Whoops! You've Got Mail!

By Robert C. Port

With a click of the mouse, your opponent has inadvertently e-mailed to you a memo outlining case strategy, a summary of the weaknesses in his case, or other highly sensitive privileged and confidential information. Or perhaps you are the unlucky sender of such information to your opponent. As the sender or recipient of such obviously misdirected e-mail, what are your professional and ethical obligations?

Both the unintended recipient, as well as the attorney responsible for the disclosure, face a number of competing professional and ethical goals and obligations in determining the course of action that should be taken once it has been discovered that confidential information inadvertently has been disclosed. The sender has breached his duty to preserve and protect his client's secrets and for doing so, he may face a professional liability claim from his client. The attorney who received the misdirected e-mail now has information which might be very useful in zealously representing his client, but which he might not be able to use because of his professional and ethical obligations.

Although research has failed to uncover Georgia cases directly addressing inadvertently misdirected e-mail, a number of cases and ethics opinions from Georgia and other jurisdictions have dealt with counsel's responsibility when mail, faxes, and other privileged communications are misdirected to opposing counsel. These authorities provide useful analytical models for determining appropriate courses of action for the sender and recipient of inadvertent e-mail disclosures.

This article initially considers whether e-mail is an appropriate method for transmitting privileged information. It then examines the various professional considerations and ethical obligations that the sender and the recipient of an inadvertent e-mail disclosure must evaluate in determining what course of action to take following the inadvertent disclosure. This article also discusses the manner in which courts and state bar associations have addressed the question of whether an inadvertent disclosure of confidential and privileged information constitutes a waiver of the attorney-client privilege, thus permitting the disclosed information to be used by the recipient. Finally, consideration also is given to the precautions an attorney should consider taking when using e-mail, and the possible exposure to malpractice liability for inadvertent disclosure.

Should Attorneys Communicate by E-mail?

An attorney's ethical and professional obligations require special consideration of whether e-mail is an appropriate method to communicate with clients, co-counsel, experts and others on matters that are subject to the attorney-client privilege. The ability to communicate and send documents and other attachments instantaneously and with minimal cost has made e-mail an essential part of law practice, but as with many new technologies, e-mail is not without risk, including potential malpractice risk. Both an attorney's duty of confidentiality and the attorney-client privilege require counsel to exercise reasonable care to avoid disclosure of a client's secrets and confidences. Is e-mail a sufficiently secure means of communication to fulfill these ethical and professional obligations?

Although some of the initial commentary on the issue of e-mail security concluded that e-mail was an inappropriate means of communication of privileged communication,[1] current analysis does not find fault, per se, with an attorney's use of e-mail for this purpose.[2] The American Bar Association (ABA) specifically concluded in its Formal Opinion 99-413 that "a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint."[3] The ABA concluded that e-mail posed no greater risk of interception or inadvertent disclosure than other types of communication, such as mail and telephone, in which the parties have a reasonable expectation of privacy for the communications transmitted.[4] This conclusion is consistent with numerous state bar association opinions.[5]

The State Bar of Georgia has not formally addressed the issue of the use of unencrypted e-mail, but, the Formal Advisory Opinion Board of the State Bar of Georgia responded to a request from its Computer Law Section for the issuance of an opinion as to "whether unencrypted electronic mail may be used to communicate with clients regarding client matters."[6] The Formal Advisory Opinion Board declined to issue a formal opinion**,** but stated unofficially in a September 1999 letter to the Computer Law Section that "in view of the criminal consequences for intercepting electronic mail correspondence of others, a lawyer would clearly be justified in concluding that correspondence with a client by electronic mail would be confidential and that the use of such electronic mail in communicating with a client would not have disciplinary consequences."[7]

Overview of Competing Ethical and Professional Obligations to be Considered In the Event of an Inadvertent Disclosure

Both the attorney who accidentally sends a confidential e-mail to his opponent, as well as the receiving attorney, are immediately faced with competing ethical and professional obligations. Attorneys are required to "maintain in confidence all information gained in the professional relationship . . . including information the client has requested to be held inviolate or disclosure of which would be embarrassing or would likely be detrimental to the client."[8] Indeed, counsel has a statutory obligation not to disclose confidential communications.[9] This is the fundamental principle in the client-lawyer relationship[10] that requires an attorney to protect his communications with his own client. By sending the misdirected e-mail, counsel has arguably breached this requirement of confidentiality.

Both the sending and receiving attorney must "zealously assert" his client's position.[11] By misdirecting confidential e-mail, the sender arguably has failed to zealously protect his client's interests. In contrast, the attorney receiving the misdirected e-mail, also having a duty to zealously assert his client's position, may now have access to information that can be used to further his client's interests. Some authorities argue that in carrying out the obligation of zealous representation of a client, counsel should be entitled to take advantage of any error or mistake by an opponent.[12] In a case of inadvertent disclosure, it is the disclosing attorney who arguably has breached his obligation to preserve the confidences and secrets of his client, and perhaps he ought to suffer the consequences of doing so.[13]

The unintended recipient of an email must also consider prohibitions against conflicts of interest.[14] If an attorney is placed in the position of trying to cure his opponent's mistake or to protect his opponent's inadvertent disclosure of privileged communications, then he may be faced with the possibility of taking action that may be in direct conflict with the interests of his client. Such a conflict raises additional professional and ethical dilemmas, since the attorney's response to his opponent's inadvertent disclosure may create a conflict with his duty of loyalty[15] to his client and possibly require his withdrawal from representation of that client.[16] Nevertheless, if the recipient attempts to use such inadvertently disclosed information he may cause the disclosing attorney to move to exclude the evidence[17] or to disqualify receiving counsel,[18] which, if successful, may cause harm to the recipient's client.

On the other hand, the unintended e-mail recipient must insure that he executes his duty of zealous representation concurrently with those duties imposed upon him as "an officer of the legal system and a citizen having special responsibility for the quality of justice."[19] As such, he is expected to act in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. Indeed, the Georgia Code of Professional Responsibility's Canons of Ethics exhorted attorneys "to conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of . . . clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."[20] The new Georgia Rules of Professional Conduct, which replaced the Canons of Ethics on January 1, 2001 include similar aspirational directives.[21]

ABA Pronouncements Concerning the Obligations of a Recipient of An Inadvertent Disclosure

In 1992, the ABA recognized that advances in technology had made it "more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the push of the wrong speed dial number on a facsimile machine."[22] In Formal Opinion 92-368, the ABA considered such inadvertent disclosures and opined that "[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them."[23] More recently, the ABA Ethics Commission on Evaluation of the Rules of Professional Conduct (known as "Ethics 2000 Commission") has proposed a modification to Rule 4.4 of the Model Rules of Professional Conduct in order to address the obligations of an attorney who has received an inadvertent disclosure of confidential documents. Proposed Rule 4.4(c) provides that "a lawyer who receives a document and has reason to believe that the document was inadvertently sent shall promptly notify the sender," but it omits the requirement of Formal Opinion 92-368 that the receiving lawyer abide by the instructions of the sender, thus leaving it to the attorney who made the mistaken disclosure to take whatever protective measures he deems appropriate.[24] In its commentary to Proposed Rule 4.4, the ABA Ethics Commission 2000 further observed that other questions raised by the disclosure, such as whether the original documents must be returned

to the sender, or whether the privilege has been waived by the disclosure, are questions of law beyond the scope of the proposed Rule.[25] The Commission Reporter's explanation of the proposed changes to the rule further comments that a lawyer who voluntarily returns a document unread "commits no act of disloyalty by choosing to act in accordance with professional courtesy."[26]

Court and State Bar Ethics Rulings

The courts and bars of the various states have reached differing conclusions when considering the issue of whether an inadvertent disclosure should be treated as a waiver of the attorney-client privilege, thereby permitting the recipient to make use of the information disclosed. Initially, it appears that the majority of courts require the receiving lawyer to notify the sending lawyer that documents which appear to be confidential have been disclosed.[27]

In considering the issues, some courts have followed ABA Formal Opinion 92-368, or reached conclusions that are consistent with that Opinion. These courts generally have evaluated the mistaken disclosure under a subjective analysis to determine whether there was an intention to waive the attorney-client privilege.[28] The United States District Court for the Southern District of New York observed that there is a "twofold rationale" behind this view.[29] "First, . . . the privilege belongs to the client, so an act of the attorney cannot effect the waiver, . . . [, and] [s]econd, a 'waiver' is by definition the intentional relinquishment of a known right, and the concept of a 'inadvertent waiver' is therefore inherently contradictory."[30]

Other courts, however, have taken a strict objective approach in determining whether an inadvertent disclosure constitutes a waiver. Those courts have held that any inadvertent disclosure of privileged documents is a waiver of the attorney-client privilege, notwithstanding the client's subjective intent.[31] Still other courts, and perhaps the majority,[32] have undertaken a balancing analysis, considering a number of factors to determine whether the inadvertent disclosure waives the privilege.[33] Such factors include (1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.[34]

Ethics opinions from state bars are similarly divided. The ethics committees of most state bars agree that an attorney who receives inadvertently disclosed confidential information must notify the other lawyer.[35] However, the various state bars have conflicting thoughts on the duties of the receiving attorney thereafter. For example, the Legal Ethics Committee of the District of Columbia Bar held that it would not be improper to retain and use confidential documents inadvertently sent by opposing counsel, if it was not facially obvious that the documents were confidential, and the recipient had to read the documents before determining that they were not intended for him.[36] Nevertheless, if the recipient knows of the inadvertent disclosure before the materials are examined, then he must return them unread, and may commit an ethical violation if he reads or uses them.[37] The State Bar of Maine's Professional Ethics Commission, on the other hand, concluded that a lawyer receiving an inadvertently produced confidential document may use the document and the information contained in it to the extent permitted by the rules of procedure and evidence.[38] The State Bar of Kentucky has stated that although it agreed with the view set forth in ABA Formal Opinion 92-368, and the use of inadvertently disclosed information is "discouraged," nevertheless, an attorney who retains and uses privileged documents inadvertently sent to him will not be disciplined if a good faith argument can be made that any privileged or protection that would otherwise would have been obtained has been waived.[39] However, the State Bar of Kentucky went on to note that there was no controlling Kentucky case law on the issue of "inadvertent waiver" and cautioned that this concept had been rejected by courts in some states, and therefore any argument to retain and use such documents is made at the risk of having the documents excluded from evidence and possibly being disqualified from further representation in

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the matter.[40] As for the sending attorney, the Ethics Committee of the State Bar of Illinois specified that the lawyer who inadvertently sent the material "has a duty to advise a client that confidential information was inadvertently transmitted to and read by opposing counsel."[41]

Georgia Law

Unfortunately for the Georgia practitioner, neither the former Code of Professional Responsibility, nor the newly adopted Georgia Rules of Professional Conduct, directly address the issue of inadvertent disclosure of confidential, privileged e-mail communications. Additionally, there are no formal advisory opinions considering this issue,[42] and research has failed to uncover any Georgia appellate cases directly on point.

Despite the absence of a state court case or advisory opinion directly on point respecting e-mail, Georgia case law does provide some insight as to how Georgia courts might address the question of whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege. The Georgia Court of Appeals has observed that "[t]hough the attorney/client privilege has rarely been discussed at length by our courts, it is generally accepted that '[t]he privilege in question is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against him in controversies with third persons, and so it is designed to secure the client's confidence in the secrecy of his communication, and to promote greater freedom of consultation between clients and their legal advisers, its object being to secure freedom in communications between attorney and client in order that the former may act with full understanding of the matters in which he is employed.'"[43] Under Georgia law, "it is axiomatic that the privilege belongs to the client, not the attorney";[44] only the client may waive the privilege.[45] In *Revera v. State*,[46] the Court of Appeals, relying on O.C.G.A. § 24-9-24[47] and *McKie v. State*,[48] stated that "[t]he privileged nature of a confidential communication is not lost or waived even if the attorney should voluntarily or inadvertently produce a transcript of the communication."[49] In *Revera*, the court held it error for the State to use a confidential communication to refresh a witness' recollection.[50]

If the rationale of these cases is followed, then counsel's inadvertent production of confidential email should not automatically be deemed a waiver of the attorney-client privilege. Instead, each case should be tested on its individual facts to determine whether counsel's disclosure should be imputed to the client as either an intentional or careless waiver of privilege. In making such a determination, presumably, courts would undertake the type of balancing test adopted by other jurisdictions.

Although federal districts courts in Georgia have addressed the issue of whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege, these courts have not employed the same approach in arriving at their decisions. In *Briggs & Stratton Corp. v. Concrete Sales & Services*,[51] Judge Owens of the Middle District of Georgia adopted the balancing analysis, and stated that the "case by case approach is the better approach" for resolving these issues.[52] Subsequently, in *In re: Polypropylene Carpet Antitrust Litigation*,[53] a Northern District of Georgia case involving application of the law enforcement investigatory privilege, Judge Murphy employed the balancing test set forth in *Briggs & Stratton*, and ordered the return of a box of Department of Justice investigatory documents inadvertently disclosed during the course of litigation.[54] Judge Murphy also discussed the issue of inadvertent waiver of the attorney-client privilege in the context of a motion to disqualify receiving counsel. In denying the motion, he cited the unsettled state of the law in the 11th Circuit with respect to an attorney's obligations upon inadvertent receipt of documents that appear to be privileged and whether such inadvertent disclosure constitutes a waiver of the attorney-client privilege.[55] The Court further held that "a party has a professional obligation to notify the court and its adversaries if it comes into possession of such documents."[56]

Judge O'Kelly of the Northern District of Georgia, however, used a subjective test to determine that an inadvertently produced letter from plaintiff to his counsel was "confidentially made to counsel for the purpose of securing legal advice and assistance and therefore is protected by the attorney-client privilege under Georgia law."[57] In a strongly worded opinion, Judge O'Kelly also found under the facts of the case before him that the improper use of the letter by receiving counsel could expose that attorney to a referral to the State Bar.[58] In contrast, Judge Carnes of the Northern District adopted a strict, objective rule, finding that the "inadvertent disclosure of privileged documents waives the privilege."[59]

Considerations for the Practitioner

Although there is no professional or ethical prohibition, *per se*, on a Georgia attorney's use of e-mail for communicating privileged or confidential information to a client, counsel must nonetheless remain vigilant in protecting confidential information from inadvertent disclosure. A number of state bar associations have issued opinions that suggest that the attorney obtain the client's consent to use e-mail for confidential communications, after disclosure of

possible risks.[60] For certain highly sensitive communications, encrypted e-mail or other secure transmission may be appropriate. As ABA Formal Opinion No. 99-413 observed, "when the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted. The lawyer then must follow the client's instructions as to the mode of transmission."[61]

If an inadvertent disclosure of e-mail occurs, one of the factors considered in determining whether a waiver of the privilege has occurred is the reasonableness of the precautions taken by counsel to avoid such errors.[62] Although research failed to uncover a case in which inadvertent disclosure of e-mail was the basis for a malpractice claim, it is not difficult to imagine a set of circumstances in which a client suffers damages due to counsel's negligent transmission of a confidential e-mail to the wrong recipient.[63] Factors such as whether the client's consent was obtained to use e-mail; the client's disclosure of and counsel's understanding of who has access to the e-mail address to which communications are sent; the attention given to assuring that e-mail addresses are accurate; the care given to maintaining accurate e-mail "address books"; and "distribution lists",[64] the instructions given to staff regarding use of e-mail; any notices of confidentiality placed on the e-mail,[65] and the availability and use of encryption might all be material considerations in determining whether counsel's use of e-mail breached the requisite duty of care to preserving inviolate a client's confidences. As technological advances render e-mail encryption more affordable, effective, and presumably more widespread, the failure to use such technology to prevent an inadvertent disclosure of confidential e-mail might more readily found to be negligent.[66]

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Conclusion

Until the State Bar of Georgia, Georgia appellate courts, or its Georgia federal district courts specifically address the is issue of inadvertently disclosed e-mail, counsel receiving such e-mail must proceed thoughtfully and with caution. At a minimum, the receiving attorney should promptly notify opposing counsel that he has received the materials. Such notification is particularly important if the recipient intends to use such information during discovery or at trial, in order to avoid further discovery disputes or charges of sandbagging. A recipient who desires to use the information must also consider the risks of disqualification or other pre-trial motions that may be filed in an attempt to minimize the damage done by the disclosure. In fashioning their arguments for and against a determination that the attorney-client privilege has been waived by the disclosure, both receiving and sending counsel should consider the various circumstances related to the disclosure, including the precautions, if any, taken by the opponent to avoid disclosure; the extent of the disclosure; the type of information disclosed; and the measures taken by the opponent to try to rectify the disclosure. Finally, throughout the process of determining the effect of an inadvertent disclosure, counsel always must proceed in a fashion that zealously represents their respective client's interests, while remaining mindful of their professional and ethical obligations to the court and the public.

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Endnotes

1. *See* S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 94-27 (1995). That Committee, citing the fact that the very nature of on-line services made it possible for system operators to access communications transmitted through them, stated that unless there is certainty that the electronic attorney-client communications will remain confidential,

communication with a client via on-line electronic media may violate South Carolina ethics rules, absent an express waiver by the client. This opinion was subsequently overruled by S.C. Bar Ethics Advisory Comm. Ethics Advisory Op. 97-08 (1997) in which the Committee stated the use of e-mail to communicate client confidences does not violate South Carolina ethics rules since an attorney has a reasonable expectation of privacy in the e-mail transmission system. *See also*, Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Formal Op. 96-01(1996)(advising attorneys that sensitive material should not be transmitted by e-mail [whether through the Internet, a non-secure intranet or other types of proprietary networks] without client consent, encryption, or an equivalent security system), *amended by* Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Formal Op. 97-01 (1997)(deleting Board determination of minimally proper e-mail security, but retaining client consent requirement); N.C. State Bar Ethics Comm., Final Op. RPC-215 (1995)(advising attorneys to use the mode of communication that best maintains confidential information and cautioning them against the use of e-mail without appropriate disclosure and precautions).

2. *See generally* Joan C. Rogers, *Ethical & Malpractice Concerns Cloud Email On-Line Advice*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT CURRENT REPORTS, March 6, 1996 <http://www.bna.com/prodhome/bus/mopc_adnew2.html>.
3. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999)(discussing the protection of confidentiality of unencrypted e-mail).
4. *Id.* The ABA's Committee on Ethics & Professional Responsibility cited two main factors in support of its conclusion that e-mail users have a legitimate expectation of privacy in their e-mail communications. First, the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C.A. §§ 2510 – 2522, 2701 – 2710, 3117, & 3121 – 3126 (West 2000), prohibits the unauthorized interception, disclosure, and use of the contents of electronic and wire communications. Unauthorized disclosure of e-mail by an "Internet Service Provider" (ISP) is also a felony. 18 U.S.C.A. § 2702 (West 2000). Additionally, the ABA pointed to the "practical constraints" on the ability of third parties and ISPs to intercept a particular message from the tens of millions of messages passing through the Internet. *Cf.* O.C.GA. § 16-11-62 (4)(unlawful for "[a]ny person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication"). Presumably this prohibition would apply to the intentional interception of e-mail.
5. *See, e.g.*, Alaska Bar Ass'n Ethics Comm., Ethics Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Ethics Op. 281 (1998); Ky. Bar Ass'n Comm. on Ethics, Advisory Op. E-403 (1998); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 709 (1998); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct 96-10 (1997); N.D. State Bar Ass'n Ethics Comm., Op. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Bd. of Professional Responsibility of the Sup. Ct. of Tenn., Advisory Ethics Op. 98-A-650(a) (1998)(overruling Advisory Ethics Op. 98-A-650 [1996] which prohibited the use of e-mail to transmit client confidences and secrets unless client consent was obtained or encryption or non-internet service provider was used); Vt. Bar Ass'n Comm. on Prof'l Responsibility, Advisory Ethics Op. 97-5 (1997).
6. *NetEthics Comm. Report*, COMPUTER LAW SECTION NEWSLETTER, (State Bar of Georgia, Computer Law Section), (Oct., Nov., Dec. 1999), at 22.
7. *Id.* at 28. As a result of this determination, the Board concluded "that [the] request did not present issues that merit the drafting of a formal advisory opinion." *Id.* The chairman of the Computer Law Section further advised that to provide additional guidance in this area, efforts would be made to draft a Comment to the Disciplinary Rules on this issue. *Id.*
8. GA. RULES OF PROF'L CONDUCT Rule. 1.6 (2001). The maximum penalty for a violation of this Rule is disbarment. *Id.*
9. O.C.G.A. § 24-9-24 (2000) provides as follows: "Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment."
10. GA. RULES OF PROF'L CONDUCT Rule. 1.6 cmt. 4 (2001).
11. GA. RULES OF PROF'L CONDUCT Preamble ¶ 2 (2001).
12. *See, e.g.*, Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26, 45.
13. *Id.* at 45.
14. *See generally* GA. RULES OF PROF'L CONDUCT Rule. 1.7 (2001).
15. *Id.* at cmt. 4 ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action to the client because of the lawyer's other competing responsibilities or interests.")
16. *See* GA. RULES OF PROF'L CONDUCT Rule. 1.16(a)(1) (2001) (concerning declining or terminating representation of a client).
17. *See, e.g.*, Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000)(party making the inadvertent disclosure moved for a protective order).
18. *See, e.g.*, Abamar Hous. & Dev., Inc., v. Lisa Daly Lady Decor, Inc, 724 So. 2d 572 (Fla. Dist. Ct. App. 1998). Although the court held that its ruling was "not to be construed as creating an automatic disqualification rule for inadvertent disclosure," *id.* at 574 n.2, it nonetheless stated that "[t]he receipt of privileged documents is grounds for disqualification of the attorney receiving the documents based on the unfair tactical advantage such disclosure provides." *Id.* at 573.
19. GA. CODE OF PROF'L CONDUCT Preamble ¶ 1 (2001).
20. GA. CODE OF PROF'L RESPONSIBILITY EC 9-6. (2000)(superceded by the Georgia Rules of Prof'l Conduct effective Jan. 1, 2001).
21. "A lawyer should demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers, and public officials." GA. RULES OF PROF'L CONDUCT Preamble ¶ 4 (2001).
22. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992)(discussing inadvertent disclosure of confidential materials).
23. *Id.*
24. ABA Ethics Comm'n 2000, Proposed R. 4.4 (1999)(public

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(1975) (murder); Hammock v. State, 233 Ga. 733, 213 S.E.2d 618 (1975) (rape); Smith v. State, 236 Ga. 5, 222 S.E.2d 357 (1976) (armed robbery); James v. State, 232 Ga. 834, 209 S.E.2d 176 (1974) (kidnapping with bodily injury).

107. 428 U.S. 153 (1976).
108. 433 U.S. 584 (1977).
109. 239 Ga. 400, 402, 236 S.E.2d 759 (1977).To effectuate the legislative intent of a statute held unconstitutional, *Collins* ordered the Court of Appeals to transfer appeals in the following types of cases to the Supreme Court: (1) cases involving the revenues of the state, (2) election contests, and (3) cases in which the constitutionality of any municipal or county ordinance or other legislative enactment was drawn into question. *Id*. at 403 (3). The 1983 Constitution gives the Supreme Court jurisdiction over the second and third case categories but not the first. Consequently, the Supreme Court no longer exercises jurisdiction over cases involving state revenues. *See Collins v. American Tel. &c. Co*., 265 Ga. 37, 456 S.E.2d 50 (1995).
110. 433 U.S. 917 (1977).
111. Collins, 239 Ga. at 402-03, 236 S.E.2d at 761.
112. Godfrey v. Francis, 251 Ga. 652, 672, 308 S.E.2d 806, 822 (1983) (Gregory, J., dissenting).
113. 253 Ga. 524, 322 S.E.2d 711 (1984).
114. UNIFORM SUP. CT. R. 34 (II) (A) (Unified Appeal Procedure).
115. *See* Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999) (Benham, C. J., concurring specially).
116. *See* Phillips v. State, 133 Ga. App. 461, 462, 211 S.E.2d 411, 413 (1974).
117. *See* State v. Thornton, 253 Ga. 524, 322 S.E.2d 711 (1984).
118. *See* Union Camp Corp. v. Helmy, 258 Ga. 263, 264, 367 S.E.2d 796, 797 (1988).
119. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

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discussion draft)<http://www.abanet.org/cpr/rule44draft.html>.

25. *Id*. at cmt. 3.
26. ABA Ethics Comm'n 2000, *Proposed R. 4.4 - Reporter's Explanation of Changes* (1999) <http://www.abanet.org/cpr/rule44memo.html>.
27. *See, e.g.*, Transport Equip. Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp. 1187, 1187 - 88 (N.D. Ohio 1996); Resolution Trust Corp. v. First of Am. Bank, 868 F.Supp. 217, 219-20 (W.D. Mich. 1994); State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 655, 82 Cal. Rptr. 2d 799, 807 – 08 (1994).
28. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982)(in discussing circumstances in which an attorney may have been negligent in failing to remove privileged letters from files before disclosing the files to his opponent, the court stated that "if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege"); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 20-21 (D. Neb. 1983).
29. Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 160 F.R.D.437, 442 (S.D.N.Y. 1995)(citations omitted), *mot. to compel produc. of docs. granted, mot. for protective order denied*, 1995 U.S. Dist. LEXIS 14808 (S.D.N.Y. 1995).
30. *Id.* At least one legislature has also weighed in on the issue. California law provides that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." Cal Evid. Code § 952 (2000).
31. *See, e.g.*, Wichita Land & Cattle Co. v. Am. Fed. Bank, *F.S.B.* 148 F.R.D.456, 457 (D.D.C. 1992); Ares-Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988).
32. Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 329 (N.D. Cal. 1985).
33. This approach seems particularly to have taken hold in the federal courts. *See, e.g*; O'Leary v. Parcell Co., 108 F.R.D. 641, 644 (M.D. N.C. 1985); Suburban Sew N Sweep, Inc., v. Swiss-Bernina, Inc. 91 F.R.D. 254, 260 (E.D. Ill. 1981).
34. *See, e.g.*, Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993) (the court upheld the lower court's application of the five factor test and the conclusion drawn therefrom that although defendant had not taken reasonable precautions to protect privileged materials from disclosure, defendant could reasonably have discovered any privileged materials, and plaintiff had become aware of full contents of privileged materials, nevertheless, inadvertent disclosure did not waive privilege because defendant immediately asserted privilege upon learning of disclosure, and considerations of fairness counseled in favor of ordering materials returned); Harmony Gold U.S.A, Inc. v. FASA Corp., 169 F.R.D. 113, 116 (N.D. Ill. 1996).
35. *See, e.g.*, Fla. Bar Ass'n Prof'l Ethics Comm., Ethics Op. 93-3 (1994); Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar of Maine, Advisory Op. 146 (1994); Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 93-11 (1993); Utah State Bar Ethics Advisory Op. Comm, Ethics Op. 99-01 (1999); N.C. Bar Ass'n, Final Op. RPC-252 (1997); Colo. Bar Ass'n Ethics Comm., Formal Ethics Op. 108 (2000).
36. D.C. Bar Legal Ethics Comm., Ethics Op. 256 (1995).
37. *Id. Cf.* Aerojet-General Corp. v. Transp. Indem. Ins., 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862 (1993)(court vacated sanctions which trial court had imposed upon law firm for failure to timely disclose innocent receipt of privileged communications).
38. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar of Maine, Advisory Op. 146 (1994).
39. Ky. Bar Ass'n Comm. on Ethics, Advisory Op. E-374 (1995).
40. *Id*.
41. Ill. State Bar Ass'n, Advisory Op. on Professional Conduct 98-04 (1999).
42. As noted above, however, the Formal Advisory Opinion Board of the State Bar of Georgia has informally approved the use of e-mail as a means of communication with a client.

43. Marriott Corp. v. American Acad. of Psychotherapists, Inc., 157 Ga. App. 497, 501-02, 277 S.E.2d 785, 789 (1981)(quoting 97 C.J.S. *Witnesses* § 276).
44. Peterson v. Baumwell, 202 Ga. App. 283, 285, 414 S.E.2d 278, 280, (1991), *cert. denied*, 1992 Ga. LEXIS 1995 (Ga. Sup. Ct. 1992); *see also*, Osborn v. Georgia, 233 Ga. App. 257, 260, 504 S.E.2d 74, 77 (1998); Moclaire v. Georgia, 215 Ga. App. 360, 363, 451 S.E.2d 68, 72 (1994), *cert. denied in related proceeding*, Morrill v. State, 1995 Ga. LEXIS 482 (Ga. Sup. Ct. 1995).
45. *See* Nationsbank, N.A. v. Southtrust Bank of Georgia, N.A., 226 Ga. App. 888, 896, 487 S.E.2d 701, 708 (1997) ("the lawyer has no power to waive" the attorney-client privilege).
46. 223 Ga. App. 450, 477 S.E.2d 849 (1996).
47. *See supra* note 5 and text.
48. 165 Ga. 210, 140 S.E. 625 (1927).
49. 223 Ga. App. at 452, 477 S.E.2d at 851.
50. *Id. See also* Moclaire v. Georgia, 215 Ga. App. 360, 363, 451 S.E.2d 68, 72, (Ga. App. 1994) (the court held that there is no waiver of the attorney-client privilege without evidence that client made a disclosure to attorney for the purpose of having attorney impart the information to others or otherwise authorized disclosure of attorney-client privileged communications to third persons); Marriott Corp v. American Acad. of Psychotherapists, 157 Ga. App. 497, 277 S.E.2d 785 (1981) (no waiver of privilege found merely because plaintiff, without explanation, had obtained a copy of a privileged communication).
51. 176 F.R.D 695 (M.D. Ga. 1997).
52. *Id*. at 699.
53. 181 F.R.D. 680 (N.D. Ga. 1998).
54. *Id*. at 688 - 89.
55. *Id*. at 697 – 99.
56. *Id*. at 700.
57. Lazar v. Mauney, 192 F.R.D. 324, 328 (N.D. Ga. 2000)
58. *Id.* at 330. In *Lazar*, a caustic letter from the plaintiff to his counsel was inadvertently produced during a voluminous document production. Plaintiff's counsel discovered the error soon after the disclosure, and requested that it be returned. Defendant's counsel did so, but unknown to plaintiff's counsel, defendant's counsel retained a copy. That copy was later used as an attachment to papers opposing plaintiff's motion to compel, claiming that the attorney-client privilege had been waived. Judge O'Kelly rejected the assertion that the privilege had been waived. He further found that found that defense counsel's actions in secretly retaining the copy and not letting the producing attorney know that he disputed any claim of privilege, and in asserting without any basis that the privilege had been waived constituted ethical violations, and directed that a copy of the Court's Order be forwarded to the State Bar.
59. BellSouth Adver. & Publ'g Corp. v. American Bus.-List, Inc., 1992 U.S. Dist. LEXIS 17679 (N.D. Ga.1992).
60. Pa. Bar Ass'n Comm. of Legal Ethics & Prof'l Responsibility, Op. 97-130 (1997); State Bar of Arizona, Advisory Op. 97-04 (1996).
61. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).
62. *See supra*. text accompanying note 34.
63. To establish legal malpractice, a plaintiff must establish three elements: "(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." Allen v. Lefkoff, Duncan, Grimes & Dermer P.C., 265 Ga. 374, 375, 453 S.E.2d 719, 720 (1995)(quoting Rogers v. Norvell, 174 Ga. App. 453, 457, 330 S.E.2d 392, 395 [1985]). With respect to the "ordinary care, skill and diligence" element, "the law imposes upon [persons performing professional services] the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances." 259 Ga. 435, 436, 383 S.E.2d 867, 868 (1989)(case discusses architectural malpractice).
64. The author has experienced one instance where his e-mail address was apparently placed on his opponent's internal e-mail distribution list for a case, and as a result, an e-mail communication between the opposing partner and his associate was inadvertently sent to the author.
65. Many attorneys now include a notice on all e-mails advising the recipient that the e-mail may contain confidential information, and providing instructions as to the course of action to take if the e-mail has been sent erroneously. An example of such a disclosure follows:

    NOTICE: This e-mail may contain information that is privileged or otherwise confidential. It is intended solely for the holder of the e-mail address to which it has been directed, and should not be disseminated, distributed, copied or forwarded to any other persons. It is not intended for transmission to, or receipt by, any other person. If you have received this e-mail in error, please delete it without copying or forwarding it, and notify us of the error by reply e-mail or by calling Robert C. Port, Esq., (770) 393-0990, so that our address records can be corrected.
66. *See, e.g.*, Jones, Robert, *Client Confidentiality: A Lawyer's Duties with Regard to Internet E-Mail*, STATE BAR OF GEORGIA COMPUTER LAW SECTION NETETHICS READINGS <http://www.computerbar.org/netethics/bjones.htm>. In evaluating whether an inadvertent disclosure of email rises to the level of actionable negligence, some commentators have suggested that the analysis follow the formulation set forth by Learned Hand in United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947). Under the "Hand Formula," a risk is unreasonable when the foreseeable probability of the resulting harm times the gravity of the harm outweighs the burden to the defendant of taking actions which would have prevented harm. Thus, if encryption is easily accomplished at nominal cost, the fact that attorneys do not currently routinely use encryption might not be a defense to a malpractice claim. *See also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 709 (1998)(an attorney using e-mail "must also stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost.")