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TRUSTING THE MACHINES: NEW YORK STATE BAR ETHICS OPINION ALLOWS ATTORNEYS TO USE GMAIL

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ABSTRACT

Information technology is evolving at an unprecedented rate; new forms of communication appear so often that it is difficult to keep track of them all. This presents a difficult problem for attorneys, who must carefully consider whether using new technology to communicate with clients is consistent with the duty of confidentiality. Google's Gmail scans the content of e-mails to generate targeted advertising, a controversial practice that raises questions about whether its users have a reasonable expectation of privacy. The New York Bar responded to this issue in Opinion 820, which states that using an e-mail provider that scans the e-mail content to display relevant advertising does not violate a lawyer's duty of client confidentiality. This article explains the controversial nature of Gmail, the evolution of e-mail in ethics opinions, and Opinion 820's content and implications.

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INTRODUCTION

The use of free e-mail providers has become virtually ubiquitous in electronic communication. But while the majority of e-mail users do not directly pay for Internet-based services, these services do have the potential to generate income. Many e-mail providers recoup some of their costs by placing advertisements inside the e-mail viewing window, or even within the e-mail itself.

Some of the more successful e-mail providers have found ways to target ads to the characteristics of a particular user, which makes the ads more valuable to advertisers than mere random placement. Most providers gather targeting information by monitoring user activities within the providers' domains,[1] such as which ads users click on, which areas of the providers' domain they visit, or even which other Web sites they visit.[2] But one e-mail provider, Google's Gmail, has attracted controversy by gathering information for targeted advertising with software that scans the actual content of e-mails.

Attorneys, through their duty of confidentiality, must ensure that their communications remain private and confidential.[3] Due to the popularity of Gmail, attorneys will likely be corresponding with some clients who use Gmail addresses. Although a number of states have issued ethics opinions on the impact of the duty of confidentiality on e-mail,[4] the New York State Bar is the first to consider Gmail's practice

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[1] In this context, the term "domain" refers to a lower level domain of the Domain Name System (DNS). The three-letter extension such as ".com" or ".net" is a top-level domain, and lower level domains are any word that appears to the left of the extension, such as "Google" or "Yahoo."

[2] For a summary of how targeted online advertisements are generally gathered and delivered, see Testimony of Edward W. Felten, *Behavioral Advertising: Industry Practices and Consumers' Expectations: Hearing Before the H. Comm. on Energy and Commerce the Subcomm. On Commc'ns, Tech. and the Internet, and the Subcomm. On Commerce, Trade and Consumer Prot.*, 111th Cong. (2009) (June 18, 2009), *available at* http://www.cs.princeton.edu/~felten/testimony_18june2009.pdf. In addition to email providers, many web portals and social networking services collect user data for targeted advertisements.

[3] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

[4] So far, at least 22 states have issued ethics opinions regarding the use of e-mail

of actually scanning the text of e-mail messages. The New York opinion concludes that using e-mail services that scan content to generate targeted advertising does not breach the duty of confidentiality so long as the information is not reviewed by humans.[5]

This Article analyzes the New York Bar opinion. It first describes how Gmail conducts targeted advertising. It then reviews the history of bar opinions related to new communications technologies and explains how they have evolved. Next, it examines the nature of the controversy over Gmail. Last, it explains how the New York Bar opinion resolved those issues and discusses key implications of the opinion.

I. GMAIL AND TARGETED ADVERTISING

The New York State Bar Opinion directly implicates Gmail, a popular Web-based e-mail service run by Google. Gmail is a free, Web-based e-mail service with a very large storage capacity.[6] Gmail is currently the third most popular e-mail provider, with over 113 million users worldwide.[7] With such a large user base, it is likely that attorneys

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and the duty of confidentiality. Alaska Bar Ass'n Ethics Comm. Op. 98-2 (1998); St. Bar Ariz. Comm. Rules of Prof'l Conduct Adv. Op. 97-04 (1997); Conn. Bar Ass'n Ethics Op. 99-52 (1999); D.C. Bar Op. 281 (1998); Fla. St. Bar Ass'n Ethics Op. 00-4 (2000); Ill. St. Bar Ass'n Adv. Op. 96-10 (1997); Iowa Sup. Ct. Bd. Prof'l Ethics Conduct Op. 97-01 (1997); Ky. Bar Ass'n Ethics Op. E-403 (1997); Me. Prof. Ethics Comm. Bd. of Overseers of the Bar Ethics Op. 195 (2008); Mass. Bar Assoc. Comm. Prof'l Ethics Adv. Op. 00-1 (1998); Md. Law. Prof. Resp. Bd. Op. No. 19 (1992); Minn. Law. Prof. Resp. Bd. Ethics Op. 19 (1999); Mo. St. Bar Legal Ethics Counsel Adv. Op. 970230 (1997); N.Y. St. Bar Ass'n Comm. Prof'l Ethics Op. 820 (2008) N.C. St. Bar Ethics Op. RPC 215 (1995); St. Bar Ass'n of N.D. Ethics Comm. Op. No. 97-09 (1997); Ohio Bd. Com. Griev. Disp. Adv. Op. 99-2 (1999); Pa. Bar Ass'n Comm. Ethics Prof. Resp. Op. 97-130 (1997); S.C. Bar Ethics Adv. Comm. Op. 97-08 (1997); Sup. Ct. Tenn. Bd. of Prof'l Resp. Adv. Op. 98-A-650(a) (1998); Utah St. Bar. Ethics Op. 00-01 (2000); Vt. Adv. Ethics Op. 97-5 (1997). Hereinafter, these opinions will be referred to as Advisory Opinions (Adv. Op.) or Ethics Opinions (Ethics Op.).

[5] NY Ethics Op. 820 (2008).

[6] Gmail launched with two gigabytes of storage capacity per user. Currently, the storage capacity is over seven gigabytes, and it is still growing.

[7] Chua Hian Hou, *Gmail Users Locked Out*, THE STRAITS TIMES, Feb. 25, 2009, http://www.straitstimes.com/Breaking%2BNews/Singapore/Story/STIStory_342

will be expected to send e-mail correspondence to Gmail accounts.

Gmail generates revenue by displaying advertisements next to the content of the messages. In order to tailor these advertisements to the Gmail user, Google's software scans the content of an open e-mail for relevant text and then displays advertisements related to that text.[8] For instance, if a Gmail user opens an e-mail about an upcoming trip to Chicago, the web interface might display ads for hotels and restaurants in Chicago. The advertisements are entirely text-based, which minimizes both the effect on the user and bandwidth usage.

Gmail's process of scanning e-mail content and matching it to advertisements is entirely automated.[9] Humans are not directly involved with the process, and the information gleaned from the e-mails is not disclosed to any third parties, including the advertisers.[10] The ad content is dynamically generated when an e-mail is opened, meaning that ad content is not attached to particular accounts.[11] Although Google's patent on the technology covers the ability to create logs of user profiles, which can include keywords and potentially sensitive data,[12] Google's Vice President of Engineering stated that Gmail does not use this feature.[13]

Automated scanning of e-mail content is not unique to Gmail. Virtually every e-mail service conducts similar automated scanning for many purposes, including "spam filtering, virus detection, search, spellchecking, forwarding, auto-responding, flagging urgent messages, converting incoming e-mail into cell phone text messages, automatic saving and sorting into folders, converting text URLs to clickable links, and reading messages to the blind."[14] The primary difference between

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818.html. The other top e-mail providers are Hotmail (283 million) and Yahoo (274 million).

[8] Google, About Gmail, Jan. 2007, http://mail.google.com/mail/help/about_privacy.html#scanning_email (on file with the author).

[9] *Id.*

[10] Google, About Gmail, Jan. 2007, http://mail.google.com/mail/help/about_privacy.html#targeted_ads (on file with the author).

[11] *Id.*

[12] Electronic Privacy Information Center, Gmail Privacy Page, Aug. 8, 2004, http://epic.org/privacy/gmail/faq.html#23.

[13] Kim Zetter, *Free Email With a Steep Price?*, WIRED, April 1, 2004, http://www.wired.com/techbiz/media/news/2004/04/62917.

[14] Google, About Gmail, Jan. 2007, http://mail.google.com/mail/help/about

Gmail's targeted advertising technology and these other uses is that Gmail's scanning generates income from third-party advertisers, while the other uses are typically billed as services for the user.

II. ELECTRONIC COMMUNICATIONS AND CONFIDENTIALITY

The legal ethics community has been cautious about the ability of lawyers to maintain the confidentiality of communications in newly introduced electronic media. For example, when cell phones were first introduced, federal courts did not find a reasonable expectation of privacy in their use, partially because no law directly prohibited interception of their signals.[15] Then in 1986, Congress passed the Electronic Communications Privacy Act (ECPA), which made it illegal to intentionally intercept electronic transmissions.[16] Following the protection of the ECPA and advances in cell phone technology from analog to digital transmissions, state bars found their use consistent with an attorney's duty of confidentiality.[17]

The American Bar Association (ABA) first considered the issue of e-mail confidentiality in 1986. The ABA concluded that before communicating client confidences over an electronic network, attorneys needed to obtain bar approval or make an informed opinion regarding the system's reliability in maintaining confidentiality.[18] Similarly, the initial state bar ethics opinions held that unfettered use of e-mail was not consistent with the duty of confidentiality. A 1995 ethics opinion from South Carolina required express waivers from the

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_privacy.html#targeted_ads (on file with the author).

[15] *See* Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989) (finding that cell phone communications are not protected by the Wiretap Act, and noting that the events in question occurred before the ECPA was passed).

[16] 18 U.S.C. § 2511(1) (2008). The ECPA was written to apply to cell phone communication, but it was amended in 1994 to apply to cordless telephone communication and e-mail. Mitchel L. Winick, Brian Burris & Y. Danae Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 TEX. TECH L. REV. 1225, 1242-1248 (2000).

[17] Mark W. Pearlstein & Jonathan D. Twombly, *Cell Phones, Email, and Confidential Communications: Protecting Your Client's Confidences*, 46 B. B.J. 20, 21 (2002).

[18] Winick, et al., *supra* note 16, at 1249.

clients unless confidentiality was certain,[19] and a 1996 ethics opinion from Iowa required encryption of sensitive materials.[20] After the Iowa opinion, no other state opinions required encryption except in unusual circumstances.[21] Both the Iowa and South Carolina opinions were later amended to remove the encryption requirements.[22]

In 1999, after extensively reviewing the issue, the ABA issued a formal opinion on e-mail confidentiality.[23] The opinion analyzes risks associated with all modes of e-mail transmission, considers the security of alternative means of communication, and notes the statutory protections for illicitly intercepting e-mail.[24] It concludes "lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure."[25] The opinion states that while some state bars have required express consent from clients, "more recent opinions reflecting lawyers' greater understanding of the technology involved approve the use of unencrypted Internet e-mail without express client consent."[26] The opinion also recommends, but does not require, that attorneys use encryption in sensitive e-mail communications.[27]

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[19] S.C. Bar Ethics Adv. Comm. Op. 94-27 (1995).

[20] Iowa Sup. Ct. Bd. Prof'l Ethics Conduct Op. 95-30 (1996).

[21] Winick, et al., *supra* note 16, at 1253. Some opinions, such as the opinion from Connecticut, describe these as being circumstances "which would place a lawyer on notice that there is a greater than ordinary risk of interception or unauthorized disclosure (such as an e-mail "mailbox" which is accessible to persons other than the intended recipient) . . ." Conn. Ethics Op. 99-52 (1999).

[22] *See* Iowa Ethics Op. 96-01 (1996); S.C. Adv. Op. 97-08 (1997). The amended Iowa opinion now provides that "with sensitive material to be transmitted on e-mail, counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof . . . or it must be encrypted or protected by password/fire-wall or other generally accepted equivalent security system."

[23] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

III. PRIVACY CONCERNS SURROUNDING GMAIL

When Google introduced its Gmail service in March 2004, it was met with widespread distrust from privacy advocates. Within one month, 31 privacy and civil liberties organizations published an open letter to Google decrying the practice of scanning e-mails for targeted advertisements.[28] The letter argues that scanning e-mails "violates the implicit trust of an e-mail service provider," that Google's policies lacked clarity, and that the scanning set a precedent for reduced expectations for privacy.[29] Regarding the actual privacy of the content, the letter states that "a computer system, with its greater storage, memory, and associative ability than a human's, could be just as invasive as a human listening to the communications, if not more so."[30] The controversy was so great that it even provoked legislation in California.[31]

Numerous technology and business advocates—and even some prominent privacy advocates—criticized the outcry against Gmail.[32] Those organizations maintained that the harm envisioned by Gmail's opposition was largely hypothetical, Gmail was operating within the bounds of the law, and there was no real threat that private information would be divulged to humans, which was the central

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[28] Privacyrights.org, Thirty-One Privacy and Civil Liberties Organizations Urge Google to Suspend Gmail, April 6, 2004, http://www.privacyrights.org/ar/GmailLetter.htm. The letter acknowledges that the scanning technology is essentially as invasive as scanning for spam or viruses, but insists that displaying ads "is fundamentally different than removing harmful viruses and unwanted spam."

[29] *Id.*

[30] *Id.*

[31] In the same month that the open letter was issued, April of 2004, California State Senator Liz Figueroa introduced SB1822, Ban on Secretly Scrutinizing E-Mail Messages for Targeted Advertising. Grant Yang, *Stop the Abuse of Gmail*, 2005 DUKE L. & TECH. REV. 14, 23 (2005). The bill would allow e-mail providers to derive information from the content of their communications, but would prohibit using it for the provider's marketing purposes. Thus, scanning for antivirus or spam removal would be legal, but Gmail's scanning for targeted advertising would not be. The legislation was ultimately abandoned.

[32] Brad Templeton, Privacy Subtleties of Gmail, http://www.templetons.com/brad/gmail.html (last visited May 2, 2010). Brad Templeton is the chairman of the Electronic Frontier Foundation.

concern of both privacy groups and attorney confidentiality.[33] Nevertheless, the controversy has followed Gmail and may have been the impetus for the New York State Bar to consider the implications on attorney-client confidentiality.

IV. THE NEW YORK STATE BAR OPINION AND ITS IMPLICATIONS

Opinion 820 starts by pointing out that a previous New York State Bar Opinion found a reasonable expectation of privacy in the use of unencrypted e-mail.[34] The prior opinion states that a lawyer may not transmit client confidences by e-mail where there is a heightened risk of interception, and that a lawyer "who uses internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception."[35] Hence, Opinion 820 asks whether Gmail's scanning for targeted advertising presents a heightened risk as a new technology. Although Gmail is never specifically named, the opinion refers to "the particular e-mail provider's published privacy policies," implying a focus on Gmail.[36] The opinion observes that according to those privacy policies, no humans will be exposed to the e-mail content, and therefore concludes that the risks to confidentiality

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[33] *See* Nicole A. Wong, *Google's Gmail and Privacy Policy*, 797 PRAC. L. INST./PAT. 263 (2004). The article consists of exerts from prominent publications and organizations complied by an attorney for Google that support Gmail's privacy policy and technology.

[34] N.Y. St. Bar Ass'n Comm. Prof'l Ethics Op. 709 (1998).

[35] *Id.* A number of other state e-mail confidentiality opinions have similar caveats to their permission that could be grounds for later exceptions under particular circumstances. *See, e.g.*, DC Ethics Op. 281 (1998) ("absent special factors"); Mass. Adv. Op. 00-1 (1998) (use of e-mail "does not, *in most instances*, constitute a violation…") (emphasis added); Md. Ethics Op. 19 (1999) ("precautions taken by a lawyer depend on the circumstances"); Me. Ethics Op. 195 (2008) ("reasonable judgment may require additional safeguards depending on the circumstances); Tenn. Adv. Op. 98-A-650(a) ("unless unusual circum-stances require enhanced security measures"); Utah Ethics Op. 00-01 (2000) (when "the lawyer has reason to believe that the risk of interception is higher, he may want to use a means of communication with higher security"). New York's opinion, however, appears to be the only one that requires lawyers to stay abreast of evolving e-mail technology to reassess the issue, and hence they may be the only state that issues an opinion on Gmail.

[36] N.Y. Ethics Op. 820 (2008).

through Gmail are no greater than they are with other e-mail services in general.[37]

After concluding that the use of Gmail does not violate an attorney's duty of confidentiality, the opinion draws an analogy between the commercial dimension that appears to be at the heart of the Gmail controversy and an attorney's use of external support services. The commercial dimension is the primary difference between Gmail's advertising service and other common software scanning methods, and it appears to be the source of much of the controversy. New York Code provides that a lawyer may not "knowingly. . . [u]se a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."[38] According to the opinion, Gmail's advantage from the information, advertising profits, is not substantially different than the profits that lawyer services such as litigation support companies make.[39] This view is consistent with a recently published ABA opinion finding that it is acceptable to outsource technical support staff, so long as reasonable precautions are taken to ensure that sensitive information remains confidential.[40] In addition, the observation addresses the heart of the Gmail controversy: not that personal information is used for some malicious purpose to the detriment of the customer, but that Gmail is making a profit from it.

The opinion has several implications for the activities of attorneys and the general acceptance of technology by the legal community. First, it makes attorneys' jobs easier by allowing them to use the third largest e-mail provider. Second, the opinion avoids presenting a threat to other automated scanning tools used by e-mail providers. The primary difference between Gmail's scanning and anti-virus scanning is the marketing purpose. The marketing purpose has no realistic impact on confidentiality, so an opinion invalidating the use of Gmail would also cast doubt on other automated scanning tools. And finally, the

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[37] *Id.*

[38] N.Y. Code DR 4-101(B)(3).

[39] N.Y. Ethics Op. 820 (2008).

[40] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008). The opinion also states that the client's informed consent is required if their confidential information will be revealed to the technical support staff.

success of Gmail's service suggests that other similar advertising models will come into existence in the future. As technology and advertising models continue to evolve, companies will probably come up with new ways to generate profit from similar targeted advertisements. These business models do not threaten confidentiality as long as humans are not exposed to the information used to generate the advertisements. This opinion helps to pave the way to the immediate acceptance of more business models like Gmail.

CONCLUSION

Like many new communications technologies, Gmail was controversial when first introduced due to privacy and security concerns. State bars reflected this reluctance to trust the security of a new communication technology by initially proscribing the use of e-mail to transmit client confidences. But after several years of using and becoming familiar with various e-mail services, the legal community is beginning to accept the risks associated with online data storage and mechanized scanning technology. Following these developments, the first state bar opinion to address the confidentiality of Gmail concluded that it does not pose a greater risk than e-mail generally. The New York State Bar's opinion has positive implications for attorneys and technology, and should provide guidance to other states that consider this issue.