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## Of Cell Phones and Electronic Mail: Disclosure of Confidential Information under Disciplinary Rule 4-101 and Model Rule 1.6

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**OF CELL PHONES AND ELECTRONIC MAIL:  
DISCLOSURE OF CONFIDENTIAL INFORMATION  
UNDER DISCIPLINARY RULE 4-101 AND  
MODEL RULE 1.6**

KARIN MIKA\*

Technology has become a fact of life—perhaps nowhere more so than in business and in the legal profession.<sup>1</sup> By the end of 1997, it was reported that an estimated sixty million people worldwide used the Internet,<sup>2</sup> with the number of Internet access lines growing nearly twenty times faster than traditional voice phone lines.<sup>3</sup> Similarly, the global use of cellular phones has risen from approximately eleven million users in 1990 to 135 million users in 1996.<sup>4</sup> Commuting workers routinely conduct business on cellular phones on their way to and from work.<sup>5</sup>

Despite the prevalence of these electronic communications, the security risks of their use are well-known. It is common knowledge that information sent via the Internet has the capacity of being intercepted at an Internet server.<sup>6</sup> It is also known that cellular communications, because they are transmitted through public airwaves, can be overheard on other types of common communications equipment.<sup>7</sup> These two facts would seem to present a quandary for the attorney who is attempting to conduct business efficiently, yet confidentially in compliance with the Code of Legal Ethics.

Regardless of the known security risks, it is difficult, if not impossible, to imagine a law firm in the twentieth century operat-

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1. See Carey R. Ramos & Curtis Carmack, *Beware of Cyberspace Marauders*, N.Y.L.J., Feb. 24, 1997, at S1.

2. See *Internet vs. The Carriers: The Challenge Goes Worldwide*, 27 BUS. COMM. REV. 8 (1997).

3. See *id.*

4. See Mario Osava, *Communications: Global Change Moving at the Speed of Light*, INTER PRESS SERV., Aug. 8, 1997.

5. See Robert A. Clifford, *Cellular Phones May Drive Drivers to Dangerous Distraction*, 20 CHI. LAW. 9 (Oct. 1997).

6. See Sharon Machlis & Mitch Wagner, *E-commerce Brings Applause, Some Fears*, COMPUTERWORLD, Sept. 1, 1997, at 1A.

7. See Jeannine Aversa, *Gingrich Cell Call a Reminder They Can Be Overheard*, MILWAUKEE J. & SENTINEL, Jan. 12, 1997, at 8.

ing without the technological advancements that make it possible to communicate with anyone, anywhere, at any time.<sup>8</sup> These advancements often enable immediate responses that are beneficial to attorneys and clients alike. Cellular phone usage and electronic mail are an integral mode of communication between firm members, negotiating attorneys, as well as between attorneys and their clients.<sup>9</sup> While it has developed into a mode of communication making the practice of law more efficient,<sup>10</sup> it is doubtful that most attorneys give too much thought to what exactly happens to the content of their message as it either travels along Internet phone lines or is relayed from cell phone terminal to cell phone terminal.<sup>11</sup>

The prohibition on disclosing confidential communications is one of the cornerstones of the legal profession.<sup>12</sup> To that end, Disciplinary Rule 4-101 of the Model Code of Professional Responsibility provides: "[A] lawyer shall not knowingly reveal a confidence or secret of his client."<sup>13</sup> Model Rule of Professional Conduct 1.6 provides: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ."<sup>14</sup> Neither one of these ethical standards

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8. Cell phone Interview with Gerald B. Chattman, Managing Partner of Chattman, Gaines & Stern, L.P.A. (May 5, 1998). Chattman reports that he averages about 2500 minutes a month of cellular phone usage. His cellular phone includes a speed dial feature, a call waiting feature, and a "world-wide roam" feature. The world-wide roam enables anyone to dial his local cell phone number and contact him wherever he might be, whether out-of-state or out of the country.

9. See *id.*

10. See Stephanie Simon, *Internet Holds Appeal for Online Attorneys*, CHI. SUN TIMES, July, 11, 1996, at 35.

11. Even if attorneys are aware of security risks, it is doubtful whether all clients have the same knowledge of those risks. See Peter R. Jarvis & Bradley F. Tellam, *Competence and Confidentiality in the Context of Cellular Telephone, Cordless Telephone, and E-Mail Communications*, 33 WILLAMETTE L. REV. 467 (1997).

12. See, e.g., CODE OF PROFESSIONAL ETHICS Canon 6 (1908).

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 4-101 (1981). Some variation of Disciplinary Rule 4-101 is included in the following: GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1997); ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6(h)(1) (1998); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); NEB. CODE OF PROFESSIONAL RESPONSIBILITY Rule 4-101 (1997); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1997); N.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1998); OR. RULES OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1998); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1998); TEX. RULES OF PROFESSIONAL CONDUCT Rule 1.05 (1998); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1997); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1997).

14. MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Some variation of Model Rule 1.6 is included in the following: ALA. RULES OF

contemplates a situation in which an attorney might reasonably be expected to foresee that his or her communications with a client were possibly being disclosed to an unknown audience, such as exists when using electronic communications.<sup>15</sup> These rules of Professional Responsibility should be updated to reflect these technological advancements.

On December 21, 1996, the nation (if not the world) learned of the potential dangers of cellular phone transmissions when a Florida couple "fortuitously" overheard a conference call between Republican officials concerning how they could limit political damage caused by the allegedly unethical activities of Newt Gingrich.<sup>16</sup> The "fortuitous" eavesdropping (which was done over a police scanner) was taped and turned over to Democrat Congresswoman Karen Thurman.<sup>17</sup> She shared it with Congressman Jim McDermott.<sup>18</sup> Although it is, in fact, illegal to

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PROFESSIONAL CONDUCT Rule 1.6 (1997); ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); ARK. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); COL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); DEL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1998); HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); IND. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); KAN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); KY. RULES OF PROFESSIONAL CONDUCT SCR 3.130 (1.6) (1998); LA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); MISS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); MO. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1997); MONT. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); NEV. RULES OF PROFESSIONAL CONDUCT Rule 156 (1997); N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-106 (1998); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); R.I. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); S.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); S.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998); WASH. CODE OF PROFESSIONAL CONDUCT Rule 1.6 (1997); W. VA. CODE OF PROFESSIONAL CONDUCT Rule 1.6 (1998); WIS. RULES OF PROFESSIONAL CONDUCT SCR 20:1.6 (1998); WYO. CODE OF PROFESSIONAL CONDUCT Rule 1.6 (1997).

15. See Confidentiality: Electronic Communications, Lawyers' Manual on Professional Conduct (ABA/BNA) 401 (1998) [hereinafter Lawyers' Manual].

16. See Guy Gugliotta, *A Congressman Takes it Personally to Court: Boehner Sues McDermott Over Leaked Tape of Phone Call on Gingrich's Ethics Woes*, WASH. POST, Mar. 10, 1998, at A4.

17. See *id.*

18. See *id.*

disclose intercepted cellular communications,<sup>19</sup> this has little bearing on the fact that the communication was disclosed in the first place. In fact, the notion that a cellular phone conversation may be broadcast through a baby monitor<sup>20</sup> or stereo speaker<sup>21</sup> would seem to make any user hesitant about discussing any sensitive topic over a cellular phone.

By the same token, electronic mail is not directly shipped from one computer terminal to another. Rather, it has the potential of stopping at various servers along the way and is susceptible to being viewed by parties unknown.<sup>22</sup> In the most extreme of espionage-like circumstances, computer hackers are able to intercept messages or perhaps access a file of stored e-mail messages.<sup>23</sup> In some instances, even deleted e-mail messages may be accessed by an individual intent on discovering their content.<sup>24</sup>

On the one hand, it may seem as though modern advances in technology pose no more confidentiality problems than the invention of the telephone or even conference calling. However, the advances of the cellular phone and Internet communication have posed unique and perhaps yet-to-be-discovered confidentiality problems.<sup>25</sup> In order to tap "land" telephone lines, the perpetrator must act deliberately and with some technological knowledge.<sup>26</sup> Land line telephone calls, unlike cellular phone calls, do not ordinarily have the potential to be received on commonly possessed radio equipment.<sup>27</sup> The user of a telephone need not worry about inadvertent broadcasts to homes or nearby offices.

Additionally, the market that called for a quick and mobile form of communication has given rise to its own market that calls for experts who are able to penetrate any minimal security on

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19. See 18 U.S.C. §2511(1) (1994), as amended by 18 U.S.C. §2511(1)(e)(i) (Supp. II. 1996). See also 47 U.S.C. §605(a) (1994).

20. See Lawyers' Manual, *supra* note 15, at 404.

21. See Anthony S. Higgins, *Professional Responsibility—Attorney-Client Privilege: Are Expectations of Privacy Reasonable for Communications Broadcast Via Cordless or Cellular Telephones?*, 24 U. BALT. L. REV. 273, 280 (1995).

22. See Bert L. Slonim, *E-mail and Privileged Communications: What are the Security Concerns?*, N.Y.L.J., Nov. 24, 1997, at S3.

23. See David Hricik, *Confidentiality & Privilege in High-Tech Communications*, 60 TEX. B.J. 104, 115 (1997).

24. See Heidi L. McNeil & Robert M. Kort, *Discovery of E-mail and Other Computerized Information*, ARIZ. ATT'Y., Apr. 1995, at 18.

25. See Hricik, *supra* note 23.

26. See *id.*

27. See Lawyers' Manual, *supra* note 15, at 404.

this relatively insecure technology.<sup>28</sup> In fact, there are actually groups of cellular hackers whose hobby is listening in on cellular communications of attorneys or other business decision makers.<sup>29</sup> While these individuals must possess a similar technological expertise as "land line" wiretappers, there is a major difference. A wiretap on a land line can be traced back to its source.<sup>30</sup> This is not necessarily true of the cellular hacker who needs to install no wiring to receive a cellular signal, but needs only a certain type of receiving equipment.

E-mail, on the other hand, presents a series of different problems. It is not necessarily a problem of an individual inadvertently (or deliberately) intercepting an e-mail message, or even looking over one's shoulder to read what is on the screen; it is more the central technology of the system. E-mail requires a networking system that in effect links every computer in the world having access to the Internet.<sup>31</sup> Given the system, it is impossible to predict how many individuals may have access to a particular e-mail message.<sup>32</sup> Moreover, the utmost benefit of the computer is that information is kept in files—categorized efficiently and capable of easy day-to-day access. As long as the files exist, and as long as the computer is linked by phone lines to other computers, there is the potential that the files may be accessed by an outside source.<sup>33</sup> This access could actually be obtained by way of a law firm's Web site on the Internet.<sup>34</sup>

While it may appear that owning a computer, in and of itself, presents a far greater danger than using e-mail, it is the e-mail and the technology of signals traveling along phone lines that presents the greatest danger of a breach of confidentiality. Espionage need no longer consist of spies secretly photographing sensitive documents with miniature cameras; it need only consist of e-mailing an entire file across the globe. In fact, it is even quite easy to reveal a confidence inadvertently when accidentally e-mailing confidential information along with an intended transmission.<sup>35</sup>

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28. See *Privacy, and More, at Risk*, USA TODAY, Apr. 16, 1998, at 14A.

29. See *Lawyers' Manual*, *supra* note 15, at 401.

30. See Stephen Budiansky, *Spying on Phone Calls and Bank Teller Machines: Cheaper Electronics Makes it a Snap to Snoop*, U.S. NEWS & WORLD REP., May 18, 1987, at 54.

31. See Jonathan Rose, *E-Mail Security Risks: Taking Hacks at the Attorney Client Privilege*, 23 RUTGERS COMPUTER & TECH. L.J. 179, 197 (1997).

32. See *id.* at 198.

33. See *id.* at 199-201.

34. See Ramos & Carmack, *supra* note 1.

35. See *CIBA-Geigy Corp. v. Sandoz*, 916 F.Supp. 404 (D.N.J. 1995).

Given that neither the Model Code nor Model Rules address electronic communications directly, several states have issued ethical opinions concerning the confidentiality of both cellular phone and electronic mail communications. For example, both North Carolina<sup>36</sup> and the city of New York<sup>37</sup> have chosen a middle ground with respect to attorneys engaging in cellular phone communication. Such communications are not forbidden, but the attorney should use caution when communicating about sensitive matters, and perhaps apprise the other party that the phone line may not be secure. Other states, such as Massachusetts,<sup>38</sup> New Hampshire,<sup>39</sup> Washington,<sup>40</sup> Colorado,<sup>41</sup> Iowa,<sup>42</sup> and Illinois,<sup>43</sup> require a type of "informed consent." The client must be made aware that the cellular conversation may be overheard and that the material discussed may not be confidential. Washington requires that the client be given the option of discussing the material at a more secure time and place.<sup>44</sup> Colorado, Iowa, and Illinois require that the client be advised that the conversation may result in the loss of the attorney-client privilege.<sup>45</sup>

Opinions concerning the use of e-mail are similar. States such as Alaska,<sup>46</sup> Arizona,<sup>47</sup> Illinois,<sup>48</sup> South Carolina,<sup>49</sup> Colorado,<sup>50</sup> and North Dakota<sup>51</sup> have issued ethical opinions requiring that "reasonable care" be employed when using e-mail to communicate with a client. Encryption (or other means of security) should be considered when sending confidential materials. The state of Alaska's ethical advisory board suggests that a "prudent" lawyer would advise the client of the risks of e-mail,<sup>52</sup> and the state of Arizona suggests a statement of confidentiality be included with an e-mail message.<sup>53</sup> North Carolina requires the lawyer to "minimize the risk" of electronic communication and

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36. See N.C. St. Bar Op. RPC 215 (1995).

37. See New York City Ethics Op. 94-11 (1994).

38. See Mass. Ethics Op. 94-5 (1994).

39. See N.H. Ethics Op. 91-92/6 (1992).

40. See Wash. Informal Ethics Op. 91-1 (1991).

41. See Colo. Ethics Op. 90 (1992).

42. See Iowa Ethics Op. 96-1 (1996).

43. See Ill. Ethics Op. 90-7 (1990).

44. See Wash. Informal Ethics Op., *supra* note 40.

45. See Ethics Ops., *supra* notes 41-43.

46. See Alaska Ethics Op. 98-2 (1998).

47. See Ariz. Ethics Op. 97-04 (1997).

48. See Ill. Ethics Op. 96-10 (1997).

49. See S.C. Bar Advisory Op. 97-08 (June 1997).

50. See Colo. Ethics Op., *supra* note 41.

51. See N.D. State Bar Assoc. Ethics Comm. Op. 09 (1997).

52. See Alaska Ethics Op., *supra* note 46.

53. See Ariz. Ethics Op., *supra* note 47.



advise the client if a security breach is feared.<sup>54</sup> Iowa, alone, has issued an opinion requiring written acknowledgment of the risks by the client before the attorney may use e-mail as a means of communication.<sup>55</sup> If written acknowledgment from the client is not received, e-mail communication must be encrypted.<sup>56</sup>

There are various ways the Model Rules and State Codes of Professional Responsibility could be modified to account for the advancements in technology. These modifications should take into account the state ethical opinions already issued and incorporate them into a new version of the rule respecting confidential communications. Communication via e-mail or cellular phone need not be prohibited. Instead the rules should reflect the dangers of such communication to make the attorney aware of potential breaches of confidentiality and consequent breaches of ethical responsibility.

The main difference between Model Rule 1.6 and Disciplinary Rule 4-101 is the latter's use of the modifier "knowingly." As such, DR 4-101 prevents "knowing" confidential revelations by the attorney, while Rule 1.6, in many respects broader, prohibits revealing *any* information relating to the representation of the client.<sup>57</sup> Since the word "knowingly" does not appear in the prohibition, Rule 1.6 arguably applies to both knowing disclosures and inadvertent disclosures.

In considering an appropriate integration of electronic communications into the rules, the following suggested rules are plausible renditions of what the new rules might include. These suggested modifications take into consideration ethics opinions that have already been issued, as well as the reality that the pervasiveness of electronic communications potentially extends breaches of confidentiality beyond attorneys. Because of this, the suggested modifications expand an attorney's duties further by imposing upon the attorney an obligation of notifying non-attorney employees and clients of the potential inadvertent disclosures of electronic communications.

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54. See N.C. Ethics Op. 215 (1995).

55. See Iowa Ethics Op., *supra* note 42.

56. See *id.*

57. Except with consent or when necessary to carry out appropriate representation. See, e.g., OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1998).

*Suggested Modification of Disciplinary Rule 4-101:*<sup>58</sup>

(B) Except when permitted under DR 4-101(D), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

**(C) The term "knowingly" shall not only refer to purposeful disclosures of confidential communications, but shall also refer to situations in which the attorney has reason to believe or should have reason to believe that the mode of communication being used is not secure. The reasonably prudent attorney should take steps to ensure that particularly sensitive matters are not discussed with clients or other individuals over cellular phone communications or e-mail communications without the consent of the client involved, or without taking steps to ensure the method of communication is secure.**

**(D) A lawyer may reveal . . .**

**(E) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(D) through an employee. An attorney shall exercise reasonable care in apprising those with whom he/she has communications that caution should be used when communicating sensitive materials over electronic medium. If the firm is not working within a closed computer network, the attorney should apprise his/her non-attorney employees that discretion should be used when using electronic mail as a means of communication.**

*Suggested Modification of Model Rule 1.6:*<sup>59</sup>

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. **A lawyer shall be considered to have revealed information relating to representation if he/she has reason to believe or should have reason to believe that the mode**

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58. Suggested modifications to the original are indicated by bold-face type.

59. Suggested modifications to the original are indicated by bold-face type.

**of communication being used to communicate information is not secure.**

- (b) **The reasonably prudent attorney should take steps to ensure that particularly sensitive matters are not discussed with clients or other individuals over cellular phone communications or e-mail communications without the consent of the client involved, or without taking steps to ensure the method of communication is secure.**

An attorney shall exercise reasonable care in apprising those with whom he/she has communications that caution should be used when communicating sensitive materials over electronic medium. If the firm is not working within a closed computer network, the attorney should apprise his/her non-attorney employees that discretion should be used when using electronic mail as a means of communication.

- (c) A lawyer may reveal . . .

These suggested modifications to Model Rule 1.6 and Disciplinary Rule 4-101 take into account technological developments while informing the attorney that he or she is ultimately responsible for ensuring communications are kept confidential, whatever mode of communication is chosen. The modifications also place upon the attorney the responsibility of understanding the technology he or she is using for communication and apprising both clients and employees of any risks involved. Further, the modifications eliminate the ability of the attorney to plead ignorance as to the capabilities of modern technology, or as to his or her precise responsibility under the Code of Professional Responsibility.

### CONCLUSION

The attorney-client privilege and its corresponding requirement to keep information confidential is, in many respects, a sacred privilege that ranks with clergy-parishioner and doctor-patient relationships.<sup>60</sup> The concept of the privilege stems from the honor of the profession and the Code of Professional Responsibility is a testament to the tradition of confidentiality that it protects. While the original Code bound the attorney to the honor of keeping confidentiality in a more straightforward way by not revealing secrets or using "secrets" to a client's disadvantage,<sup>61</sup> technology has given the attorney a way of breaching his or her ethical responsibility without being overtly aware of doing so.

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60. See Ramos & Carmack, *supra* note 1.

61. See *supra* text accompanying note 13.

Although the original notion of keeping client confidentiality did not contemplate the insecurities of electronic communications, these communications are a reality. They are something which should be addressed by the legal profession, and correspondingly, the rules governing the legal profession. The Code of Professional Responsibility should be modified to reflect the realities of these technological advancements and bind the lawyer to the honor of keeping confidences on the much broader scale that now exists.