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THE ETHICS OF E-MAIL AND SOCIAL MEDIA: A TOP TEN LIST

Hypotheticals

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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.

(a) May you tell your corporate client about the email?
   YES          NO

(b) Will you be able to represent your corporate client if the would-be plaintiff files a lawsuit?
   YES          NO
**Hypothetical 2**

You have been trying to determine how you can "cash in" on consumers' increasing use of the Internet to obtain advice, while avoiding some of the implications of an attorney-client relationship. One idea comes to mind, and you want to make sure that it would work.

May you set up a website in which you and other lawyers answer consumers' questions in return for a fee, while explicitly disclaiming an attorney-client relationship?

**YES**

**NO**
Hypothetical 3

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?

YES

NO

(b) May a lawyer ethically communicate with a client using a cell phone?

YES

NO

(c) May a lawyer ethically communicate with a client using unencrypted email?

YES

NO

(d) May a lawyer ethically store confidential client communications in the "cloud"?

YES

NO
Hypothetical 4

You represent a company sued by two elderly individual plaintiffs. During discovery, you learn that the two plaintiffs routinely asked their son to help them print off emails to and from their lawyer (before anyone anticipated litigation). You wonder whether you can argue that such a practice waived the plaintiffs' attorney-client privilege.

Does a client waive the attorney-client privilege by relying on a third party to print off privileged emails?

YES           NO
Hypothetical 5

You have tried to teach your corporate clients' executives to understand the attorney-client privilege and maximize the corporation's privilege protection. The executives now realize that they cannot assure privilege protection by writing "privileged" in their emails' "Re" line. However, you are now moving to more subtle issues.

Is the attorney-client privilege likely to protect a corporate executive's email describing some incident or issue about which the executive seeks legal advice from you?

YES  NO
Hypothetical 6

You have served as your company's general counsel for several decades, and have seen plenty of executives come and go. One recently-promoted vice president has an annoying habit of copying numerous other employees on any emails he sends you. You have occasionally asked why he does this, because you don't think that some of the employees receiving copies need to know what you and the vice president are communicating about. The vice president explains that he would rather err on the side of giving a "heads up" to any of his colleagues who might be interested in your email communications.

Does widespread disclosure of privileged communications within a company pose a risk to the privilege protection?

YES

NO
Hypothetical 7

You have been practicing for about 30 years, and have seen an enormous change in the way that you and your clients work on draft documents. In the "old days," you would either send a memorandum describing your suggested changes to a client's draft, or send the client back a fax of the client's draft document with your handwritten marginal notes reflecting your suggested changes. Now you tend to collaboratively work on the same electronic document -- each making changes in the same document as you transmit it back and forth to each other.

(a) Will the attorney-client privilege protect drafts that your client creates for your review?

YES  NO

(b) Will the attorney-client privilege protect drafts that you create for your client's review?

YES  NO

(c) If the privilege protection is available, what will it protect?
Hypothetical 8

As part of your standard practice when an employee leaves your company and threatens a lawsuit, you asked your company's IT folks to examine the former employee's laptop for any pertinent communications. You just received a call from an IT colleague, who tells you that she has found several emails between the then-employee and a personal lawyer he was consulting about suing the company for discrimination in case he was terminated. The employee had tried to delete all of his emails on his last day at work, but the IT folks were able to retrieve them.

(a) Must you advise the former employee's lawyer that you have the emails?
    YES    NO

(b) May you read the emails?
    YES    NO
Hypothetical 9

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 to All" function, and defending your client's positions in the negotiations?

YES		NO
Hypothetical 10

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 accidently 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?

YES          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?

YES          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?

YES          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?

YES          NO
(e) Must the other lawyer advise his client of the mistakes he has made?

YES   NO
Hypothetical 11

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).

May you try to review whatever "metadata" accompanied your adversary's settlement proposal?

YES NO
**Hypothetical 12**

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?

YES          NO
Hypothetical 13

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?

YES  NO

(b) What ethics considerations will you have to address?
**Hypothetical 14**

One of your colleagues has served for several years on the board of an inner-city organization that helps disadvantaged high school students learn about the business world. When your law department decided to switch from regular PCs to laptops for all lawyers, your colleague asked the General Counsel whether she could donate the old PCs to the organization on whose board she serves.

May your law department donate the old PCs to the inner-city organization?

YES

NO
Hypothetical 15

The outcome of a large commercial case might hinge on a neutral witness's credibility. You are considering ways to confidentially test his credibility.

May you:

(a) Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

   YES
   NO

(b) Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

   YES
   NO

(c) Use the new speech pattern software to analyze the neutral witness's statements on the subject matter during a press conference that was broadcast on the local news station?

   YES
   NO
**Hypothetical 16**

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?

YES

NO
**Hypothetical 17**

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?

YES  NO
Hypothetical 18

You recently have had problems with one of your paralegal's attention to detail, and just learned that he missed an obviously privileged document during a recent review. You discovered his oversight when the adversary introduced a very damaging but obviously privileged email as an exhibit during a deposition. Now you wonder about the effect of the soon-to-be-former paralegal's mistake.

(a) Will the inadvertent production of the email waive any privilege that otherwise protected the email?

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
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(b) If the court finds that the paralegal's mistake waived the privilege, will it trigger a subject matter waiver?

<table>
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<tr>
<th>YES</th>
<th>NO</th>
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Hypothetical 19

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?

YES  NO
Hypothetical 20

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?

YES  NO
Hypothetical 21

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?

YES    NO
Hypothetical 22

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?

YES          NO
Hypothetical 23

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?

YES

NO
Hypothetical 24

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

(a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

   YES    NO

(b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

   YES    NO
Hypothetical 25

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?

YES

NO
Hypothetical 26

For the last several months, you have prepared a "blog" describing recent criminal cases in the southern city where you practice criminal defense law. Most of the cases you describe are your own cases. The bar has insisted that you include a prominent disclaimer preceding those blogs in which you describe cases that you won. You take the position that you have a First Amendment right to publish stories about significant new cases, so your state's restrictive marketing rules should not apply to your blog.

If you "blog" about cases that you have won, must you include a prominent disclaimer required by your state's ethics rules whenever a lawyer mentions past successes in marketing materials.

YES

NO
Hypothetical 27

You just asked one of your newest lawyers to propose ways to expand your firm's marketing activities using social media. Now you have to decide whether to accept one of her recommendations.

May your law firm offer the sort of "daily deals" that have become increasingly popular?

YES

NO
Hypothetical 28

After attending an excellent seminar entitled "The Ethics of Email and Social Media: A Top Ten List," you think you understand the basic ethics rules governing your law firm's marketing. However, you have been considering how the basic rules apply to new forms of electronic marketing.

(a) Do the rules governing in-person solicitation apply to your emails to potential clients?
   YES          NO

(b) Do the rules governing in-person solicitation apply to your communications with potential clients during real-time electronic "conversations"?
   YES          NO