup> *Id.* at 641.

Other concerns relating to the use of email to communicate with clients relate to the delivery of the communication.<sup>131</sup> For example, much like the facsimile message that can be picked up by anyone with access to the facsimile machine, so too may an email be read by anyone who sees it on the computer screen.<sup>132</sup> Email can also be misdirected and sent to an unknown third party or perhaps even an opposing litigant.<sup>133</sup> Finally, a third party could respond to an email from the lawyer purporting to be the client and the lawyer would be none the wiser.<sup>134</sup>

Thus, the lawyer has an affirmative duty to both use technology in a way that does not compromise confidentiality, and to monitor the client's use of technology to ensure communication confidentiality.

## II. CHANGES TO THE MODEL RULES TO REFLECT THE IMPACT OF TECHNOLOGY ON THE PRACTICE OF LAW

Because of its effect on the way lawyers practice, the use of technology by lawyers has led to two efforts to amend the Model Rules. Specifically, in both 1997 and 2009, the ABA formed commissions to study and propose revisions to the Model Rules to resolve concerns brought about by the use of technology. Both efforts ended in changes to the Model Rules and therefore altered the ethical landscape for practicing lawyers.

### *A. Ethics 2000*

In 1997, the ABA formed the Ethics 2000 Commission to conduct a wholesale review of the Model Rules for the first time since 1983.<sup>135</sup> One of the issues providing the backdrop against which the Ethics 2000 Commission considered amendments to the rules included "the impact of technology and globalization."<sup>136</sup> The

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<sup>131</sup> As stated in note 7, other ethics opinions and provisions of the Model Rules analyze the effect of the misdirected communication on the lawyer's responsibilities. These opinions and provisions of the Model Rules are beyond the scope of this Article.

<sup>132</sup> Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 99-52 (1999).

<sup>133</sup> Me. Prof'l Ethics Comm'n, Op. 195 (2008).

<sup>134</sup> See *supra* note 109 and accompanying text.

<sup>135</sup> Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002).

<sup>136</sup> *Id.* at 442.

Ethics 2000 Commission's amendments, however, included no changes to the black letter law of the Model Rules relating to a lawyer's use of technology to communicate with the client but rather changes to the comments for Rules 1.4 and 1.6.

With respect to Rule 1.4, the Ethics 2000 Commission's acknowledgment of the impact of technology on the lawyer's duty to communicate with the client came in the form of an admonition to lawyers to promptly return or acknowledge the telephone calls of their clients.<sup>137</sup> Specifically, the Ethics 2000 Commission recommended, and the House of Delegates approved, the following addition to language in Comment 4 that required a lawyer to respond promptly to client inquiries: "Client telephone calls should be promptly returned or acknowledged."<sup>138</sup> According to the Reporter's Explanation of Changes, and perhaps as a sign of the prevalent use of the telephone for lawyer/client communications, the Ethics 2000 Commission "thought that emphasis should be given to promptly returning or at least acknowledging receipt of phones calls."<sup>139</sup>

The Ethics 2000 Commission proposed more substantial changes to Rule 1.6. Specifically, the approved changes to Rule 1.6 included two new comments relating to the lawyer's duty to protect the client's confidential information. First, the Ethics 2000 Commission added Comment 15, explaining that the lawyer has an affirmative duty to act competently to protect the client's confidential information against inadvertent or unauthorized disclosure by the lawyer or those working with the lawyer.<sup>140</sup>

Second, the Ethics 2000 Commission added Comment 16, which gives the lawyer guidance in discharging this duty. This guidance reflects the tenor of the then recent ethics committee opinions analyzing email communications. Specifically, much like

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<sup>137</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4, cmt. 4 (2002). According to the Reporter's Explanation of Changes, "the Commission thought that emphasis should be given to promptly returning or at least acknowledging receipt of phone calls." ABA Ethics 2000 Comm'n, Reporter's Explanation of Changes: Model Rule 1.4 (2000) [hereinafter Reporter's Explanation of Changes: Model Rule 1.4], available at [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_mission/e2k\\_rule14rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_mission/e2k_rule14rem.html).

<sup>138</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4, cmt. 4 (2002).

<sup>139</sup> Reporter's Explanation of Changes: Model Rule 1.4, *supra* note 137.

<sup>140</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (2002).

the state and ABA ethics opinions, Comment 16 cautions the lawyer to consider the sensitivity of the information and legal consequence to those who might intercept the communication in determining the reasonableness of the lawyer's expectation of privacy.<sup>141</sup> It also warns the lawyer to consider the special circumstances surrounding the communication and instructions to the client in deciding whether additional security measures might be necessary.<sup>142</sup> According to the Reporter's Explanation of Changes, the Ethics 2000 Commission recognized the backdrop of the ethics committee opinions analyzing the use of unencrypted email to communicate with clients, but did not limit its guidance to email.

### *B. Ethics 20/20*

Seven years later, at the end of its 2009 annual meeting, the ABA announced the formation of the ABA Commission on Ethics 20/20 ("Ethics 20/20 Commission").<sup>143</sup> The stated purpose of the Ethics 20/20 Commission was to consider the impact of technology and globalization on the practice of law.<sup>144</sup> Carolyn B. Lamm, the president of the ABA at that time, explained, "Technologies such as email, the Internet and smart phones are transforming the way we practice law and our relationship with clients, just as they have compressed our world and expanded international business opportunities for our clients."<sup>145</sup>

In particular, the Ethics 20/20 Commission identified three categories for its work: the regulation of lawyers who practice in multiple states and countries, "advances in technology that enhance virtual cross-border access," and "other challenges presented by changing technology, including 'data security and confidentiality.'"<sup>146</sup> The Ethics 20/20 Commission further explained that the third category included the following subtopics:

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<sup>141</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2002).

<sup>142</sup> *Id.*

<sup>143</sup> News Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), *available at* [http://apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 25 LAW. MAN. PROF'L CONDUCT 694 (Dec. 9, 2009).

“access to justice, competence, data security and confidentiality; and jurisdictional issues in lawyer discipline.”<sup>147</sup> In its “Issues Paper” soliciting comments, the Ethics 20/20 Commission’s working group identified cloud computing and portable electronic devices as posing confidentiality issues.<sup>148</sup> With respect to the use of portable electronic devices, the proposed areas of focus included protection of data stored on a portable electronic device in case it is lost or stolen and protection of information transmitted via the device.<sup>149</sup>

The Ethics 20/20 Commission proposed amendments to Rules 1.1, 1.4, and 1.6 at its May meeting.<sup>150</sup> On August 6, 2012, the House of Delegates considered and approved the Ethics 20/20 Commission’s proposals relating to technology and confidentiality.<sup>151</sup>

As discussed above, ethics committees analyzing the propriety of lawyers using technology to communicate with their clients had consistently stated that Rule 1.1 implicitly required the lawyer to analyze and minimize the risks associated with using technology to communicate with a client.<sup>152</sup> According to the Ethics 20/20 Commission, Rule 1.1’s requirement that lawyers “keep abreast of changes in the law” already implicitly required that lawyers be knowledgeable about changes in technology and

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<sup>147</sup> *Id.*

<sup>148</sup> Client Confidentiality Issues Paper, *supra* note 2; *see also* 26 LAW. MAN. PROF’L CONDUCT 586 (Sept. 29, 2010).

<sup>149</sup> Client Confidentiality Issues Paper, *supra* note 2.

<sup>150</sup> The Ethics 20/20 Commission’s proposed revisions to the Model Rules underwent minor changes throughout the comment period. For example, the earliest proposed revisions did not include any changes to Rule 1.4, and the amendment to Rule 1.1 did not limit the technology about which the lawyer should stay updated to “relevant” technology. ABA COMM’N ON ETHICS 20/20, INITIAL DRAFT PROPOSALS – TECH. AND CONFIDENTIALITY (May 2, 2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/20110502\\_technology.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_technology.authcheckdam.pdf).

<sup>151</sup> The House of Delegates also considered the Ethics 20/20 Commission’s proposed amendments to the Model Rules relating to technology and client development, lawyer mobility, and outsourcing. *See* INTRODUCTION & OVERVIEW, *supra* note 1. The Ethics 20/20 Commission proposed, and the House of Delegates approved, a second set of amendments on February 11, 2013. Those amendments related to foreign-licensed lawyers and to choice of law provisions in lawyer/client agreements. 29 LAW. MAN. PROF’L CONDUCT 101 (Feb. 13, 2013).

<sup>152</sup> *See supra* notes 14-15 and accompanying text.



their impact on client confidentiality.<sup>153</sup> It decided that this obligation needed to be explicit:<sup>154</sup> “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>155</sup>

Interestingly, the amendment implies that a lawyer who does not use technology when technology would benefit the client does not provide competent representation.<sup>156</sup> Indeed, in its Report to the House of Delegates, the Ethics 20/20 Commission observed that competent representation requires that a lawyer be able to use basic technology to send email or create an electronic document.<sup>157</sup> By including the duty to keep abreast of the benefits of technology, the Commission suggests that failing to use technology could, in some situations, violate the lawyer’s ethical obligations. A situation in which such a violation could arise might involve the lawyer’s duty to communicate with the client and keep the client reasonably informed under Rule 1.4. Under some situations, the lawyer’s duties under Rule 1.1 to know of the benefits of technology and Rule 1.4 to communicate promptly might require the lawyer to use the most expedient mode of communication. Perhaps the lawyer who prefers to communicate by letter, telephone, or in person might find that the amended

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<sup>153</sup> ABA COMM’N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES 3 (Aug. 6, 2012) [hereinafter ETHICS 20/20 REPORT], available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf).

<sup>154</sup> INTRODUCTION & OVERVIEW, *supra* note 1, at 8.

<sup>155</sup> ETHICS 20/20 REPORT, *supra* note 153, at 3.

<sup>156</sup> The focus of this Article is on the lawyer’s use of technology and how this new duty under Rule 1.1 impacts the use of technology for client communications. This new duty, however, could have much broader implications, including the lawyer’s knowledge regarding how technology impacts the client’s business. See Jon M. Garon, *Technology Requires Reboot of Professionalism and Ethics for Practitioners*, 16 J. INTERNET L. 3, 4-5 (2012) (“The duty is not to become technologically savvy so much as to understand the impact technologies will have on a client’s activities and the activities of the law firm.”).

<sup>157</sup> ETHICS 20/20 REPORT, *supra* note 153, at 3 (“For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.”).

Model Rules require the use of technology in order to communicate “promptly.”<sup>158</sup>

The approved amendment to Rule 1.4 reflects the reality of the different ways that lawyers communicate with their clients. As discussed above, as part of Ethics 2000, the Comments to Rule 1.4 were amended to explicitly state that lawyers should promptly return or acknowledge client telephone calls.<sup>159</sup> In recognition that a lawyer’s mode of communication with the client is one of constant change, the Ethics 20/20 Commission amended the text to remove the specific reference to telephone calls. Rather, the amended text now reads, “A lawyer should promptly respond to or acknowledge client communications.”<sup>160</sup>

Just like in 2002, the most significant changes were to Rule 1.6. This time, however, the Ethics 20/20 Commission recommended, and the House of Delegates adopted, a change to the black letter law.<sup>161</sup> Specifically, the amendment added a new subsection (c), which provides as follows: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>162</sup>

Although the Ethics 2000 Commission provided guidance on protecting confidentiality during the transmission of client information, that guidance did not include factors relating to the storage of the information.<sup>163</sup> The Ethics 20/20 Commission significantly changed the guidance the Comments provide for lawyers in discharging this affirmative duty to protect confidential client information.<sup>164</sup> The amendments to the Comments recognize

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<sup>158</sup> Another trap for the unwary lawyer relates to the speed with which the lawyer responds to client emails. Because email is instantaneous, the lawyer must be responsive to email and manage client expectations regarding the speed with which the lawyer will respond. See Hricik, *supra* note 9, at 469.

<sup>159</sup> Reporter’s Explanation of Changes: Model Rule 1.4, *supra* note 137.

<sup>160</sup> ETHICS 20/20 REPORT, *supra* note 153, at 4.

<sup>161</sup> INTRODUCTION & OVERVIEW, *supra* note 1, at 8 (“[W]e concluded that technological change has so enhanced the importance of this duty [to take reasonable measures to protect client confidences from inadvertent or unauthorized disclosure or unauthorized access] that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.”).

<sup>162</sup> ETHICS 20/20 REPORT, *supra* note 153, at 4.

<sup>163</sup> See *supra* notes 141-42 and accompanying text.

<sup>164</sup> ETHICS 20/20 REPORT, *supra* note 153, at 5.

that unauthorized access or disclosure can occur even despite the lawyer's reasonable efforts to protect the information.<sup>165</sup> Although the Comments do not prescribe strict rules for the lawyer to follow in deciding whether a technology threatens the client's confidential information, it does provide a list of factors for the lawyer to consider.<sup>166</sup> Specifically, the Comments provide as follows:

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).<sup>167</sup>

These factors, of course, sound similar to the concerns raised in ethics committee decisions from across the country.

Even from its initial issues paper soliciting comments with respect to its work, the Ethics 20/20 Commission recognized the limitation of using amendments to the Model Rules as a vehicle for helping lawyers determine whether a particular use of technology comports with the lawyer's ethical requirements.<sup>168</sup> That limitation results from the rapid pace at which technology changes.<sup>169</sup> For that reason, the Commission asked the ABA

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<sup>165</sup> *Id.*; see also INTRODUCTION & OVERVIEW, *supra* note 1, at 8 ("The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable.")

<sup>166</sup> ETHICS 20/20 REPORT, *supra* note 153, at 5.

<sup>167</sup> *Id.*

<sup>168</sup> Client Confidentiality Issues Paper, *supra* note 2.

<sup>169</sup> ETHICS 20/20 REPORT, *supra* note 153, at 1. In a 1992 ethics opinion, the Ethics Committee of the Colorado Bar Association recognized the "ever-increasing varieties" of technology that had developed even at that point and the likelihood that technology would continue to change. The committee recognized that changes in technology would impact both the methods through which lawyers could communicate with their clients as well as the ways that third parties might intercept those communications. Colo. Bar Ass'n Ethics Comm., Formal Op. 90 (1992), available at [http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion\\_90\\_2011.pdf](http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_90_2011.pdf).

Center for Professional Responsibility to design and maintain a web-site devoted to providing practitioners with current information relating to technology and ethical issues.<sup>170</sup> The web-site would provide the technology-specific guidance that an amendment to the Model Rules could not.

The effect of these rules, of course, depends on whether they are adopted by state courts and bar associations.<sup>171</sup> On January 15, 2013, Delaware became the first state to adopt changes proposed by the Ethics 20/20 Commission.<sup>172</sup>

### III. IMPLICATIONS FOR LAW STUDENTS AND NEW LAWYERS

As the Model Rules now explicitly state, weighing the risks and benefits of technology is an ethical responsibility of all lawyers. All lawyers must think harder about how they use technology for client communications and must also monitor their clients' use of technology to make sure that it does not jeopardize communication confidentiality. Traditional brick-and-mortar law firm lawyers perhaps have to analyze whether incorporating more technology into their practice would benefit their clients. More technologically-inclined lawyers have to consider whether their use of technology perhaps exposes their clients' confidential information to an unacceptable risk of interception<sup>173</sup> or fails to satisfy the lawyers' duties to provide competent legal advice and

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<sup>170</sup> *Id.* (describing the proposed website as "a centralized user-friendly website with continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers' use of technology, including information about the latest data security standards").

<sup>171</sup> 29 LAW. MAN. PROF'L CONDUCT 282 (May 8, 2013).

<sup>172</sup> 29 LAW. MAN. PROF'L CONDUCT 71 (Jan. 30, 2013). The Delaware Supreme Court did not adopt all the changes that the Ethics 20/20 Commission had recommended. Specifically, the court declined to adopt changes relating to practice pending admission to the bar. *Id.*

<sup>173</sup> Regardless of the form of transmittal or storage of confidential client information, some risk of interception is always present. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999) (exploring risks of interception in accepted modes of communication such as U.S. and commercial mail and land-line telephones). The Ethics 20/20 Commission recognized this reality in its Introduction and Overview to Resolution 105A: "The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a filed cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable." INTRODUCTION & OVERVIEW, *supra* note 1, at 8.

to communicate effectively. This evaluation of the benefits and risks of technology is perhaps most challenging for the current generation of law students and new lawyers, who are primarily part of the technologically-inclined Millennial Generation.<sup>174</sup> Therefore, this Article proposes that law professors, legal writing professors in particular, and lawyers who supervise new lawyers challenge law students and new lawyers to think critically about when and how they use technology to communicate confidential client information so that they are adequately prepared to represent their clients.

*A. Instruction about Use of Electronic Communications in Law Practice Is an Important Component of a Legal Writing Curriculum and New Lawyer Mentoring*

Though use of electronic communication became widespread among practitioners by the mid-1990s, drafting electronic communications was not a common component of the curriculum of legal writing classes even after the beginning of the 21<sup>st</sup> Century. For example, in 2006, the ABA Section of Legal Education and Admissions to the Bar published the second edition of the *Sourcebook on Legal Writing Programs* (the “*Sourcebook*”).<sup>175</sup> Part II of the *Sourcebook* describes the types of documents that legal writing professors commonly taught at that time: the objective office memorandum, pretrial and trial briefs, and client letters.<sup>176</sup> The *Sourcebook* does not include or reference

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<sup>174</sup> The “Millennial Generation” refers to those born after 1980. See PEW RESEARCH CTR., *MILLENNIALS: A PORTRAIT OF GENERATION NEXT 25* (2010), available at <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>. Members of the Millennial Generation are also referred to as “digital natives,” which refers to their distinction as the first generation to grow up with technology. See Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 120-21 (2012). The prevalence of technology has created a generation of young adults who predominantly use technology to obtain new information as well as to share information. *Id.* at 126.

<sup>175</sup> ERIC B. EASTON ET AL., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *SOURCEBOOK ON LEGAL WRITING PROGRAMS 21* (Eric B. Easton et al. eds., 2d. ed. 2006) [hereinafter *SOURCEBOOK*].

<sup>176</sup> *Id.*

electronic communication in its list of commonly taught documents.<sup>177</sup>

Because the increased use of technology had significantly changed the way in which even lawyers in brick-and-mortar law firms were advising their clients, scholars began advocating changes to the ways that law students are taught to communicate with their clients.<sup>178</sup> For example, Professor Kristen Robbins-Tiscione's 2006 survey of graduates of the Georgetown University Law Center determined that practitioners are more likely to use email to advise their clients than the traditional office memoranda that most legal writing professors teach.<sup>179</sup> According to Professor Robbins-Tiscione's research, few practitioners write traditional office memoranda and instead advise their clients about the results of their research by "e-mail, telephone, face-to-face discussion, informal memorandum, or a letter, and in that order of preference."<sup>180</sup> She found that email was the "graduates' method of choice for communicating with clients."<sup>181</sup> For that reason, Professor Robbins-Tiscione recommended that legal writing professors acknowledge the growing importance of electronic communication and incorporate it into the legal writing curriculum.<sup>182</sup>

That the current generation of law students and new lawyers are part of the technologically savvy Millennial Generation does not lessen the need for instruction regarding electronic communication.<sup>183</sup> For example, in a recent article, Professor Kendra Huard Fershee encourages law professors to include email

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<sup>177</sup> *See id.*

<sup>178</sup> *See generally* Maria Perez Crist, *Technology in the LRW Curriculum – High Tech, Low Tech, or No Tech*, 5 *LEGAL WRITING* 93, 101-02 (1999) ("E-mail should be a part of every LRW curriculum."); Anne Enquist & Laurel Oates, *You've Sent Mail: Ten Tips to Take with You to Practice*, 15 *PERSP.: TEACHING LEGAL RES. & WRITING* 127 (2007) (providing tips legal writing professors can provide students in last class regarding email communications when curriculum does not include email); Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 *J. LEGAL EDUC.* 32 (2008) (discussing increased use of email by practitioners).

<sup>179</sup> Robbins-Tiscione, *supra* note 178, at 32.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 33, 41-43.

<sup>182</sup> *Id.* at 34, 49.

<sup>183</sup> Kendra Huard Fershee, *The New Legal Writing: the Importance of Teaching Law Students How to Use e-mail Professionally*, 71 *MD. L. REV. ENDNOTES* 1, 10-14 (2012).

communication in their curriculum because although current law students are quite familiar with email,<sup>184</sup> they most often do not have experience with professional email.<sup>185</sup> Because most of that experience with email has been in social settings, which is necessarily less formal than professional email, law professors cannot assume from students' familiarity with email that they know how to use it professionally.<sup>186</sup> Specifically, the "rudimentary language usage" and lack of emphasis on proper punctuation, spelling, and grammar in social email are inappropriate for professional email.<sup>187</sup>

Similarly, Professors Aliza Kaplan and Kathleen Darvil emphasize that the current generation of law students' familiarity with technology and differences in learning style from prior generations necessitate a different approach to research instruction.<sup>188</sup> Much like Professor Fershee, Professors Kaplan

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<sup>184</sup> See Ian Gallacher, "Who Are Those Guys?": *The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 CAL. W. L. REV. 151, 173-75 (2007). Gallacher's survey of the writing habits of incoming law students from seven schools in 2006 documented the frequency with which that group communicated via email or other forms of electronic communication. *Id.* Based on the survey results, Professor Gallacher concluded that "electronic communication is thriving among incoming law students." *Id.* at 173. According to the survey results, email, text messaging, and instant messaging were very common methods for electronic communication for the students. *Id.* at 173-74.

<sup>185</sup> Fershee, *supra* note 183, at 14. Professor Fershee points out that email began its rise to widespread use when many of today's law students were in elementary school. *Id.* at 11. For that reason, today's law students had considerable more exposure to email than prior generations. *See id.*

<sup>186</sup> *Id.* at 12-14. Other scholars have made a similar argument that current students' frequent use of social media necessitates instruction (either through guidelines or classroom instruction) regarding the risks and benefits of its use. *See, e.g.*, Anna P. Hemingway, *Keeping it Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism*, 43 N.M. L. REV. 43, 53-57 (2013); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 376-82 (2010).

<sup>187</sup> Fershee, *supra* note 183, at 12.

<sup>188</sup> Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 LEGAL COMM. & RHETORIC: JALWD 153, 154-56 (2011); *see also* Margolis & Murray, *supra* note 174, at 26. In 2011, Professors Margolis and Murray conducted a survey of first year law students to determine their "research training, experience, and general research practices." *Id.* at 133. They concluded that law students enter law school with "certain research competencies, confidences, and practices." *Id.* at 152. Because incoming law students are accustomed to conducting online research in which almost any search produces some results, Professors Margolis

and Darvil emphasize that the current generation of law students is the first generation to have grown up using technology.<sup>189</sup> That familiarity with technology, however, perhaps explains why some of the law students surveyed turned to non-legal Internet sources like Google or Wikipedia and seldom used print resources for their research.<sup>190</sup> Thus, students' familiarity with technology necessitates perhaps a different approach to instruction about its use, but does not vitiate the necessity of that instruction.<sup>191</sup>

Finally, Professor Helia Garrido Hull has argued that common personality traits among members of the Millennial Generation and their frequent use of social media and electronic modes of communication necessitate additional professionalism training.<sup>192</sup> As one example of the increased need for this training, she points to Millennials' frequent use of instantaneous, public forms of electronic communication and evidence that indicates that they place a lower value on privacy than older generations.<sup>193</sup> For that reason, she argues that law schools should place more emphasis on training students about their ethical requirements of protecting client confidences during law school.<sup>194</sup>

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and Murray propose that legal research classes focus on helping students sift through and analyze the results of their searches, rather than finding the law. *Id.* at 152-56.

<sup>189</sup> Kaplan, *supra* note 188, at 174-76. ("Millennials believe themselves to be technologically savvy and efficient multitaskers. They grew up using computers and relating to the world through technology.")

<sup>190</sup> *Id.* at 165-68.

<sup>191</sup> *Id.* at 176 ("Due to the profound changes in technology and how Millennials learn, it is up to us as educators to rethink and reimagine how to teach legal research.")

<sup>192</sup> See generally Helia Garrido Hull, *Legal Ethics for the Millennials: Avoiding the Compromise of Integrity*, 80 UMKC L. REV. 271, 276 (2011) ("This article considers the need to provide additional training in ethics and professionalism, and argues that the current generation of law students are not receiving sufficient training under the current approach used in most law schools.")

<sup>193</sup> See *id.* at 277-78, 285. Professor Hull describes Millennials' views on confidentiality as follows: "Millennials value confidentiality and privacy less than other age groups, in part, because information flow is virtually instantaneous and they generally believe that knowledge is meant to be shared not owned. As a result, Millennials are less likely to appreciate breaches of privacy than other age groups." *Id.* at 277-78. This willingness to share private information publicly is perhaps best demonstrated in social media. The frequent "oversharing" of personal information on social media by law students demonstrates their lower expectations for personal privacy. See Vinson, *supra* note 186, at 376-82.

<sup>194</sup> *Id.* at 285.



The most recent survey of legal writing professors demonstrates that legal writing professors have heeded the recommendations to include email assignments in their curriculum.<sup>195</sup> Question 20 of the Association of Legal Writing Directors/Legal Writing Institute's annual survey of legal writing professors asks "[w]hat writing assignments are assigned . . . in the required LRW program?"<sup>196</sup> For the first time in 2012, the survey included "electronic (emails) memos" as a choice among other traditional writing assignments such as office memoranda, client letters, and appellate briefs.<sup>197</sup> Of the 172 schools that responded to this question, 81 indicated that they assigned electronic memos.<sup>198</sup>

The increased focus on electronic communication has not been limited to just law school legal writing classes. Rather, a search of bar journal articles and practitioner materials demonstrate an increased focus on electronic client communications and concern among practicing lawyers regarding email.<sup>199</sup> These practitioner pieces discuss both the need for

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<sup>195</sup> In addition, many of the research and writing textbooks provide readings regarding electronic communication. *See, e.g.*, CHRISTINE COUGHLIN ET AL, *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 9-10 (Carolina Academic Press 2008); RICHARD K. NEUMANN, JR. & SHEILA SIMON, *LEGAL WRITING* 193-96 (Aspen 2d ed. 2011); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 255-59 (Aspen 5<sup>th</sup> ed. 2010); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 203-11 (Aspen 5<sup>th</sup> ed. 2010). Although some of these textbooks refer to the confidentiality concerns for electronic communication, their primary focus is on the professional appearance and content of the communication.

<sup>196</sup> ASS'N OF LEGAL WRITING DIRECTORS & LEGAL WRITING INST., *REPORT OF THE ANNUAL LEGAL WRITING SURVEY 13* (2012) [hereinafter ALWD survey], *available at* <http://lwionline.org/uploads/FileUpload/2012Survey.pdf>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See, e.g.*, Jim Calloway, *Email Issues for Lawyers Today*, 83 OKLA. B.J. 1760 (2012); Gerald Lebovits, *E-mail Netiquette for Lawyers*, N.Y. ST. B.J., Nov. 2009, at 64; Donald R. Lundberg, *Ready, Aim, Disclose: Understanding the Power of the Email 'Send' Button in Your Law Practice*, RES GESTAE, Mar. 2012, at 30; Janice MacAvoy et al., *Think Twice Before You Hit the Send Button! Practical Considerations in the Use of Email*, THE PRACTICAL LAWYER, Dec. 2008, at 45, *available at* [www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PL](http://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PL); Marian C. Rice, *Email Communications with Clients*, LAW PRAC., Jan. 2013, at 14; Catherine Sanders Reach, *Enjoy Email Responsibly*, ARK. LAW., Summer 2009, at 30; Wayne Schiess, *E-mail Like a Lawyer*, 12 SCRIBES J. LEGAL WRITING 151 (2008); *see also* Peter Roberts, *Protecting Client Data: 11 Steps to Take When Using Technology*, LAW PRAC., Mar. 2010, at 48

electronic client communications to be professional in appearance and content and the confidentiality concerns surrounding electronic communications.

Thus, there exists a recognized need for instruction regarding electronic communications.

*B. Legal Research and Writing Courses and New Lawyer Mentoring are Natural Fits for Instruction About the Decision to Use Electronic Communication*

Much of the conversation about the need to educate law students about electronic communication has involved instruction regarding the structure of electronic communication as well as the need for electronic communication to be professional in appearance and content. Although correct grammar, editing, formatting, and tone are among the necessary components of instruction regarding professional email,<sup>200</sup> to prepare law students and new lawyers for the practice of law, that instruction also needs to put electronic communications in their ethical context.

Creative legal writing professors have designed legal writing assignments that help prepare students to communicate the results of their research or advice in electronic form.<sup>201</sup> These assignments require students to consider the appropriate content and organization for a professional email.<sup>202</sup> Because the needs of a reader who is viewing an electronic communication on a smartphone, tablet, or laptop computer differ from the needs of the reader who is viewing a hard copy of the analysis, assignments

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(providing “list of the present requirements of competency for protecting client information when using technology”).

<sup>200</sup> Fershee, *supra* note 183, at 15-18; see also Tracy Turner, *E-Mail Etiquette in the Business World*, 18 PERSP.: TEACHING LEGAL RES. & WRITING 18, 18-23 (2009). Professor Turner’s “practical tips” on professional email relate primarily to the content of the email, but she also discusses situations in which practitioners should not use email: when the email includes “sensitive, confidential or confrontational information,” when the client prefers another form of communication, or when the email involves an urgent matter. *Id.* at 18-19.

<sup>201</sup> See, e.g., Ellie Margolis, *Incorporating Electronic Communication in the LRW Communication*, PERSP.: TEACHING LEGAL RES. & WRITING, Winter 2011, at 121 (describing legal writing assignment that required students to communicate results of research and analysis in email to senior partner).

<sup>202</sup> *Id.*

such as these are crucial to a well-rounded legal writing curriculum.

This instruction, however, should be supplemented with discussions regarding the ethical implications of electronic communication.<sup>203</sup> The ease and frequency with which the current generation of law students and new lawyers communicate electronically necessitates rather than vitiates the need for this discussion.<sup>204</sup> Law students and new lawyers should be taught that the lawyer's duties of confidentiality, competence, and communication sometimes preclude or alter the decision to communicate electronically. That the recent amendments to the Model Rules and recent ethics opinions obligate lawyers to be knowledgeable about the risks of technology and warn clients when their clients use technology in a manner that jeopardizes confidentiality demonstrates the necessity of this instruction.<sup>205</sup> To prepare law students and new lawyers to appreciate the significance of the decision to use technology, the instruction should include specific reference to the relevant provisions of the ethical rules and ethics opinions.

Specifically, instruction and mentoring should focus on the ethical issues raised in the ethics committee opinions discussed herein and other related concerns:<sup>206</sup>

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<sup>203</sup> As discussed *infra*, other scholars have proposed that legal writing instruction include specific references to the ethical obligations that apply to the student's work. Professor Melissa Weresh has developed a textbook that provides the relevant ethical rules and other readings for the assignments typically completed by students in a first year legal writing course. Her textbook includes a chapter on email communication includes some of the considerations that this Article proposes legal writing professors and supervising lawyers raise. See MELISSA H. WERESH, LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS 15-37 (LexisNexis 2d ed. 2009).

<sup>204</sup> See *supra* notes 183-94 and accompanying text.

<sup>205</sup> See *supra* notes 112-20 and 142-172 and accompanying text. In a recent article, Professor Michael Green points out that California Ethics Opinion No. 2010-179, ABA Ethics Opinions No. 11-459, and the recently adopted amendments to Rule 1.1 are part of a trend of putting an additional burden on lawyers to be knowledgeable about the risks associated with technology, even when it is the client's use of technology that jeopardizes the confidentiality. Green, *supra* note 121, at 356-57. Educating law students and new lawyers about the risks of using an electronic mode of communication for confidential client information will help them be better prepared to discharge this duty when early in their practice.

<sup>206</sup> State privacy laws may also impact the lawyer's decision of whether and how to use technology to communicate with the client. Comment 10 to Rule 1.6 provides that

- Using technology to communicate regarding extremely sensitive matters;
- Using technology to communicate with the client who does not use technology effectively;
- Using technology to communicate with a client who uses a device or system that third parties can access;<sup>207</sup>
- Using technology carelessly, such as by not scrutinizing the recipient list<sup>208</sup> or not checking the document carefully for metadata;
- Using technology without understanding the service provider's policies regarding confidentiality and data retention;
- Using unsecure mobile devices<sup>209</sup> or public Internet connections when communicating with a client or working on confidential client information;
- Continuing to use technology to communicate with a client even when the electronic communication is not producing the information the lawyer needs in order to provide competent representation;

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these privacy rules are beyond the scope of the Model Rules, and they are also beyond the scope of this Article.

<sup>207</sup> A third party could potentially access stored email either because the third party has a relationship with the client and knows the password, the third party is an employer who owns the device or email account that the client is using to send or receive email, or the third party gains access to the device used to access the email or the password for the email account because of carelessness by the lawyer or client. *See* Hricik, *supra* note 9, at 469-70 ("If reasonable precautions are not taken to protect access to computers which can access the stored e-mail, then the information, even if safely transmitted over the Internet to the lawyer's mailbox, can be misused.").

<sup>208</sup> *See* MacAvoy, *supra* note 199, at 46-48 (describing embarrassing consequences of misdirected or forwarded emails).

<sup>209</sup> As of December 2012, 45% of Americans over the age of 18 own a smartphone, 61% own a laptop computer, and 31% own a tablet computer. Trend Data (Adults), Pew Internet & American Life Project, *available at* [http://www.pewinternet.org/Trend-Data-\(Adults\)/Device-Ownership.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Device-Ownership.aspx). An almost equally high percentage of teens, who are future law students, own these devices. Trend Data (Teens), Pew Internet & American Life Project, *available at* [http://www.pewInternet.org/Static-Pages/Trend-Data-\(Teens\)/Teen-Gadget-Ownership.aspx](http://www.pewInternet.org/Static-Pages/Trend-Data-(Teens)/Teen-Gadget-Ownership.aspx). Specifically, 37% of teens own a smartphone, 80% own a laptop computer, and 23% own a tablet computer. *Id.*

- Recognizing client expectations for the lawyer's responsiveness for communications sent through an instantaneous technology like email;<sup>210</sup> and
- Evaluating risks associated with new or developing technologies or new risks of interception for established technologies.<sup>211</sup>

Legal writing professors are specially situated to raise these issues with their students. In fact, some legal scholars have proposed for a number of years that one way to rectify the perceived lack of civility in legal practice is by beginning to educate students about professionalism and ethical requirements in the first year legal writing course.<sup>212</sup> First, because the legal writing and research course is the foundational course for learning

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<sup>210</sup> See *supra* note 157.

<sup>211</sup> The constant development of new technologies has at least two effects for lawyers. First, new technologies offer new ways to communicate with the client. Second, new technologies perhaps pose new risks of interception of established forms of electronic communication.

<sup>212</sup> Donna Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889, 896-99 (1999); Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 427 (2005) ("I argue that we should promote this rich doctrinal material as an essential component of our curricula. We should not only introduce concepts of ethics and professionalism in class, but we should make these concepts a pervasive theme of our curriculum and pedagogy."). Chin gave the nature of feedback that legal writing professors provide, the nature of the assignments that students complete, and the interaction between legal writing professors and their students as reasons why the legal writing course is well-suited for instruction on professionalism. Chin, *supra*, at 896-99; see also Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 LEGAL WRITING 105, 110-18 (2006) (proposing that legal writing classes include "value dilemmas" because of small size of class, teaching techniques, and practice experience of professor). More recently, Professor Anna Hemingway proposed that law professors use Facebook posts as a vehicle to teach professional responsibility and professionalism. Hemingway, *supra* note 186, at 53. She offers the first year "legal methods" or legal research and writing course as one possible place in the curriculum to offer this instruction. *Id.* at 54. She cites the legal writing professor's ability to tap into the first year students' eagerness to learn about the profession and the "unequivocal message . . . that professionalism is core to the study of law" as weighing in favor of not waiting until the second year professional responsibility course to provide this instruction. *Id.* She asserts that the smaller class size, increased faculty/student interaction, and nature of some of the work done in the course also make this instruction a natural fit in the legal writing course. *Id.* at 54-55.

to communicate with clients, colleagues, and the court, introducing the relevant ethical rules contemporaneously allows the students to put both the rules and the communication in context and therefore have a richer learning experience.<sup>213</sup> Second, most first year law students arrive at law school excited to learn more about their chosen profession; incorporating ethics and professionalism into the first year legal writing class highlights its importance.<sup>214</sup> Finally, the nature of the feedback and the individualized attention that legal writing professors give their students makes the legal writing classroom an appropriate venue for introducing instruction about ethics and professionalism.<sup>215</sup>

That the legal writing curriculum is already packed full and that ethics is typically a required upper level course<sup>216</sup> do not provide ample reason to avoid teaching law students that a lawyer's professional obligations impact decisions regarding the use of technology in client communications. The ABA's efforts to revise the Model Rules in the Ethics 2000 and Ethics 20/20 Commissions to reflect the changes to legal practice due to advances in technology signal the significance technology will have on the practice of today's law students and new lawyers.<sup>217</sup> Given the current generation of law students' and new lawyers' familiarity and comfort with technology for social uses and the prevalence of technology in modern legal practice, failing to teach

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<sup>213</sup> See SOURCEBOOK, *supra* note 175, at 36-38; see also Weresh, *supra* note 212, at 436-39, 442-44. According to the SourceBook, ethical rules regarding competence, diligence, communication, meritorious claims and contentions, and candor toward the tribunal are especially relevant for legal writing courses because they relate directly to the skills taught in the course. SOURCEBOOK, *supra* note 175, at 36-38; see generally Kristen E. Murray, *Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom*, 20 PERSP.: TEACHING LEGAL RES. & WRITING 134 (2012) (describing exercise requiring first year legal writing students to identify errors in legal writing from media sources that had profound consequences for lawyers).

<sup>214</sup> Weresh, *supra* note 212, at 439-41.

<sup>215</sup> Chin, *supra* note 212, at 896-99.

<sup>216</sup> Professor Weresh identifies an "already overburdened" curriculum and required upper-level courses devoted to ethics and professionalism as common objections to incorporating ethics and professionalism into the first year legal writing class curriculum. Weresh, *supra* note 212, at 429-32; see also Hemingway, *supra* note 186, at 55-56. Although she does not dispute the legitimacy of these concerns, she argues that the benefits to including the material outweigh them. Weresh, *supra* note 210, at 430-32.

<sup>217</sup> See *supra* notes 135-72 and accompanying text.

that technology is not always the best choice and that a lawyer needs to use technology differently when communicating with clients could lead to ethical problems.

My proposal is not that legal writing professors assume the burden of teaching all the nuances of ethics and professionalism to their students. Most law schools award two credit hours for each of the two semesters of the legal writing course,<sup>218</sup> which is barely enough time to teach the fundamentals of legal writing. Rather, because legal writing professors are rightly incorporating assignments that require students to prepare electronic communications,<sup>219</sup> that instruction is incomplete unless it includes a discussion of the threshold questions of when and how students should use that form of communication.<sup>220</sup>

Raising this threshold question does not necessarily require creating additional assignments. As described above, many legal writing professors already include an email assignment in their curriculum.<sup>221</sup> An assignment in which the student has to communicate research results to the client provides an excellent opportunity to instruct students about the ethical concerns with electronic communication as well as content, tone, and professionalism. Weaving ethical considerations into the assignment can be as simple as adding facts involving an associate lawyer who has been asked to convey the advice to the client but

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<sup>218</sup> ALWD survey, *supra* note 196, at 7. According to the 2012 survey, 90 and 103 schools award two credit hours for the fall and spring semesters, respectively. *Id.* The trend seems to be toward awarding more credit hours: 72 and 66 schools award two credit hours for the fall and spring semesters, respectively. *Id.*

<sup>219</sup> Although the current trend is to include instruction about email in the legal writing course, my proposal is intentionally broader than just email. As Professor Hemingway points out in her article about the use of Facebook posts, a professor who incorporates technology into the classroom must adapt to changes in technology. Hemingway, *supra* note 186, at 73-76. She uses email as an example. *Id.* at 73-74. Although email is the current technology of choice for legal writing assignments, younger generations prefer different technologies, such as texting. My proposal is that regardless of the technology that a professor chooses for an assignment, the professor should also discuss with the students how to use that technology in a way that comports with a lawyer's ethical obligations.

<sup>220</sup> This proposal is consistent with Professor Weresh's approach to integrating ethics and professionalism into the legal writing curriculum. *See* Weresh, *supra* note 212, at 461. She describes one aspect of that integration as follows: "As we introduce new forms of writing, we should bring our students' attention to the attendant ethical and professional obligations associated with the production of that document." *Id.*

<sup>221</sup> *See supra* note 196.

the lawyer is out of town for a family trip, a client who uses an email address that seems to belong to an employer, or a potentially unfavorable result for the client. The instructions to the student regarding how to communicate the advice should be left intentionally vague, except for making clear the need for some written documentation of the advice in the file that the client also receives. The student would then have to sift through the choices – phone call with follow up letter, letter sent through the postal service or a courier, email, and so forth. After the students have completed the assignment, the professor can engage the class in a discussion about the choices each student made regarding how to communicate the advice and how the ethical requirements impacted that decision.

While critical, this instruction during the first year of law school is the starting point for ensuring that future lawyers are prepared to use technology for client communications in a way that is consistent with their ethical obligations. Rather, the instruction needs to continue through the law students' early years as a practicing lawyer. More experienced lawyers charged with the responsibility of mentoring new lawyers need to recognize the Millennial's probable preference for technology and electronic communication and temper it with instruction regarding the risks it can pose.

#### CONCLUSION

Technology has forever changed the way that lawyers practice law. Although today's law students and new lawyers are a product of a technologically advanced society, the experience of using that technology as a professional subject to ethical requirements is new. To adequately prepare their students and mentees to use technology as an ethical professional when their communication involves a client or client information, legal writing professors and supervising lawyers need to provide instruction on both the content of electronic communication as well as the manner in which it is used.



