

Ethics Q & A: PRIVILEGE AND E-MAIL

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It was not that long ago when a CLE would be packed if it could offer someone who could (gasp!) show the attendees how to *get on the web.* Nowadays, that, and much more, is old history.

One issue that was raised early in the days of e-mail and the Internet was whether attorneys and clients could have privilege communications by e-mail. The concern was that since e-mail could be hacked into, the reasonable expectation of confidentiality that is required for privilege might not exist.

Although several state bar ethic opinions suggested that there might be a problem here, it now seems clear that attorney-client privilege is now available for e-mail communications and that encryption is not required for a claim of privilege. See, e.g., ABA Formal Ethics Op. No. 413 (1999); Peter R. Jarvis & Bradley F. Tellam, *Competence and Confidentiality,* 33 Willamette L. Rev. 467 (1997). Indeed, privilege is also available for cordless and cell phone conversations.

This does not mean, however, that it is necessarily advisable to discuss a client*s most precious confidences and secrets by e-mail or by other less than maximally secure means. Reasonable judgment with an eye towards risks should be used in this as in all other settings. It also does not mean that there may not come a time in the future when encryption becomes so commonplace and so easy to do that not encrypting e-mail messages could be said to fall below the standard of care for at least some sets of communications. On the other hand, we are not there yet.

This also does not mean that e-mail may not present some unexpected twists and turns. Suppose, for example, that you receive an angry e-mail from opposing counsel that is also sent to co-counsel. Before you elect the *reply to all* option, you may wish to check whether the opposing counsel copied her client on the e-mail. If she did, then your replying to all could be considered a direct and impermissible communication with a represented party in light of DR 7-104(A)(1). At least when paper was king, the simultaneous sending of correspondence to opposing counsel and opposing counsel*s client violated this rule. The same result could easily be reached in our brave new electronic world.

If you would like to suggest one or more issues for future topics, please contact me at :Peter Jarvis via e-mail.

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