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Ethics Three-Pack
Maintaining Client Confidentiality in the Digital Era

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EDUCATION AND PRACTICE

Scott Rothenberg is a sole practitioner from Houston, Texas. He has practiced law for approximately three decades, and has been board certified in civil appellate law since 1992. Scott is a Past Chair of the State Bar of Texas Appellate Section, a Past Chair of the Houston Bar Association Appellate Section, and is currently an ex-officio member of the State Bar Board of Directors and State Bar of Texas Board of Directors Executive Committee.

Over the past three decades, Scott has experienced the Pick 4 of law practice: a large firm (Fulbright & Jaworski), a medium sized firm (Mithoff & Jacks), a small firm (Rothenberg & Gunn), and as a sole practitioner (Law Offices of Scott Rothenberg).

Scott earned his B.A. in Political Science from The State University of New York at Albany and a J.D. from the University of Houston College of Law. To pay his way through law school, Scott drove a taxicab during the day and parked cars at Astroworld (now a really big patch of weeds south of IH-610 and Kirby Drive) at night. He also served as a certified tester of new Nintendo games prior to their release to the public.

Scott has been designated a Texas Appellate Super Lawyer by Texas Monthly magazine numerous times over the past decade. 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, he 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." In 2012, Scott received an award from TexasBarCLE for Numerous Outstanding Contributions to the Continuing Legal Education of Texas Attorneys

Despite authoring and presenting over 100 CLE articles and presentations, Scott's proudest accomplishment is the close and loving relationship that he has with Lisa, his wife of 28 years, and his four sons– Daniel, a 2011 graduate of the University of Texas-Austin with highest honors in biomedical engineering and a PhD candidate in cancer research at the Massaschusetts Institute of Technology; Jared, a 2012 graduate of Texas A&M Corpus Christi, and a calculus teacher, baseball coach and assistant football coach at Spring Woods High School; Benjamin, a 2013 graduate from the University of Texas-Austin, and Digital Marketing Coordinator at Buzz Points, Inc., in Austin, Texas, and Jacob, a student at Lamar High School in Houston, Texas, and starting third baseman/right handed pitcher for the Lamar Texans Junior Varsity baseball team.

When not practicing law, Scott can be found umpiring on Little League baseball fields in beautiful Southwest Houston.

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I. Introduction

The Texas Disciplinary Rules of Professional Conduct were enacted 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 a quarter of a century, the Texas Disciplinary Rules of Professional Conduct pertaining to maintaining client confidentiality have never 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.

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 21st 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 21st 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. Hot Off the Presses: Ethics Opinion 648

In April of 2015, the Professional Ethics Committee for the State Bar of Texas issued Ethics Opinion 648. If the Opinion was released in April of 2015, why don't you know about it yet? The Opinion has not yet been published in the Texas Bar Journal. Until today, its existence is not widely known by Texas attorneys even though it significantly affects their practice of law.

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 to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.

Before you run off to communicate confidential information to one of your clients, be aware that the "some circumstances" exception mentioned in the conclusion is broad enough to swallow up the general rule. That is, a fair reading of the Ethics Opinion means that most attorneys should NOT communicate confidential information to clients by unencrypted email. Why is that so?

On the bottom of page 3 of the Ethics Opinion, the Committee provides six "examples" of circumstances in which "a lawyer should consider whether the confidentiality of the information will be protected if communicated by email and whether it is prudent to use encrypted email or another form of communication." Those examples include:

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