Practical Solutions To Technological 'Slips'

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Law News Network and New Jersey Law Journal
May 25, 2000

It's 4:30 on a Friday afternoon. Joe (or is it Jo?), the junior attorney on a massive litigation matter, has been instructed by the senior partner to send a letter by fax to certain defense counsel and not to others. As our gender-generic associate gets ready to send the fax, s/he isn't sure any more who's on the "receive" list and who's not. So Jo(e) catches the partner on the way out the door for the weekend and asks again. But the partner impatiently shrugs off the query, eager to beat the worst of the traffic.

"I was afraid they'd think I wasn't smart enough, but I guess I was still confused," our associate later confessed. "I knew the letter was important; it was about our defense strategy, and the trial date was coming up. I sent it out, including to one lawyer who wasn't part of the strategy -- actually the lawyer for the defendant we had decided to point the finger at. I don't need to tell you how the partners reacted when they found out." Only blaming the fax on a temp who'd left the firm salvaged our associate's career.

Meanwhile, the defense lawyer who received the misdirected fax made it clear that he'd use it any way he wanted. "I'm completely free of any wrongdoing," he trumpeted. "I'll be damned if I'm going to stand by while the rest of you move your guns into position against my client without fighting back."

There's little doubt that this lawyer fought back. It was probably impossible for him to read the fax, addressed to defense counsel from one of his own teammates, and know it was not intended for his eyes. And once he read it, it was just as hard to un-ring the bell by setting aside the information he learned.

But what if the facts (or the fax) were a little different? Let's say a memo about a privilege log that was supposed to go to general counsel for the client that went to opposing counsel instead. This document will almost certainly arrive on the opposing lawyer's fax machine accompanied by a cover sheet with an admonition that will say something like this:

CONFIDENTIAL!

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMISSION IS CONFIDENTIAL, AND MAY ALSO CONTAIN PRIVILEGED ATTORNEY-CLIENT OR WORK PRODUCT INFORMATION, AS WELL AS CLIENT CONFIDENCES AND SECRETS. IF YOU ARE NOT THE INTENDED RECIPIENT, OR AUTHORIZED TO RECEIVE IT FOR THE ADDRESSEE, DO NOT READ, COPY, DISTRIBUTE OR USE IT. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE NOTIFY US BY TELEPHONE, AND RETURN THE FACSIMILE BY MAIL. WE WILL GLADLY REIMBURSE YOU FOR ANY COSTS YOU INCUR. OUR PHONE, FAX NUMBER AND ADDRESS ARE ALL SET FORTH ABOVE. THANK YOU.

Should opposing counsel read the fax? May they? Must they, in order to protect their clients' interests zealously? Thus far, case law and rules of professional conduct fall far short of unanimity. In fact, they don't even make it to clear consensus.

On one hand, there are those who believe the fax should forever be set aside, at least as soon as the receiving attorney realizes he or she was not one of the intended recipients. After all, they reason, if you left your purse or wallet on the subway, wouldn't you hope someone would return it? If you found someone's purse in the subway, would you take all the money or give it back? On the other hand, those who see "zealous advocacy" as their primary duty will likely ask what their clients would want them to do, and probably answer "Read the fax!"

In November 1992, the ABA drafted an ethics opinion on the subject that says a lawyer's zeal in pursuing the client's cause must be tempered by "doing the right thing." To the ABA this meant setting aside accidentally received information without looking at it, and notifying the sender. But the opinion's drafters could find almost no direct authority in support of this proposition, and like the few courts that have tried to fashion a rule on this subject, they mixed and matched two separate and distinct (though related) concepts: the ethical principle of confidentiality and the evidentiary privilege.

THE SOLUTION

For the moment, the solutions to these issues are more practical than legal, at least until a clear consensus emerges about how lawyers should balance dedicated advocacy with altruistic honesty. Let's return to the fax. First, most offices send faxes starting with the first sheet -- the page that announces "CONFIDENTIAL" and shows the recipients list -- and end with the last sheet. But most offices receiving them get the pages stacked in reverse order, with the confidentiality sheet buried on the bottom. If the Friday evening fax sent by Jo(e) is not picked up until Saturday, chances are it will be a lawyer who plucks it out of the fax machine at the receiving end, not a secretary or clerk who re-stacks the pages and staples them neatly together before putting them in the lawyer's in-box. This lawyer may well start reading long before seeing the cover sheet.

Second, the use of confidentiality cover sheets has become so widespread that the warnings they contain have become marginalized if not totally meaningless. Think about this: What's the meaning of the word "CONFIDENTIAL"? How many times has your firm's lawyers used the standard confidentiality sheet when faxing friends or getting a tee time? If the confidentiality cover sheet is used indiscriminately, it no longer has much, if any, significance on the issue of confidentiality, and ceases to be effective to prevent anyone who's received such a fax from reading it.

The obvious solution, of course, is to have two fax cover sheets, one to go with truly confidential material, and one that says nothing, to cover all other faxes, including ordering pizza and, of course, communicating with the opposing side.

It's interesting that the technology age has focused our attention on fax transmissions, e-mails, cell phone conversations and the like. No one seems much concerned about overnight messenger services. But read the back of your FedEx airbill and you'll find it says the following: "Right To Inspect. We may, at our option open and inspect your packages before or after you give them to us to deliver." Pretty clear, isn't it? It doesn't mean we have no reasonable expectation of privacy when communicating with our clients by FedEx. But it does put things in perspective: Overnight

carriers are no more immune from privacy concerns than e-mail -- or the good old U.S. Postal Service.

Besides, reasonable expectation of privacy is no guarantee or substitute for common-sense security. Cell phone communications are now almost universally considered private and lawyers have become more candid in their drive-time conversations with clients. We suggest adding a practical component. Since cell phones are easier to listen into than regular phone lines, remember that the walls -- or rather the air -- has ears.

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