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Confounded Computers

DAVID WALTHER

Computers are now ubiquitous in law offices, and there are few lawyers who do not use them for many of the tasks of practicing law. These include emails between clients and office personnel, creation of documents, attaching these documents to emails, timekeeping, and maintaining client lists. It is technologically possible to reconstitute emails, even when those have been deleted. Thus to use emails in correspondence with clients we have learned to warn the client of the possibility that security of the document may be breached. If emails are to be used, the client should authorize such use in the fee agreements.

However, there are many other unexpected areas where use of computers can result in improper breaches of client confidentiality. A recent decision from the New York State Bar requires lawyers to guard against the dissemination of "metadata."[1] Metadata is hidden data contained in most word processing software that is not visible in the printed document, but can be detected in the electronic versions of the document. The New York Bar opinion has required lawyers to install metadata cleaning software. How many lawyers have considered this?

Many law firms use outside technical support. Such Information Technology Specialists have remote electronic access to the firm's entire computer system. This includes all emails, all documents, all billing systems, and all client lists. What must be done to protect client confidentiality under these circumstances?

Some opinions have been issued relating to this situation. ABA Model Rules 5.3(b) provides: "a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;" Comment 1 to that rule states that a lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The Comment continues: The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

RISK FROM COMPUTER MAINTENANCE COMPANIES

In 1995 the American Bar Association Committee on Ethics and Professional Responsibility issued formal opinion 95-398. In that opinion the committee stated:

> A lawyer who gives a computer maintenance company access to information in client files must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information. Should a significant breach of confidentiality occur, the lawyer may be obligated to disclose it to the client.

The committee noted as to the law firm in question that:

> The law firm has all of its client files stored in a central computer, or network, and the maintenance company, in order to reduce maintenance costs, would be able to gain access to the net-

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> work computer through a terminal located at the company's offices. This would enable the maintenance company to handle many computer problems without having to travel to the firm to make repairs and adjustments. As a consequence, when effecting repairs or correcting problems the computer maintenance company employees would be able to view all or portions of the files of the law firm's clients.

and opined:

> In connection with this inquiry, a lawyer might be well advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.

Considering that many of the employees of the service provider may be temporary, transient, or not acutely aware of the nuances of client confidentiality, this may be an impossible task. What lay person could resist the temptation of using such confidential information if it is important to the personal life of that person.

In 1976 the ABA Committee issued an opinion, Informal Opinion 1364, under the earlier Ethical Considerations, and concluded it is not mandatory for an attorney to notify his client in advance of giving information from the client's file to a data processing service for bookkeeping, accounting and other data processing as above detailed. However, client relationships may suggest that an attorney notify a client in advance, such as when an attorney has reason to believe the client may not possess a degree of business sophistication sufficient to realize that modern methods of technology require the use of outside agencies. Of course, the lawyer is required to exercise due care in the selection of the agency and to take all reasonable steps to assure that the agency maintains the confidentiality of the information. I assume that opinion would retain validity today, despite the technological advances that have occurred in the past 30 years.

Confounded computers!

ENDNOTES

1. *See* 2004 WL 3021157, N.Y.St. Bar Assn. Comm. Prof. Eth.