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## **Ethics Three-Pack**

### **Maintaining Client Confidentiality in the Digital Era**

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## BACKGROUND, EDUCATION AND PRACTICE

Scott Rothenberg is a trial and appellate attorney from Houston, Texas. He has twice served as Director of the State Bar of Texas, as chair of the State Bar of Texas Appellate Section, chair of the Houston Bar Association Appellate Section, Member of the State Bar of Texas Board of Directors Executive Committee, Small Section Representative to the State Bar Board of Directors, a multi-term appointee to the State Bar of Texas Continuing Legal Education Committee, a multi-year member of the State Bar of Texas Appellate Section Council, a multi-year member of the Houston Bar Association Appellate Section Council, and a Sustaining Life Fellow of the Texas Bar Foundation.

Scott has been board certified in civil appellate law for over a quarter-century since December of 1992. Scott has been designated a Texas Appellate Super Lawyer (© 2018 Super Lawyers®, part of Thomson Reuters) several times, most recently from 2009 through the present.

Last month, TexasBarCLE honored Scott with the 2019 Pat Nester Innovation in Professional Development Award. In 2012, Scott received the State Bar of Texas Continuing Legal Education Department's Standing Ovation Award for his lifetime contributions to continuing legal education in the State of Texas. In 1999, Scott received the State Bar of Texas President's Award in Appreciation for Outstanding Contributions through Distinguished Service to the Lawyers of Texas. In 1994, Scott was honored by the College of the State Bar of Texas for writing the Outstanding Continuing Legal Education Article of the Year, "Advanced Legal Research - 15 Tips and 20 TRAPs."

Despite authoring and/or presenting well-over 100 continuing legal education articles and presentations, Scott's proudest accomplishment is the loving relationship that he has with Lisa, his wife and life partner of 31 years, and his four sons— Daniel, a proteomics scientist for Neon Therapeutics in Cambridge, Mass., and a PhD graduate from the David H. Koch Institute for Integrative Cancer Research at the Massachusetts Institute of Technology; Jared, a mathematics teacher and sophomore head baseball coach at Memorial High School in Houston, Texas; Benjamin, a Marketing Program Manager for Buzz Points, Inc., in Austin, Texas; and Jacob, a sophomore at Cedar Valley College in Lancaster, Texas, and a right handed pitcher on the Cedar Valley Suns men's baseball team.

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## Maintaining Client Confidentiality in the Digital Era

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### I. Introduction

The Texas Disciplinary Rules of Professional Conduct were enacted approximately three decades ago in 1990. Later that same year, the first cell phone call would be made. One year later, in 1991, a newfangled contraption called the “World Wide Web” first became available to the general public. Two years later, in 1992, the first digital copier would be marketed commercially. Three years later, in 1993, the first text message would be sent. Despite the passage of almost thirty years, the Texas Disciplinary Rules of Professional Conduct pertaining to maintaining client confidentiality have barely been updated to take these and other new technologies into account.

Does this mean that lawyers owe no duties to clients with respect to the use and application of new technologies? Absolutely not. The existing Texas Disciplinary Rule of Professional Conduct pertaining to safeguarding client property (Rule 1.14(a) and its related formal comment) applies to **all** client property, whether tangible or intangible:

Rule:

A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. . . . ***Other client property shall be identified as such and appropriately safeguarded.***

Comment 1:

***A lawyer should hold property of others with the care required of a professional fiduciary.***

Additionally, Texas Disciplinary Rule of Professional Conduct 1.05(b) instructs that except as otherwise provided in other subsections of Rule 1.05, a lawyer shall not knowingly reveal confidential information of a client or a former client to a person that the client has instructed is not to receive the information or anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

Further, on February 26, 2019, the Supreme Court of Texas made a very significant addition to comment 8 to Texas Disciplinary Rule of Professional Conduct 1.01 (new language in bold and underlined print):

Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, **including the benefits and risks associated with relevant technology**. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

These standards provide basic parameters regarding an attorney's duty to safeguard client confidences. However, they do little to assist attorneys in evaluating their compliance with the standards in terms of use of modern technology in the 21<sup>st</sup> Century.

Fortunately, as you will see in the next section of this paper, other jurisdictions and organizations have been somewhat more proactive in terms of dragging their ethical rules, guidelines and formal opinions into the 21<sup>st</sup> Century. Given the State Bar of Texas' consideration and evaluation of other jurisdictions' rules in past rule making endeavors, today's Texas legal practitioner would be wise to inform himself or herself about recent efforts by the American Bar Association and various states to clarify attorneys' duties to clients with respect to the use of modern technology in the practice of law. This paper is an effort to assist you in doing just that.

## II. Earliest Technology Guidance: Ethics Opinion 648

In April of 2015, the Professional Ethics Committee for the State Bar of Texas issued Ethics Opinion 648.

The question presented in that Ethics Opinion is whether "a lawyer may communicate confidential information by email." The Committee's conclusion?

Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer

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"Ethics Three-Pack: Client Confidentiality, Advertising, and Social Media"