

**Ethics in the Digital Age**

**Steven L. Nichols**  
Steve@Nichols-IP.com  
(801) 572-0185

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

**Ethics in the Digital Age**

1. Online Privacy Laws and Their Effect on Legal Practice
2. Using the Metadata Opposing Side Accidentally Shared Through Electronic Communication
3. Pitfalls of Interactive Websites
4. What Can Attorneys Say in Chat Rooms and Weblogs?

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

**Online Privacy Laws  
Email and Client Confidentiality**

- Rule 1.6 of both the American Bar Association (“ABA”) Model Rules and the Utah Rules of Professional Conduct (“URPC”) governs the confidentiality of client information and state that “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”
- Paragraph (b) covers those instances in which an attorney must reveal confidential client information (1) to prevent harm resulting from a client’s criminal activity, (2) in a controversy between the lawyer and client or (3) to comply with a court order.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality

- How can using email potentially endanger client confidentiality?
- Unauthorized interception of an email bearing confidential information.
- Inadvertent misdirection of an email bearing confidential information.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality Email Interception

- In 2005, Cliff Stanford was tried in the UK for unauthorized interception of emails in a case of industrial espionage.
- *U.S. v. Szymuszkiewicz*, 2009 WL 1873657 (U.S. District Court for the Eastern District of Wisconsin 2009) An IRS employee was convicted to rigging his supervisor's computer to forward to him all incoming emails.
- In September, 2009, The three men were convicted in the United Kingdom of a plot to bomb several transcontinental flights in part using crucial e-mail correspondences intercepted by the U.S. National Security Agency.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality Inadvertent Misdirection

- Email program "helpfully" guesses at the email address you want.
- No control over subsequent forwarding of your message.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality

- Comment 16 to Rule 1.6 extends a lawyer's obligation with regard to inadvertent or unauthorized disclosure of client information. "[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." (URPC, Rule 1.6, Comment [16]) ([www.utcourts.gov/resources/rules/ucja/ch13/1\\_6.htm](http://www.utcourts.gov/resources/rules/ucja/ch13/1_6.htm)).
- Can client confidential information be ethically transmitted by email?

RADDER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality

- Utah State Bar Ethics Advisory Opinion Committee: "There is little evidence that unencrypted e-mails pose any greater risk of unauthorized disclosure than other forms of communication commonly used, such as telephone and facsimile. The fact that Internet service provider (ISP) administrators or hackers are capable of intercepting e-mail (in violation of federal law) does not render the expectation of privacy unreasonable, any more than the risk of an illegal telephone tap removes the reasonable expectation of privacy in a land-line telephone call." (Opinion No. 00-01, Utah State Bar Ethics Advisory Opinion Committee).
- Consequently, the Opinion concludes that "[a] lawyer may, in ordinary circumstances, use unencrypted Internet e-mail to transmit client confidential information without violating the Utah Rules of Professional Conduct." (*Id.*).
- The ABA agrees (Formal Opinion No 99-413).

RADDER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality

- Caveat: "Where the client information is particularly sensitive or the lawyer has reason to believe that the risk of interception of the communication is higher, he may want to use a means of communication with higher security. The lawyer should abide by any policy of the client regarding the use of e-mail (or any other means of communication) for its confidential information. A lawyer may wish to advise a client at the time he is retained that the lawyer intends to use unencrypted e-mail as one of the methods of communication with the client." (Opinion No. 00-01, Utah State Bar Ethics Advisory Committee).
- You may wish to agree with the client in your engagement letter that email is a mutually acceptable means for transmitting confidential information.

RADDER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

## Email and Client Confidentiality Electronic Communications Privacy Act

Section 2511 of the Electronic Communications Privacy Act (1986) (18 U.S.C. 2511) is entitled "Interception and disclosure of wire, oral, or electronic communications prohibited." Under this statute,

(1) Except as otherwise specifically provided in this chapter any person who -  
(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

...  
(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [OR]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection ...

shall be punished as provided in subsection (4) [fined and jailed up to 5 years] or shall be subject to suit as provided in subsection (5) [civil suit by injured party or government].  
(18 U.S.C. 2511).

18 U.S.C. Sec. 2701(e)(2) similarly penalizes unauthorized access to electronic communications, e.g., email messages, that are stored, for example on a computer, rather than intercepted during transmission. *See Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Using Electronic Communications

- Understand the source of electronic communications offered by a client or others to be used in representing that client.
- This applies not only to email, but also to information that a party inputs to a website where there is a reasonable expectation of privacy. *In re Pharmtrak, Inc. Privacy Litigation* 329 F. 3d 9 (1st Cir. 2003).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Soliciting Business by Email Ethical Rules and CAN-SPAM

- The ABA Model Rules and URPC both specify that  
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning of any recorded or electronic communication, unless the recipient of the communication is a person [who is also a lawyer or has an existing relationship with the lawyer sending the message]. (ABA Model Rules, Rule 7.3(c)).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Soliciting Business by Email Ethical Rules and CAN-SPAM

- CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*, a "commercial electronic mail message" is "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." (15 U.S.C. §7701).
- The CAN-SPAM Act permits e-mail marketers to send unsolicited commercial e-mail as long as it contains all of:
  - an opt-out mechanism;
  - a valid subject line and header (routing) information;
  - the legitimate physical postal address of the mailer; and
  - a label if the content is adult.

RADER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield

- In December 2005, the Florida Bar's Board of Governors considered the issue of lawyers who look for metadata in electronic documents they have received, for example, from opposing counsel. The board voted unanimously for a motion condemning the practice and referred two specific questions related to the practice of mining metadata to the Professional Ethics Committee of the Florida Bar. This moment in legal ethics history was made most notable, however, because several member of the Board stated publicly that, prior to having this issue raised, they had never heard of metadata.

RADER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield

- In a real world example, former California Attorney General, Bill Lockyer, issued a letter denouncing peer-to-peer filing sharing software as "a dangerous product." Metadata in the electronic version of the letter showed that a senior executive with the Motion Picture Association of America (MPAA) had been involved in drafting the letter. This clearly biased input, into a letter which was issued officially by the state's Attorney General, lead at least one critic to the conclusion that "California AG Plays Sock Puppet to the MPAA." ("Beware Your Trail of Digital Fingerprints," Tom Zeller, New York Times, November 7, 2005).

RADER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield

### Legal example

- Settlement letter reviewed by client includes client's ceiling for a settlement.
- Is it ethical to look for confidential information in metadata?
- Is it ethical to use metadata found on behalf of your client?

RADER  
FISHMAN  
G. GRAUER

---

---

---

---

---

---

---

---

## Metadata Minefield

### ABA Position

- The most general pronouncement on these questions comes from the ABA. According to the ABA's Standing Committee on Ethics and Professional Responsibility
- "The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by 'scrubbing' metadata from documents or by sending a different version of the document without the embedded information." (ABA's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-442 (Aug. 5, 2006)) ([http://www.pdfforallawyers.com/files/06\\_442.pdf](http://www.pdfforallawyers.com/files/06_442.pdf)).

RADER  
FISHMAN  
G. GRAUER

---

---

---

---

---

---

---

---

## Metadata Minefield

### Jurisdictional Split

- Allow use of inadvertently disclosed metadata:
  - Maryland
  - D.C.
- Prohibit use of inadvertently disclosed metadata:
  - New York
  - Alabama

RADER  
FISHMAN  
G. GRAUER

---

---

---

---

---

---

---

---

## Metadata Minefield Colorado

- A Sending Lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing Confidential Information.
- A Receiving Lawyer who receives electronic documents or files generally may search for and review metadata.
- The Receiving Lawyer must promptly notify the Sending Lawyer.
- Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred.
- If, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata.
- (Colorado Bar Association Formal Ethics Opinion 119, adopted May 17, 2008) ([www.cobar.org/index.cfm/ID/386/subID/23789/CETH/](http://www.cobar.org/index.cfm/ID/386/subID/23789/CETH/)).

RADER  
FISHMAN  
& CRAIGER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield Utah

- No opinion yet issued specific to metadata
- However, the Utah State Bar Ethics Committee has issued Advisory Opinion No. 99-01 that addresses the broader question: "What are an attorney's ethical obligations when the attorney or his client has lawfully obtained an attorney-client communication between an opposing party and opposing counsel under conditions where the opposing party may not have intended to waive the attorney-client privilege?" (Utah Bar Ethics Committee, Opinion No. 99-01; [www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_99\\_01.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_99_01.html)).

RADER  
FISHMAN  
& CRAIGER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield Utah

- If a lawyer lawfully obtains a confidential communication, for example, an attorney-client communication, "[that] lawyer is required to bring to the attention of opposing counsel the receipt of any such communication unless it is clear from the circumstances that the attorney-client privilege has been *intentionally* waived." (emphasis added).
- The opinion further notes that the URPC place "an obligation upon every lawyer to take steps to preserve the attorney-client privilege [including between other lawyers and their clients] in order to effect the orderly administration of justice." (*Id.*, see URPC, Rule 8.4(d)).

RADER  
FISHMAN  
& CRAIGER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield Utah

- Utah Rules of Professional Conducts Rule 4.4. Respect for Rights of Third Persons.
- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
- Comment
- [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.
- [2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield Utah

- You can look for metadata.
- If you find metadata and it appears to represent confidential information, you must notify opposing counsel
- The question then becomes whether any privilege in the confidential information was *intentionally* waived.

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Metadata Minefield

- Some courts have held that failure to take reasonable precautions to maintain the confidentiality of information will be equated with consent to its disclosure and, consequently, waiver of privilege. (See *People v. Gomez*, 134 Cal. App. 3d 874, 879 (1982)).
- Might the metadata issue become so thoroughly publicized and debated that attorneys will be universally expected to remove metadata from any electronic document being transmitted outside one's firm and any failure to do so will be considered a failure to take reasonable precautions to protect client confidentiality and a waiver of privilege? (See Model Rule 1.6).

RADDER  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

---

---

## Pitfalls of Interactive Websites

- Judge Susan Criss of Galveston, Texas, a regular user of Facebook, reports a lawyer who appeared to ask for a continuance due to the death of her father. However, Criss had seen a string of posts on Facebook from the same attorney detailing a week of going out, drinking and partying, rather than attending to a death in the family.
- Judge Criss also reports finding comments on Facebook by another attorney who was complaining about having to appear before Judge Criss.

([www.abajournal.com/news/facebooking\\_judge\\_catches\\_lawyers\\_in\\_lies\\_cris\\_sing\\_ethical\\_fines\\_abachicago](http://www.abajournal.com/news/facebooking_judge_catches_lawyers_in_lies_cris_sing_ethical_fines_abachicago)).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Social Networking

- Social networking sites are used everywhere, by everyone.
- "A survey of British employees by Morse, a technology firm, found that 57% of staff use Twitter, Facebook or other social-networking websites for personal use during office hours, sometimes divulging sensitive business information. The average worker spends almost one working week a year on such sites."

-The Economist, October 31, 2009, "Business this Week."

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Pitfalls of Interactive Websites

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." (Model/URPC Rule 7.1).
- "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." (Comment [3], URPC Rule 7.1).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

### Pitfalls of Interactive Websites

- LinkedIn recommendations
- Facebook wall comments
- California ethical rules expressly prohibit any advertising and solicitation materials that include testimonials, unless such communication also contains an express disclaimer.

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

### Pitfalls of Interactive Websites

- [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. (Comment [2], URPC, Rule 7.1)
- What about a comment on Facebook that says: "Just won another case. Haven't lost one all year!"

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

### What can attorneys say in chat rooms and weblogs?

- Model Rule 7.3 prohibits the in person solicitation of business.
- The Utah Rule focuses on "real-time" communications. (URPC, Rule 7.3, note [1a])
- This draws a clear distinction between chat rooms (real-time, subject to the rule against in person solicitation) and blogs (not subject to the rule).

RADER,  
FISHMAN  
& GRAUER

---

---

---

---

---

---

---

---

## Attorney Blogs

- “An attorney may operate a website accessible by the general public. We believe a potential client's access to information through a website is analogous to telephoning the firm or visiting the lawyer's office to request information. This type of advertising must therefore comply with: Rule 7.1 regarding false or misleading communication, Rule 7.2(b) regarding retention of a copy of any advertisement for two years, Rule 7.2(d) regarding inclusion of the name of a responsible lawyer on any advertisement, and Rule 7.4 regarding fields of practice.” (Opinion No. 97-10, Utah State Bar Ethics Advisory Opinion Committee)
- A blog need not be marked as “Advertising Material.” (Opinion No. 02-02, Utah State Bar Ethics Advisory Committee)

RADER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

---

---

## Unauthorized Practice of Law

- The Utah State Bar cautions that “it is incumbent upon the lawyer responding to a request for advice from someone outside of the lawyer's geographic practice jurisdiction to be aware of the prohibition against the unauthorized practice of law.” (Opinion No. 97-10, Utah State Bar Ethics Advisory Committee)
- Applies to both chat rooms and blogs.

RADER  
FISHMAN  
GRAUER

---

---

---

---

---

---

---

---

---

---

