E-Mailing Clients Is Under Increasing Scrutiny

No lawyer — even the most ethical — would want a prosecutor to see or hear his client communications. Indeed, the most sacred ethic is that of confidentiality. Surprisingly though, even in post-Enron America, most lawyers believe that because the attorney-client privilege is likewise so sacred, it will triumph, rendering their client communications impervious to (and beyond the reach of) sophisticated adversaries who seek them in discovery. They somehow feel that their bilateral client contacts, even when made through e-mail, surely will not be disseminated.

After all, they say, the devastating e-mails used by some businessmen, the kind of rapid-fire thoughts communicated electronically without the self-editing process used when committing something to writing by letter or fax, are not privileged in the first place. Say these lawyers: “It can’t happen to me, especially in a lawyer-client conversation. And I don’t write that stupid stuff, anyway.”

These lawyers apparently gain comfort from ABA Formal Opinion 90-413, which, though somewhat off point, affirmatively states that lawyers may transmit communications, as well as client-confidential information, even by unencrypted e-mail over the Internet without violating their ethical duty to maintain client confidentiality. Lawyers who reach the conclusion that their communications remain protected may not have considered a number of other factors:

- Whether or not a lawyer writes that “stupid stuff,” clients frequently do — even to their attorneys. A lawyer must, above all, protect the client from himself.
- Clients have a way of forwarding their communications from their lawyers to third parties, whether the communications are verbal or otherwise, for whatever purpose. Sometimes, it is not necessarily for a good purpose. And the task is made easier with e-mail, too easy. Lawyers must recognize that when a client, who may be a non-lawyer, repeats or resends their lawyer’s communication to another it frequently loses its privileged status.
- The client may actually be up to no good. He may, by forwarding the communication deliberately out of context, be using the attorney’s advice — now in the form of e-mail advice — even though the lawyer honestly does not know it, in order to engage in ongoing criminal conduct. More importantly, the client may put the lawyer in an extremely awkward situation when the communication becomes available to an aggressive adversary.
- E-mails have a potential for permanency greater than memory, and are far more easily obtainable than testimony concerning oral conversations. Some conversations between a lawyer and client should remain just that — oral conversations. This is, of course, not an invitation to act unethically. It is a reminder that conversations between a client and an attorney are much more difficult to obtain, and infinitely less susceptible to production by error.

**Self-Protection?**

When a lawyer perceives that the wrongdoing of a client who is prone to mischief may fall under a prosecutor’s investigation, the lawyer might actually prefer, for self-protection, that the prosecutor know that the lawyer’s advice was beyond reproach. A preserved e-mail might prove that demonstrably in black and white. The well-motivated lawyer, however, should be more concerned with his client than his own neck and reputation. There is nothing wrong with a lawyer covering his bases when he recognizes that a client’s behavior might place the lawyer, too, under the aggressive investigator’s or prosecutor’s microscope. Probably, he should.

Still, in an age of increased court-ordered surveillance — prosecutors may now obtain warrants to surveil e-mail accounts — a lawyer’s papering of his legal advice may come home to harm a client if those communications are obtained by a prosecutor.

Though of somewhat less importance, it may make even the finest, most ethical, lawyer look self-serving for having engaged in “papering.” With the availability of e-mail surveillance, and given a lawyer’s use of e-mail to communicate with clients, there may be nothing more potentially damaging to a client, and a lawyer’s reputation, than the retrieved e-
E-mail is extremely user-friendly, but rife with potential dangers. Even the most cautious and conservative among us might be surprised by the looseness or laxity in language or nuance employed, which would never be used in hard-copy communications.

Criminal Investigations

Even for the most pristine lawyer, when an official investigation is afoot, or even potentially in the offfing, any criminal lawyer should say that the less that is committed to writing, the better. Period.

When properly instructed, clients understand that while a lawyer's physical billing time for speaking to the client by telephone or in person may be more expensive, the potential savings in maintaining attorney-client confidentiality intact may prove exponentially less "costly."

True, when representing a corporation with many tentacles and necessary correspondents, it is far easier and effective to communicate by e-mail. Still, just a short while ago lawyers were able to do it "the hard way," and remain reasonably confident that attorney-client contacts remained secure.

Lawyers must use judgment before they press the "send" key — indeed, before they even decide to employ e-mail to send anything at all.

When representing an individual in a criminal investigation or indictment, there is no excuse for communicating with the client by e-mail on any substantive aspect of the case, no matter how confident the lawyer or client may be that "my side" is secure. The one exception may be the limited purpose of communicating purely housekeeping matters, such as setting up times for meetings.

E-Mail Culture

One of the biggest difficulties stemming from society's conversion to an electronic culture is that e-mail, unlike hard copy memos or letters, are frequently closer to verbal rather than written communications.

The things that lawyers — even lawyers exercising the punctilio of caution — may commit to oral interchange they would never, ever, commit to a written memo-