Lawyer A has struggled financially as a sole practitioner for a number of years. Law Firm B approaches Lawyer A about the possibility of practicing law in an "of counsel" relationship with Law Firm B while continuing to maintain Lawyer A's sole practice. Lawyer A is interested in generating additional income without adding overhead to Lawyer A's existing practice. Can Lawyer A enter into an "of counsel" relationship with Law Firm B and still maintain a separate sole practice without violating M.R.P.C. 1.5(e)?

Lawyer A can enter into such a dual relationship with Law Firm B provided Lawyer A's arrangement "of counsel" is clearly set forth on Law Firm B's letterhead and/or marketing material. Further, Lawyer A's legal services with Law Firm B should be regular and continuous, rather than occasional or singular. See Professional Ethics Commission Advisory Opinion #175 (4/12/01).

Lawyer A does not violate M.R.P.C. 1.5(e) which prohibits a lawyer from dividing a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office provided Lawyer A acts in a true "of counsel" role which is established in good faith. Lawyer A and Law Firm B must be very clear with all potential clients whether the proposed engagement is with Lawyer A alone or with Law Firm B to avoid misleading clients. Finally, Lawyer A and Law Firm B must continue to carefully apply the conflict of interest rules which includes disqualification requirements for both Lawyer A and Law Firm B due to conflicts. See M.R.P.C. 1.7.
Enduring Ethics Opinions: Opinion #195 - Client Confidences: Communications with Clients by Unencrypted E-mail - By Robert J. Stolt, Esquire - Professional Ethics Commission

On June 30, 2008, the Professional Ethics Commission issued Opinion 195 answering affirmatively whether an attorney could "... utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality." Opinion 195 was issued under Maine Bar Rule 3.6(a) and (h)(1). Maine Bar Rule 3 was abrogated the next year and replaced by Rule 1.6 on August 1, 2009, when the Supreme Judicial Court adopted the "Maine Rules of Professional Conduct". The SJC adopted Maine's version of the ABA Model Rules "to coordinate" Maine's rules with the ABA Model Rules, "to maximize" conformity of Maine's rules with other states embracing the ABA Model Rules; and, "to preserve" the integrity of the manner in which Maine lawyers practice law. (Maine Rules of Professional Conduct, Preamble (1)).

Opinion 195 endures today. Rule 3.6 and its replacement, Rule 1.6, rely on the same "... general standard requiring lawyers to 'employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services.'" Opinion 195 recites then Maine Bar Rule 3.6(h), ABA Formal Opinion No. 99-413 and Rule 1.6 of the ABA Model Rules as support for this general principle and also for the appropriate methodology to utilize in determining what is "reasonable care and skill" necessary to apply the lawyer's "best judgment" in the particular circumstance.

The ABA has issued two additional Formal Opinions since Opinion 99-413. First, Formal Opinion 11-459 requiring attorneys to warn clients of the "significant risks" of disclosure where the client authorizes the attorney to send e-mail to the client at the client's place of work or to the client to an employer mobile device. Risk of interception or access is significant even when the employee has a personal address to equipment owned by the employer. The second Formal Opinion is Opinion 11-460 which deals with the obligation of employer counsel upon finding e-mail between an employee in the employee's personnel file or on an employer electronic device. This is another significant risk of e-mail communication between client and attorney that the client has deemed safe and has authorized use by client's attorney. The significance of these opinions is as examples of significant risks of third parties through the misapplication of an attorney's best judgment.

The ABA has recently amended comments 18 & 19 to Rule 1.6 (select left drop down menu and click on Rule 1.6 comment). The revised comments discuss [18] lawyer requirements in "...safeguarding client information from unauthorized access by third parties or inadvertent or unauthorized disclosure" and the factors to consider; and, [19] the lawyer's duty of reasonable precautions.

The Commission's subsequent Opinion 207 regarding Cloud Storage discusses the same principles and concepts regarding confidentiality. In Opinion 207, the Commission canvassed the ethical challenges of modern technology and synthesized those challenges to general rules of reasonable care and skill necessary to apply the lawyer's best judgment. As the Commission concluded in Opinion 195: "... as a general matter and subject to appropriate safeguards, an attorney may utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality."

Enduring Ethics Opinions: Opinion #46 -Advertising for Personal Injury Cases - By Ellen Best, Esquire - Professional Ethics Commission

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Hard as it is to imagine now, Opinion #46, issued in 1984, addresses the question of whether a law firm may advertise to attract personal injury clients. A proposed generic advertisement in the opinion reads as follows:

INJURED? Who's on your side when the insurance company decides how much to pay you for your injury? We can work for you and help you get as much money as you should. You can come in for a free consultation. You may have a good case and not know it. WE WILL FIGHT FOR YOU.

This opinion addresses the specific question of whether the proposed advertisement is permissible under the bar rules and addresses it in the context of Maine Bar Rule 3.9 (a) which prohibited false advertising and 3.9 (b) which defined "a false, fraudulent, misleading, or deceptive statement or claim."

The Rule of Professional Conduct which would govern this question today is Rule 7.1 Communications Concerning a Lawyer's Services. The rule is short and to the point - "A lawyer shall not make a false or misleading communication about the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Without specifically mentioning advertising it neatly covers the subject in any media or format. The Comments to the rule also note that statements may be truthful but still misleading and are therefore prohibited.

The analysis in Opinion #46 viewed the proposed advertisement in the context of the definitions set forth in Rule 3.9 (b). The current rule omits those definitions, and substitutes no others. Instead Rule 7.1 places, as the Reporter's Notes state "a reasonable obligation on lawyers to ensure that their statements about themselves or their legal services are not false or misleading." However, current Rule 8.4 (Misconduct) does list a number of prohibited acts, and includes language similar to parts of former Bar Rule 3.9 (b), but places those acts in a larger context than advertising.

The proposed advertisement, permissible under Maine Bar Rule 3.9, is also consistent with and remains permissible under the provisions of Maine Professional Conduct Rule 7.1. While the definitions of "a false, fraudulent, misleading or deceptive statement or claim" no longer appear in the rule, the methodology of review remains the same. The rule relies on the integrity of the lawyer to present the lawyer's skills and services in an appropriate manner and that is the underlying theme of Opinion #46, an opinion still consistent with the Maine Rules of Professional Conduct.