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## Departments

### Whoops: Legal Malpractice Prevention

*E-mail Disclaimers, Inadvertent Disclosures, and the Attorney-Client Privilege*  
by Heather K. Kelly

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### **About the Author**

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The e-mail disclaimer has become ubiquitous in the practice of law. There are websites devoted entirely to disclaimers, listing "awards" for the longest disclaimer (a London law firm's disclaimer totaling a whopping 1,800 words wins the dubious honor); the most incomprehensible disclaimer; and the best spoof-disclaimer.<sup>1</sup> E-mail disclaimers appear to have two goals: (1) to preserve confidentiality of the information contained in the e-mail; and (2) to prevent the recipient's reliance on advice contained in the e-mail.

This article discusses whether e-mail disclaimers accomplish these goals. The initial determination is that although a disclaimer may provide some protection of the attorney-client privilege, it is by no means a panacea. The use of a disclaimer alone falls far short of meeting an attorney's ethical duty to keep the client's confidences, and often does not govern whether an attorney-client privilege exists where legal advice has been dispensed in an e-mail correspondence.

## **Confidentiality and the Attorney-Client Privilege**

The attorney–client privilege applies to confidential matters communicated by or to the client in the course of gaining counsel, giving advice, or providing direction with respect to the client’s rights or obligations.<sup>2</sup> Communications between an attorney and his or her client that are disclosed to third parties outside the attorney–client relationship are not protected.<sup>3</sup> To preserve the privilege, the attorney and client have an affirmative duty to prevent the disclosure of confidential information to third parties.

In the context of e-mail communications, it is possible for problems preserving the privilege to arise in any number of ways. For example, the client may forward a privileged e-mail to a third party, or the attorney or client may inadvertently send an e-mail containing privileged information to another individual. When an e-mail containing confidential information is inadvertently sent to a third party, key questions are whether the privilege has been preserved and whether a generic e-mail disclaimer stating that the information is confidential and privileged constitutes sufficient measures to preserve the privilege.

Courts addressing these questions have applied their jurisdiction’s “inadvertent disclosure” rule.<sup>4</sup> Courts generally are split on whether an inadvertent disclosure waives the privilege. Under the majority view, courts look at the facts surrounding the inadvertent disclosure before determining that privilege has been waived.<sup>5</sup> Waiver of the privilege for mistakenly divulged information occurs only if the producing party failed to take reasonable steps to maintain confidentiality. Under the minority view, where there has been a disclosure of privileged communications to third parties, the privilege is lost, even if the disclosure is unintentional or inadvertent.<sup>6</sup> Although Colorado courts have yet to apply the inadvertent disclosure rule in the context of sending an e-mail to the wrong party, Colorado courts look to the extent to which reasonable precautions were taken to prevent the disclosure of privileged information when determining whether an inadvertent disclosure resulted in waiver of privilege.<sup>7</sup>

Of course, the reasonableness of precautions taken is subject to interpretation, and courts have yet to offer practical guidance as to the precautions attorneys are required to take to prevent inadvertent disclosure of e-mail communications. Courts addressing this issue have found that a disclaimer identifying the contents as privileged may protect the privilege. For example, in *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*,<sup>8</sup> a federal district court concluded that a series of e-mails among employees and corporate counsel was protected by the attorney–client privilege, reasoning “this particular e-mail chain contains disclaimers identifying its contents as privileged and confidential.”<sup>9</sup>

### ***Ethical Obligations and Malpractice***

Adding a disclaimer to an e-mail message may preserve the attorney–client privilege, but using one does not necessarily mean that an attorney has fulfilled his or her ethical obligations or that an attorney is not subject to malpractice for the disclosure of e-mail.<sup>10</sup> There may be and likely will be circumstances in which the disclosure of information itself, even if ultimately inadmissible, is damaging. Under the Colorado Rules of Professional Conduct, a lawyer has an ethical obligation to keep the clients’ confidences, and this ethical duty to maintain the confidence of attorney–client communications is much broader than the protection afforded by the attorney–client privilege.<sup>11</sup>

Both the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility and the Colorado Bar Association Ethics Committee have concluded that a lawyer may transmit information relating to the representation of a client by unencrypted e-mail without violating their respective Rules of Professional Conduct, as long as an attorney uses "reasonable care" to preserve the client's confidences.<sup>12</sup> The ABA recognizes that the more sensitive the information, the stronger the protective measures employed by the attorney must be. A disclaimer apparently does not qualify as a particularly strong measure, because the ABA lists the avoidance of e-mail altogether as one way to protect sensitive information.

### ***Other Sources of Protection***

If inadvertent disclosure of an e-mail may waive the attorney-client privilege, other doctrines may also serve to preclude its admissibility, including the work product doctrine and state and federal privacy laws.

**Work product.** In *United States v. Stewart*,<sup>13</sup> Martha Stewart sent an e-mail to her attorney relaying the facts regarding her sale of ImClone Stock. She then forwarded the same e-mail to her daughter. The court concluded that by forwarding the e-mail, the attorney-client privilege was waived; however, the e-mail was protected under the work product doctrine.

**Electronic Communications Privacy Act (ECPA).** The ECPA provides that an e-mail that has been "intercepted" will not lose its privilege.<sup>14</sup> An important limitation of the ECPA, however, is that it employs a strict definition of the term "interception." Accidental e-mail recipients are not interceptors under the ECPA. Therefore, the ECPA's guarantee of legal confidentiality offers no protection for a client's secrets that are inadvertently sent to the opposing party on the eve of trial.

**Copyright.** Although some commentators have concluded that federal copyright law provides another possible legal basis for e-mail privacy, the limitations on copyright protection make this area unavailing for protection of client confidences. Stating a claim for copyright infringement requires that the infringer violate the owner's copyright rights by copying the work or distributing it; however, simple disclosure of an e-mail's contents does not appear to qualify as infringement.

### ***Practical Alternatives***

An effective tool in avoiding inadvertent disclosure is to delay sending an electronic message. Most e-mail users at one time or another have accidentally e-mailed the wrong person, often realizing the mistake mere moments after hitting "send." Thus, it may be helpful to configure Microsoft Outlook to delay sending e-mail messages by five minutes or more.<sup>15</sup>

Another alternative in preventing inadvertent disclosure is to disable Microsoft Outlook's autocomplete feature. This feature guesses the intended recipient by looking at the first few letters you type. The feature can be turned off.<sup>16</sup>

## **Preventing Reliance on Professional Advice**

A second goal of e-mail disclaimers is to prevent the formation of an attorney–client relationship or reliance on an attorney’s advice. With the narrow exception of tax advice, it is doubtful that an e-mail disclaimer will trump state law regarding the formation of an attorney–client relationship.

### ***IRS Circular***

Internal Revenue Service (IRS) Circular 230 requires the inclusion of a disclaimer with written statements about specific federal tax issues. Section 10.35 of Circular 230 requires that tax professionals, when providing written tax advice, must either include all relevant and potentially relevant legislation, regulations, court cases, and IRS rules that may be related to the subject of the tax advice, or include a disclosure stating that the opinion cannot be relied on for penalty purposes. Under such circumstances, the inclusion of an e-mail privacy disclaimer is actually required by law.

### ***Legal Guidance via E-mail***

An attorney–client relationship based on conduct is established where a person seeks and receives legal advice from an attorney regarding the legal consequences of the person’s past or contemplated actions.<sup>17</sup> Accordingly, attorneys who provide specific legal advice in an e-mail may find it difficult at some future point to persuade a court that they did not intend to incur any professional obligations by answering questions. Courts have found that in some circumstances a disclaimer may effectively preclude the formation of an attorney–client relationship where an attorney gratuitously provides free legal advice.<sup>18</sup> It is the conduct of the lawyer and the expectations of the client that will govern whether an attorney–client relationship is formed, rather than the boilerplate terms of some written warning.

### **Conclusion**

At best, an e-mail disclaimer may assist in preserving the attorney–client privilege for purposes of precluding the admissibility of inadvertently sent e-mail; however, a disclaimer does not erase the harm caused by failing to preserve client confidences. Accordingly, attorneys should employ other techniques to prevent inadvertent e-mail disclosure and should exercise caution or consider avoiding the use of e-mail altogether when sending highly sensitive materials through electronic correspondence.

Other than the IRS requirements for tax professionals, e-mail disclaimers have become long paragraphs packed with legalese that are universally ignored by readers and may not offer legal protection for the sender. Nonetheless, e-mail disclaimers have gained widespread use throughout the professional community. Ironically, the universal adoption of these disclaimers by the legal community may mean that the use of disclaimers has become the standard of care for reasonably prudent attorneys.

## Notes

1. See, e.g., [goldmark.org/jeff/stupid-disclaimers](http://goldmark.org/jeff/stupid-disclaimers); [dltj.org/article/pointless-e-mail-disclaimers](http://dltj.org/article/pointless-e-mail-disclaimers).
2. See, e.g., *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982).
3. *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000).
4. See, e.g., *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993).
5. See, e.g., *Tinn v. EMM Labs, Inc.*, 556 F.Supp. 2d 1191, 1198 (D.Or. 2008).
6. *Id.*
7. *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo.App. 1997).
8. *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 632 F.Supp. 2d 1370 (M.D.Ga. 2009).
9. *Id.* at 1381.
10. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts. . .").
11. Colo. RPC 1.6(a).
12. American Bar Association Comm. on Ethics and Prof'l Responsibility Formal Op. 99-413: Protecting the Confidentiality of Unencrypted E-Mail (March 10, 1999), available at [www.abanet.org/cpr/pubs/fo99-413.html](http://www.abanet.org/cpr/pubs/fo99-413.html); Colorado Bar Association Ethics Comm. Op. 90: Preservation of Client Confidences in View of Modern Communications Technology (Nov. 14, 1992), available at [www.cobar.org/index.cfm/ID/386/subID/1811](http://www.cobar.org/index.cfm/ID/386/subID/1811).
13. *United States v. Stewart*, 287 F.Supp. 2d 461, 465 (S.D.N.Y. 2003).
14. See 18 U.S.C. §§ 2510-22 (1994 and 1999 supps.); 18 U.S.C. § 2511(1)(a).
15. See [office.microsoft.com/en-us/outlook/HP052427901033.aspx](http://office.microsoft.com/en-us/outlook/HP052427901033.aspx).
16. See [office.microsoft.com/en-us/outlook/HP063767541033.aspx](http://office.microsoft.com/en-us/outlook/HP063767541033.aspx).
17. *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1309 (Colo.App. 1998).
18. *People v. Gionis*, 9 Cal.4th 1196, 1203 (Cal. 1995); *Bohn v. Cody*, 832 P.2d 71, 75 (Wash. 1992) (holding that client's subjective belief does not govern "unless it is reasonably formed based on the attending circumstances, including the attorney's

words or actions," and that the client must show that the lawyer "acted inconsistently" with disclaimers of representation).

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