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Profits Per Me (PPM)

By Mark Jungers and Jane Sullivan Roberts

Over the last 20 years, *The American Lawyer's* profits per partner (PPP) has become the number America's largest law firms use to keep score. Perhaps more importantly, it is the number lateral partner candidates use to evaluate the strength of a firm and to predict their compensation. While law firm partners generally assume that a higher PPP will result in higher compensation for them, PPP is a surprisingly poor predictor of an individual partner's compensation. PPP is just a measure of the average compensation of the firm's equity partners. As one of our firm's founding partners, Jon Lindsey says, lateral partner candidates need to look beyond PPP and focus on what he calls PPM — "profits per me." Averages are great, but how much of the law firm's profits can I fairly expect to get?

We have seen situations where the market compensation for an individual at one set of firms is roughly $500,000 and at another set of firms in the same city is double that for a guaranteed period of time. The difference lies not in the firms' respective PPPs, but rather in the various structural, cultural and historical factors that influence their ability and willingness to pay premium compensation and bonuses, guarantee base compensation, and take creative approaches to attracting talent.

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Ethical Issues of the 21st Century

e-Mail, e-Discovery, Blogs and Social Networking Sites

Part One of a Two-Part Article

By Frederick L. Whitmer and Benjamin D. Goldberg

This past January, when *The New York Times* published that Eli Lilly & Co. was engaged in settlement discussions with the government regarding the company's alleged marketing improprieties related to its Zyprexa® schizophrenia drug, the company accused federal officials of leaking the information to the press. They were misguided. To Lilly's surprise, an internal investigation revealed that the unlikely and unintentional source of the press leak was not the government at all. The "leaker" was one of Lilly's own outside counsel. How did this happen? The lawyer, doing what each of us has done at one time or another, writing confidential information in an e-mail to co-counsel at another firm (or a client), inadvertently sent the e-mail to a reporter at the *Times* because of the remarkably convenient, yet insidiously dangerous, "auto-complete" feature of e-mail. That feature proposed the recipient name "Berenson, Alex," instead of "Berenson, Bradford," the intended recipient of the e-mail. Berenson the reporter claimed that even though he received the e-mail from the Lilly lawyer, he *actually* developed his detailed information from other sources. That is cold comfort to the author of the e-mail, and probably even colder comfort to the client whose activity and strategy was disclosed.

This "there-but-for-the-grace-of-God" story highlights the potential ethical trapdoors into which even careful lawyers can fall through the gremlins of technology, and how, in a world filled with an ever-evolving technology, it can transmute a moment's inattention into an embarrassing — and perhaps costly — mistake. Reputation and integrity are among the most sensitive of assets; built over a lifetime, they can vanish in a moment. This article addresses various ethical issues faced by attorneys coping with those technologies, including e-mail, e-discovery, blogging, and social networking sites. And for many plaintiff-oriented lawyers, these technological tools can become the newest form of legal alchemy, turning factual lead into legal gold.

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E-Mail and Confidentiality

e-mail, now nearly ubiquitous, has developed at warp speed as a communications tool since its advent in the mid-1960s. An otherwise anonymous software engineer, Ray Tomlinson, introduced the world to the "@" sign, which was falling so far into disfavor that it was near typographical extinction when Tomlinson rescued it from its imminent place in the scrap heap of communications history, alongside carbon paper, mimeograph machines, and God forbid, onion skin paper. The choice was made to distinguish the names of users and their machines. *See* "E-mail," http://en.wikipedia.org/wiki/E-mail. Today, of course, millions, if not billions, of people around the world use e-mail to communicate continuously with each other, and lawyers are no exception; many times in simultaneous conversations. The instant message can be the instant ethical problem, for it is true that e-mail has become the preferred method of communication between lawyers and their clients. Here is where the ethical snare lies in surreptitious wait.

While lawyers have attained a strong understanding of the ethical rules, as one commentary puts it, "surrounding postal mail and telephonic communications … e-mail is relatively new to the law." *See* Christopher J. Wesser, Ethical Considerations and the Use of E-mail, 49 *DRIFTD 68, For the Defense*, February, 2007. Rule 1.6 of the Model Rules of Professional Conduct (the "Model Rules"), as well as its state-level counterparts, protects client confidences, establishing a "duty to prevent confidential communications from being misdirected or otherwise revealed to third-parties." Wesser, *supra*. Although application of these rules has become relatively stable and predictable in the context of postal mail and the telephone, its application to e-mail is not as straightforward. Indeed, it is fair to say that the situation with e-mail is fluid. E-mails are typically sent in unencrypted "plain text" and pass through numerous servers controlled by third parties, and facially, at least, do not have the same procedural indicia of confidentiality as more traditional methods of communication.

Application of Rule 1.6

The uncertainty surrounding the application of Rule 1.6 to e-mail, all too unfortunately, does not render that Rule inapplicable. Very much to the contrary, many state ethics opinions have ruled that it is applicable. The mode of transmitting confidential information, in other words, does not diminish the ethical requirements of maintaining confidentiality. Local ethics authorities have developed some general principles concerning confidential communications by e-mail, based upon local variants of the Model Rule. *See* discussion of numerous examples in, *e.g.*, West Litigation Management Handbook, §6:25 (2007). These opinions distinguish between encrypted and unencrypted e-mail communications, and between e-mail sent by a direct, computer-to-computer connection and e-mail sent via the Internet.

For example, apparently at one extreme is Iowa, where an advisory opinion states that an attorney "should obtain the consent of the client prior to communicating" via e-mail. Iowa Bar Ass'n Op. 1997-1; Mo. Bar Ass'n Informal Advisory Opin. 970230. This may justify Iowa's nickname as the Hawkeye State, for no other state appears to be so vigilant in the supervision of e-mail communications to clients. At the opposite extreme, in Alaska, an advisory opinion stipulates that "an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client … and the client should be advised … that the confidentiality of unencrypted e-mail is not assured." Alaska Bar Ass'n Eth.

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When and How Can Departing Lawyers Contact Clients?

Where the Proverbial Rubber Meets the Road

By Jeffrey P. Ayres

Lawyers come and lawyers go. That's a fact of life in today's law firm. Whether they are rainmakers or foot soldiers, business generators in all industries — from commercial real estate agents to pharmaceutical salesmen — create a myriad of legal issues when they change employers. So why should law firms be any different?

Recent editions of *Law Firm Partnership & Benefits Report* have addressed various topics on this subject. In January 2008, for example, Wayne N. Outten and Mark R. Humowiecki published an article entitled Forfeiture-For-Competition Agreements. In June 2007, Mr. Outten and Cara E. Greene published Jumping Ship (and Taking the Crew): Can Law Firm Partners Solicit Their Firms' Employees? The article herein addresses the related questions of when and how can departing lawyers contact clients.

Clients (especially ones with the ability and willingness to pay) are the lifeblood of every law firm. That's why I say that the process through which clients decide to stay with the old firm or leave with the departing attorney are where the proverbial rubber meets the road. Because dollars and livelihoods are at stake, no matter how "friendly" a departure may seem to be on the surface, contacting clients always gets people excited. Sometimes, relationships deteriorate to levels reached only in the most bitter of marital or business divorces. In this article, I will discuss the ethical issues, which arise in collegial as well as vitriolic contexts, surrounding the contact of clients by departing attorneys.

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The Mutual Duty to Notify

Most if not all jurisdictions recognize, at some point in the process, a mutual obligation on the part of the departing attorney and the old firm to notify clients that the attorney is leaving and to provide new contact information for the attorney. Through the satisfaction of this mutual duty, the client is able to exercise a meaningful choice — to stay with the old firm, go with the departing lawyer, or move to a different firm.

As the highest court of Maryland stated in *Attorney Grievance Comm'n. v. Potter*, 380 Md. 128, 844 A. 2d 367 (2004):

"The withdrawing attorney and the firm also have a duty to orderly maintain or transfer the clients' files in accordance with the clients' directions and to withdraw from representing those clients by whom they are discharged. Both the withdrawing attorney and the firm have a mutual duty, not only to the client, but to each other as well, to make certain that these tasks are completed in a competent and professional manner to the reasonable satisfaction of their client."

The mutual obligation of the old firm and the departing attorney seems straightforward enough. But tricky questions persist. When in the process must clients be notified? Who are the "clients" to which notification must be sent? What should clients be informed when they are notified? In a perfect world, the old firm and the departing attorney would come to an agreement on all those questions. In the real world, that often doesn't happen. As a result, attorney grievance commissions, courts and even juries are often left with the task of drawing the lines on the groundrules underlying these issues. In the next sections of this article, I will discuss some of these groundrules.

When in the Process Are Clients to Be Notified?

Absent agreement between the parties, when in the process are clients to be notified? The answer varies widely from jurisdiction to jurisdiction. Moreover, even within the same jurisdiction, the answer may be different depending upon the context.

A good example can be seen in Oregon Formal Opinion 2005-70. There, Oregon authorities noted that "[d]epending on the nature and status of Lawyer's work, this [fiduciary] duty [to the clients] may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm A, to go with Lawyer to Firm B, or to pursue some other alternative." On the other hand, while he remains on A's payroll, Lawyer also owes contractual, fiduciary, and/or agency duties to Firm A. Opinion 2005-70 notes that Lawyer could be sued by the firm, even when his ethical obligations dictated pre-departure notification, for trying to take clients while still affiliated with the firm. Moreover, the Lawyer could be subject to additional discipline for trying to take clients — at least in Oregon — if his or her "conduct would, under the circumstances, amount to fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law … "

Other authorities come down differently on these issues, from the perspective of both potential civil liability and ethics rules. Some — such as Section 9(3) of The Restatement of the Law Governing Lawyers (Third) — state that the law firm must be notified before clients. Others — including ABA Formal Opinion 99-414 — state otherwise.

So what's a departing attorney to do? In some jurisdictions, such as Florida, ethics rules or decisions specifically address the procedures and protocols to be followed when attorneys change firms. Unless there is clear authority in your jurisdiction that provides a safe harbor to pursue a different strategy, however, a cautious attorney will tell the firm before he or she tells clients — unless a client will be harmed if the firm isn't told first. In my opinion, factual scenarios where such client harm can actually be demonstrated are few and far between.

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Departing Lawyers

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Who Can Be Notified?

Again, if the old law firm and the departing attorney can come to an agreement on who should be notified, a lot of uncertainty can be avoided. Otherwise, tricky questions need to be addressed. For example, in the absence of agreement between the parties, does the proper population include "current" as well as "former clients"? Must all clients of the firm be notified, or only those on which the departing has performed meaningful work?

According to ABA Formal Opinion 99-414 and most, if not all other authorities, only current clients need be notified. Moreover, authorities generally recognize that notification need only be provided to those current clients for which the departing attorney had been directly responsible in active and pending matters at the time of the departure. Indeed, an attorney who contacts a firm client for which he or she does not have a prior attorney-client or personal relationship may violate the ethics rules in many jurisdictions that regulate direct contact with a prospective client.

But that does not end the inquiry. Even if the departing attorney has done work in the past for a client, whether or not a matter is "active" is sometimes a close question. Two good examples arise in the trust and estates field and patent prosecution practices.

The Ethics Committee of the Maryland State Bar Association recently addressed the former in the July 2008 edition of the *Maryland Bar Journal*. That Committee's position employed an ad hoc, case-by-case approach to the issue. If the trust and estates practitioner prepared the documents, but had no ongoing responsibilities after the client executed everything, the Committee suggested that notification of departure was not required. Subtle factual differences, however, can lead to different conclusions.

For example, the terms of the engagement letter between the lawyer and the client could define the scope of the engagement in such a way that notification would be required. Similarly, if the attorney has retained original estate planning documents, is named as a personal representative or executor, or is granted a power of attorney, notification might also be required.

When the departing attorney specializes in patent prosecutions, notification also can be required even after the patent has been issued. Again, the terms of the engagement letter could require notification. Or, because of trigger dates arising in the U.S. Patent and Trademark Office after the original patent has been issued, the client may need to be notified. Of course, failure to notify the client could have both ethical and liability ramifications if a patent lapses because the client wasn't notified.

What Must Clients be Informed?

ABA Formal Opinion 99-414 provides helpful guidance on what clients should and shouldn't be informed when attorneys leave the firm. Citing a California ethics opinion, the ABA Opinion notes that joint notification by the lawyer and the firm is far preferable. When joint notification is not practical or feasible, though, the ABA Opinion states that the departing attorney should ordinarily send the notice.

The ABA Opinion goes on to identify the following guidelines on what the initial in-person or written communication to current clients should include:

1. The communication can indicate the departing attorney's willingness and ability to continue handling matters on which the attorney is working, but cannot urge the client to sever its relationship with the old firm;
2. The communication should clearly specify that the client has the ultimate right to decide who will complete or work on the matter; and
3. The communication must not disparage the old firm.

As the ABA Opinion states, the departing attorney must make sure that the new firm would not have any disqualifying conflicts of interest, and also has the competence to handle the matter. Moreover, if the client asks for additional information — such as billing rates and a description of the resources available at the new firm to handle the matter — the departing lawyer must provide it. As the ABA Opinion emphasizes on p.6, though, "[t]he departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and the new firm, or some other lawyer will continue the representation."

In communicating with clients, both the departing attorney and the old firm must be mindful of the lawyer advertising rules. In communicating with clients about a breakup, statements that omit material facts of that unfairly compare the departing lawyer to the old firm, for example, are particularly susceptible to grievances. In the August 1997 edition of Bench & Bar of Minnesota, Kenneth L. Jorgensen provided some cogent examples of this issue. Stating that "I'm the only attorney who knows anything about your case," for example, can be problematic if billing statements reflect services performed by other firm lawyers. As another example, informing the client that "I'm the only lawyer from the old firm who practices in this area of law" can be grievable when the lawyer had told other clients that an associate at the old firm was quite capable and competent to handle a particular matter in the same area of law.

Conclusion

As long as lawyers continue to change law firms as frequently as they do, the prudent firm will continue to employ centralized systems to oversee these issues. Typically, the attorneys who interface through these systems with the departing lawyer will include someone versed in ethics rules, as well as someone from the departing lawyer's practice group and the attorney responsible for overseeing firm liability issues. Ideally, these attorneys will be able to collaborate with the departing lawyer to reach agreement on when to notify clients and what to say. In a perfect world, this agreement

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PPMs

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A Hypothetical Situation

To help illustrate the factors that typically contribute to PPM, consider the following hypothetical: Jennifer is a third-year intellectual property partner practicing at an IP boutique firm with an estimated portable practice of $5 million/year. She has exceptional credentials with a Ph.D. in Molecular Biology from MIT and a law degree from Yale, and generally bills 2,200/hours a year at $525/hour. She has been a partner for the last three years and has seen her practice double each year since becoming a partner. The majority of her practice comes from a close friend who started a biotechnology company. She is most interested in a large general-practice firm so she can more broadly serve her rapidly growing client as it looks toward a possible IPO.

Economic Contribution

Most law firms have compensation systems that factor in intangible contributions such as firm citizenship and management, as well as economic contributions, as measured by business generation (originations/collections), billable hours, and billable rates. For lateral partners whose firm citizenship and management skills are less apparent to the new firm, firms have over the last ten years increasingly focused at least initially on business generation and billable rates. Firms typically ask a lateral candidate to provide an historical account of his economic contribution over the prior three or even five years and to estimate how much of that business is likely to move to the new firm. Not surprisingly, a lateral candidate with a history of higher economic contributions and a large amount of portable business will generally be paid more than one with lower economic contributions or a smaller amount of portable business.

Turning to Jennifer, she knows from speaking with her recruiter and friends at other firms that compensation for a $5 million practice ranges from the $1 million she is paid to, in some cases, nearly $2 million. Jennifer's originations, hours, realization rate and billable rate are strong. Other factors probably explain her relatively low compensation.

Strategic Need

The ideal lateral partner both brings a book of business and fills a strategic need such as providing a specific skill set, lifting the firm's profile, adding critical mass, or opening doors to new relationships. While firms occasionally hire lateral partners who bring only a book of business, they prefer, and will pay more to, one who also fills a strategic need.

On the flip side, firms sometimes hire a lateral partner with little or no business but who fills a strategic need. For example, firms often see hiring a marquee lateral such as a high-profile government lawyer from the Solicitor General's Office, the Antitrust Division of the Department of Justice, or the Security and Exchange Commission as a way for them to enter or bolster a practice area with instant credibility. These firms typically place a higher value on such lateral candidates and are willing to pay a significant premium over firms that already have well established practices in the area.

So, returning to Jennifer, one reason for her relatively low compensation is that she may not fill a strategic need at her firm. The boutique may have several partners with a strong biotechnology background, and probably cannot take full advantage of the business opportunities outside IP. A firm with an IP practice with a need for a molecular biologist may pay Jennifer more. Similarly, a firm with the experience and capabilities to take biotechnology companies public would also likely be more interested in Jennifer, and pay her more.

Hot Practice Areas and the Market

A "hot" practice area is one in which the demand for talent exceeds the supply. Looking back at 2007, for example, hot practice areas included private equity, corporate, real estate finance, and securitization. Firms typically found themselves competing vigorously with other firms to attract talent in these areas. That competition often drove firms to pay these lateral partners a premium, that is, more than what they were earning at their old firms and more than what the new firm would pay legacy partner for an equivalent economic contribution.

Jennifer's candidacy further illustrates how market forces can impact compensation. Biotechnology is a perpetually hot practice area because the supply of highly skilled lawyers — those with medical and doctoral degrees — is minuscule compared to the demand. Firms that need Jennifer's expertise are more likely to pay her a premium over what they pay other lawyers for a similar amount of business.

Premium compensation, however, does have its pitfalls. At some point after joining the new firm the lateral partner's economic contribution will have to match up with his compensation. And, the higher the compensation, the faster the firm will expect the lateral to ratchet up his economic contribution to match his similarly compensated peers.

Structural, Cultural, and Historical Factors

A firm's ability or willingness to pay premium compensation to lateral partners may depend on certain structural, cultural, or historical factors at work in the firm.

Compensation Spread/Ratio

The spread or ratio in compensation between the highest and lowest compensated partners can be an important factor in determining partner compensation. At one end, several "elite" firms at the top of the AmLaw 100 list have ratios as compressed as 3:1 or 4:1 from the

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highest to the lowest compensated partner. These firms rarely hire lateral partners, in part for reasons of culture, tradition and lack of necessity, and in part because competitive compensation for star laterals is less likely to fit well into the firm's spread. "Aspirational" firms (those seeking to move up on the AmLaw 100 rankings) have wider spreads/ratios: 10:1, 15:1 and even 20:1, giving them more flexibility to compete for top talent. Thus an aspirational firm with a lower PPP but higher spread than an elite firm can often pay more for top talent.

Looking at Jennifer, she has a thriving practice; while above the average for equity partners at most AmLaw 100 firms, it is not large enough to stretch the top of an AM Law 100 firm's compensation system.

Open or Closed Compensation Systems

Many partners don't like to see someone with an economic contribution equivalent to their own paid a premium over what they are paid unless there is a very good reason for doing so. Thus firms with an open compensation system (where each partner's compensation is disclosed to all partners) sometimes have less flexibility to pay a premium than firms with a closed compensation system (where that data is known by only a handful of partners and administrators). Firms with open compensation systems need to manage carefully communications to the broader partnership about the lateral's premium compensation, making the business case for the need, the benefit and the market forces that justify it.

For someone like Jennifer, how she fits into the strategic plan of the prospective firm and how that fit is conveyed to the general partnership, to the partners in her practice group, and even to specific partners at or near her compensation and/or business generation level will be important factors when the firm determines her compensation.

Bonuses

Most firms award their partners bonuses based on firm profitability (firm exceeds budget) and individual performance (outstanding contributions). More and more firms are also budgeting for lateral partner signing bonuses to entice lateral partners to the firm. Some bonuses are meant to make whole lateral partners who will forfeit some compensation upon leaving their old firm, while some are designed purely to entice a lateral to the new firm. Signing bonuses are particularly attractive to government attorneys after years of public service. One-time signing bonuses can also be more palatable to legacy partners than premium base compensation, which can be hard to adjust in subsequent compensation cycles. Some firms structure signing bonuses as forgivable loans, with a portion forgiven on the candidate's first anniversary and the balance periodically as other milestone dates are reached.

Compensation Cycle and Guarantees

Firms typically guarantee a lateral partner's base compensation for some period of time. The vast majority of AmLaw 100 firms have a one-year compensation cycle with a small number of firms setting partner compensation every two years. Even in cases where the lateral has a large practice that transitions to the new firm, it is at least two to three months before the firm receives its first dollar from the lateral's business. As a result, firms typically guarantee compensation for the remainder of the lateral's first year (the "stub"). Some firms, if it does not contravene their "we're all in this together, you take your points at whatever value they turn out to have next year" philosophy, may guarantee the stub plus one additional year or (in a recent trend for high-profile laterals) the stub plus two or even three years.

Budget Cycle

Near the end of a budget cycle (usually calendar year end) many firms, even those with significant budgets for lateral partner acquisitions, find limited financial flexibility to pay premium compensation or bonuses. In these situations, the firms may put off the acquisition to the next budget cycle or next year, or find a creative longer term solution that does not impact the firm's immediate financial picture.

Seniority

In some firms, particularly those in traditionally less competitive markets, seniority still plays a significant role in determining compensation. In certain areas of the South and Texas, for example, local firms have been unwilling to pay laterals, even star performers, materially more than what their classmates are paid. New law firms entering these markets have seen the opportunity and, for top talent, are paying premium base compensation and signing bonuses. For someone like Jennifer whose practice is booming at a relatively young age, a compensation system with a heavy seniority component would likely depress her compensation.

Decision-Making Process and Prior Success with Laterals

We have observed that firms who entrust their lateral partner hiring decisions to a small circle of partners are typically able not only to move faster in recruiting lateral partner talent, but also to be more flexible in fashioning a competitive compensation package. Many of these firms have made big bets on lateral partners; whether they are inclined to make additional big bets is likely to depend on the success of the earlier wagers.

CONCLUSION

Any partner considering moving to another firm should be open to speaking with firms in a wide range of PPP. Put another way, it can be a grave mistake to assume that because a firm's average partner compensation is lower the firm cannot afford to pay them at or above their market value. Because any given partner's PPM — Profits Per Me — can vary significantly from firm to firm due to a combination of market and firm specific factors, a potential lateral should focus first on whether a firm provides the strongest possible platform, and whether the firm's culture is a congenial one, before focusing on short term compensation.

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Comm. Opin. 98-2. And in New York City, the Bar Association has opined that an attorney does not need to encrypt e-mails addressed to clients in order to comply with the confidentiality requirement. *See* Formal Opinion No. 1998-2, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics.

The ABA's Stance

The American Bar Association Committee on Ethics and Professional Responsibility, one of the leading committees in this area, took an even stronger position validating the use of e-mail in an Opinion rendered in 1999. That Committee expressed the view that "e-mail communications … pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy." ABA Formal Opin. 99-413. As a result, the Committee concluded that "a lawyer sending confidential information by unencrypted e-mail does not violate Rule 1.6(a) … because there is a reasonable expectation of privacy in its use." *Id*. While there is some skepticism concerning the predicate for the conclusion inasmuch as many of us deem the risk of compromise to the confidentiality of e-mails far greater than, say, the interception of snail mail communications, the Opinion does offer a measure of comfort to the general use of e-mail communications.

The ABA Committee's Opinion makes it particularly clear that it is critical, in determining "whether it is appropriate for attorneys to send client communications via e-mail," to inquire whether there is an "expectation of privacy in routine, unencrypted e-mail." Wesser, *supra*. By issuing its Opinion, the ABA was expressly attempting to "harmonize a standard regarding the use of unencrypted e-mail." *Id*. The Committee determined that all types of e-mail systems employ a sufficient level of safeguards to minimize the risk of interception. The issue, though, is far from being free from doubt. Careful practitioners and firms should assure themselves about the safeguards present in their e-mail systems to protect the integrity of their communications.

Attorney-Client Privilege

Another ethical issue related to e-mail stems from the relationship between the attorney-client privilege and the ubiquitous threat of inadvertent disclosure. Given the high number of e-mails that lawyers exchange with clients, there can scarcely be a shock that inadvertent disclosure of confidential information occurs. The circumstances surrounding the Eli Lilly incident mentioned earlier represents only a recent and well-publicized example. The fact pattern of the matter, however, is hardly unique. It is important to recognize that the consequences of the inadvertent disclosure may be far more significant and damaging than the admittedly dreadful embarrassment caused by the disclosure. Inadvertent disclosure of an e-mail may lead to an attorney waiving the attorney-client privilege, even though the client had not authorized the disclosure. The consequences of prejudicing the client's right to protect its privilege are too apparent to require extensive elaboration.

The Supreme Court has held that the attorney-client privilege generally "protects the client from compelled disclosure of communications with his or her professional legal adviser made in confidence, unless the client has waived the privilege." *See* Todd Flaming, Internet E-mail and the Attorney-Client Privilege, 85 *Ill. B.J.* 183, 184 (1997). In *Upjohn Co. v. United States*, the Supreme Court acknowledged that "the attorney-client privilege was designed to encourage full and frank communication between attorneys and their clients." 449 U.S. 383, 389 (1981); *see also* Gopal S. Patel, E-mail Communication and the Attorney-Client Privilege: An Ethical Quagmire, 26 *Whittier L. Rev*. 685, 687 (2004).

More specifically, the important elements underlying the privilege are easily summarized: 1) legal advice is sought; 2) from a professional legal adviser acting in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence by the client; 5) are currently permanently protected; 6) from disclosure by himself or by the legal adviser; 7) so long as the privilege is not waived. The client owns the privilege, and, therefore, only the client has the authority to voluntarily waive it. An attorney, however, can involuntarily or inadvertently waive it, such as by sending an e-mail to the wrong person, or by "replying all" instead of just replying to a single individual in an e-mail. The attorney, after all, is the client's agent, whose acts are attributable to the principal, *i.e.*, the client. This is the nub of the difficulty.

The first question to be examined in determining the availability of the attorney-client privilege is whether e-mail communications are made "in confidence." The Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2510, and parallel state electronic communications privacy statutes support the conclusion that e-mail communications should be regarded as privileged because of their security in transmission. For example, the ECPA provides that "[n]o otherwise privileged … electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter, shall lose its privileged character." 18 U.S.C. § 2517(4). Similarly, New York CPLR § 4548 states that "no communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means … " However, these general rules do not directly address circumstances, such as inadvertent disclosure of an e-mail communication, which may constitute a waiver of the attorney-client privilege. Patel, *supra*, at 688.

Courts in a number of cases have concluded that a sender or recipient of e-mail has a reasonable expectation of privacy in such communications. For example, in *Dunlap v. County of Inyo*, the court opined that "we reasonably expect privacy in our … e-mail messages" despite the fact that it is a technology "of questionable privacy." 1997 U.S. App. LEXIS 19249 (9th Cit., June 10, 1997). Further, in *United States. v. Keystone Sanitation Co.*, the court noted that "e-mail communications over a private network or closed system provide a reasonable expectation

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of privacy so that inadvertent or intentional interception would have no effect on confidentiality." 903 F. Supp. 803 (M.D. Pa. 1995). In *United States v. Maxwell*, it was determined that "e-mail stored on a commercial network … [is subject] to a reasonable expectation of privacy because there was virtually no risk that [the] computer transmissions could be received by anyone other than the intended recipients." 42 M.J. 568 (A.F.C.C.A. 1995), rev'd on other grounds, 45 M.J. 406 (C.A.A.F. 1996). One District Court, in *ACLU v. Reno*, in its broad-ranging review of Internet technology, noted that "unlike postal mail, simple e-mail generally is not 'sealed' or secure, and can be accessed or viewed on intermediate computers between the sender and the recipient (unless the message is encrypted)." 929 F. Supp. 824, 834 (E.D. Penn. 1996).

POTENTIAL WAIVER

Once it is determined whether or not an e-mail communication is covered under the attorney-client privilege, the issue of a potential waiver involved with an inadvertent disclosure can be addressed under the rules developed for such disclosures in more traditional settings. Of course, it may be the conduct of the client that causes the loss of the privilege in the case of e-mail communications. A number of recent cases have dealt with situations in which clients have sent private attorney-client communications through an employer's e-mail system. S*ee In re Asia Global Crossing*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (articulating a four-part test for determining whether use of the employer's e-mail system to send private attorney-client communications constitutes waiver) and *Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934; 847 N.Y.S.2d 436 (Sup. Ct. N.Y. Cty 2007) (applying the four-part test). "Currently, there is a jurisdictional split with regard to whether an inadvertent disclosure of information by an attorney amounts to a waiver of the attorney-client privilege." Patel, *supra*, at 692. Courts employ three approaches when deciding the issue: the traditional, the limited waiver, and the intermediate. *See* Julie Rubin, The Impact of E-mail on the Lawyer's Duty of Confidentiality, 36 Md. B.J. 56, 56 (Aug. 2003).

Under the traditional view, any disclosure, regardless of whether it was inadvertent or not, will result in the loss of the attorney-client privilege. The D.C. Circuit has held that "confidentiality of important information should be jealously guarded by the holder of the privilege." *In Re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *see also* Patel, *supra*, at 692. This rigid approach exacts a draconian penalty for what may be an innocent, indeed commonplace, mistake.

The second approach often employed by courts is the limited waiver approach, which protects the privilege even if the disclosure is inadvertent. *Johnson v. Sea-Land Serv., Inc.*, 2001 WL 897185 at * 6 (S.D.N.Y., Aug. 9, 2001); *Bank Brussels Lambert v. Credit Lyonnaise*, 160 F.R.D. 437, 446 (S.D.N.Y. 1995); see also Patel, supra, at 693. This is so because the privilege belongs to the client, and, therefore, only the client can waive it. *Id*. However, the Southern District of New York has held that even though the information in an e-mail may be protected by the privilege, "opposing counsel would not be disqualified simply because she read the e-mail." *U.S. v. Stewart*, 294 F. Supp.2d 490 (S.D.N.Y. 2003); *see also* Patel, *supra*, at 694.

The final approach, followed by the majority of courts, is known as the intermediate approach. Under this approach, courts analyze cases on a fact-specific basis to determine whether or not the privilege has been waived. An inadvertent disclosure will only result in a waiver if the producing party failed to take reasonable precautionary steps to protect confidentiality. Put simply, this is a very practical approach, recognizing the frailty of human conduct and the extreme consequence that may follow an otherwise innocent mistake. Many courts utilize the following factors: "1) the reasonableness of the precautions taken to prevent the inadvertent disclosure; 2) the number of inadvertent disclosures; 3) the extent of the disclosure; 4) any delay and measure taken to rectify the disclosure; and 5) whether the overriding interests of justice would or would not be served by relieving a party of its error." *Id*.

SOLUTIONS

While there may not be a universally accepted solution to the problem of inadvertent disclosure of e-mail communications, one that is often suggested is encryption. The use of encryption is no doubt a practical solution to issues of confidentiality in many environments, and may even be an imperative in certain circumstances. *See* J.T. Westermeier, Ethics and the Internet, 17 *Geo. J. Legal Ethics* 267, 300-301 (2004). However, the routine use of encryption in all communications between attorneys and clients has not yet overcome the practical difficulties that include the lack of sufficient proliferation of compatible encryption technology and education of both attorneys and clients on its proper use. This comment is in addition to the obvious difficulty in educating persons on the use of encryption technology generally.

Part Two of this article will discuss ethical issues relating to e-discovery and social networking and blogs.

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Departing Lawyers

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may even result in a communication that will please the marketing departments of both the old firm and the new firm of the departing attorney. But even if the departure is bitter and hotly contested, prudent firms and attorneys will remember that, when the rubber meets the road, we all have an ethical obligation to keep the needs of the client as our highest priority.

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