

ELECTRONIC ERA ETHICS

Hypotheticals

Hypothetical 1

Your law firm website bio has a link allowing visitors to send you an email. This morning you opened an email from someone seeking a lawyer to file a wrongful discharge case against a local company. You instantly recognized the company's name -- because your firm handles all of its employment work.

What do you do with the information you gained by reading the email?

- (A) You must tell your client about what you read.
- (B) You may tell your client about what you read, but you don't have to.
- (C) You cannot tell your client about what you read, but instead must maintain its confidentiality.

Hypothetical 2

You have one partner who seems to be a "nervous Nelly." He worries about nearly everything, and he frequently bothers you with what sometimes seem to be frivolous questions. He must have just read some marketing piece from an electronic security firm, because he has called you in a panic with several questions.

- (a)** May a lawyer ethically communicate with a client using a cordless phone?
 - (A)** YES
 - (B)** NO

- (b)** May a lawyer ethically communicate with a client using a cell phone?
 - (A)** YES
 - (B)** NO

- (c)** May a lawyer ethically communicate with a client using unencrypted email?
 - (A)** YES
 - (B)** NO

- (d)** May a lawyer ethically communicate with a client using WIFI?
 - (A)** YES
 - (B)** NO

- (e)** May a lawyer ethically store confidential client communications in the "cloud"?
 - (A)** YES
 - (B)** NO

Hypothetical 3

Your landlord just terminated your lease, so you are looking for new office space. You have always lived near the border of two states, and are used to crossing the border on a nearly daily basis as you shop, try new restaurants, etc. You are licensed only in the state where you live -- focusing your practice on elder-law issues. You just read about a small office that would be perfect for your practice. It is actually closer to your home than your current office, and just a few minutes away from a large retirement community. However, the office is in the neighboring state, where you are not licensed to practice law.

(a) May you continuously practice in the neighboring state, as long as you very carefully explain in all of your marketing materials and to your clients that you are not licensed there?

(A) YES

(B) NO

(b) May you continuously practice in the neighboring state, as long as you follow the step discussed above, and also work under the direct supervision of a partner who is licensed in that neighboring state?

(A) YES

(B) NO

Hypothetical 4

You have practiced for a number of years in Pennsylvania (where you are licensed), and primarily handle trust and estate matters. With the recent economic downturn, you have tried to expand your client base. Thanks to your good reputation and "word of mouth" from satisfied clients, you have begun to attract a number of clients who live in Delaware -- where you are not licensed. You communicate electronically and by telephone with these clients, and carefully avoid traveling into Delaware to meet with any of the clients.

May you continue to represent Delaware trust and estate clients as long as you avoid spending any time in Delaware providing those services?

- (A) YES
- (B) NO

Hypothetical 5

Your elderly father lives in Utah. You are considering whether you can move from Los Angeles (where you practice in a medium-sized firm) to Utah, where you can take care of your dad. You would work remotely from Utah – not representing any clients in that state, or practicing Utah law. In essence, you would be “invisible” in Utah, and continue your normal practice.

May you continuously practice in Utah under these conditions?

(A) YES

(B) NO

Hypothetical 6

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply All" function, and defending your client's positions in the negotiations?

- (A) YES
- (B) NO

Hypothetical 7

A lawyer on the other side of one of your largest cases has always relied on his assistant to send out his emails. He must just have hired a new assistant, because several "incidents" in the past few months have raised some ethics issues.

- (a) A few weeks ago, you received a frantic call from the other lawyer saying that his assistant had accidentally just sent you an email with an attachment that was intended for his client and not for you. He tells you that the attachment contains his litigation strategy, and warned you not to open and read it. You quickly find the email in your "in box," and wonder about your obligations.

May you open and read the attachment?

- (A) YES
- (B) NO
- (b) Last week you opened an email from the other lawyer. It seems to be some kind of status report. About halfway through reading it, you realize that it is the other lawyer's status report to her client.

Must you refrain from reading the rest of the status report?

- (A) YES
- (B) NO
- (c) You just opened an email from the other lawyer. After you read several paragraphs, you realize that the email was intended for a governmental agency. The email seems very helpful to your case, but would not have been responsive to any discovery requests because your adversary created it after the agreed-upon cut-off date for producing documents.

Must you refrain from reading the remainder of the email?

- (A) YES
- (B) NO

- (d) Must you advise your client of these inadvertently transmitted communications from the other lawyer, and allow the client to decide how you should act?
- (A) YES
 - (B) NO
- (e) Must the other lawyer advise his client of the mistakes he has made?
- (A) YES
 - (B) NO

Hypothetical 8

You just received an email with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

What do you do?

- (A)** You must check for any metadata (to diligently serve your client).
- (B)** You may check for any metadata, but you don't have to.
- (C)** You may not check for any metadata.

Hypothetical 9

Your firm just purchased several new servers, and they have given you nothing but trouble for the past two weeks. You have been unable to send or receive email at least several hours each day. The supplier from whom you purchased the servers seems incapable of fixing the problem, and you want to quickly retain another consultant to fix the problem.

Must you include a confidentiality provision in whatever agreement you enter into with the new consultant?

- (A) YES
- (B) NO

Hypothetical 10

In an effort to cut expenses in an upcoming document collection, privilege review and log creation project, you are considering a number of options. One of your newest lawyers recommends that you use a cost-saving measure that her previous firm frequently used -- relying on lawyers and paralegals in Bangalore, India, to handle those tasks.

(a) May you outsource these tasks to lawyers in India?

(A) YES

(B) NO

(b) What ethics considerations will you have to address?

Hypothetical 11

You represent an automobile manufacturer which has just been sued in a product liability case. The plaintiff claims to have suffered serious back injuries in an accident. One of the newest lawyers at your firm suggests that you check the plaintiff's Facebook page to see what the plaintiff has to say about the accident and her injuries.

May you check the plaintiff's Facebook page (and perhaps other social media sites on which the plaintiff is active) without the plaintiff's lawyer's consent?

- (A)** YES
- (B)** NO

Hypothetical 12

You have read about the useful data a lawyer can obtain about an adverse party or witness by searching social media sites. One of your partners just suggested that you have one of your firm's paralegals send a "friend request" to an adverse (and unrepresented) witness. The paralegal would use his personal email. He would not make any affirmative misstatements about why he is sending the "friend request," but he likewise would not explain the reason for wanting access to the witness's social media.

May you have a paralegal send a "friend request" to an adverse witness, as long as the paralegal does not make any affirmative misrepresentations?

- (A)** YES
- (B)** NO

Hypothetical 13

You have read about lawyers and their representatives researching adverse parties' and witnesses' social media sites. One of your partners about to begin a jury trial just asked if he could conduct the same research of potential jurors.

May a lawyer research potential jurors' social media sites?

- (A) YES
- (B) NO

Hypothetical 14

You just won a large intellectual property case. Your celebration was cut short when you learned that one of the jurors had used her smartphone to research the meaning of some terms in the jury instructions.

Does a juror's personal investigation provide grounds for reversing a judgment?

(A) YES

(B) NO

Hypothetical 15

You recently finished a rare court-appointed criminal case, and were disappointed that your client was convicted of armed robbery. You just discovered that one of the jurors had been posting comments on her Facebook page during the trial. You wonder whether this will give you grounds for an appeal.

May you base an appeal on a juror's postings on a social media site?

- (A) YES
- (B) NO

Hypothetical 16

You are handling a criminal case in which one key issue is whether a witness properly identified your client. Your client allegedly was wearing a yellow hat, so an important issue was the availability of yellow hats in New York City. To your surprise, the judge announced in court this morning that he had conducted some Internet research last evening, and discovered that there were many types of yellow hats on sale in New York City. You wonder whether the judge's investigation amounted to improper conduct that gives you ground for a mistrial.

Is it permissible for judges to conduct their own research using the Internet?

- (A) YES
- (B) NO

Hypothetical 17

You have been going through a long series of discovery fights in a case pending in one of your state's most rural areas. You suspect some "home cooking," because the judge has ruled against you on essentially every matter that has come before him. You just discovered that the judge is a Facebook "friend" with the adversary's lawyer, and you wonder whether this is proper.

Is it permissible for a judge to be a Facebook "friend" with a lawyer who appears before the judge?

- (A) YES
- (B) NO

Hypothetical 18

Folks in charge of your law firm's marketing effort have urged you to send email "alerts," "law updates," etc. to one-time clients, even those who have not sent your firm any work for the last year or so. They reason that maintaining some link with these arguably former clients might prompt them to hire you again. You worry about the conflicts of interest ramifications, because a former client might point to the communication as indicia of a continuing attorney-client relationship -- and try to disqualify you from representing another client adverse to it.

Is it risky to send a continuing stream of electronic communications to arguably former clients?

- (A) YES
- (B) NO