

**E-Mail, Cordless and Wireless Communication**

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In the computer age, within the last ten years or so, the main goal was increased computer speed. However, within the last year or two, a competing, and sometimes conflicting, goal of wireless communication has become as important, if not more important, than mere computer speed. Additionally, integrated devices in which a person would be able to use cell phone, e-mail and internet access, in a single instrument, is becoming more and more available in the market place.

As we know, as technology advances, previously-unknown or unrecognized ethics issues arise. In the medical field, the issue of cloning has created bio-ethical issues for physicians. For attorneys the technological advancements regarding computers, e-mail, internet access, and other wireless and wired communications with clients has become a serious topic of discussion. Certainly, as more and more lawyers and their clients go “on-line,” the ethical issues surrounding these technological advancements become of greater and greater importance.

The purpose of this presentation will be to address the ethical considerations regarding an attorney’s use of such technological advancements as e-mail, the internet, and wireless communication generally.

**Rules of Professional Conduct:**

The Rules of Professional Conduct governing attorneys in Kentucky is set forth within SCR 3.130. In particular, RPC 1.6, concerning confidentiality, reads, in full:

- (a) A lawyer shall not reveal information relating to 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).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (3) To comply with other law or a court order.

A. **Defining the “Reasonable Expectation of Confidentiality” in Light of the Ease of Intercepting Wireless Communications.**

The word “ease” regarding the interception of wireless conversations or wireless communications is somewhat of a “moving target.” Advances in technology have turned the unreasonable into the reasonable.

Perhaps the benchmark for a reasonable expectation of confidentiality in the electronic age of communication is land line telephone conversations. In Catz v. United States, 389 U.S. 347 (1967), the United States Supreme Court held that the Fourth Amendment protection against unreasonable searches and seizure included telephone communications sought to be

intercepted by a listening device. Additionally, the intentional interception of a telephone communication would be violative of the federal wire tap statute, 18 U.S.C. 2510 et. seq. It should also be noted that the criminalization of the interception of wired communications under the federal wire tap statute, which is not been extended criminalizing the intentional interception of cordless phone and cell phone communications, is a reason used in Ethics Opinions from around the United States which have held that such communications are in violation of the attorney's duty of confidentiality of client communications.

Early generation cordless phone and early generation analog cellular phones relied on radio transmission of the communication. As a result, either intentionally, negligently, or just through casual use, radio scanners could be used to intercept cordless telephone conversations and analog cellular phone conversations. As a result, earlier Ethics Opinions expressed grave concerns regarding an attorney's use of such easily intercepted telephone communication.

**B. What the Court's Say Regarding Privileged and Wireless Conversations**

Since the issue of whether a wireless communication is consistent with an attorney's ethical obligation is primarily an ethics issue, the law on this topic primarily comes from state Ethics Opinion.

1. Cellular:

Most Ethics Opinions which have addressed the issue of cellular phone use, have generally permitted the use of such cell phones subject to certain general guidelines.

- \* Illinois 90:07 (1990): A lawyer should not use a cordless or other mobile telephone that is easily susceptible to interception when discussing confidential client matters.
- \* Arizona Ethics Opinion 95-11 (1995): Lawyers may use cordless or

cellular phones to communicate with a client without a scrambling device or without providing a warning subject to the attorney using caution about communicating confidential matters.

- \* Massachutes Ethics Opinion 94-5 (1994): Lawyers should not use a cell phone to discuss a matter with a client if there is a real chance of the conversation being intercepted and any doubts should be resolved in favor of not communicating such confidential matters over a wireless telephone connection.
- \* North Carolina Ethics Opinion 215 (1995): Lawyers should use reasonable care to select method of communication will best maintain any confidential information which might be intercepted.
- \* New York City Ethics Opinion 1994-11 (1994): Lawyers should use caution when discussing client information on a wireless connection and to avoid, to the extent possible, revealing any client confidences in the communication. The Opinion also notes that an attorney, who may be using a land line should still be sensitive towards the possibility that the person they are talking to may be on a non-secure cordless phone or cell phone.

Early cell phones, some of which are still around used the analog radio signal method of transmitting the communication from the cell phone to the other party. As a result of the ability of radio scanners to pick up such conversations, some Ethics Opinions earlier held that such methods of communication were questionable. Massachutes Ethics Opinion 94-5 and New Hampshire Ethics Opinion 1991-92/6.

However, the advent of digital signals generate a signal which can not be picked up by the ordinary radio scanner. As such, the “reasonable expectation of confidentiality” concerns regarding earlier analog cell phones would not apply to current digital cell phones.

As a practical matter, since most cell phones are multi-mode, meaning they can receive and send an analog or digital signal, the security of a digital signal will be lost if the cell phone was communicating through the analog mode.

2. E-mail:

The ever-increasing use of e-mail raises similar issues regarding both wired and wireless electronic communication.

E-mail communications generally fall into three modes of communication:

1. Local area network/internal office e-mail.
2. E-mail through a commercial provider such as AOL.
3. E-mail through the internet.

The use of e-mail in its varied forms was the subject of a Formal Opinion from the American Bar Association's Standing Committee on Ethics and Professional Responsibility. In Formal Opinion No. 99-413, issued March 10, 1999, the ABA held generally that an attorney may use unencrypted e-mail sent over the Internet without violating the Rules of Professional Conduct. The ABA concluded that such routine e-mail transmissions provided a "reasonable expectation of privacy" from both a technological and a legal standpoint.

From a legal standpoint, the civil and criminal penalties contained in the Electronic Communications Privacy Act, 18 U.S.C. Section 2510 et. seq., which extend to e-mail transmissions, provide one of the grounds for finding such e-mail communications to not run afoul of the Rules of Professional Conduct. The reasoning is that a person should have a reasonable expectation of privacy regarding any communication which would be a crime to intercept.

As a practical matter, such e-mail is typically secure either through the mode of transmission. For example, interoffice e-mail or e-mail which is modem-to-modem, from one computer directly to another computer, is secure by its nature, to the same extent as a land line telephone conversation. Additionally, regarding e-mail transmission over the Internet, the very

nature of such communication, i.e., the message being broken up into pieces, sent through different routes to the designated e-mail address, made interception of the message highly improbable if not impossible.

The following is a brief review of some recent Ethics Opinions from states which have addressed the issue of e-mail transmission:

- \* Tennessee State Bar Association Opinion 98-A-650 (1998) improper for attorney to use e-mail to transmit client confidences in secret unless the client consents, the message is encrypted or the transmission is through a secure non-internet connection.
- \* Alaska Bar Association Opinion 98-2 (1998) attorney may communicate with client but should use judgment as to sensitive matters and inform client that communications may not be completely secure.
- \* District of Columbia Bar Opinion 281 (1998) e-mail communication appropriate in more circumstances even if attorney does not obtain client consent.
- \* Illinois State Bar Association Opinion 96-10 (1997) attorney may use e-mail without encryption, unless “unusual circumstances” require additional security measures such as encryption.
- \* Iowa Supreme Court Board of Professional Ethics and Conduct Opinion 97-1 (1997) e-mail in general permitted although client consent required for “sensitive” communications.
- \* State Bar Association of North Dakota Opinion 97-09 (1997) unless “unusual circumstances” present, attorney may use unencrypted e-mail.
- \* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion 97-130 (1997) attorney may use unencrypted e-mail but must advise client of risks and obtain consent.
- \* South Carolina Bar Ethics Advisory Committee, Opinion 97-08 (1997) e-mail communication permitted, considered that there is a

reasonable level of certainty and expectation that such e-mail communications are confidential.