

Unsolicited E-Mails Not Subject to Rules Applicable to Client Communications

The San Diego County Bar Association, through its Legal Ethics Committee, issued Ethics Opinion 2006-1 recently to address the issue of how to treat the receipt of unsolicited e-mails containing confidential information.

In particular, the Opinion addressed the situation where a lawyer received an unsolicited e-mail from a potential client who was a driver in a multi-car accident, after the lawyer had already been retained by a separate driver in the same multi-car pileup. The unsolicited e-mail contained confidential information that was potentially harmful to the sender of the unsolicited e-mail, but it was helpful to the previous client that had already been retained by the same lawyer.

The Legal Ethics Committee concluded as follows: (1) The unsolicited e-mail was not deemed confidential for purposes of the applicable rules. Private information from a non-client sent in an unsolicited e-mail is not required to be held in confidence if the lawyer did not have an opportunity to warn or stop the non-client before the communication was delivered; (2) The attorney involved in this case was not precluded from representing the prior client, and the lawyer was entitled to use the subsequent information received in the unsolicited e-mail.

The policy basis for the opinion of the Committee was three-fold. First, the Committee encourages the widest possible access to legal services. Second, public policy must support the confidentiality of communications by those seeking legal services once both parties determine that a client relationship is appropriate. Third, public policy should protect current clients from conflicts created by unsolicited confidential information sent from prospective clients.

Citing California law, the Committee described the basis of a lawyer's duty of confidentiality and communications protected by the attorney/client privilege. The

Committee noted that the triggering of an attorney/client privilege does not always require the actual retention of an attorney. The reasoning for this is to protect the information of clients whose retention was declined by the attorney. Once the privilege attaches, moreover, the attorney has a duty to refuse to disclose confidential information.

In order for the duty of confidentiality to apply, however, two prerequisites must be satisfied under California law according to the Opinion: (1) The party must be considered by the lawyer as a possible "client"; and (2) The communication between the person and the attorney must be "confidential." Under Section 951 of the California Evidence Code, a "client" is defined as a person who consults a lawyer for the purpose of securing legal advice. Thus, the first requirement is that the client must "consult" a lawyer. Also, the purpose of the consultation must be to secure legal advice. Moreover, the attorney must be solicited for the legal services in his or her professional capacity as a lawyer (citing Restatement (3rd) of the Law Governing Lawyers, Section 70(c)).

The Committee cited to a California Supreme Court decision in *People v. Gionis*, 9 Cal. 4th 1196, 1202-1205 (1995), in connection with the requirement that the attorney have an opportunity to prevent a prospective client from engaging in a consultation which would invoke the duties of confidentiality. That case was cited for the rule that the privilege does not extend to disclosures made after an attorney refuses to accept representation, because in that context the person could have no reasonable expectation of being represented by an attorney after such a rejection was made. See also Opinion No. 2003-161 of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California.

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Ethics Article continued...

The Committee concluded that because the attorney did not have an opportunity to expressly refuse to represent the person who sent the unsolicited e-mail, it would be unreasonable for the sender of the e-mail to believe that her unsolicited message would be confidentially treated.

The Committee determined that as long as the attorney notifies the sender of an e-mail as soon as "reasonably possible after it has become apparent that the sender wants to consult with the attorney" and unequivocally explains to the sender that the attorney cannot represent the sender, that attorney does not acquire duties of confidentiality in connection with the review by the attorney of an unsolicited e-mail from an unknown sender.

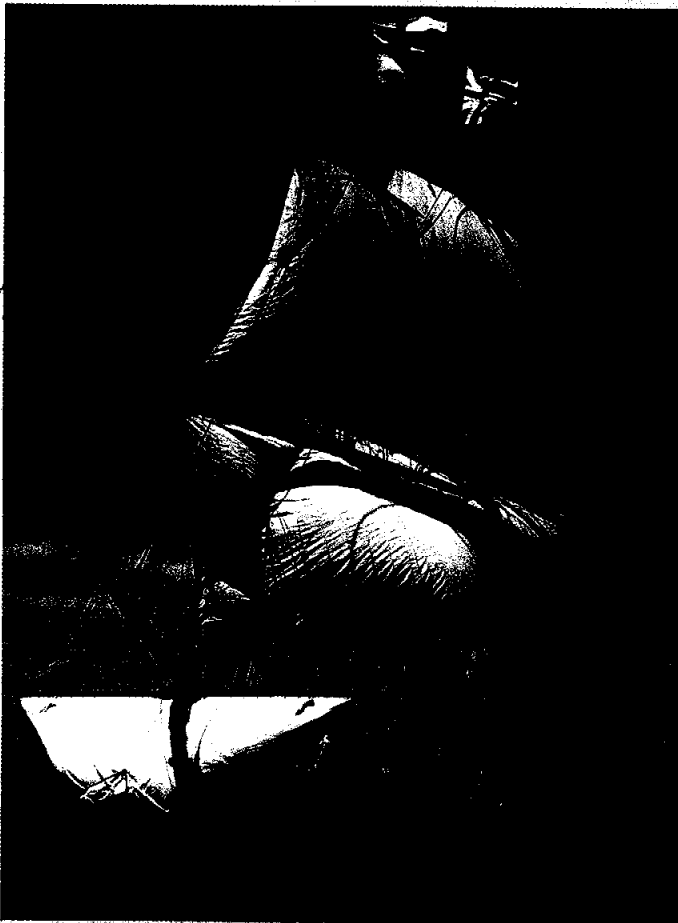
The Committee noted that substantially similar results have been expressed by the Arizona State Bar Ethics Committee in its Opinion 02-04, as well as in Formal Opinion 2001-1 of the Association of the Bar of the City of New York, and that similar reasoning was employed in Comment 2 to Rule 1.18

of the American Bar Association's Model Rules of Professional Conduct.

The San Diego County Bar Association Legal Ethics Committee further reasoned that if the "mere sending of an unsolicited e-mail seeking legal services to an attorney" would trigger a duty of confidentiality, it would create an unmanageable risk for attorneys. They added that: "Such a rule would give unilateral and unfettered control to non-lawyer senders of e-mail... Not only does this create the risk of non-lawyer abuse and "tactical tricks" but also gives the innocent prospective consumer of legal services a means of disrupting existing attorney/client relationships by creating conflicts of interest."

In sum, this is a thoughtful opinion that strikes a reasonable balance between the important duties of confidentiality and the modern reality that allows unsolicited e-mails to be sent with ease. It appears that the best practice would be to reply to any sender of e-mails seeking legal representation to clarify that no such attorney/client relationship or duty of confidentiality has been established. ♦

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