REPLY ALL REGRETS:
Appellate Ethical Issues for Both Tech Geeks and Luddites

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By
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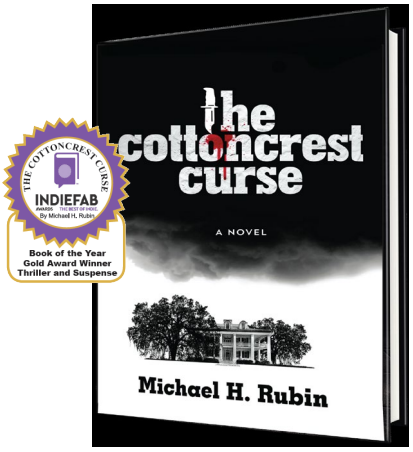

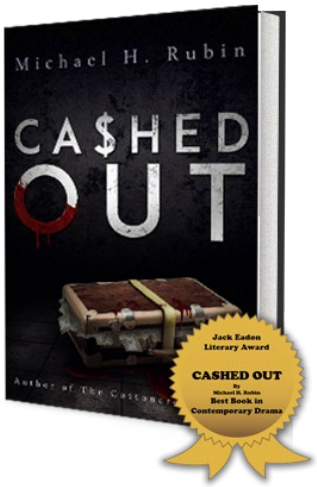

THE COTTONCREST CURSE

When they know who you really are, you're never safe.

In this heart-racing thriller, a series of gruesome deaths ignite feuds that burn a path from the cotton fields to the courthouse steps, from the moss-draped bayous of Cajun country to the bordellos of 19th century New Orleans, from the Civil War era to the Civil Rights era and across the Jim Crow decades to the Freedom Marches of the 1960s and into the present.

CASHED OUT

Holding $4 million in cash, given to you by your murdered client, makes you everyone's target.

One failed marriage. Two jobs lost. Three maxed out credit cards. "Schex" Schexnaydre was a failure as a lawyer. Until three weeks ago, he had no clients and no cash. Well, no clients except for infamous toxic waste entrepreneur G.G. Guidry, who's just been murdered. And no cash, except for the $4,452,737 Guidry had stashed with him for safekeeping.

A WHITE HOT PLAN

A disgraced and fired New Orleans homicide detective, relegated to working in a rural area writing his quota of speeding tickets, stumbles across a terrorist plot to bomb the French Quarter.

Praise for "The Cottoncrest Curse"

"Rubin's **gripping debut mystery** depicts the bitter racial divides of post-Reconstruction South and its continuing legacy."
Publishers Weekly

"This historical thriller is thoroughly researched. It is literary fiction taking "readers on **an epic journey**."
Southern Literary Review

"A thrilling murder mystery."
225 Magazine

Praise for "Cashed Out"

"*Cashed Out* features **a lawyer down and out enough to make John Grisham proud**. He's culled from the likes of **Michael Connelly by way of James Lee Burke**. A gem of a tale."
Providence Journal

If you like John Grisham and Michael Connelly's Lincoln Lawyer, you're gonna love "Schex" Schexnaydre – an attorney who breaks all the rules looking for some kind of justice. **Fast, funny, and filled with twists and edge-of-your-seat suspense.** Michael H. Rubin really nails it!
R.G. Belsky, author of the Gil Malloy mystery series

Praise for "A White Hot Plan"

"A **gripping, propulsive thriller I couldn't put down**."
Ellen Byron, USA Today Best-Selling Author

"A **lightning-paced hardboiled winner**."
Baron Birtcher, LA Times Best-Selling Author

"A **rocket-sled ride of a crime thriller**."
Jim Nesbitt, award winning thriller author

Reply All Regrets:
Appellate Ethical Issues for Both Tech Geeks and Luddites[2]

BY: MICHAEL H. RUBIN[3]

1. AN OVERVIEW OF THE ISSUES

Electronic communications envelop us. From mobile phones to smart watches to email, texting, instant messaging, social media, and video conferencing, we're spending more and more time engaged in remote communications through electronic interfaces rather than meeting in person or consulting over the phone.

In the "old" days, a lawyer would dictate a memo to a stenographer or onto a Dictaphone or similar device. Now, we simply dictate directly into a voice memo, text, or email, which automatically transcribes what we say with unusual accuracy. When we travel to foreign countries, we often rely on electronic communication devices to translate text and speech. And some of us don't even bother to write or dictate anything originally; rather, we use AI assistance, such as ChatGPT, GPT-4,[4] ChatSonic,[5] and DialoGPT.[6]

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[2] A portion of this paper consists of adaptations of the author's prior publications, including "Technology Traps and Reply All Regrets, Ethical Issues for Both Tech Geeks and Luddites," Stewart Title, Boca Raton Florida (January 2024); "Technology Traps and Reply All Regrets, Ethical Issues for Both Tech Geeks and Luddites," National Association of Estate Planners and Councils, Fort Lauderdale (November, 2023); Reply All Regrets, Electronic "Reply All Regrets: Electronic Communication Issues," American College of Real Estate Lawyers Mid-Year Meeting, Charleston, S.C. (March 2023); "Bordering on the Edge: Multijurisdictional Practice Issues for Real Estate and Trust and Estate Practitioners," 32nd Annual ABA Real Property Trust and Estates Section Spring Conference Webinar (May 2020); "Ouch! Social Media for Estate Planners," Sioux Falls Estate Planning Council (Nov. 2019), Sioux Falls, South Dakota; "Bordering, on the Edge," ICSC U.S. Shopping Center Law Conference (Oct. 2018), Orlando, Florida; "Bordering on the Edge," ICSC/OKIMP Retail Development and Law Symposium (Feb. 2014), Kansas City, Missouri; "Multijurisdictional Ethical Traps for Real Estate Lawyers," ALI-CLE Webinar (Dec. 2013); "The Social Media Thicket: Surviving And Thriving In A Tangled Web And The Ethical Issues This Raises for Lawyers," ALI-ABA Webinar (2011); and "The Multiplying Multijurisdictional Morass: What's A Transactional Lawyer To Do?" ABA Business Law Section Spring Meeting (March 2012), Las Vegas, Nevada.

[3] The author is licensed to practice law only in Louisiana. This paper, while it refers to and discusses the law of states other than Louisiana, reflects an outsider's view of the laws and jurisprudence of those states.

[4] *See*: https://openai.com/gpt-4, (last visited 07/25/24).

We have become so dependent on our smartphone that, if we inadvertently misplace it, we not only feel bereft, but we also often have no way of calling many of our loved ones because we no longer memorize phone numbers, relying instead on our electronic devices for that task.

Electronic communications are wonderful but can raise unexpected ethical issues for litigators and appellate lawyers. This paper explores just a few of these issues through the law professor's favorite tool—the hypothetical.

2. REPLY ALL REGRETS

2.1 The "Reply All Regrets" Hypothetical

Overworked young lawyer Justin is rushing to meet a deadline on an appellate brief being filed in federal court on behalf of three corporate co-defendants. Issues that must be addressed include what issues to raise on appeal, which issues will not be raised or briefed, and the "tone" of the brief.

As the lead drafter on the appellate brief, Justin receives an email from Candace, the lawyer for one of the other two co-defendants. Candace's email is direct to Justin with thoughts on the brief and issues about potential positional conflicts among the three defendants that need to be resolved in the brief. Candace cc's on her email all the other lawyers for all the clients, as well as her own client.

Justin then responds to Candace cc'ing everyone on Candace's email, including Candace's client.

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[5] *See:* https://writesonic.com/chat, (last visited 07/25/24).

[6] *See:* https://www.microsoft.com/en-us/research/project/large-scale-pretraining-for-response-generation/ (last visited 07/24/24).

Does Justin's action raise any ethical concerns?

2.2 Background on the Hypothetical

ABA Model Rule 4.2 prevents a lawyer from directly communicating with an opposing party who has counsel without the consent of opposing counsel.[7]

The Comments to the ABA Model Rule state that the Rule applies to "communications with any person represented by counsel concerning the matter to which the communication relates."[8] The Comments do not suggest that it makes any difference whether the communications occur in person, by phone, or via electronic media.

While the Comments state that a lawyer may "seek a court order" if counsel is uncertain whether such communication is permitted,[9] this is of no assistance to appellate lawyers working under a tight deadline.

Where is one to look for guidance in connection with this hypothetical? Is the fact the sending lawyer cc'd the client sufficient to constitute actual or implied consent for the recipient lawyers on the other side of the table to "reply all," including to the sending lawyer's client? The reported bar opinions on this subject break down into one of three approaches:[10]

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[7] ABA Model Rule 4.2:

> Transactions With Persons Other Than Clients
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[8] ABA Model Rule 4.2, comment [2].

[9] ABA Model Rule 4.2, comment [6].

[10] *See:* Patricia A. Saller, "Pay Attention to the CC," 59 Arizona Attorney 8 (2022).

- A lawyer who cc's a client on a group email is *not* giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client;
- A lawyer who cc's a client on a group email *is* giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client;
- A lawyer who cc's a client on a group email may or may not be giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client—it simply depends on the circumstances.

2.2(a) The "It's Never Okay to Reply All and There's No Implied Consent" Analysis

Opinions of the New York City Bar,[11] the South Carolina Bar[12] the Kentucky Bar,[13] the Illinois Bar,[14] and the North Carolina Bar[15] reject implied consent and hold

[11] New York City Bar Formal Opinion 2009-01 (2009), found at:
https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2009-01-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers
(last visited 07/25/24).

[12] South Carolina Bar Ethics Opinion 2018 18-04, found at:
https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-18-04/#:~:text=%5Bi%5Dn%20representing%20a%20client,law%20or%20a%20court%20order
(last visited 07/25/24).

[13] Kentucky Bar Association Ethics Opinion KBA E-442 (2017), found at:
https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions_(part_2)_/KBA_E-442.pdf
(last visited 10/25/22).

[14] Illinois State Bar Association Professional Conduct Advisory Opinion 19-05 (Oct. 2019), found at:
https://www.isba.org/sites/default/files/ethicsopinions/Opinion%2019-05%20%28Email%20Reply%29%28100119%29%20_0.pdf
(last visited 10/24/22).

[15] North Carolina Bar Formal Ethics Opinion 2012-7 (2013), found at:

that a lawyer cannot "reply all" merely because the sending lawyer includes her client on the group email.

The 2009 New York City Bar opinion discerns no difference between emails and letters, holding that "sending simultaneous correspondence to a represented person and her lawyer without prior consent violates the no-contact rule unless otherwise authorized by law."[16]

This opinion does not refer to the ABA Model Rules; rather, it references the then-extant New York DR 7-104(A)(1), which was superseded in April 2009 when New York revised its ethics rules to track the ABA Model Rule format and numbering system.[17]

The New York City Bar opinion says the no contact rule "fundamentally embodies principles of fairness. The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact."[18] The opinion is concerned the client might respond before her lawyer does;[19] it does not consider whether the sending lawyer has an obligation to properly instruct the client about not responding.

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https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/?opinionSearchTerm=Changes%20in%20the%20law (last visited 07/25/24).

[16] See the citation at footnote 11, above.

[17] *See*, the New York State Bar Rules of Professional Conduct, found at: https://nysba.org/app/uploads/2022/07/Rules-of-Professional-Conduct-as-amended-6.10.2022-20220701.pdf (last visited 07/25/24).

[18] *Id*., internal quotation marks and cites omitted.

[19] The New York opinion states:

The South Carolina Bar opinion expressly states that a receiving lawyer may never "reply all" without the express consent of the sending lawyer, and the "mere fact that a lawyer copies his own client on an email does not, without more, constitute implied consent to a 'reply to all' responsive email."[20] Like the 2009 New York City Bar opinion, the South Carolina Bar opinion sees no reason to differentiate between mailed communications and emailed communications.[21]

The Kentucky Bar opinion holds there was no implied consent merely because a lawyer cc'd a client on an email to opposing counsel.[22] The opinion recommends either

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> While it is true that sending a copy of the communication to counsel reduces the risk that the represented person will be subject to overreaching, the risk is not eliminated. In practical terms, there is no assurance that a letter or email sent simultaneously to a lawyer and her client will be received by them at the same time. For any number of reasons—the vagaries of the postal or computer system, the lawyer's work or travel schedule, or delays in the distribute on of mail at the lawyer's office—the lawyer might not receive her copy of the communication until after the client has received it and made a direct uncounseled response. The risk is magnified with email communications, where a response by the client can be made with the touch of a button on a keyboard.

[20] South Carolina opinion 2018 18-04 (*see* footnote 12, above).

[21] *Id*., (emphasis supplied):

> In S.C. Bar Eth. Adv. Op. 91-02, this Committee was asked if a prosecutor copying criminal defendants on court appearance notifications (i.e., trial date, roll call, etc.) and consequences for failure to appear would violate Rule 4.2. Unless the lawyer for the opposing party consented to the communication or the communication was authorized by law, the Committee opined the notification would violate Rule 4.2. In S.C. Eth. Adv. Op. 93-16, the Committee was asked two questions about communication with a represented person, one of which was whether a plaintiff's lawyer can copy a represented defendant on any settlement proposals sent to the defendant's lawyer. Looking to the language of Rule 4.2 and noting the absence of any South Carolina law that would allow for the contemplated communication, the Committee concluded that "Rule 4.2 proscribes all communication with a represented party; thus, precluding copying the represented party on written letters directed to that party's attorney. The lawyer may contact the represented party only if that party's attorney so consents." S.C. Eth. Adv. Op. 93-16 at 2.
>
> *In the same way that sending a letter is prohibited, copying an opposing party on an email is prohibited by Rule 4.2, absent consent of opposing counsel.*

[22] See the citation at footnote 13, above.

forwarding the email to the client or bcc'ing the client; however, the opinion does not consider the possibility (raised in the Virginia Bar's opinion[23]) that a bcc'd client may then "reply all."

While the North Carolina Bar's opinion recognizes that consent may sometimes be implied, it holds that merely cc'ing a client on an email does not constitute implied consent.[24] Like the Kentucky Bar's opinion, North Carolina recommends either forwarding the email trail to the client or bcc'ing the client, but also like the Kentucky Bar's opinion, the North Carolina opinion does not explore the risks of bcc'ing the client.

The Illinois opinion holds that, while it "does not contravene a rule of professional conduct for a lawyer to cc the client when corresponding with another lawyer by e-mail," nonetheless, if "the mere copying of one's own client on an e-mail were considered to be an invitation to opposing counsel to do the same, the purposes of Rule 4.2 could be thwarted."[25] The Illinois opinion, referring to the 2009 New York City Bar analysis, notes the possibility of a client reading and responding to an email before her counsel does, undermining the role of "the represented person's lawyer as

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[23] See the discussion in Section 2.2(b), above.

[24] North Carolina's Bar's opinion (*see* footnote 15, above), emphasis supplied:

> There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a "reply to all" responsive electronic communication. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2.

[25] See the citation at footnote 14, above.

spokesperson, intermediary, and buffer."[26] Neither the New York nor Illinois opinion consider whether the represented person's lawyer has an obligation to instruct her client not to respond to such emails.

While the Illinois opinion, on the one hand, states that Rule 4.2 seems to prohibit an implicit-at-all-times-consent-to-reply-all emails when the client is cc'd, the opinion also recognizes that, under certain, limited conditions, consent can be implied.[27] The opinion suggests, however, that the best course of action is either (a) for the sending lawyer not to cc the client but rather forward the email trail to the client, or (b) for a receiving lawyer to ask the sending lawyer for permission to "reply all." The opinion does not discuss why the duty rests on the receiving lawyer and not on the sending lawyer who copied her client.

[26] *Id*.

[27] The Illinois opinion states:

> That is not to say that consent to a 'reply all' email may never be implied. The particular circumstances surrounding an email communication could amount to implied consent to a 'reply all' from opposing counsel." South Carolina Bar Ethics Advisory Opinion 18-04. If the lawyers and clients involved had a long-standing custom and practice to include their clients on routine emails (which is not the case in the present inquiry), then Rule 4.2 would permit it. Some of the considerations that demonstrate acquiescence are mentioned in the North Carolina, Alaska, and South Carolina opinions cited above.

2.2(b) The "It's Okay to Reply All" Analysis

In contrast to the "never-reply-all" rule discussed above, New Jersey[28] and Virginia[29] take the opposite approach, finding implied consent to exist when the sending lawyer cc's the client.

The New Jersey ethics opinion places the burden of communication on the sending lawyer. If the sending counsel did not want other counsel corresponding with the sending lawyer's client by a "reply all" response, then the sending lawyer should not have cc'd her client. The opinion states that "reply all" in a group email "should not be an ethics trap for the unwary or a 'gotcha' moment for opposing counsel."[30] The sending of the group email, the opinion continues, constitutes implicit consent for opposing counsel to respond to the entire group—just as if the developer's lawyer instituted a conference call and included the client on the call. This is because, as the opinion notes, email "is an informal mode of communication. Group emails often have a conversational element with frequent back-and-forth responses. They are more similar to conference calls than to written letters. When lawyers copy their own clients on group emails to opposing counsel, all persons are aware that the communication is between the lawyers."[31]

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[28] New Jersey Advisory Committee on Professional Ethics Op. 739 (03/10/21), found at: https://www.njcourts.gov/notices/acpe-opinion-739-rpc-42-lawyers-who-include-clients-group-emails-and-opposing-lawyers-who (last visited 07/25/24).

[29] Virginia Legal Ethics Opinion 1897, found at: https://www.vacourts.gov/courts/scv/amendments/leo_1897.pdf (last visited 07/25/24).

[30] *Id*.

[31] *Id*.

The New Jersey opinion, unlike the 2009 New York City Bar and South Carolina Bar opinions discussed above, sees a distinct difference between group emails and written, mailed letters: "There is no question that a lawyer who receives a letter from opposing counsel on which the sending lawyer's client is copied may not, consistent with Rule of Professional Conduct 4.2, send a responding letter to both the lawyer and the lawyer's client."[32]

In 2022, the Virginia Supreme Court issued an opinion that, in line with the New Jersey analysis, held a lawyer who cc's a client on an email "has given implied consent to a reply-all response by opposing counsel."[33] The Virginia opinion, however, advises against sending a blind copy to a client because "a blind copied client may still be able to reply all to everyone who was in the 'to' field of the original email." Thus, the opinion recommends blind copying all recipients "to avoid the risk of a reply all response."

2.2(c) The "It Depends" Analysis

Washington[34] and Alaska[35] reject a one-size-fits-all approach, ruling that "reply all" is permitted if "it can be implied by the facts and circumstances."[36]

The Washington State Bar's opinion, for example, looks to "the totality of the facts and circumstances."[37]

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[32] *Id*.

[33] Virginia Legal Ethics Opinion 1897; see the cite at footnote 29, above.

[34] Washington State Bar Association Opinion 202201 (2022), found at: https://ao.wsba.org/print.aspx?ID=1698 (last visited 07/25/24).

[35] Alaska Bar Association Ethics Opinion No. 2018-1, found at: https://alaskabar.org/wp-content/uploads/2018-1.pdf (last visited 07/25/24).

[36] Washington State Bar Association Opinion 202201 (*see* footnote 34, above).

Alaska counsels that a "lawyer who copies a client on e-mail communications with opposing counsel risks waiver of attorney/client confidences [and] a lawyer who responds to an e-mail where opposing counsel has 'cc'd' the opposing counsel's client ***has a duty to inquire*** whether the client should be included in a reply."[38] Alaska's opinion also warns of "instances where disclosure of an e-mail address may, in itself, violate a court order or other confidentiality requirement (*i.e.*, if there is a protective order or if the fact that the person is represented is confidential)." Yet, Alaska's opinion states that the "rules only apply to the subject of the representation or other client confidences or secrets" and that "it is likely not problematic to 'cc' a client on electronic communications regarding scheduling or other purely administrative matters."

2.3 The ABA Opinion on the "Reply All" Situation

In November 2022, the ABA released Formal Opinion 503, entitled "'Reply All' in Electronic Communications."[39] It concludes that copying a client on emails and texts constitutes implied consent to a "reply all" response, but it also warns that the presumption of implied consent is "not absolute." For example, the opinion excludes from the implied consent rule "a traditional letter, printed on paper and mailed." It also excludes emails where the sending lawyer has informed others in a "prominent" manner and in advance that there is no consent to a "reply all" response, but the opinion fails to explain why the sending lawyer can do so but still cc the client and put the burden on the

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[37] *Id*.

[38] Alaska Bar Opinion 2018-1 (*see* footnote 35, above), emphasis supplied.

[39] ABA Formal Opinion 503 found at:
https://www.lawnext.com/wp-content/uploads/2022/11/aba-formal-opinion-503.pdf
(last visited 07/25/24).

responding lawyers.[40] For example, what if there is a lease that was negotiated in 2023 and there are ongoing issues over the years? Would one "don't reply all to my client" warning in 2023 be sufficient for a series of emails sent in 2026?

ABA Formal Opinions, while recognized by many courts and disciplinary counsel as persuasive authority,[41] have no force of law and cannot supersede state bar opinions to the contrary.

3. WHERE ARE YOU SITTING WHEN YOU "REPLY ALL"

3.1 The "Where are You Sitting When You Reply All" Hypothetical

The facts are similar to the first hypothetical. Drafts of brief are being circulated by email among the attorneys and some of the attorneys are cc'ing their clients on the emails.

Candace reads Justin's response to her prior email. She disagrees with Justin, wants to stick with the changes she suggested, and threatens to file a separate brief if Justin, his client, and the other co-defendant do not agree.

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[40] *Id*., stating in part:

> First, an express oral or written remark informing receiving counsel that the sending lawyer does not consent to a reply all communication would override the presumption of implied consent. Thus, lawyers who do not wish for their client to receive a "reply all" communication should communicate that fact in advance to receiving counsel, preferably in writing. This communication should be prominent; lawyers who simply insert this preference in a long list of boilerplate disclaimers in their email signature area run the risk of the receiving counsel missing it. Although such disclaimers are better than nothing, a more effective approach would be to inform the receiving counsel - at the beginning of the email or in an earlier, separate communication – that including the client in the communication does not signify consent (or as noted above, not copy the client at all).

[41] *See, e.g. Innovative Images v. Summerville,* 309 Ga. 675, 679, 848 S.E.2d 75, 79 (2020):

> ABA formal opinions and the opinions of other state courts and bar associations interpreting professional conduct rules analogous to Georgia's may be persuasive to this Court's interpretation of the [Georgia Rules of Professional Conduct].

Candace is not working in the office in State A, where she's licensed to practice.

Candace is at her vacation home in State B, where she's not licensed to practice. She's been living there since the Covid pandemic because her law firm allows remote practice.

Does Candace's action raise any ethical concerns? Does it matter that (i) Candace was retained in State B by her client who operates only in State B, (ii) Candace met her client while living in State B, and (iii) before moving to State B, neither Candace nor her firm had ever represented her client?

3.2 Background on the Hypothetical

Two related issues arise from this hypothetical: ABA Model Rule 5.5, and which state's law applies to the emailed communication.

A full analysis of Rule 5.5 and its implications exceed the scope of this paper, but many other resources explore the issue in depth.[42] Suffice it to say, ABA Model Rule 5.5[43] contains an absolute prohibition on the practice of law in a jurisdiction where a lawyer is not licensed, except for two narrow exceptions for transactional lawyers:

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[42] *See, e.g.* James W. Jones, Anthony E. Davis, Simon Chester, and Caroline Hart, "Reforming Lawyer Mobility—Protecting Turf or Serving Clients?" 30 Georgetown Journal of Legal Ethics 125 (217); James Geoffrey Durham and Michael H. Rubin, "Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach," 81 Louisiana Law Review 678 (2021); and Michael Haber, "Transactional Clinical Support for Mutual Aid Groups: Toward a Theory of Transactional Movement Lawyering," 68 Washington University Journal of Law & Policy 218 (2022).

[43] ABA Model Rule 5.5(a)-(c) provides:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> >
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

- a "temporary practice" taken in "association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;" [44]
- or matters that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[45]

Candace's first problem is that, unless State B has a rule or opinion allowing for remote practice, she may be committing the unauthorized practice of law in State B. At least 17 states have remote practice rules,[46] and ABA Opinion 495[47] approves of remote

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> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
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> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
>
> (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

[44] ABA Model Rule 5.5(c)(1).

[45] ABA Model Rule 5.5(c)(4).

[46] *See*: James Geoffey Durham and Michael H. Rubin, "Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach," 81 Louisiana Law Review 678 (2021).

[47] ABA Formal Opinion 495 (2020), found at: https://www.lawnext.com/wp-content/uploads/2021/09/aba-formal-opinion-495.pdf (last visited 07/25/24). The synopsis of the opinion states:

> Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to

practice as long as the lawyer is essentially working virtually in the home office in State A and not doing any "local" work in State B.

But this hypothetical does not fit comfortably within the scope of Opinion 495, because:

(a) Candace was retained by her client in State B, where she's not licensed to practice;

(b) Neither Candace nor her firm previously represented the client, which means neither are protected by Rule 5.5's exception of work arising out of or reasonably related to the lawyers' practice in State A. The Comments to the rule seem to indicate that this exception relates to (i) a previous relationship, (ii) work that is legally related to the state of licensure, or (iii) a particular body of nationally uniform law.[48] Is appellate law a "nationally uniform law" within the scope of the Model Rule?

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provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.

[48] Comment [14] to Model Rule 5.5 states (emphasis supplied):

> [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. *The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted.* The matter, although involving other jurisdictions, *may have a significant connection with that jurisdiction*. In other cases, significant aspects of the lawyer's work might be conducted *in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction*. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in

Even if Candace overcomes the hurdle of unauthorized practice, she faces an additional concern—namely, determining the ethical rules of (i) State A, where she's licensed, and (ii) State B, where she's sitting when she responds to the email and where her client is located. It has been clear since the *Birbrower* decision[49] that "one may practice law in the state . . . although not physically present" in the state.[50] Moreover, a lawyer may be subject to discipline under both (a) ABA Model Rule 8.3 if the lawyer violates a state's rules of professional conduct, and (b) ABA Model Rule 8.4 even if the lawyer is not physically present in the jurisdiction.[51]

> which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[49] *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct*., 949 P.2d 1 (Cal. 1998).

[50] *Id*. 949 P.2d at 5.

[51] ABA Model Rule 8.5:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
> >
> > (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Candace may face the unenviable task of figuring out what to do *after* hitting "reply all" if State A prohibits that action and State B either allows it by assuming implied consent or has a "totality of the circumstances" approach.[52]

On the other hand, in this interconnected world, where emails have no physical location, one might question why the lawyer receiving the group email is tasked with protecting the sender's client when the sender's attorney did not do so.

4. Need a Hand and Lend a Hand

4.1 The "Need a Hand and Lend a Hand" Hypothetical

Two lawyers, Della and Felix, eagerly read emails from "*For Whom the Bell Appeals*," a listserv[53] for those interested in appellate issues, including lawyers, insurers, litigation funders, law students, and undergrads in pre-law courses. Users pose and respond to questions about appellate issues as well as post information on recent developments.

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[52] A choice-of-law analysis is beyond the scope of this paper. For more on this issue, *see, e.g.*, Paul Schiff Berman, "Legal Jurisdiction and Virtual Social Life, 27 Catholic University Journal of Law & Technology 103 (2019); Paul Schiff Berman, "Legal Jurisdiction and the Deterritorialization of Data," 71 Vanderbilt Law Review 11 (2018); and David Hricik, Prashant Patel, and Natasha Chrispin, "Ethics and the Internet: It's a Funny Old New World," 57 Practical Lawyer 21 (2011).

[53] As noted in Maryland State Bar Association's Committee on Ethics, Ethics Docket No. 2015-03, found at:
https://www.msba.org/site/content/Resources-and-Tools-Content/Ethics-Opinions/2015/2015-03.aspx
(last visited 07/25/24):

> LISTSERV is a trademarked "software for managing e-mail transmissions to and from a list of subscribers." Similar to other brand names that have been "genericized" (think Xerox or Kleenex), the word "listserv" is no longer used to indicate the specific software used, but is rather a generic term for a process of sending one email simultaneously to a pre-determined group of recipients.

Della is working on an appeal involving the First Amendment issues, prior restraint, preliminary injunctions, and social media, and she posts some questions about this and asks if anyone else on the listserv has faced these issues.

Felix, who always responds quickly to listserv questions he knows anything about, has recently handled a case for a social media influencer. Felix posts a detailed response on the listserv, including a "war story" illustrating issues of which Della should be aware.

Should Della or Felix be concerned about any ethical issues?

4.2 Background on the "Need a Hand and Lend a Hand" Hypothetical

This hypothetical raises five issues: competent representation,[54] confidentiality,[55] conflicts of interest,[56] the unauthorized practice of law,[57] and reporting of misconduct.[58]

4.2(a) Competent representation

ABA Model Rule 1.1 mandates that a "lawyer shall provide competent representation to a client." The Comments to Rule 1.1 recognize that one of the ways a lawyer acts competently is by consulting with attorneys "of established competence in the field in question."[59] The Comments also note that a "lawyer need not necessarily have

[54] See the discussion in Section 4.2(a), below.

[55] See the discussion in Section 4.2(b), below.

[56] See the discussion in Section 4.2(c), below.

[57] See the discussion in Section 4.2(d), below.

[58] See the discussion in Section 4.2(e), below.

[59] ABA Model Rule 1.1, Comment [1] states (emphasis supplied):

special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."[60]

While the Comments to ABA Model Rule 1.1 encourage lawyers to "consult with" experienced lawyers[61] and caution lawyers who retain or contract with other lawyers to assist or provide advice,[62] the Comments do not contemplate informal lawyer-

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> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter ***and whether it is feasible to*** *refer the matter to, or associate or* ***consult with, a lawyer of established competence in the field in question***. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[60] ABA Model Rule 1.1, Comment [2] states (emphasis supplied):

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. *Competent representation can also be provided through the association of a lawyer of established competence in the field in question.*

[61] ABA Model Rule 1.1, Comment [1], quoted in footnote 59, above.

[62] ABA Model Rule 1.1, Comment [6] states:

> Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

to-lawyer advice.[63] Commentators have noted, however, that not only can legal listservs "provide a powerful means of educating and socializing lawyers and can serve as an important resource when lawyers engage in decisionmaking,"[64] but that listservs for lawyers should be encouraged.[65] On the other hand, Oregon disciplined a lawyer who disclosed client information on the Bar's worker's compensation listserv.[66]

In the days before the use of listservs became ubiquitous, the ABA issued an opinion on lawyer-to-lawyer consultation.[67] The opinion does not use the words "listserv" or "Internet," but broadly aims at any "lawyer to lawyer consultation." It concludes that:

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[63] For a more detailed discussion of this issue, *see* Robert W. Dermer, "Ethical Limitations on Lawyer-to-Lawyer Online Consultations Regarding Pending Cases," 10 St. Mary's Journal on Legal Malpractice & Ethics (2019).

[64] Leslie C. Levin, "Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers," 37 Arizona State Law Journal 589, 591 (2005).

[65] Josiah M. Daniel, III, "'Listserv Lawyering': Definition and Exploration of Its Utility in Representation of Consumer Debtors in Bankruptcy and in Law Practice Generally," 11 St. Mary's University Journal on Legal Malpractice and Ethics 54, 87 (2021) (footnotes omitted, emphasis supplied):

> Lastly, the criteria of a profession such as law are:
> First, . . . a definable body of organized knowledge, an expertise that derives from extensive academic training. . . . Second, . . . a moral commitment of service to the public that goes beyond the test of the market or the desire for personal profit. . . . [And, third,] the relative independence or autonomy of professional life . . . [with] the right as a separate entity in society to regulate their own affairs and define their own standards.
> ***Listservs for professional groups***, such as bankruptcy lawyers, subsume these characteristics, always on an ethical basis, and ***should therefore be encouraged***.

[66] *In re Quillinan*, 20 DB Rptr. 288 (2006).

[67] ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 98-411 (08/30/1998), found at:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/98-411.pdf
(last visited 07/25/24).

- "Hypothetical or anonymous consultations are favored where possible." [Most listservs contain the names of those who make postings, although whether these posters are lawyers is often not revealed.]
- No lawyer-client relationship arises as a result of the consultation.
- "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development."
- "Testing ideas about complex or vexing cases can be beneficial to a lawyer's client."
- The lawyer posing the question must be careful to preserve client confidentiality, but the issuer of the opinion, the ABA Standing Committee on Ethics and Professionalism, stated that it interpreted Model Rule 1.6, "as illuminated by Comment [7], to allow disclosure of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."
- The consulting lawyer should avoid asking questions of a lawyer who does or is likely to represent an adverse party and should "consider requesting an agreement from the consulted lawyer to maintain the confidentiality of the information disclosed."
- The consulted lawyer "should reasonably assure that the advice given is not adverse to an existing client."

4.2(a)1(i) State Bar Listserv Opinions

A number of state bars have issued ethics opinions addressing listservs. Many of these opinions note the utility of listservs while also warning of potential problems. Some recommend either not participating in a listserv or obtaining prior client consent to do so. All of these opinions address, in one way or another, the issues of competency, confidentiality, and conflicts of interest.

The Maryland Bar recognizes that "peer-to-peer listservs represent a powerful tool for lawyers," are "extremely efficient," and are "of particular benefit to solo practitioners."[68] It cautions, however, against disclosure of confidential information and that "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."

The Oregon State Bar's 2011 opinion[69] concludes that a lawyer may post a question on a listserv and "disclose information relating to the representation" of the client. It also states that a responding lawyer may reply without first checking for conflicts, recognizing that consultations "among lawyers, whether during the course of a mentorship program, on LISTSERVs [*sic*] . . . are an important part of a lawyer's professional development and a critical component in representing clients" and may be one way lawyers fulfill their ethical duty to provide competent representation.

[68] See the citation to the Maryland Bar's opinion at footnote 53, above.

[69] Oregon State Bar Formal Opinion 2011-184, found at: https://www.osbar.org/_docs/ethics/2011-184.pdf (last visited 07/25/24).

The Illinois State Bar's opinion does not prohibit the use of listservs and notes that lawyers "may consult with other lawyers in an online discussion group," but cautions that client confidentiality, attorney-client privileges, and conflicts of interest must be considered and that, in any event, "an online discussion group is not a substitute for the consulting lawyer's legal research."[70]

The Texas Bar's opinion allows lawyers to use listservs without the client's express consent, but only if there is a "limited amount of unprivileged confidential information" given and "it is not reasonably foreseeable that revelation will prejudice the client."[71] The Texas Bar's opinion does not consider the issue of confidential information that is not privileged.

On the other hand, the Los Angeles County Bar's ethical opinion warns that since "attorneys must always remain mindful of their duties to protect confidential client information, and one never knows who might read or react to e-mail posted to a listserv, attorneys should avoid including information in listserv postings identifiable to particular cases or controversies."[72]

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[70] Illinois State Bar Professional Conduct Advisory Opinion 12-15 (2012). The Opinion's digest states:

> Use of a lawyer listserv or bar association online discussion group can be a useful and effective means to educate lawyers and can provide a resource when lawyers engage in research and decision-making. However, when lawyers consult with other lawyers who are not associated with them in the matter, both the consulting lawyer and the consulted lawyer must take care to protect client confidentiality and the attorney-client privilege and take care to avoid creating a conflict of interest with existing clients. In addition, an online discussion group is not a substitute for the consulting lawyer's legal research.

[71] The State Bar of Texas' Professional Ethics Committee Opinion 673 (2018), found at: https://www.law.uh.edu/libraries/ethics/Opinions/601-700/EO673.pdf (last visited 07/25/24).

[72] Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 514 (08/01/05), found at: https://lacba.org/?pg=ethics-opinions (last visited 07/25/24).

The New Hampshire Bar's opinion raises concerns similar to those of the Los Angeles County Bar, warning that "the use of a Listserv to communicate with other lawyers on a client-related matter is particularly fraught with risks, due to the public nature of the conversation. The lawyer simply cannot make information posted on a Listserv secure from unwanted interception or use either by a member of the Listserv or any individual who might receive the information by retransmission. Even if a Listserv is restricted to a private organization or group, you should always treat it as being potentially available to the public."[73] It recommends that a lawyer should obtain client consent prior to posting on a listserv.

4.2(b) Confidentiality

Our employers and our clients expect that we will all keep confidential information that they want kept confidential.

In addition, for lawyers, ABA Model Rule 1.6 mandates that a lawyer "shall not reveal information relating to the representation of a client" unless: the client has given informed consent; disclosure is required by a court order; to detect and resolve conflicts when lawyers change employment; or to prevent reasonably certain death, substantial bodily harm, or the commission of a crime or fraud "in furtherance of which the client has used or is using the lawyer's services."[74]

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[73] New Hampshire Bar "Guidance Offered on Posting to Listservs, Ethics Corner Article (09/20/13), found at: https://www.nhbar.org/resources/ethics/ethics-corner-practical-ethics-articles/2013-09 (last visited 07/25/24).

[74] ABA Model Rule 1.6 states:

The confidentiality that Rule 1.6 encompasses is broader than the attorney-client privilege.[75] It protects not only "matters communicated in confidence by the client, but

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> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent reasonably certain death or substantial bodily harm;
> >
> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> >
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> >
> > (4) to secure legal advice about the lawyer's compliance with these Rules;
> >
> > (5) 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;
> >
> > (6) to comply with other law or a court order; or
> >
> > (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) 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.

[75] Detailing the differences between the privilege and confidences is beyond the scope of this article, but there are many resources available exploring this area, including: Dru Stevenson, "Against Confidentiality," 48 University of California Davis Law Review 337 (2014); Sande L. Buhai, "Confidentiality of Client Identity," 2013 Professional Lawyer 195 (2013); Leah M. Christensen, "A Comparison Of The Duty Of Confidentiality And The Attorney-Client Privilege In The U.S. And China: Developing A Rule Of Law," 34 Thomas Jefferson Law Review 171 (2012); David F. Chavkin, "Why Doesn't Anyone Care About Confidentiality? (And, What Message Does that Send to New Lawyers?)," 25 Georgetown Journal of Legal Ethics 239 (2012); Anne Klinefelter, "When to Research Is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking," 16 Virginia Journal of Law & Technology 1 (2011); and Lloyd B. Snyder, "Is Attorney-Client Confidentiality Necessary?" 15 Georgetown Journal of Legal Ethics 477 (2002) (arguing for robust, traditional confidentiality rules).

Note that at least one court has held that the attorney-client privilege can be waived if a client prints an otherwise privileged email at a hotel front desk. *See*: *Fourth Dimension Software v. Der Touristik Deutschland GMBh*, 2021 WL 4170693 (N.D. Cal. 2021). The court stated (internal record cites omitted, emphasis supplied):

> The parties have a discovery dispute about whether plaintiff Fourth Dimension Software ("FDS") has properly withheld a September 28, 2016 email from its former in-house counsel, John Pavolotsky, to its President and CEO, Ilya Pavolotsky (who is also John's father), on attorney-client privilege grounds. That email contains the subject line "Re: AOVO" and was sent the day

also . . . all information relating to the representation, whatever its source."[76] As one law review article noted, even "accidental disclosure of confidential information can nonetheless be viewed as a breach of the lawyer's ethical obligation."[77]

Model Rule 1.6(c) specifically requires that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of" confidential information, and ABA Formal Opinion 480[78] cautions lawyers who blog "or engage in other public commentary" not to reveal confidential information.

> before Ilya met with third-party company, Aovo Touristik, in Germany to discuss Aovo's potential licensing of FDS's software tools. Defendant Der Touristik Deutschland GMBh contends FDS has not shown that the email is subject to attorney-client privilege, and even if a privilege applied, ***FDS waived it when Ilya forwarded the email to a hotel front desk at "info.berlin@hilton.com," with the subject line "Please print one copy. I'm waiting at the front desk. Thanks." Id***., Ex. A. As discussed below, the Court finds that the privilege applied but FDS waived it.

[76] ABA Model Rule 1.6, Comment [3].

[77] Ido Baum, "The Accidental Lawyer: A Law and Economics Perspective on the Inadvertent Waiver," 3 St. Mary's Journal of Legal Malpractice & Ethics 112, 150 (2013).

[78] ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 480 (03/06/18), found at:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-480.pdf
(last visited 07/25/24).

This opinion has generated much criticism. For example, one commentator noted (emphasis in the original):

> It should come as no surprise that we would get absurd results from a rule that is based on logic so twisted it makes contortionists cringe. As professional legal marketers, we're seeing them, every day (the absurd results, not the cringing contortionists).
>
> Chief, and perhaps most frustrating, among them: Law firms that represent a client cannot write about the outcome without the client's permission, while other law firms can.
>
> That's right.
>
> Imagine Lawyer A winning an appeal for Client X. The court publishes the opinion – it's a public record. Lawyer M can write a legal blog about it. Lawyer A cannot, until they obtain informed consent from Client X. This is true, *even if the blog post contains nothing that is not in the public record*. This is true, *even if both blog posts are identical*.

The confidentiality requirement encompasses not only includes what the client tells the lawyer, but it may also protect the client's identity from disclosure. It may prevent a lawyer from revealing even information "contained in a public document or record . . , without regard to the fact that others may be aware of or have access to such knowledge."[79] Thus, a violation of Rule 1.6 can occur through the use of a hypothetical "if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical."[80]

Under the ABA Model Rules, even the telling of "war stories" that omit the client's name and privileged information can run afoul of the black-letter language of Rule 1.6.[81] This is the conclusion reached by an Alaska Bar opinion, although the opinion backs away from the black-letter rule to formulate the position that war stories are permissible if the lawyer "reasonably believes that the disclosures will not cause harm to the client."[82] The opinion, however, does not consider that a client may not want the facts

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See: Myers Freelance, "The ABA Formal Opinion 480 is Also Absurd" (Nov. 2021), found at https://www.myersfreelance.com/the-aba-formal-opinion-480-is-also-absurd/ (last visited 07/25/24).

[79] ABA Formal Opinion 480, p.3.

[80] *Id*.

[81] *See, e.g.*: Paula Schaefer, "Lawyers as Caregivers," 12 St. Mary's Journal of Legal Malpractice & Ethics 330 (2022); Joel M. Pores, "Social Networking and the Ethical Duty of Confidentiality," 55 Orange County Lawyer 38 (2013); and John Levin, "New Rules on Client Confidences," 25 Chicago Bar Association Record 64 (2011). *Also see* the David Chavkin article cited at footnote 75, above.

[82] Alaska Bar Ethics Opinion 95-1, found at: https://alaskabar.org/wp-content/uploads/95-1.pdf (last visited 07/24/25). The opinion also states (emphasis supplied):

> A literal application of the rule would undoubtedly prohibit the exchange of pleadings and opinions that relate in any manner to a lawyer's representation of a client, as well as forbidding "shop-talk," "war stories," and other such informal exchanges of information between lawyers. As noted by the lawyer who requested our opinion, informal communication has been traditionally

of the representation revealed or a discussion of the issues involved or how they were resolved.

The Alaska opinion quotes with approval from Professor Wolfram's Modern Legal Ethics book (1986), in which Wolfram argues that prohibiting war stories "would be senseless, would create morbid secretiveness among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality principle. Instead, [Model Rule] 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client."

If the black letter provisions of Rule 1.6 mandates this conclusion, might a better solution be to change the rule, rather than interpret it in a way that is at odds with the text's explicit language? Those in favor of a relaxed reading of the Model Rules rely on the Rules' "Scope" section, which states these are "rules of reason." It may be difficult, however, to rely on a relaxed reading of the rules when, as the Scope section notes, the terms "shall" and "shall not" are used as imperatives.

Model Rule 1.6 uses "shall not" in prohibiting a lawyer from disclosing client confidences without permission, except in a very narrow range of circumstances.[83] One may look in vain at the black letter text of Model Rule 1.6 to find an exception for war stories.

> employed in Alaska to educate new lawyers, to circulate information about important developments in the law, and to maintain courteous relations between the learned practitioners of our sometimes fractious profession. Literal application of Rule 1.6 would ban these valuable routes of intra-professional communication.

[83] *See* the text of Model Rule 1.6, quoted at footnote 74, above.

In an analogous situation of matters involving statutory interpretation, the Supreme Court had stated that there should not be a "free ranging search" for the best policy, rather, the "controlling principle" is "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."[84] Thus, courts must "begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'"[85] Is that the standard of interpretation to apply to the Model Rules, or should there be a different standard and, if so, what is that standard and where is it to be found?

The problem of the loss of confidentiality is heightened on listservs and other social media because, unlike war stories delivered verbally at a conference or over cocktails, the electronic discussions are preserved, perhaps forever,[86] and who knows what person, business, court, or governmental entity may be looking at it now or in the future. Thus, some fact relating to a situation might seem innocuous when written, but may become important, useful, or even critical when viewed years later with the benefit of 20-20 hindsight.

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[84] *Star Athletica, L.L.C. v. Varsity Brands, Inc*, 580 U.S. 405 (2017), 137 S.Ct. 1010 (2017).

[85] *Id*.

[86] While there is an ongoing debate about how "permanent" digital media is, there is no question that it can last for a very long time, either publicly available or stored on servers of the listserv or social media provider. *See, e.g*., Colin O'Keefe, "The Permanence of Digital Media is Hitting Us—And it is Weird" (2021), found at: https://www.pastthepressbox.com/2021/09/the-permanence-of-digital-media-is-hitting-us-and-it-is-weird/ (last visited 07/24/24); Cat Coode, "The Shocking Permanence of Your Online Data: How Online Posts, Pictures, and Messages Can Ruin Your Reputation, Even Years Later" (2016), found at: https://www.yummymummyclub.ca/blogs/cat-coode-technically-speaking/20160216/the-permanence-of-your-online-data-0 (last visited 07/24/24); and North Carolina State Archives, "Best Practices for Digital Permanence" (2013), found at: https://archives.ncdcr.gov/media/83/open (last visited 07/24/24).

Also see:
The Historic Internet Wayback Machine, which claims to preserve over 754 billion web pages. Found at: https://archive.org/web/ (last visited 07/24/25), and
Syed Hammad Mahmood, "8 Tools to View Old Versions of Any Website" (4/15/22), found at https://www.makeuseof.com/tools-view-old-versions-website/ (last visited 07/25/24).

4.2(c) Conflicts of interest

The ABA Model Rules on conflicts of interest are strict and prohibit lawyers from simultaneously representing two clients at the same time when they have conflicting interests.[87]

The use of listservs by lawyers may raise difficult issues for attorneys, because if the lawyers and non-lawyers posting on listservs do not mention their clients by name (which they should not do without client permission), there is no way for the responding lawyer to know whether an actual conflict of interest exists with the responding lawyer's client, or whether a "positional" conflict may arise.[88]

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[87] *See*: ABA Model Rules 1.7, 1.8, and 1.9.

[88] For more on positional conflicts of interest, *see*: David D. Dodge, "Positional Conflicts Revisited," 56 Arizona Attorney 8 (2020); David D. Dodge, "Positional Conflicts of Interest," 50 Arizona Attorney 8 (2019); Anthony E. Davis and Noah Fiedler, "The New Battle over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What is a Conflict," 24 The Professional Lawyer 1 (2016); Christopher L. Colclasure, Denise W. Kennedy, and Stephen Masciocchi, "Climate Change and Positional Conflicts of Interest," 40 Colorado Lawyer 43 (2011); Frances Chang, "Arguing Both Sides: Positional Conflicts of Interest in Antidumping Proceedings," 19 Georgetown Journal of Legal Ethics 583 (2006); Helen A. Anderson, "Legal Doubletalk and the Concern with Positional Conflicts: A 'Foolish Consistency,'" 111 Pennsylvania State Law Review 1 (2006); John S. Dzienkowski, "Positional Conflicts of Interest," 71 Texas Law Review 457 (1993); and Freivogel on Conflicts, found at: http://www.freivogelonconflicts.com/issuepositionalconflicts.html (last visited 07/25/2422).

Also see the following ethics opinions:

Oregon State Bar Formal Opinion 2007-177 (2007), found at: https://www.osbar.org/_docs/ethics/2007-177.pdf (last visited 07/25/24);

Board of Overseers of the Bar of the State of Maine Opinion #155 (1997), found at: https://www.mebaroverseers.org/attorney_services/opinion.html?id=89688, (last visited 07/25/24), disagreeing with the position taken in ABA formal Opinion 93-377;

State Bar of California Formal Opinion 1989-108 (1989), found at:
https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/1989-108.htm (last visited 07/25/24);

Philadelphia Bar Association Ethics Opinion 89-27 (1989) (last visited 10/30/22); State Bar of Arizona Opinion 87-15 (1987), found at:
https://philadelphiabar.org/?pg=EthicsOpinion89-27 (last visited 07/25/24); and

State Bar of Arizona Opinion 87-15 (1987), found at:

Most authorities conclude that "positional" conflicts of interest in transactional matters do not pose an ethical issue.[89] Even in litigation matters, room for positional conflicts can exist. For example, the New York State Bar issued an ethics opinion finding no ethical violation when a law firm proposed assembling two "mutually exclusive teams" to work on two different amicus briefs in the same case, with each group submitting an amicus brief setting forth opposite views of the same issue,[90] as long as they filed these briefs in their "individual capacities" and not on behalf of any organization or client.[91] Moreover, the ABA issued an opinion stating that a "lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter."[92] Sophisticated clients avoid this issue with engagement letters prohibiting such

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https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=564
(last visited 07/24/24).

[89] See the articles cited in footnote 88, above.

[90] New York State Bar Association Ethics Opinion 1174 (2019), found at:
https://nysba.org/ethics-opinion-1174
(last visited 07/25/24).

[91] The opinion stated:

> 10. We suggest that the law firm consider whether the Supreme Court would expect attorneys appearing pro se on opposite sides of an issue to disclose that they are affiliated with the same firm, or at least disclose their law firm affiliation, for the affiliation could affect the Court's evaluation of the competing briefs.
>
> CONCLUSION
>
> 11. Attorneys at the law firm representing clients may not submit amicus briefs on opposing sides of an issue before the Supreme Court of the United States, but attorneys at the firm may in their individual capacities submit amicus briefs for opposite sides of an issue pro se.

[92] *See*: ABA Formal Opinion 95-390 (1995), which states:

activities, and most law firms hesitate taking on representations that may pose positional conflicts without the clients' consent.

Although positional conflicts may not create ethical issues for transactional lawyers, they can pose a distinct business risk. A client who hires a law firm on complex matters may not want lawyers in that firm expressing positions contrary to the ones the client takes in negotiations or litigation. Lawyers and firms that do so may face the financial risk of losing the client.

Because use of listservs and social media leave a trail of the lawyer's advice, attorneys should be cautious about posting comments that may give rise to a positional conflict that is not an ethical conflict but could create a business issue for the law firm.

4.2(d) The Unauthorized Practice of Law

While it is beyond the scope of this paper to address how the rules governing jurisdiction and conflict of laws work when confronted with postings on listservs and social media,[93] suffice it to say that a lawyer who posts a response on a listserv in State A

> Conflicts of Interest in the Corporate Family Context. A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client will materially limit the lawyer's representation of the other client. Even if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice, a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation.

[93] For sources on this, *see, e.g.*, Julia Hörnle, "Conflicts of Law and Internet Jurisdiction in the U.S." (2021), Oxford Academic, found at: https://academic.oup.com/book/39409/chapter-abstract/339113938?redirectedFrom=fulltext (last visited 07/25/24); Marketa Trimble, "Targeting Factors and Conflicts of Laws on the Internet" (2020), Scholarly Commons @ UNLV Boyd Law, found at: https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2356&context=facpub (last visited 07/25/24); Ellen Smith Yost, "Tweet, Post, Share ... Get Haled Into Court? *Calder* Minimum Contacts Analysis In Social Media Defamation Cases," 73 SMU Law Review 693 (2020); and the Institute for Research on Internet and Society, "Jurisdiction and Conflicts of Law in the Digital Age: Regulatory Framework on

may have no idea in which state (or country) the recipient is located and whether the recipient is even a lawyer.

The ABA excludes from attorney-client relationships consulting-lawyer-to-lawyer advice, but that does not hold true to advice given to a non-lawyer. If the recipient is out of state and the posting lawyer is deemed to have provided information about legal issues or about taking a position on legal issues, the posting lawyer might be accused of the unauthorized practice of law in the state the non-lawyer recipient is located.

The D.C. Bar issued an opinion cautioning lawyers using any type of social media that "social media does not stop at state boundaries" and, thus, an attorney's "social media presence may be subject to regulation in other jurisdictions, either because [we apply] another state's rules through [our] choice-of-law rule, or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states."[94]

Internet Regulation" (2016), found at: https://irisbh.com.br/wp-content/uploads/2017/08/Jurisdiction-and-conflicts-of-law-in-the-digital-age.pdf (last visited 07/25/24).

[94] D.C. Bar Ethics Opinion 370, found at: https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-370 (last visited 07/25/24).

4.2(e) Reporting Professional Misconduct

ABA Model Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate the Rules of Professional Conduct," and Model Rule 8.3(a) requires a lawyer to report another lawyer's actions to the disciplinary authorities if the other lawyer "committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

What are the obligations of a lawyer viewing a listserv post who believes (i) the posting attorney violated a client's confidentiality; (ii) the responding attorney disclosed client confidences in a "war story" response; or (iii) a responding lawyer engaged in the unauthorized practice of law by giving legal advice to a non-lawyer? If there is an obligation to act, which state's disciplinary authority should the viewing attorney notify? The state of the posting attorney? The state of the responding attorney? The state of the viewing attorney? How does the viewing attorney ascertain the state in which the posting attorney is licensed or from which the posting attorney is located when making the post? These difficult questions are a boon to lawyers whose practices consist of giving ethics advice to other attorneys, but they may raise a conundrum for attorneys who use, view, or post on listservs and social media.

5. How Could They Say That About Me?

5.1 The "How Could They Say That About Me" Hypothetical

Easy going Viola likes to be liked. Therefore, she is incensed to learn that her former client, a disgruntled appellate client, has posted nasty things about her on Facebook and LinkedIn. Among the comments are:

- "Don't trust anything Viola says and don't hire her. She promised me we'd win this appeal, but she lost big time!
- "I watched Viola do an oral argument in the appellate court. She was outclassed by the other side and looked like a deer caught in the headlights when one of the judges asked her a question she should have hit out of the ballpark. I'd never hire her to do anything for me!"

Viola starts to respond to these comments, which she deems defamatory. She's concerned that they not only impugn her reputation, but that they also will hurt her business and make others reluctant to hire her. She feels she must act now to control the damage.

Does Viola have any problem in responding truthfully to these posts?

5.2 Background on the "How Could They Say That About Me" Hypothetical

No one likes to be criticized, especially online, where we don't know who is going to read that criticism. But sometimes responding to online criticism only exacerbates and amplifies the issue.

ABA Model Rule 1.6 requires lawyers to keep client confidences, but it does not require lawyers to remain silent in the face of all criticism. Rule 1.6(b)(5) permits a lawyer to "reveal information relating to the representation of a client to the extent the

lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client."[95] Comment [10] to Rule 1.6 states that a lawyer need not await a formal proceeding before responding.[96]

At the same time, the black-letter rule of 1.6(c) mandates that 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," and Comment [19] to the Rule cautions that, "when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

ABA Formal Opinion 496 (2021)[97] deals squarely with this issue, stating that a "negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that

[95] For the full text of Model Rule 1.6, see footnote 74, above.

[96] Comment [10] to Model Rule 1.6 states (emphasis supplied):

> [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[97] Found at:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-496.pdf
(last visited 07/25/24).

discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule."

While Opinion 496 cites a number of state ethics' opinions to support its conclusion and refers to state proceedings disciplining or sanctioning lawyers for online responses,[98] it contains no easy solution and, instead, suggests four alternatives for attorneys who are the subject of negative online reviews:[99]

(a) don't respond;

(b) request the website or search engine to delete the post;

(c) post an invitation to contact the lawyer "privately to resolve the matter"; or

(d) "indicate that professional considerations preclude a response."

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[98] Opinion 496, footnote 7, contains (in part) the following citations and case blurbs (a selected excerpt, ellipses omitted):

> Reciprocal discipline of 60-day suspension by *Wisconsin in In re Peshek*, 798 N.W.2d 879 (2011); *People v. Isaac*, No. 15PDJ099, 2016 WL 6124510 (Colo. O.P.D.J. Sept. 22, 2016)(lawyer suspended 6 months for responding to online reviews of former clients; lawyer revealed criminal charges made against clients, revealed that client wrote check that bounced, and revealed that client committed other unrelated felonies); *In re Skinner*, 740 S.E.2d 171 (Ga. 2013)(Supreme Court of Georgia rejected a petition for voluntary discipline seeking a public reprimand for lawyer's violation of the confidentiality rule by disclosing confidential client information on the internet in response to client's negative reviews of lawyer, citing lack of information about the violation in the record); and *People v. Underhill*, 15PDJ040 (Colo. 2015)(lawyer suspended 18 months for responding to multiple clients' online criticism by posting confidential and sensitive information about the clients).

[99] For more on the issues involved in dealing with and possibly removing negative online comments, *see*: Wes Gerrie, "Say What You Want: How Unfettered Freedom Of Speech On The Internet Creates No Recourse For Those Victimized," 26 Catholic University Journal of Law & Technology 26 (2017); Erin Cooper, "Following In The European Union's Footsteps: Why The United States Should Adopt Its Own 'Right To Be Forgotten' Law For Crime Victims," 32 John Marshall Journal of Information Technology & Privacy Law 185 (2016); Bailey Roese, "Defamation, Humiliation, And Lost Reputations: Mitigating The Damage To Women Harassed Online," 35 Women's Rights Law Reporter 123 (2014); Corey M. Dennis, "Social Media Defamation And Reputation Management In The Online Age," 17 Journal of Internet Law 1 (2013); Jacqueline D. Lipton, "Combating Cyber-Victimization," 26 Berkeley Technology Law Journal 1103 (2011); and Ternisha Miles, "*Barrett v. Rosenthal*: Oh, What A Tangled Web We Weave -- No Liability For Web Defamation," 29 North Carolina Central Law Journal 267 (2007).

Each of these options contains its own set of issues. A lawyer who does not respond may be seen as admitting the allegations. A lawyer who asks a search engine to delete a post may find that obtaining such relief is either nigh-impossible or will take such a long time as to be ineffective in countering adverse reputational damage. Asking the poster to contact the lawyer privately does not resolve anything if the poster doesn't respond and creates additional problems if third parties (not the poster) then contact the lawyer "privately." The lawyerly "I can't respond because of professional considerations" may be seen as a legalistic dodge. And further problems arise if the poster is not the client, as ABA Opinion 496 notes.[100]

6. The Technology Advanced Home Office

6.1 The "Technology Advanced Home Office" Hypothetical

Yves frequently works remotely from his home office in a state where he is licensed to practice. He likes not having to commute to the office and being able to work around his family's schedule.

His home office is fully equipped—a desktop docking system, two large screens, an adjustable desk, a ring light to illuminate his face during Zoom calls, and a smart speaker his family uses daily. Yves enjoys listening to music while he works, calling up

[100] On this issue, ABA Opinion 496 states:

> If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance. However, a lawyer must use caution in responding to posts from nonclients. If the negative commentary is by a former opposing party or opposing counsel, or a former client's friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client's representation without the client or former client's informed consent. Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information. The lawyer is free to seek informed consent of the client or former client to respond, particularly where responding might be in the client or former client's best interests. In doing so, it would be prudent to discuss the proposed content of the response with the client or former client.

songs through the smart speaker. During boring Zoom calls, Yves opens up a second window on his computer and plays online games and interacts with others via the games' chat feature. In addition, he uses AI (such as ChatGPT) to do initial drafts of emails, letters, and even documents.

Does any of this pose an ethical problem for Yves?

6.2 Background on the "Technology Advanced Home Office" Hypothetical

This hypothetical raises four different issues: how the use of AI impacts ethics; the use of a home computer; the privacy of a home office; and the use of smart speakers.

6.2(a) Generative AI[101] and Ethics

It is beyond the scope of this article to deal with the continually evolving area of ethics and AI-created text and documents. The use of AI by lawyers can pose significant risks,[102] but there are also business and other benefits that might accrue.[103] The ABA

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[101] As defined in the following online article, generative AI "describes algorithms (such as ChatGPT) that can be used to create new content, including audio, code, images, text, simulations, and video."
See: https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai (last visited 07/25/24).

[102] For further resources on this, *see*:
The State Bar of California's Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, found at
https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf
(last visited 07/25/24), listing 9 issues to be considered and numerous cites to the Rules of Professional Conduct;
The D.C. Bar's Ethics Opinion 388, "Attorney's Use of Generative Artificial Intelligence in Client Matters, https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-388 (last visited 07/26/24);
New York State Bar Association's Task Force on Artificial Intelligence Report and Recommendations (April 2024), https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf (last visited 07/26/24), listing as examples of Open Model LLM's ▪ OpenAI's GPT-3 and GPT-4 LLMs; ▪ Google's LaMDA and PaLM LLMs ▪ HugginFace's BLOOM and XLM-RoBERTa ▪ Nvidia's NeMO LLM ▪ XLNet ▪ Co:here ▪ GLM-130B.
New Jersey's "Preliminary Guidelines on the sue of Artificial Intelligence by New Jersey Lawyers,"
https://www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf (last visited 07/26/24);

Model Rules on competence include competence of technology, and the pressure will be on the legal profession to find ways to use AI "ethically," with the awareness that not only may it never be possible to know how AI-generated text reaches its conclusions, but also that one cannot "know" either if or how the AI protected client confidences that may have been inputted by the attorney to get the result.

6.2(b) Use of a home computer

Lawyers should utilize caution when using a computer that is not supplied and maintained by the law firm, because placing client information and confidential information on a private computer can impair privileges. Even if the lawyer uses a firm-

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The Pennsylvania State Bar and the Philadelphia Bar Association's Joint Formal Opinion 2024-200 on "Ethical Issues Regarding the Use of Artificial Intelligence," https://www.lawnext.com/wp-content/uploads/2024/06/Joint-Formal-Opinion-2024-200.pdf (last visited 07/26/24);

The Florida Bar's Ethics Opinion 24-1 on generative artificial intelligence, https://www.lawnext.com/wp-content/uploads/2024/01/FL-Bar-Ethics-Op-24-1.pdf (last visited 07/26/24), stating, in part:

> In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI

See also: David Alexander, "New York State Bar Association Warns that AI Must Not Compromise Attorney-Client Privilege, https://nysba.org/new-york-state-bar-association-warns-that-ai-must-not-compromise-attorney-client-privilege/ (last visited 07/26/24);

Jon Meredith Garon, "Ethics 3.0—Attorney Responsibility in the Age of Generative AI," The Business lawyer (2024), https://www.americanbar.org/groups/business_law/resources/business-lawyer/2024-winter/ethics-attorney-responsibility-in-the-age-of-generative-ai/?login (last visited 07/26/24);

Aviva Meridian Kaiser, "Ethical Obligations When Using ChatGPT," 96 Wisconsin Lawyer 44 (2023); Sheehan, "The Ethics of ChatGPT," 66 Res Gestae 121 (2023); Sharon D. Nelson, John W. Simek, and Michael Maschke, "Beware Ethical Perils When Using Generative AI," 46 Wyoming Lawyer 28 (2023); Hon. John G. Browning, "Real World Ethics in an Artificial World, 40 Northern Kentucky University Law Review 155 (2022);

[103] See, for example, the Browning article cited in footnote 102 above (49 NKYLR at 164), discussing a case in which a court reduced a request for attorney's fees because of the court's questioning of the time and expense of legal research, the court noting: "If artificial intelligence sources were employed, no doubt counsel's preparation time would have been significantly reduced."

supplied computer, care must be exercised in how the lawyer virtually connects to the office. The ABA recommends that, to "protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs)."[104]

6.2(c) Home office privacy

Some lawyers have the luxury of being able to establish a secure area of their home—a location where they can work uninterrupted behind a closed door. Others are not as fortunate and may have to find workspace at the dining room table, on the couch, or (during good weather) outside on a patio visible to others and subject to others overhearing their conversations. Anytime a third party can eavesdrop on an attorney-client conversation, there is a potential risk that the attorney has breached the duty of confidentiality under Model Rule 1.6. The duty to make reasonable efforts to safeguard confidential information includes, in the words of an ABA Formal Opinion, a "non-exhaustive list of factors" that consist of a verbatim quotation from Comment [18} to Model Rule 1.6.[105]

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[104] ABA Formal Opinion 498 (2021), found at:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-498.pdf
(last visited 07/25/24).

[105] Those non-exhaustive factors include:

> "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)."

6.2(d) Smart speakers

Regardless of the type of smart speaker Yves uses (such as Amazon Echo, Google Nest, Apple HomePod, or Sonos), these speakers never stop listening.[106] The New York Times reported that software in some Android games have the ability to listen to what is going on in the room.[107] Smart speakers can be hacked to continuously record conversations.[108] Even if not hacked, smart speakers often activate as many as 19 times a day when they mistakenly hear the "wake word," and when that happens, the recordings can last from 20-43 seconds, exposing confidential communications.[109] Those voice recordings are stored in the cloud and can be retrieved. For example, Amazon says it allows users to review their voice recordings.[110] If these recordings are preserved, that means that third parties (Amazon employees, contractors, or others) may listen to them.

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[106] *See*: Paul Lamkin, "Is Alexa always listening? Is your smart speaker spying on you?" The Ambient (2022), found at: https://www.the-ambient.com/guides/does-amazon-alexa-echo-speaker-listen-conversations-2785 (last visited 07/25/24).

See also: Lindsey Barrett and Ilaria Liccardi, "Accidental Wiretaps: The Implications of False Positives by Always-Listening Devices for Privacy Law & Policy," 74 Oklahoma Law Review 79 (2022).

[107] *Id*.

[108] BBC Science Focus, "Can Smart Speakers Eavesdrop on Our Conversations?" found at: https://www.sciencefocus.com/future-technology/can-smart-speakers-eavesdrop-on-our-conversations/ (last visited 07/25/24).

[109] Kate O'Flaherty, "Amazon, Apple, Google Eavesdropping: Should You Ditch Your Smart Speaker?" Forbes (02/26/2022), found at: https://www.forbes.com/sites/kateoflahertyuk/2020/02/26/new-amazon-apple-google-eavesdropping-threat-should-you-quit-your-smart-speaker/?sh=ff67f7e428d1 (last visited 07/25/24). *Also see*: Danny Bradbury, "Smart Speakers Mistakenly Eavesdrop Up to 19 Times a Day," Naked Security By Sophos (02/25/20), found at: https://nakedsecurity.sophos.com/2020/02/25/smart-speakers-mistakenly-eavesdrop-up-to-19-times-a-day/ (last visited 07/25/24).

[110] Andrew Williams, "Smart Home Privacy: What Amazon, Google, and Apple Do With Your Data," The Ambient (03/10/22), found at: https://www.the-ambient.com/features/how-amazon-google-apple-use-smart-speaker-data-2765 (last visited 07/24/24).

Further, it has been reported that Amazon has "been known to hold onto smart speaker data even after it has been 'deleted.'"[111]

If a smart speaker is mistakenly awakened during a Zoom call, everyone's voice on that call might be recorded, and, if so, biometric voice recognition can identify each person, because each voice is unique, like a fingerprint.[112] Of course, this same problem arises with smart phones containing a "wake word" activation feature.[113]

While one might think "wake words" are so distinctive that this problem seldom happens, research shows that devices can be activated by similarly sounding terms. For example, the Google Home Mini, activated by "Hey Google," can mistakenly respond to words rhyming with "Hey" "followed by something beginning with the letter 'G,' or even something that contains 'ol' such as 'cold.' The researchers discovered that 'I can spare' and 'I don't like the cold' both set off Google's device."[114] Similar problems exist with

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[111] Jacob A. Manzoor, "Hey Siri, What Does The Government Know About Me? Increasing The Volume On Smart Speaker Awareness," 49 Hofstra Law Review 831, 836 (2021).

[112] *See*, "Biometric Voice Recognition—Everything You Should Know," Imageware Blog (undated), found at: https://imageware.io/biometric-voice-recognition/ (last visited 07/25/24).

[113] *See*, the "Accidental Wiretaps" article (footnote 106, above) at 91-92:

> False positives by always-listening software have clear privacy implications for the people who knowingly use it through a smartphone, smart speaker, or another connected device. The decision to purchase a smart phone or speaker cannot be equated with the knowing acceptance of the potential to be recorded at any moment, with that recording being analyzed by human beings and used to target the speaker for products and services. But this problem is even more concerning when it comes to accidentally recorded bystanders, who generally have even less reason to suspect that they've been secretly recorded, as they might not have a reason to be aware of the recording device and are dependent on the device's owner to monitor the device for potential erroneous recordings. Expecting device owners to protect themselves from encroachments on their privacy is unreasonable enough. But it's even more unreasonable to expect people to protect themselves from always-on devices they aren't aware of. Nor can we place the privacy protections of bystanders solely at the feet of device-owners, as though requiring guests to sign a release before they enter your home or warning everyone you speak to of the potential for recording would be feasible or effective. Applicable privacy laws are poorly suited to that reality . . . .

[114] *See*: O'Flaherty article, footnote 109, above.

Apple's HomePod[115] and with Amazon[116] devices, like Alexa. This field of technology continues to evolve, as evidenced by Amazon's recent patent application that would allow Amazon devices to "listen" for the "wake word" at the end of a sentence, rather than at the beginning, leading to recordings that are more lengthy and that will encompass more information.[117]

If a smart speaker records even part of a conversation, not only is confidentiality impaired,[118] but attorney-client privileges may be lost. Additionally, recording a conversation without all parties' consent can violate some state laws, although "federal law and a majority of states require consent of only one party."[119]

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[115] *Id*:

> Meanwhile, Apple's HomePod was often activated when words rhymed with "hi" or "hey" followed by something starting with "S", or when the syllable rhymed with "ri." For example "and seriously," "I see," "I'm sorry," "they say."

[116] *Id*:

> Amazon devices were activated when words contained a "K" sound and were similar to "Alexa" —for example "exclamation," "Kevin's car," "congresswoman." Lastly, Microsoft's Invoke was activated with words starting with "co," such as "Colorado," "consider," "coming up."

[117] Lauren Chlouber Howell, "Alexa Hears With Her Little Ears—But Does She Have a Privilege?" 52 St. Mary's Law Journal 837, 843-44 (2021) (footnotes omitted):

> Amazon has recently gone a step further, though, and filed a patent application which would allow Alexa to process commands prior to a wake word in order for users to interact more naturally with the device. For example, the current command structure required to have an Echo device tell a joke is, "Alexa, tell me a joke," whereas under the new patent, one could say, "tell me a joke, Alexa," and achieve the same results. Based on the way the inventors describe the programming behind the audio retention and processing within this proposed system, this plan would allow Amazon to retain significantly more recorded data. Although this is a novel advancement, devices utilizing similarly constant and pervasive recording and retention technologies have historically evoked suspicion and criticism in the courts.

[118] *See*: Armina Manning, "It's Smart, But Is It Ethical? Confidentiality In An Environment That Is Listening," 24 Virginia Journal of Law and Technology 1 (2021).

[119] Lauren Chlouber Howell article, footnote 117, above, at 848-850 (internal footnotes omitted):

It is beyond the scope of this paper to describe all of the ABA Formal Opinions on technology,[120] but one opinion directly relates to smart speakers and home offices—ABA Formal Opinion 498 (3/10/21).[121] It states that lawyers "should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking." Because the smart phones

> To further muddy the waters, the level of consent required for recordings depends on the jurisdiction in question: in some states, all parties need to consent to a recording, whereas federal law and a majority of states require consent of only one party. In situations in which only one party's consent is required, some would purport that the owner or purchaser has consented to the recording, but this is not a black and white matter. When would consent occur, if it did at all? Would it be when a person buys the device, when they accept it as a gift, when turning it on, by leaving the assistant turned on or plugged in, when the assistant wakes, or if and when the person notices that it wakes? Since there is no express agreement between the user and the smart device and the duration of consent is not specified, the answer to this question is far from clear.
>
> Another issue rears its ugly head when visitors to a location speak, and Alexa records the speech, unbeknownst to them. It has been suggested that third parties should enjoy a reasonable expectation of privacy in this situation—and hopefully courts agree. If courts were to rule that the third parties have consented, there is a lot of grey area as to when that alleged consent may have occurred. Considerations include, but are not limited to: awareness of the presence of the device, awareness that the device is listening, awareness that the device is recording and full understanding of the specific recording procedures, awareness if the owner has their Alexa settings such that the recordings are sent to Amazon for quality control, whether the speaker activated the device intentionally, and whether the speaker was a minor or had reached the age of majority.

[120] For a discussion of these opinions, *see* the Armina Manning article, footnote 118, above. *Also see* ABA Formal Opinion 498 (2021) containing this statement:

> [L]awyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/AntiSpyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems."

[121] Citation at footnote 104, above.

use the same features as smart speakers, the rationale of the opinion seems to apply to smart phones. Does this mean that if a lawyer has two phones and is discussing confidential information on one of them, the lawyer must turn off the other phone so that it does not accidentally "awaken" and listen to the conversation?

7. Conclusion

Technology is wonderful, and each new iteration makes it easier to use, easier to "connect" all parts of our lives, and easier to access whatever we need whenever we need it. Technology, however, can also ease us into ethical traps from which we may find it difficult to extract ourselves once ensnared.