

# HOUSTON BAR ASSOCIATION PRESENTATION

## NEW TECHNOLOGY AND ETHICAL CONSIDERATIONS

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Supplement

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### Introduction

This material is intended to supplement the paper entitled “Professional Responsibility and Confidentiality Considerations When using the Internet” written by **Mary Francis Lapidus** of Mary Francis Lapidus, P.C. This supplement focuses upon the nature and characteristics associated with telephonic communications in general, and associated with attorney-client communications in particular.

Law firms should comprehend the implications of incorporating new technology into firm routine operations. While affording myriad opportunities for enhancing the delivery of legal services to clients, and concomitantly providing a unique manner in which to integrate and coordinate virtually every facet of law practice — from conflict-checking to time-billing to docket control and calendaring to document assembly and management to client contact tracking — technology is and will continue to be imperfect. Hence, law firms that simply rely upon the “miracles” and efficiencies of technology without simultaneously taking suitable prophylactic measures may be inadvertently engaging in malpractice and, indeed, are probably situated uncomfortably low on the ethics scale.

What are acceptable prophylactic measures contemplated herein? Acceptable measures obviously depend upon the extent of incorporation of technology into routine law practice. But, as a global approach to seeking to assure fail-safe operation, exploiting new technology in the context of extensive use of facsimile transmissions, cellular and microwave phones, the Internet — not to mention

law firm databases and the like — demands, as a minimum standard, procedures to assure: (1) the integrity of both firm data and client data; (2) controlled access to and use of the Internet including, of course, E-mail; and (3) sustaining the attorney-client privilege and client confidences. From a data integrity vantage point, reasonable measures should include regularly backing up of important files and databases, and proper storage of such backups on-site and off-site. Utility software from such established vendors as Symantec (Norton), Cybermedia, The Aldridge Company, Quarterdeck, and Network Associates (recently acquired McAfee and Dr. Solomons) should be used to compensate for known operating system frailties to avoid data loss and related problems. Use of such modestly-priced utility tools not only promotes safe computerized law office operation, but also helps effectively deliver high quality services to clients. Furthermore, minimizing the occurrence of anomalous technological behavior should correspondingly minimize stress manifest in attorneys and support staff.

Once law firm “desktop” computers and data stored thereon have been secured, all official aspects of communication must be considered to maximize the likelihood of the fail-safe flow of information. Such information flow involves discussing conventional land line telephonic communication and the nature and character of cordless telephone line communication. Prevalent cellular telephonic communication has become a significant concern and should be included in the discussion. Implications of the Electronic Communication Privacy Act and relevant case law, and ethical opinions handed down by state bars must be factored into the analysis.

Updates of these and related issues are tracked on an on-going basis on <http://www.legalethics.com> (links to new cases involving ethics and state bar ethics opinions). Other sites point to relevant materials and should include reference to [legalethics.com](http://www.legalethics.com) which has proven to cite to current authority on these ethical issues. See, e.g., <http://www.law.uh.edu/ethics> (Texas Electronic Ethics Reporter); <http://www.allegal.com>. Other sites of interest are mentioned in the written materials.

### Conventional Telephone Line Communications

Telephone communications transmitted over land-based wires and fiber optic cables are confidential because such communications are typically accomplished with a reasonable degree of privacy. Such telephonic communications are rarely unintentionally or inadvertently overheard by

unauthorized third parties. Even if a call accidentally directed to such third parties the caller should realize that an accident has occurred prior to communicating confidential information. Of course, since interceptions may and do occur — accidentally due to technical mishaps or intentionally using wiretapping equipment — assurances of confidential communications cannot be made.

Nevertheless, conventional conversations effectuated over telephone lines are protected from invasions of privacy. In particular, under the 4th Amendment, telephonic communications may not be subject to unreasonable search and seizure. Katz v. United States, 389 U.S. 347 (1967) (unlawful invasion of privacy of a telephone call made from a public phone booth, using a proximally placed wiretap device). Federal statutes provide for pecuniary damage awards when telephonic communications are unlawfully intercepted or disclosed. 18 U.S.C. § 2520(a). Moreover, evidence gained by such unlawful intrusions is inadmissible. 18 U.S.C. § 2525.

Accordingly, since conventional telephonic communications are routinely characterized by a reasonable expectation of privacy, attorney-client conversations using this medium should be congruous with an attorney's duty of confidentiality. The standard of care is a reasonable expectation of privacy: absolute certainty is clearly impracticable and burdensome under the myriad of factors that permeate current society. Of course, a privilege may be lost due to failure to exercise due care. One of the few cases pertaining to misdirected facsimile transmissions, for example, held (in an unpublished opinion) that a fax inadvertently forwarded to the wrong party — who was inadvertently included in a distribution list intended to “widely distribute” the information — waived the “work product privilege.” NLRB v. Monfort, Inc., 9 Law. Man. Prof. Cond. 287 (10th Cir. 1993). The Monfort Court observed that the “fate of the document was beyond the court's control.” *Id.*

In another case, however, the court appears to have considered a facsimile transmission no differently from a letter and the like delivered via normal (“sail”) mail. Vasquez v. Sears, Roebuck & Co., et al., 1998 WL 191271 (Bank. N.D. Ill. Apr. 21, 1998). Considering whether certain documents would be excluded from discovery based upon the attorney-client privilege and the (*Hackman v. Taylor*) work product doctrine, the court decided the merits of precluding a fax on the same basis of precluding E-mail memos and computer printouts. As is common practice among attorneys, the fax cover sheet had a confidentiality notice advising that confidential and privileged

information was being transmitted. Since none of the documents, regardless of medium of communication, contained any mental impressions, conclusions, opinions or legal advice of an attorney or an agent of Sears, it was held that neither the work product doctrine nor the attorney-client privilege attached, and discovery of the documents was permitted. Similarly, in a case involving patent infringement claims, discovery of alleged privileged documents was allowed regardless of whether the documents involved facsimile transmissions or normal letters or in-house memoranda. Thai Merry Co., Ltd. v. BIC Corp., 1997 WL 678166 (S.D.N.Y. Oct. 30, 1997).

### Cordless Telephone Line Communications

Unlike a conventional telephonic communications, a cordless communication is characterized by at least at one participant in the telephonic conversation using a cordless phone. Cordless phone substitutes a radio signal transmitted between a base unit and the phone for a telephone connection. The base unit is connected to a normal telephone line. Thus, cordless phones introduce an additional uncertainty factor beyond conventional telephone line communications: information broadcast between a base unit and a coupled (via radio signals) remote hand-set.

How does this broadcast facet of cordless phones impact the standard of care for attorney-client communications? It is well known that inadvertent interceptions of cordless conversations regularly occur primarily because such conversations are transmitted at FM radio frequencies. Indeed, when a cordless phone is installed, a suitable frequency is selected which presumably does not interfere with other radio signals that are used; otherwise, any device within range of the base unit's transmission power would receive the signal. While there have been cases holding that there is still a reasonable expectation of privacy using cordless phones, see, e.g., United States v. Smith, 978 F. 2d 171 (5th Cir. 1992), cert. denied, 113 S. Ct. 1620 (1993), there have been contrary cases and ethical opinions rendered by state bars, see, e.g., People v. Chavez, 44 Cal. App. 4th 1144, mod., 1996 CA. 388 (<http://www.veruslaw.com>), 1996 WL 271524 (Cal. App. 1996).

As recently amended, the Electronic Communication Privacy Act recites that intercepting a (voice or data) telephonic communication — regardless of whether transmitted using conventional telephone lines, cordless telephones, or cellular phones — is unlawful, 18 U.S.C. §§ 2510(1) and

2512(A), and does not cause waiver of any available privilege. 18 U.S.C. § 2517(4); see also, McKamey v. Roach, 55 F. 3d 1236 (6th Cir. 1995) (thoughtful elucidation of the ECPA amendments). Thus, protections accorded telephonic communications using cordless phones are bottomed in the same law as such communications using conventional telephone line phones. Nevertheless, attorneys communicating with clients should use sound discretion whether the risks of inadvertent disclosure using cordless phones are justified based upon particular requirements and client preferences.

#### Cellular (“Cell”) Telephonic Communications

Similar to communications using wireless phones, communications using cell phones broadcast information through airwaves to receiving stations which, in turn, transmit the messages over phone lines. Thus, prior to reaching a receiving station, the nature of a cellular telephonic communication is akin to a wireless telephonic communication. On the other hand, once a receiving station is reached, the nature of a cellular telephonic communication is akin to a communication using conventional telephone lines. Under current federal law, scanners capable of intercepting cellular telephonic communications are prohibited from being marketed and sold in the U.S. See Jose L. Nunez, Regulating the Airwaves: The Governmental Alternative to Avoid Cellular Uncertainty on Privacy and the Attorney-Client Privilege, 6 St. Thomas L. Rev. 479, 486 fn. 32 (Spring 1994) (addressing Telephone Disclosure and Dispute Resolution Act of 1993, Pub. L. 102-556, 106 Stat. 4181). It is nevertheless widely experienced by cell phoners that in certain geographical locations throughout Greater Houston portions of other parties’ cell phone conversations are overheard. Telephonic conversations using cell phones receive the same protection accorded conventional telephone line communications. State v. Tango, 671 A. 2d 186, 187-188 (N.J. App. 1996) (interception of cellular communication is a federal crime and privilege such as the attorney-client privilege is not forfeited if such interception occurs).

Based upon the uncertain privacy associated with cell phones, several State Bars have issued ethics opinions holding that attorneys should not transmit privileged information using cell phones. See, e.g., Mass. Ethics Op. No. 94-5 (1994); N.H. Ethics Op. No. 1991-92/6 (1992); N.Y.C. Bar Ass’n Ethics Op. No. 1994-11 (1994); Iowa. Ethics Op. No. 90-44 (1991); Ill. State Bar Ass’n Op.

No. 90-7 (1990); cited in David Hricik, Confidentiality & Privilege in High-Tech Communications, 60 Tex. Bar J. 104, 118, f.n. 40 (Feb. 1997). In spite of general improvements in the integrity and reliability of cellular systems, and the advent of digital technology overcoming analog technology, it is unlikely that the susceptibility of messages to be overheard by unauthorized third parties will disappear. Accordingly, to avoid inadvertent disclosure of client confidential information, even though use of cell phones should not waive the attorney-client privilege, attorneys should insist that such confidential information not be communicated by cell phone unless preferred by the client for convenience reasons and the like. Under such circumstances, it is recommended that written consent — acknowledging a full understanding of the risks involved — be obtained from the client.

#### Computer-Based Telephonic Communications

Obviously attorneys and clients have the option to use desktop and portable computers to communicate using modems to establish a telephonic connection. Communications may be computer initiated regardless of whether voice, facsimile, or E-mail. For any of these means of communication, there should be a standard of care for protecting the information stored on the attorney's computer. Care starts with law firm access procedures, e.g., limited access to premises, computers password-protected, and may even include safeguarding the integrity of the information stored on these computers. If visitors frequent a firm's premises and computer screens may be in plain view to such visitors, then screen-blanking or screen-saver software and desktop security software may be appropriate. Of course, there is a plethora of such screen-oriented application software available as part of a Windows 95, Windows NT, Windows 98 or other operating systems, or as commercially available software or as shareware or freeware. Software such as Symantec "Norton Your Eyes Only" provides an inexpensive, convenient manner in which to limit viewing of information stored on computers. Files stored in specified directories or folders contained on hard disks are automatically encrypted and decrypted. Besides having a screen-blanking feature, all files stored on a computer may be locked from access by unauthorized users.

Attorney-client telecommunications may be orchestrated on a stand-alone computer, on a local area network ("LAN") located within a limited physical area, e.g., located on a single floor or a limited

number of floors, on a firm Intranet which may consist of both LANs and wide area networks located over a geographically disparate area, (“WAN”). Such LANs, WANs, and Intranet are or should be available only to authorized personnel both locally and through remote connection and are typically strictly configured with telephone lines. WANs and Intranets, and even ExtraNets, which have broader reach than Intranets, e.g., may grant limited access to clients and others, enable communications to be widely distributed, but are still a far cry from the unlimited, unchecked reach of the Internet at large. Law firms should also consider the functional and economical benefits derived from having Intranets and Extranets out-sourced to specialty firms such as Interliant, wherein the ultimate in data-loss protection and limited access firewall-protection may be easily achieved at reasonable cost. It should be evident that a firm’s use of such limited access networks engenders a reasonable expectation of privacy.

Communications using commercial online services such as America Online (“AOL”) and Compuserve also provide a limited access network, albeit to a broader base of subscribers. Of course, unlike a firm Intranet and the like, subscribers of AOL have no allegiance or duty of nondisclosure to other users (and their clientele) of the service. So long as subscribers pay the prerequisite fees, absent perhaps extraordinarily aberrant behavior, online access to AOL is assured. Nevertheless, each subscriber is provided a password-protected mailbox for accommodating E-mail transactions.

Focusing on the critical issue of reasonable expectation of privacy, broadcasting E-mail over an online subscription service to select users of the service should afford sufficient protection of confidentiality. An online service functioning as a “wire communication service” is prohibited from monitoring or otherwise intruding upon users’ privacy and users’ confidential communications other than for random quality control operations and the like. See 18 U.S.C. §§ 2510 & 2511.



## Internet Behavior

### Rules

There are few if any rules on the Internet. Readily accessible information may be accumulated and distributed perhaps in modified form.

### Nature of E-mail

Cannot assure that the confidentiality of attorney-client communications is sustained using e-mail. Besides not being secure means of communications, there may be adverse effects upon the attorney-client privilege. It should be noted that an attorney has an ethical duty of confidentiality wherein confidential information may not be disclosed without the client's consent, DR?, and impacts duty of competent representation. DR? Of course, e-mail is generally sent to and received in folders stored on hard disks; accordingly, such computer information is readily available for discovery. See FED. R. CIV. P. 34(a); *Crown Life Ins. v. Craig*, 995 F.2d 1376, 1383 (7th Cir. 1993) (purview of Rule 34 encompasses information stored on a computer). E-mail is also subject to discovery if attorney-client privilege is waived by failing to protect its confidentiality. Such waiver may be made not only by the client or the client's agent, but also by the client's attorney. Attorney-client privilege applies to all communications and to virtually all situations for which legal advice is sought by a client. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The purpose of this rule is to enable clients to seek and obtain "informed legal advice" which was enabled because of the underlying protection of communications and concomitant documents prerequisite to an attorney's rendering such advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

Thus, the attorney-client privilege is bottomed on the rendering of legal advice. What if counseling occurs pertaining to other non-legal matters? Protection is accorded to communications and intertwined documents only if primarily of legal tenor, *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 635 (E.D. Pa. 1979), and provided that advice is delivered "in a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.D.C. 1984).