"REPLY ALL" REGRETS: ETHICAL CONSIDERATIONS FOR ELECTRONIC COMMUNICATIONS

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AN OVERVIEW OF THE ISSUES

Electronic communications envelop us.[1] From mobile phones and smart watches to email, texts, instant messages, social media, and video conferencing, we're spending more hours engaging in remote communications through electronic interfaces than meeting in person or consulting over the phone. In the "old" days, a lawyer would dictate a memo to a stenographer or onto a Dictaphone. Now, we simply dictate directly into a voice memo, text, or email, which automatically transcribes what we say with unusual accuracy. When we travel to foreign countries, we often rely on electronic communication devices to translate text and speech.

We have become so dependent on our smartphones that, if we inadvertently misplace them, we not only feel adrift, but we also often have no way of calling many of our loved ones, because our electronic devices have replaced the need to memorize phone numbers.

Electronic communications are wonderful, but they can also raise unexpected ethical issues. This article explores just a few of these issues through the law professor's favorite tool—the hypothetical.

"REPLY ALL" REGRETS

The Hypothetical

Overworked young lawyer Justin is rushing to meet a deadline. Ground lease and construction documents and deal points are being circulated by email among the landlord, the developer-tenant, and the lender.

As the lender's representative, Justin receives an email from the developer's lawyer concerning a major deal point. Everyone is copied on the email, including the developer herself.

The landlord's attorney responds to the developer's lawyer by copying[2] everyone with her comments. Justin then responds by copying everyone with his comments. Justin's email, like the landlord's

attorney's email, has included the developer herself because the developer was part of the original email group sent out by the developer's lawyer.

Does Justin's action raise any ethical concerns?

Applicable Rules

The American Bar Association (ABA) Model Rule 4.2 prevents a lawyer from directly communicating with an opposing party represented by counsel without the consent of opposing counsel. The Comments state that the Rule applies to "communications with any person represented by counsel concerning the matter to which the communication relates." The Comments do not suggest that it makes any difference whether the communications occur in person, by phone, or via electronic media.

While the Comments state that a lawyer may "seek a court order" if counsel is uncertain whether such communication is permitted, this is of no assistance to transactional lawyers in the midst of negotiating and closing deals.

Where is one to look for guidance in connection with this hypothetical? Is the fact that the sending lawyer copied the client sufficient to constitute actual or implied consent for the recipient lawyers on the other side of the table to "reply all," including to the sending lawyer's client? The reported bar opinions on this subject break down into one of three approaches:[3]

- A lawyer who copies a client on a group email is *not* giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client;
- A lawyer who copies a client on a group email *is* giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client; and
- A lawyer who copies a client on a group email may or may not be giving consent for the opponent's lawyer to "reply all" to the group that includes the sending lawyer's client—it simply depends on the circumstances.

The "Never Reply All" Analysis

Ethics opinions from New York City, Illinois, Kentucky, North Carolina, and South Carolina reject implied consent and hold that a lawyer cannot "reply all" merely because the sending lawyer includes her client on the group email.

The New York City Bar discerns no difference between emails and letters, holding that "sending simultaneous correspondence to a represented person and her lawyer without prior consent violates the no-contact rule unless otherwise authorized by law."[4] The opinion, based on the then-extant New York DR 7-104(A)(1) no-contact rule, notes that the purpose of the rule "is to prevent situations in which a represented party may be taken advantage of by adverse counsel."[5] The opinion observes that such a "risk is magnified with email communications" where a client could respond before her lawyer does; it does not consider whether the sending lawyer has an obligation to properly instruct the client about not responding.[6]

The South Carolina Bar opinion expressly states that a receiving lawyer may never "reply all" without the express consent of the sending lawyer, and the "mere fact that a lawyer copies his own client on an email does not, without more, constitute implied consent to a 'reply to all' responsive email."[7] Like the New York City Bar, the South Carolina Bar finds no reason to differentiate between mailed communications and emailed communications.

The Kentucky Bar opinion holds there was no implied consent merely because a lawyer copied a client on an email to opposing counsel.[8] The opinion recommends either forwarding the email to the client or blind copying the client; however, the opinion does not consider the possibility (raised in the Virginia Bar's opinion, discussed below) that a blind copied client may then "reply all."

Similarly, the North Carolina Bar recognizes that while consent may sometimes be implied, merely copying a client on an email does not constitute implied consent.[9] Like Kentucky, North Carolina recommends either forwarding the email trail to

the client or blind copying the client but does not address the potential risks.

The Illinois opinion holds that, while it "does not contravene a rule of professional conduct for a lawyer to cc the client when corresponding with another lawyer by e-mail," nonetheless, if "the mere copying of one's own client on an e-mail were considered to be an invitation to opposing counsel to do the same, the purposes of Rule 4.2 could be thwarted." [10] The Illinois opinion, referring to the 2009 New York City Bar analysis, notes the possibility of a client reading and responding to an email before her counsel does, undermining the role of "the represented person's lawyer as spokesperson, intermediary, and buffer." Neither the New York nor Illinois opinion consider whether the represented person's lawyer has an obligation to instruct her client not to respond to such emails.

While the Illinois opinion, on the one hand, states that Rule 4.2 seems to prohibit an implicit consent when the client is copied on an email, the opinion also recognizes that, under certain, limited conditions, consent can be implied. The opinion suggests, however, that the best course of action is either: (i) for the sending lawyer to forward the email trail to the client; or (ii) for a receiving lawyer to ask the sending lawyer for permission to "reply all."[11] The opinion does not discuss why the duty rests on the receiving lawyer and not on the sending lawyer who copied her client.

The "It's Okay to Reply All" Analysis

In contrast to the "never reply all" rule discussed above, New Jersey and Virginia take the opposite approach, finding implied consent when the sending lawyer copies his client.

The New Jersey ethics opinion places the burden of consent on the lawyer who includes a client in a group email.[12] If counsel does not want other counsel corresponding with her client in a group email, the sending lawyer should not copy her client. The opinion states that replying to a group email "should not be an ethics trap for the unwary or a 'gotcha' moment for opposing counsel."[13] The New Jersey opinion, unlike the New York City Bar and South Carolina Bar opinions discussed above, differentiates between group emails and written, mailed letters that could not be sent to a client without consent. Because email is "informal" and "conversational," the opinion likened it to conference calls. "When lawyers copy their own clients on group emails to opposing counsel, all persons are aware that the communication is between the lawyers."[14] The sending of the group email, the opinion continues, constitutes implicit consent for opposing counsel to respond to the entire group—just as if a developer's lawyer instituted a conference call and included the client on the call.

In 2022, the Virginia Supreme Court approved an opinion rendered by the Virginia State Bar Legal Ethics Committee holding that a lawyer who copies a client on an email "has given implied consent to a reply-all response by opposing counsel." [15] The opinion also advises against sending a blind copy to a client because "a blind copied client may still be able to reply all to everyone who was in the 'to' field of the original email."[16] Thus, the opinion recommends blind copying all recipients "to avoid the risk of a reply all response."

The "It Depends" Analysis

Washington and Alaska reject a one-size-fits-all approach and instead have held that whether a "reply all" email violates Rule 4.2 is dependent on the facts and circumstances.

The Washington State Bar held that factors to consider in determining whether consent was implied include "how the communication was initiated and by whom; the prior course of conduct between the lawyers involved; the nature of the matter and whether it is transactional or adversarial; the formality of the communications; and the extent to which a communication … might interfere with the client-lawyer relationship."[17]

Alaska counsels that a "lawyer who copies a client on e-mail communications with opposing counsel risks waiver of attorney/client confidences [and] a lawyer who responds to an e-mail where opposing counsel

has 'cc'd' the opposing counsel's client *has a duty to inquire* whether the client should be included in a reply" (emphasis added).[18] Alaska's opinion warns that there may be "instances where disclosure of an e-mail address may, in itself, violate a court order or other confidentiality requirement (i.e., if there is a protective order or if the fact that the person is represented is confidential)."[19] Yet, Alaska's opinion states that the "rules only apply to the subject of the representation or other client confidences or secrets" and that "it is likely not problematic to 'cc' a client on electronic communications regarding scheduling or other purely administrative matters."[20]

The ABA Opinion on the "Reply All" Situation

In November 2022, the ABA released Formal Opinion 503, "Reply All in Electronic Communications."[21] It concludes that copying a client on emails and texts constitutes implied consent to a "reply all" response, but it also warns that the presumption of implied consent is not absolute.[22] For example, the opinion excludes from the implied consent rule "a traditional letter, printed on paper and mailed."[23] It also excludes emails where the sending lawyer has informed others in a "prominent" manner and in advance that there is no consent to a "reply all" response. The opinion does not, however, explain why the sending lawyer can do so but still copy the client and put the burden on the responding lawyers. For example, what if there is a lease that was negotiated in 2023 and there are ongoing issues over the years. Would one "don't reply all to my client" warning in 2023 be sufficient for a series of emails sent in 2026?

ABA Formal Opinions, while recognized by many courts and disciplinary counsel as persuasive authority, have no force of law and cannot supersede state bar opinions to the contrary.

WHERE ARE YOU SITTING WHEN YOU "REPLY ALL"?

The Hypothetical

The facts are similar to the first hypothetical. Drafts of the ground lease, construction documents, and deal points are circulated by email among the landlord, the developer-tenant, and the lender.

Representing the landlord, overeager lawyer Candace sees Justin's response to her prior email. She disagrees with Justin, wants to stick with the changes she suggests, including clauses to deal with concerns about the developer's potential plans, and copies everyone on the email trail, including the developer herself.

Candace is not working in the office in State A, where she's licensed to practice.

Candace is at her vacation home in State B, where she is not licensed to practice. She's been living there since the Covid-19 pandemic because her law firm allows remote practice.

Does Candace's action raise any ethical concerns? Does it matter that: (i) Candace was retained in State B by the landlord who operates only in State B; (ii) Candace met the landlord while living in State B; or (iii) before moving to State B, neither Candace nor her firm had ever represented the landlord?

Applicable Rules

ABA Model Rule 5.5[24] contains an absolute prohibition on the practice of law in a jurisdiction where a lawyer is not licensed, except for two narrow exceptions for transactional lawyers: (i) a "temporary practice" taken in "association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;" or (ii) or matters that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[25]

Candace's first problem is that, unless State B has a rule or opinion allowing for remote practice, she may be committing the unauthorized practice of

law in State B. At least 17 states have remote practice rules,[26] and ABA Opinion 495 approves of remote practice, as long as the lawyer is essentially working virtually in the home office in State A and not doing any "local" work in State B. [27]

But this hypothetical does not fit comfortably within the scope of Opinion 495, because: (i) Candace was retained by the landlord in State B, where she is not licensed to practice; (ii) neither Candace nor her firm previously represented the landlord, which means neither are protected by Rule 5.5(c)'s exception of work arising out of or reasonably related to the lawyers' practice in State A.

The Comments to Rule 5.5 seem to indicate that this exception relates to (i) a previous relationship; (ii) work that is legally related to the state of licensure; or (iii) a particular body of nationally uniform law. Leasing does not appear to fit the criteria of a nationally uniform body of law.

Even if Candace overcomes the hurdle of unauthorized practice, she faces an additional concern—namely, determining the ethical rules of State A, where she's licensed, and State B, where she's sitting when she responds to the email and where the developer is located. It has been clear since *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct.*, that "one may practice law in the state ... although not physically present" in the state.[28] Moreover, a lawyer may be subject to discipline under both (i) ABA Model Rule 8.3 (if the lawyer violates a state's rules of professional conduct); and (ii) ABA Model Rule 8.4 (even if the lawyer is not physically present in the jurisdiction).[29]

Candace may face the unenviable task of figuring out what to do *after* hitting "reply all" if State A prohibits that action and State B either allows it by assuming implied consent or has a "totality of the circumstances" approach.[30]

On the other hand, in this interconnected world, where emails have no physical location, one might question why the lawyer receiving the group email is tasked with protecting the sender's client when the sender's attorney did not do so.

NEED A HAND AND LEND A HAND

The Hypothetical

Two lawyers, Della and Felix, eagerly read emails from Ground Up, a listserv where real estate lawyers and law professors post analyses of the latest real estate cases, while lawyers and others (including realtors and brokers) pose questions to which listserv users respond with answers and advice.

Della's client is preparing to lease a warehouse to conduct a state-legalized marijuana growing operation. Della posts specific questions about the proposed lease. Felix, who always responds quickly to listserv questions he knows anything about, has a client who leases property to a state-legalized marijuana growing business and has dealt with these issues before. Felix posts a detailed response on the listserv, including a "war story" illustrating issues of which Della should be aware.

Should Della or Felix be concerned about any ethical issues?

This hypothetical raises five issues: competent representation, confidentiality, conflicts of interest, the unauthorized practice of law, and reporting of misconduct.

Competent Representation

ABA Model Rule 1.1 mandates that a "lawyer shall provide competent representation to a client." The Comments to Rule 1.1 recognize that one of the ways a lawyer acts competently is by consulting with attorneys "of established competence in the field in question." The Comments also note that a "lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."

While the Comments to ABA Model Rule 1.1 encourage lawyers to "consult with" experienced lawyers and caution lawyers who retain or contract with other lawyers to assist or provide advice, the Comments do not contemplate informal lawyer-to-lawyer advice. Commentators have noted, however, that legal listservs "provide a powerful means of

educating and socializing lawyers and can serve as an important resource when lawyers engage in decisionmaking,"[31] and should be encouraged.[32] On the other hand, Oregon disciplined a lawyer who disclosed client information on the Bar's worker's compensation listserv.[33]

In the days before the use of listservs became ubiquitous, the ABA issued an opinion on lawyer-to-lawyer consultation.[34] The opinion does not use the words "listserv" or "Internet," but broadly aims at any "lawyer to lawyer consultation." It concludes that:

- "Hypothetical or anonymous consultations are favored where possible." (Of course, most listservs contain the names of the participating parties, although, whether these parties are lawyers is often not revealed.)
- No lawyer-client relationship arises as a result of the consultation.
- "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development."
- "Testing ideas about complex or vexing cases can be beneficial to a lawyer's client."
- Although the lawyer posing the question must be careful to preserve client confidentiality, the ABA interpreted Model Rule 1.6, "as illuminated by Comment [7], to allow disclosure of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."
- The consulting lawyer should avoid asking questions of a lawyer who does or is likely to represent an adverse party and should "consider requesting an agreement from the consulted lawyer to maintain the confidentiality of the information disclosed."
- The consulted lawyer "should reasonably assure that the advice given is not adverse to an existing client."[35]

State Bar Opinions

A number of state bars have issued ethics opinions addressing listservs. Many of these opinions note the utility of listservs while also warning of potential problems. Some recommend either not participating in a listserv or obtaining prior client consent to do so. All of these opinions address, in one way or another, the issues of competency, confidentiality, and conflicts of interest.

The Maryland Bar recognizes that "peer-to-peer listservs represent a powerful tool for lawyers," are "extremely efficient," and are "of particular benefit to solo practitioners."[36] It cautions, however, against disclosure of confidential information and that "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[37]

The Oregon State Bar concluded that a lawyer may post a question on a listserv and "disclose information relating to the representation" of the client.[38] It also states that a responding lawyer may reply without first checking for conflicts, recognizing that consultations "among lawyers, whether during the course of a mentorship program, on LISTSERVs [sic] ... are an important part of a lawyer's professional development and a critical component in representing clients" and may be one way lawyers fulfill their ethical duty to provide competent representation.[39]

The Illinois State Bar does not prohibit the use of listservs and notes that lawyers "may consult with other lawyers in an online discussion group," but cautions that client confidentiality, attorney-client privileges, and conflicts of interest must be considered and that, in any event, "an online discussion group is not a substitute for the consulting lawyer's legal research."[40]

Texas allows lawyers to use listservs without the client's express consent, but only if there is a "limited amount of unprivileged confidential information" given and "it is not reasonably foreseeable that revelation will prejudice the client."[41] The Texas Bar's opinion does not consider the issue of confidential information that is not privileged.

On the other hand, the Los Angeles County Bar's ethical opinion warns that since "attorneys must always remain mindful of their duties to protect confidential client information, and one never knows who might read or react to e-mail posted to a listserv, attorneys should avoid including information in listserv postings identifiable to particular cases or controversies."[42]

The New Hampshire Bar shares those concerns, warning that "the use of a Listserv to communicate with other lawyers on a client-related matter is particularly fraught with risks, due to the public nature of the conversation … Even if a Listserv is restricted to a private organization or group, lawyers should treat it as being potentially available to the public."[43] It recommends that lawyers should obtain client consent prior to posting on a listserv.

ABA Model Rule 1.6 mandates that a lawyer "shall not reveal information relating to the representation of a client" unless: (i) the client has given informed consent; (ii) disclosure is required by a court order; (iii) to detect and resolve conflicts when lawyers change employment; or (iv) to prevent reasonably certain death, substantial bodily harm, or the commission of a crime or fraud "in furtherance of which the client has used or is using the lawyer's services."[44]

Confidentiality

ABA Model Rule 1.6 mandates that a lawyer "shall not reveal information relating to the representation of a client" unless: the client has given informed consent; disclosure is required by a court order; to detect and resolve conflicts when lawyers change employment; or to prevent reasonably certain death, substantial bodily harm, or the commission of a crime or fraud "in furtherance of which the client has used or is using the lawyer's services."

The confidentiality that Rule 1.6 encompasses is broader than the attorney-client privilege. It protects "not only "matters communicated in confidence by the client, but also ... all information relating to the representation, whatever its source."[45] As one law review article noted, even "accidental disclosure of confidential information can nonetheless be viewed as a breach of the lawyer's ethical obligation."[46]

Rule 1.6(c) specifically requires that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of" confidential information, and ABA Formal Opinion 480 cautions lawyers who blog "or engage in other public commentary" not to reveal confidential information.[47]

Confidential information not only includes what the client tells the lawyer, but also details about the client's identity. The ABA's Opinion states that a lawyer may be prevented from revealing even information "contained in a public document or record … without regard to the fact that others may be aware of or have access to such knowledge."[48] Thus, a violation of Rule 1.6 can occur through the use of a hypothetical "if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical."[49]

Even the telling of "war stories" that omit the client's name and privileged information can run afoul of the black-letter language of Rule 1.6.[50] This is the conclusion reached by an Alaska Bar opinion, although the opinion backs away from the black-letter rule to formulate the position that war stories are permissible if the lawyer "reasonably believes that the disclosures will not cause harm to the client."[51] The opinion, however, does not consider that a client may not want the facts of the representation revealed or a discussion of the issues involved or how they were resolved.

The Alaska opinion quotes with approval from Modern Legal Ethics, which argues that prohibiting war stories "would be senseless, would create morbid secretiveness among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality principle. Instead, [Model Rule] 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client."[52]

If the black letter provisions of Rule 1.6 mandate this conclusion, might a better solution be to change the rule, rather than interpret it in a way that is at

odds with the text's explicit language? Those in favor of a relaxed reading rely on the Model Rules' "Scope" section, which states these are "rules of reason."[53] It may be difficult, however, to rely on a relaxed reading of the rules when, as the Scope section notes, the terms "shall" and "shall not" are used as imperatives.[54]

Model Rule 1.6 uses "shall not" in prohibiting a lawyer from disclosing client confidences without permission, except in a very narrow range of circumstances. One may look in vain at the black letter text of Model Rule 1.6 to find an exception for war stories.

In an analogous situation of matters involving statutory interpretation, the Supreme Court has stated that there should not be "free ranging search" for the best policy, rather, the "controlling principle" is "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."[55] Thus, courts must "begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'"[56] Is that the standard of interpretation to apply to the Model Rules, or should there be a different standard and, if so, what is that standard and where is it to be found?

The problem of the loss of confidentiality is heightened on listservs and other social media because, unlike war stories delivered verbally at a conference or over cocktails, the electronic discussions are preserved, perhaps forever,[57] for any individual or entity to see. Thus, a fact that seems innocuous when written may become important, useful, or even critical when viewed years later with the benefit of 20/20 hindsight.

Conflicts of Interest

Because lawyers and non-lawyers posting on listservs do not mention their clients by name, there is no way for the responding lawyer to know whether an actual conflict of interest exists with the responding lawyer's client, or whether a "positional" conflict may arise.[58]

Most authorities conclude that positional conflicts of interest in transactional matters do not (or should not) pose an ethical issue. The New York State Bar issued an ethics opinion finding no ethical violation when a law firm proposed assembling two "mutually exclusive teams" to work on two different amicus briefs in the same case, with each group submitting an amicus brief setting forth opposite views of the same issue,[59] as long as they filed these briefs in their "individual capacities" and not on behalf of any organization or client.

The ABA has issued an opinion stating that a "lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter."[60] Sophisticated clients avoid this issue with engagement letters prohibiting such activities, and most law firms hesitate taking on representations that may pose positional conflicts without the clients' consent.

Although positional conflicts may not create ethical issues for transactional lawyers, they can pose a distinct business risk. A client who hires a law firm for complex matters may not want lawyers in that firm expressing positions contrary to the ones the client takes in negotiations or litigation. Lawyers and firms that do so may face the financial risk of losing the client.

Because listservs and social media leave a trail of the lawyer's advice, attorneys should be cautious about posting comments that may give rise to a positional conflict that is not an ethical conflict but could create a business issue for the law firm.

Unauthorized Practice of Law

While it is beyond the scope of this paper to address the application of jurisdictional and conflict of laws rules to postings on listservs and social media,[61] suffice it to say, a lawyer who posts a response on a listserv in State A may have no idea in which state (or country) the recipient is located or whether the recipient is even a lawyer.

The ABA excludes from attorney-client relationships lawyer-to-lawyer advice, but that does not hold true for advice given to a non-lawyer. If the recipient is out of state and the posting lawyer is deemed to have provided information about legal issues or about taking a position on legal issues, the posting lawyer might be accused of the unauthorized practice of law in the state the non-lawyer recipient is located.

The DC Bar issued an opinion cautioning lawyers using any type of social media that "social media does not stop at state boundaries" and, thus, an attorney's "social media presence may be subject to regulation in other jurisdictions, either because [we apply] another state's rules through [our] choice-of-law rule, or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states."[62]

Reporting Misconduct

ABA Model Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate the Rules of Professional Conduct," and Model Rule 8.3(a) requires a lawyer to report another lawyer's actions to the disciplinary authorities if the other lawyer "committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

What are the obligations of a lawyer viewing a listserv post who believes: (i) the posting attorney violated a client's confidentiality; (ii) the responding attorney disclosed client confidences in a "war story" response; or (iii) a responding lawyer engaged in the unauthorized practice of law by giving legal advice to a non-lawyer? If there is an obligation to act, which state's disciplinary authority should the viewing attorney notify? The state of the posting attorney? The state of the responding attorney? The state of the viewing attorney? How does the viewing attorney ascertain the state in which the posting attorney is licensed or from which the posting attorney is located when making the post? These difficult questions are a boon to lawyers whose practices consist of giving ethics advice to other attorneys, but they may raise a conundrum for attorneys who use, view, or post on listservs and social media.

HOW COULD THEY SAY THAT ABOUT ME?

The Hypothetical

Easygoing attorney Viola likes to be liked. Therefore, she is incensed to learn that her former client, a disgruntled commercial tenant, has posted nasty things about her on Facebook and LinkedIn. Among the comments are:

- "Don't trust anything Viola says. She assured me the lease was fine, but the landlord has screwed me over. I'll never use her again!"
- "Viola's bill for this lease was outrageous! I knew her rates were high, but she had a team of lawyers who overworked my file! There ought to be a law against that."

Viola starts to respond to these comments, which she deems defamatory. She's concerned that they not only impugn her reputation, but that they also will hurt her business and make others reluctant to hire her. She feels she must act now to control the damage.

Does Viola have any problem in responding truthfully to these posts?

Applicable Rules

While Model Rule 1.6 requires lawyers to keep client confidences, it does not require lawyers to remain silent in the face of all criticism. Rule 1.6(b)(5) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to respond to allegations in any proceeding concerning the lawyer's representation of the client." Comment 10 to Rule 1.6 states that a lawyer need not await a formal proceeding before responding.

At the same time, the black-letter rule of 1.6(c) mandates that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure

of, or unauthorized access to, information relating to the representation of a client," and Comment 19 cautions that, "when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

ABA Formal Opinion 496 deals squarely with this issue, stating that a "negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule."[63]

While Opinion 496 cites a number of state ethics opinions to support its conclusion and refers to state proceedings disciplining or sanctioning lawyers for online responses, it contains no easy solution and, instead, suggests four alternatives for attorneys who are the subject of negative online reviews:

- Don't respond;
- Request the website or search engine to delete the post;
- Post an invitation to contact the lawyer "privately to resolve the matter"; or
- Indicate "that professional considerations preclude a response."[64]

Each of these options contains its own set of issues. A lawyer who does not respond may be seen as admitting the allegations. A lawyer who asks a search engine to delete a post may find that obtaining such relief is either nigh-impossible or will take such a long time as to be ineffective in countering adverse reputational damage. Asking the poster to contact the lawyer privately does not resolve anything if the poster doesn't respond and creates additional problems if third parties (not the poster) then contact the lawyer "privately." The lawyerly "I can't respond because of professional considerations" may be seen as a legalistic dodge. And further problems arise if the poster is not the client, as ABA Opinion 496 notes.

THE TECHNOLOGICALLY ADVANCED HOME OFFICE

The Hypothetical

Yves frequently works remotely from his home office in a state where he is licensed to practice. He likes not having to commute to the office and being able to work around his family's schedule.

His home office is fully equipped with a desktop docking system, two large screens, an adjustable desk, a ring light to illuminate his face during Zoom calls, and a smart speaker his family uses daily. Yves enjoys listening to music while he works, calling up songs through the smart speaker. During boring Zoom calls, Yves opens up a second window on his computer and plays online games and interacts with others via the games' chat feature.

Does any of this pose an ethical problem for Yves?

This hypothetical raises three different issues: the use of a home computer, the privacy of a home office, and the use of smart speakers.

Use of a Home Computer

Lawyers should utilize caution when using a computer that is not supplied and maintained by the law firm, because placing client information and confidential information on a private computer can impair privileges. Even if the lawyer uses a firm-supplied computer, care must be exercised in how the lawyer virtually connects to the office. The ABA recommends that, to "protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs)."[65]

Home Office Privacy

Some lawyers have the luxury of being able to establish a secure area of their home where they

can work uninterrupted behind a closed door. Others are not as fortunate and may have to find workspace at the dining room table, on the couch, or (during good weather) outside on a patio visible to others and subject to others overhearing their conversations. Anytime a third party can eavesdrop on an attorney-client conversation, there is a potential risk that the attorney has breached the duty of confidentiality under Model Rule 1.6. The duty to make reasonable efforts to safeguard confidential information includes a "non-exhaustive list of factors" that consist of a verbatim quotation from Comment 18 to Model Rule 1.6.[66]

Smart Speakers

Regardless of the type of smart speaker Yves uses (such as Amazon Echo, Google Nest, Apple HomePod, or Sonos), these speakers never stop listening.[67] The New York Times reported that software in some Android games have the ability to listen to what is going on in the room.[68] Smart speakers can be hacked to continuously record conversations.[69] Even if not hacked, smart speakers often activate as many as 19 times a day when they mistakenly hear the "wake word," and when that happens, the recordings can last from 20 to 43 seconds, exposing confidential communications.[70] Those voice recordings are stored in the cloud and can be retrieved. For example, Amazon says it allows users to review their voice recordings.[71] If these recordings are preserved, that means that third parties (Amazon employees, contractors, or others) may listen to them. Further, it has been reported that Amazon has "been known to hold onto smart speaker data even after it has been "deleted."[72]

If a smart speaker is mistakenly awakened during a Zoom call, everyone's voice on that call might be recorded, and, if so, biometric voice recognition can identify each person, because each voice is unique, like a fingerprint.[73] Of course, this same problem arises with smart phones containing a "wake word" activation feature.

While one might think "wake words" are so distinctive that this problem seldom happens, research shows that devices can be activated by similarly sounding terms. For example, the Google Home Mini, activated by "Hey Google," can mistakenly respond to words rhyming with "Hey" "followed by something beginning with the letter 'G,' or even something that contains 'ol' such as 'cold.' The researchers discovered that 'I can spare' and 'I don't like the cold' both set off Google's device."[74] Similar problems exist with Apple's HomePod and Amazon's Alexa. This field of technology continues to evolve, as evidenced by Amazon's recent patent application that would allow Amazon devices to "listen" for the "wake word" at the end of a sentence, rather than at the beginning, leading to recordings that are lengthier and that will encompass more information.[75]

If a smart speaker records even part of a conversation, not only is confidentiality impaired,[76] but attorney-client privileges may be lost. Additionally, recording a conversation without all parties' consent can violate some state laws, although "federal law and a majority of states require consent of only one party."[77]

It is beyond the scope of this paper to describe all of the ABA Formal Opinions on technology,[78] but one opinion directly relates to smart speakers and home offices. ABA Formal Opinion 498 states that lawyers "should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking."[79] Because the smart phones use the same features as smart speakers, the rationale of the opinion seems to apply to smart phones. Does this mean that if a lawyer has two phones and is discussing confidential information on one of them, the lawyer must turn off the other phone so that it does not accidentally "awaken" and listen to the conversation?

CONCLUSION

Technology is wonderful, and each new iteration makes it easier to use, easier to "connect" all parts of our lives, and easier to access whatever we need, whenever we need it. Technology, however, can also ease us into ethical traps from which we may find it difficult to extract ourselves once ensnared.

Notes

1 A portion of this paper consists of adaptations of the author's prior publications, including Reply All Regrets: Electronic Communications Issues, American College of Real Estate Lawyers (Mar. 2023); Bordering on the Edge: Multijurisdictional Practice Issues for Real Estate and Trust and Estate Practitioners, 32nd Annual ABA Real Property Trust and Estates Section Spring Conference Webinar (May 2020); Ouch! Social Media for Estate Planners, Sioux Falls Estate Planning Council (Nov. 2019); Bordering, on the Edge, ICSC U.S. Shopping Center Law Conference (Oct. 2018); Bordering on the Edge, ICSC/OKIMP Retail Development and Law Symposium (Feb. 2014); Multijurisdictional Ethical Traps for Real Estate Lawyers, ALI-CLE Webinar (Dec. 2013); The Social Media Thicket: Surviving And Thriving In A Tangled Web And The Ethical Issues This Raises for Lawyers, ALI-ABA Webinar (2011); and The Multiplying Multijurisdictional Morass: What's A Transactional Lawyer To Do? ABA Business Law Section Spring Meeting (March 2012).

2 This article frequently references the words "copy" and "blind copy" rather than the abbreviated colloquial forms "CC" and "BCC."

3 See Patricia A. Saller, Pay Attention to the CC, 59 Ariz. Att'y. 8 (2022).

4 N.Y. City Bar Pro. Ethics Comm. Formal Op. 2009-01 (2009), available at https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2009-01-the-no-contact-rule-and-communications-sent-simultaneously-to-represented-persons-and-their-lawyers.

5 Id. The rule was superseded in April 2009 when New York revised its ethics rules to track the ABA Model Rule format and numbering system.

6 Id.

7 S.C. Bar Ethics Advisory Comm. Op. 18-04 (2018), available at https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-18-04/#:~:text=%5Bi%5Dn%20representing%20a%20client,law%20or%20a%20court%20order.

8 Ky. Bar Assoc. Ethics Op. KBA E-442 (2017), available at https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions_(part_2)_/KBA_E-442.pdf.

9 N.C. Bar Formal Ethics Op. 2012-7 (2013), available at https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/?opinionSearchTerm=Changes%20in%20the%20law.

10 Ill. State Bar Assoc. Pro. Conduct Advisory Op. 19-05 (Oct. 2019), available at https://www.isba.org/ethicsopinions/1905.

11 Id.

12 N.J. Advisory Comm. on Pro. Ethics Op. 739 (Mar. 3, 2021), available at https://www.njcourts.gov/notices/acpe-opinion-739-rpc-42-lawyers-who-include-clients-group-emails-and-opposing-lawyers-who.

13 Id.

14 Id.

15 Va. State Bar Legal Ethics Comm. Op. 1897 (Sept. 19, 2022), available at https://www.vacourts.gov/courts/scv/amendments/leo_1897.pdf. Ethics advisory opinions are rendered by the Virginia State Bar Legal Ethics Committee but must be approved or

16 Id.

17 Wash. State Bar Assoc. Op. 202201 (2022), available at https://ao.wsba.org/print.aspx?ID=1698#:~:text=SUMMARY%3A%20If%20a%20lawyer%20emails,the%20relevant%20facts%20and%20circumstances.

18 Alaska Bar Assoc. Ethics Op. No. 2018-1, available at https://alaskabar.org/wp-content/uploads/2018-1.pdf.

19 Id. at n. 2.

20 Id. at 3.

21 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 503 (Nov. 2, 2022), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-503.pdf.

22 Id.

23 Id. at 4.

24 A full analysis of Model Rule 5.5 and its implications exceeds the scope of this paper, but many other resources explore the issue in depth. See, e.g., James W. Jones, Anthony E. Davis, Simon Chester, and Caroline Hart, Reforming Lawyer Mobility—Protecting Turf or Serving Clients?, 30 Georgetown J. of Legal Ethics 125, 217 (2017); James Geoffrey Durham and Michael H. Rubin, Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach, 81 La. L. Rev. 678 (2021); and Michael Haber, Transactional Clinical Support for Mutual Aid Groups: Toward a Theory of Transactional Movement Lawyering, 68 Wash. Univ. J. of L. & Pol'y 218 (2022).

25 ABA Model Rule 5.5(a)-(c) provides:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> >
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> > (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> >
> > (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
> >
> > (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
> >
> > (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

26 See Durham and Rubin, supra note 24.

27 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 495 (Dec. 16, 2020), available at https://www.lawnext.com/wp-content/uploads/2021/09/aba-formal-opinion-495.pdf.

28 Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct., 949 P.2d 1 (Cal. 1998).

29 ABA Model Rule 8.5 state, in part: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."

30 A choice-of-law analysis is beyond the scope of this paper. For more on this issue, see, e.g., Paul Schiff Berman, "Legal Jurisdiction and Virtual Social Life, 27 Catholic Univ. J. of L. & Technology 103 (2019); Paul Schiff Berman, Legal Jurisdiction and the Deterritorialization of Data, 71 Vanderbilt L. Rev. 11 (2018); and David Hricik, Prashant Patel, and Natasha Chrispin, Ethics and the Internet: It's a Funny Old New World, 57 Practical Lawyer 21 (2011).

31 Leslie C. Levin, Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers, 37 Ariz. State L. J. 589, 591 (2005).

32 Josiah M. Daniel, III, "Listserv Lawyering": Definition and Exploration of Its Utility in Representation of Consumer Debtors in Bankruptcy and in Law Practice Generally, 11 St. Mary's Univ. J. on Legal Malpractice and Ethics 54, 87 (2021).

33 In re Quillinan, 20 DB Rptr. 288 (Or. 2006).

34 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 98-411 (Aug. 30, 1998).

35 Id.

36 Md. State Bar Assoc. Comm. on Ethics, Ethics Docket No. 2015-03 (2015), The Use of Listservs and the Rule on Confidentiality and the Duty to Report Misconduct of Others, available at https://www.msba.org/ethics-opinions/the-use-of-listservs-and-the-rule-on-confidentiality-and-the-duty-to-report-misconduct-of-others/.

37 Id.

38 Or. State Bar, Formal Op. 2011-184, Confidentiality, Conflicts of Interest: Consulting between Lawyers Not in the Same Firm, available at https://www.osbar.org/_docs/ethics/2011-184.pdf.

39 Id.

40 Ill. State Bar Pro. Conduct Advisory Op. 12-15 (May 2012), available at https://www.isba.org/sites/default/files/ethicsopinions/12-15.pdf.

41 Tex. Comm. On Professional Ethics, Op. 673 (Aug. 2018), available at https://www.legalethicstexas.com/resources/opinions/opinion-673/.

42 L.A. Cnty. Bar Assoc. Pro. Resp. and Ethics Comm. Op. 514, Ethical Issues Involving Lawyer and Judicial Participation in Listserv Communications (Aug. 15, 2005), available at https://s3.amazonaws.com/membercentralcdn/sitedocuments/lacba/lacba/0454/2094454.pdf?AWSAccessKeyId=AKIAIHKD6NT2OL2HNPMQ&Expires=1698952316&Signature=OTgzemuoC0vGh4dRg54%2BtSMjC4I%3D&response-content-disposition=inline%3B%20filename%3D%22eth514%2Epdf%22%3B%20filename%2A%3DUTF%2D8%27%27eth514%252Epdf&response-content-type=application%2Fpdf.

43 N.H. Bar News, Ethics Corner Article: Guidance Offered on Posting to Listservs, (Sept. 20, 2013), available at https://www.nhbar.org/resources/ethics/ethics-corner-practical-ethics-articles/2013-09.

44 ABA Model R. 1.6, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/.

45 Id. at cmt. 3.

46 Ido Baum, The Accidental Lawyer: A Law and Economics Perspective on the Inadvertent Waiver, 3 St. Mary's J. of Legal Malpractice & Ethics 112, 150 (2013).

47 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 480, Confidentiality Obligations for Lawyer Blogging

and Other Public Commentary (Mar. 6, 2018), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.authcheckdam.pdf.

48 Id.

49 Id.

50 See, e.g., Paula Schaefer, Lawyers as Caregivers, 12 St. Mary's J. of Legal Malpractice & Ethics 330 (2022); Joel M. Pores, Social Networking and the Ethical Duty of Confidentiality, 55 Orange County Lawyer 38 (2013); and John Levin, New Rules on Client Confidences, 25 Chi. Bar Assoc. Record 64 (2011).

51 Ala. Bar Assoc. Ethics Op. 95-1 (Jan. 13, 1995), available at https://alaskabar.org/wp-content/uploads/95-1.pdf. The opinion also noted that a "literal application of Rule 1.6 would ban … valuable routes of intra-professional communication" and other "informal exchanges of information" that have "been traditionally employed in Alaska to educate new lawyers, to circulate information about important developments in the law, and to maintain courteous relations between the learned practitioners of our sometimes fractious profession."

52 C.W. Wolfram, Modern Legal Ethics S 6.7, at 301 (1986).

53 ABA Model R. of Pro. Conduct: Preamble & Scope, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.

54 Id.

55 Star Athletica, L.L.C. v. Varsity Brands, Inc, 580 U.S. 405 (2017), 137 S.Ct. 1010 (2017).

56 Id.

57 While there is an ongoing debate about how "permanent" digital media is, there is no question that it can last for a very long time, either publicly or stored on servers of the listserv or social media provider. See, e.g., Colin O'Keefe, The Permanence of Digital Media is Hitting Us—And it is Weird (2021), available at https://www.pastthepressbox.com/2021/09/the-permanence-of-digital-media-is-hitting-us-and-it-is-weird/; Cat Coode, The Shocking Permanence of Your Online Data: How Online Posts, Pictures, and Messages Can Ruin Your Reputation, Even Years Later (2016), available at https://www.yummymummyclub.ca/blogs/cat-coode-technically-speaking/20160216/the-permanence-of-your-online-data-0; and N.C. State Archives, Best Practices for Digital Permanence (2013), available at https://archives.ncdcr.gov/media/83/open.

58 For more on positional conflicts of interest, see David D. Dodge, Positional Conflicts Revisited, 56 Ariz. Att'y 8 (2020); David D. Dodge, Positional Conflicts of Interest, 50 Ariz. Att'y 8 (2019); Anthony E. Davis and Noah Fiedler, The New Battle over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What is a Conflict, 24 The Pro. Lawyer 1 (2016); Christopher L. Colclasure, Denise W. Kennedy, and Stephen Masciocchi, Climate Change and Positional Conflicts of Interest, 40 Colo. Lawyer 43 (2011); Frances Chang, Arguing Both Sides: Positional Conflicts of Interest in Antidumping Proceedings, 19 Georgetown J. of Legal Ethics 584 (2006); Helen A. Anderson, Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency," 111 Pa. State L. Rev. 1 (2006); John S. Dzienkowski, Positional Conflicts of Interest, 71 Tex. L. Rev. 457 (1993); and Freivogel on Conflicts, available at http://www.freivogelonconflicts.com/issuepositionalconflicts.html.

59 N.Y. State Bar Assoc. Comm. on Pro. Ethics, Ethics Op. 1174 (Oct. 15, 2019), available at https://nysba.org/ethics-opinion-1174.

60 See ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 95-390 (1995).

61 See, e.g., Julia Hörnle, Conflicts of Law and Internet Jurisdiction in the U.S. (Oxford Academic, 2021), available at https://academic.oup.com/book/39409/chapter-abstract/339113938?redirectedFrom=fulltext; Marketa Trimble, Targeting Factors and Conflicts of Laws on the Internet, 40 The Rev. of Litig. 1 (2020), available at https://scholars.law.unlv.edu/facpub/1329; Ellen Smith Yost, Tweet, Post, Share ... Get Haled Into Court?, Calder Minimum Contacts Analysis In Social Media Defamation Cases, 73 SMU L. Rev. 693 (2020); Institute for Research on Internet and Society, Jurisdiction and Conflicts of Law in the Digital Age: Regulatory Framework on Internet Regulation (2016), available at https://irisbh.com.br/wp-content/uploads/2017/08/Jurisdiction-and-conflicts-of-law-in-the-digital-age.pdf.

62 D.C. Bar Ethics Op. 370 (Nov. 2016), found at: https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-370.

63 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 496, Responding to Online Criticism (Jan. 13, 2021), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-496.pdf.

64 Id. For more on the issues involved in dealing with and possibly removing negative online comments, see Wes Gerrie, Say What You Want: How Unfettered Freedom Of Speech On The Internet Creates No Recourse For Those Victimized, 26 Catholic Univ. J. of L. & Tech. 26 (2017); Erin Cooper, Following In The European Union's Footsteps: Why The United States Should Adopt Its Own "Right To Be Forgotten" Law For Crime Victims, 32 John Marshall J. of Info. Tech. & Privacy L. 185 (2016); Bailey Roese, Defamation, Humiliation, And Lost Reputations: Mitigating The Damage To Women Harassed Online, 35 Women's Rights L. Reporter 123 (2014); Corey M. Dennis, Social Media Defamation And Reputation Management In The Online Age, 17 J. of Internet L. 1 (2013); Jacqueline D. Lipton, Combating Cyber-Victimization, 26 Berkeley Tech. L. J. 1103 (2011); and Ternisha Miles, Barrett v. Rosenthal: Oh, What A Tangled Web We Weave—No Liability For Web Defamation, 29 N.C. Central L. J. 267 (2007).

65 ABA Standing Comm. on Ethics and Pro. Resp., Formal Op. 498, Virtual Practice (Mar. 10, 2021), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf.

66 Id. (quoting Rule 1.6, cmt. 18). Those non-exhaustive factors include: "the sensitivity of the information, the

likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."

67 See Paul Lamkin, Is Alexa always listening? Is your smart speaker spying on you? The Ambient (2022), available at https://www.the-ambient.com/guides/does-amazon-alexa-echo-speaker-listen-conversations-2785. See also Lindsey Barrett and Ilaria Liccardi, Accidental Wiretaps: The Implications of False Positives by Always-Listening Devices for Privacy Law & Policy, 74 Okla. L. Rev. 79 (2022).

68 Id.

69 BBC Science Focus, Can Smart Speakers Eavesdrop on Our Conversations?, available at https://www.sciencefocus.com/future-technology/can-smart-speakers-eavesdrop-on-our-conversations/.

70 Kate O'Flaherty, Amazon, Apple, Google Eavesdropping: Should You Ditch Your Smart Speaker?, Forbes (Feb. 26, 2022), available at https://www.forbes.com/sites/kateoflahertyuk/2020/02/26/new-amazon-apple-google-eavesdropping-threat-should-you-quit-your-smart-speaker/?sh=ff67f7e428d1. See also Danny Bradbury, Smart Speakers Mistakenly Eavesdrop Up to 19 Times a Day, Naked Security By Sophos (Feb. 25, 2020), available at https://nakedsecurity.sophos.com/2020/02/25/smart-speakers-mistakenly-eavesdrop-up-to-19-times-a-day/.

71 Andrew Williams, Smart home privacy: What Amazon, Google, and Apple do with your data, The Ambient (Mar. 10, 2022), available at https://www.the-ambient.com/features/how-amazon-google-apple-use-smart-speaker-data-2765.

72 Jacob A. Manzoor, Hey Siri, What Does the Government Know About Me?: Increasing The Volume On Smart Speaker Awareness, 49 Hofstra L. Rev. 831, 836 (2021).

73 See Biometric Voice Recognition—Everything You Should Know, Imageware Blog, available at https://imageware.io/biometric-voice-recognition/.

74 See O'Flaherty, supra note 70.

75 Lauren Chlouber Howell, Alexa Hears with Her Little Ears—But Does She Have a Privilege? 52 St. Mary's L. J. 837, 843-44 (2021).

76 See: Armina Manning, It's Smart, But Is It Ethical? Confidentiality in an Environment that Is Listening, 24 Va. J. of L. and Tech. 1 (2021).

77 Howell, supra note 75.

78 For a discussion of these opinions, see Manning, supra note 76. See also, ABA Formal Op. 498, supra note 65.

79 ABA Formal Op. 498, supra note 65.