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2017 Fall Forum information inside.

Securing Communication of Protected Information in an Electronic World

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In the last installment of *Focus on Ethics and Civility*, we learned about a client that mistakenly waived the attorney-client privilege by sharing confidential information over the internet without password protection. See *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017). This is a wakeup call in a world where lawyers and clients communicate and share information predominantly through electronic means.

On May 22, 2017, the American Bar Association issued a new opinion on a lawyer's duty to protect confidential information in an electronic world. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R (2017). The opinion provides important guidance on how lawyers can better protect client information.

Summary of ABA Opinion

The opinion provides its own succinct summary, as follows:

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct *where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access*. However, *a lawyer may be required to take special security precautions* to protect against inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or *when the nature of the information requires a higher degree of security*.

Id. at 1 (emphasis added).

Application

The ABA Opinion reminds lawyers that the duty of competent representation includes an obligation to keep abreast of the benefits and risks of using technology. As technology changes, including changes in use of technology and changes in security

risks associated with technology, lawyers have to continually educate themselves, or obtain the help of someone else who is keeping up with the changes.

For the most part, the ABA Ethics Committee rejected bright-line rules for when and how it is okay for lawyers to electronically communicate and share information. Instead, the committee's "test" relies on several factors delicately balanced on a series of sliding scales while swimming in a murky, swirling pool of "reasonableness." This lack of precision results in a greater need for lawyers to study and understand the risks of using technology.

For example, the Ethics Committee lists the following, non-exclusive factors as relevant to determining whether a lawyer acts ethically when transmitting electronic information:

- 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; or
- 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).

See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R, p. 45 (2017).

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