

LAW PRACTICE MANAGEMENT ETHICAL CONSIDERATIONS

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It almost goes without saying that technology plays an important role in the administration and practice of law. But, some lawyers still do not see the value in learning or using technology. As you read earlier in this course, former corporate counsel for Kia Motors, America, Inc. Casey Flaherty, has created an audit tool to assess lawyer's technology skills.¹ The audit serves as a wake-up call to lawyers who are now trapped in the dust behind the technology bandwagon. Interestingly, Mr. Flaherty has developed a practice² similar to that of Professor Wilson's practice³.

Cloud-based software solutions are marketed as the latest and greatest tools. Service providers say: access your firm's information from anywhere, from any device, as long as you have an internet web-connection. Let us worry about privacy issues. Let us perform automatic data backups. Our web-based software is easy to use. The provider rolls out free updates to the user interface, making you and your firm more efficient. And, the software is likely cheaper than what the lawyer is using now. There is nothing to lose! Some providers live up to the hype. Others have risen quickly and faded away just as quickly.

That said, some lawyers still do not like electronic anything. More importantly, those lawyers (and even some tech savvy lawyers) have not taken the time to understand the ethical implications that arise when using technology in the practice of law.

¹ <http://www.legaltechaudit.com> (last accessed November 29, 2015).

² <https://www.linkedin.com/in/dcaseyflaherty> (last accessed November 27, 2016).

³ <http://sethrwilson.com/> (last accessed November 27, 2016).

Lawyer ethics are governed by each state's version of Rules of Professional Conduct.⁴ These rules are based on the American Bar Association's (ABA) Model Rules of Professional Conduct.⁵ The ABA sets forth the proposed guidelines for lawyers to follow and those proposed guidelines are adopted or adopted as modified by the majority of the states.⁶ There are a few ethical rules that are hallmarks of the profession: lawyers cannot represent someone if the lawyer has a conflict of interest, lawyers must communicate with their clients, lawyers must protect confidential information, and lawyers must protect client property. Associated rules address the lawyer's duty to maintain competence, both with the area of law practiced, and the practice of law itself.

With tangible paper and things, lawyers generally had a good grasp on their ethical duties and how to comply with the ethics rules. The problem is that information is now largely electronic. At the risk of stating the obvious, there is a difference between paper/tangible files and electronic files. There is a difference between email and a fax machine. There are different risks associated with electronic information than with information in paper form. All software is not created equal regarding protecting information.

Nationally, the ABA recognizes the issues associated with increased use of technology in the practice of law. In early 2013, the ABA amended its model rules

⁴ See, e.g., the Indiana Rules of Court, Rules of Professional Conduct, available at http://www.in.gov/judiciary/rules/prof_conduct/ (last accessed November 29, 2015).

⁵ See ABA Model Rules of Professional Conduct, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last accessed November 29, 2015).

⁶ California has not adopted the ABA Model Rules. See State Adoption of the ABA Model Rules of Professional Conduct, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last accessed November 29, 2015).

regarding a lawyer's competence. The ABA Rules now require the lawyer to maintain technology competence as part of the duty to maintain general competence in the practice of law. Specifically, the lawyer "should keep abreast of changes in the law and its practice, including the **benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."⁷ While the competence rule arguably already had this requirement, the change makes it clear that lawyers must understand the technology they use in their practice from the ABA's perspective.

Another issue that has received mainstream attention is security breaches involving personal information. Lawyers often handle sensitive client information. But, the lawyer's duty is broader than just sensitive information. ABA Model Rule 1.6 requires the lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."⁸ Two key points from this rule: first, the lawyer must make reasonable efforts to keep client information confidential. The duty includes protection against accidental disclosure. Second, the lawyer must protect "information relating to the representation of a client." That could be interpreted broadly to include calendar entries mentioning the client, a client's contact

⁷ Emphasis added. ABA Model Rule 1.1 [8], available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (last accessed November 29, 2015).

⁸ ABA Model Rule 1.6 Confidentiality of Information, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (last accessed

information, social media postings about attending a hearing on behalf of a client and the like.

In today's connected environment, it is easy to imagine scenarios where the confidentiality of client information could be compromised. What happens when the lawyer stores client files on a cloud-based practice management system and the cloud-provider suffers a data breach, inadvertently exposing client information? Has the lawyer breached its duty of confidentiality? What about using email? How many lawyers send confidential information through unencrypted channels? Is that a breach of the duty of confidentiality?⁹ The answer is probably yes.

Further, lawyers have a duty to supervise non-lawyer assistants, which include legal assistants, paralegals, bookkeepers, accountants, and litigation support vendors (copying/scanning companies).¹⁰ This is a challenge by itself. But now, the duty is increasing. The ABA Model Rules include in the duty to supervise nonlawyer assistants, "using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."¹¹ Now that this duty now extends to third party

⁹ See Attorney-Client Confidentiality and Email, available at <http://lawyerist.com/attorney-client-confidentiality-email/> (last accessed November 29, 2015).

¹⁰ See ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistant, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html (last accessed November 29, 2015); See also, Comment [3], which relates to using nonlawyers outside of a firm, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/comment_on_rule_5_3.html (last accessed November 29, 2015).

¹¹ ABA Model Rule 5.3 [3], available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/comment_on_rule_5_3.html (last accessed November 29, 2015).

service providers, including software vendors and cloud service providers, the lawyer should understand the service provider's terms of service, privacy policies, data use and storage policies to properly supervise use of those types of vendors. If the law firm maintains its own server(s), the lawyer should know how that information is stored and protected from inside and outside the firm.

Lawyers have a general duty to safeguard client property.¹² While this rule specifically addresses physical property and client funds, remember that it includes client files in paper or electronic format.¹³ In an electronic environment, having client information on one hard drive that fails or is stolen could be disastrous to the lawyer. The lawyer should be sure to have adequate backups and should have adequate encryption in place to protect digital client files.

The ABA Model Rule amendments clearly extend the lawyer's ethical duties to better understand the implication of technology use and the practice of law. As the "big three" (Microsoft, Google, Apple) continue to push cloud-based software solutions, lawyers eventually will have no choice but to move data to the cloud.¹⁴ Any lawyer who uses email in his or her practice needs to understand the basics of how email works, since email uses the "cloud." The issue of cloud computing is not going away and comes with its own set of ethical implications. What happens if one of the cloud-providers suffers a data breach? Does the lawyer have an obligation to

¹² ABA Model Rule 1.15: Safekeeping Property, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property.html (last accessed November 29, 2015).

¹³ See, e.g., *In re Crumpacker*, 383 N.E.2d 36 (1978) (refusal of attorney to return client files was a violation of what became Indiana Rules of Professional Conduct 1.15); See also, *In re Golding*, 700 N.E.2d 464 (Ind. 1998) (an attorney's failure to return client's materials when so requested by the client was a violation of this rule).

¹⁴ This is especially true for smaller firms when considering the cost of keeping data inside the firm or hosting it with a cloud provider. The march toward cloud-based applications continues to increase since 2013 when I first wrote this article.

monitor the service provider's activities and report breaches to clients? Does that cloud provider mix the lawyer's client data with all other data hosted by the provider? If the company is served with a subpoena for records relating to a business that in no way involves the client, is the lawyer confident that client files will not be turned over as part of that data sweep if the names or search terms reveal similarities?

All of these issues are cause for legitimate concern. But, these issues should not stop the use of cloud-based solutions. There are steps lawyers can take to meet ethical and practical obligations. First, the lawyer should have appropriate engagement agreements with clients. The client should give written, informed consent to the types of technology the lawyer uses and the communication methods used by the firm.¹⁵ If the client is comfortable with the technology used by the lawyer and firm to access and store client information, the client's signature should go a long way to establishing that the lawyer took reasonable steps to meet his or her ethical requirements.

Second, the lawyer should have written policies and procedures governing the technology used by the firm. These policies should address approved hardware and software, including antivirus, firewall, and malware protection on both servers and workstations. They should also address who has access to what data within the firm. The policies should address social media use within the firm. The policies should address backup and retention of data. Perhaps most importantly, the firm should have two lawyers, if possible, who know and maintain the firm's technology.

¹⁵ ABA Model Rule 1.0(b) and (e): Terminology, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_0_terminology.html (last accessed November 29, 2015).

Further, those lawyers should ensure that staff are well trained on the software and policies used by the firm.

Third, for cloud-based vendors, the lawyers should check industry standards to determine if a potential software vendor meets the lawyer's ethical requirements. Check with the local ethic's office to determine if there is an ethic's opinion on the permissibility of using a cloud based solution. There are many resources available to determine what is an appropriate cloud based or software based practice management system.¹⁶ Finally, a call to the lawyer's IT professional will help the lawyer understand if a cloud-solution is right for the firm.

Technology, used appropriately, is a great tool for lawyers. But, lawyers must understand the technology they use in their practice to ensure they are meeting their ethical requirements. The standard is reasonableness. Lawyers need to be able to explain the steps taken to review a software provider's qualifications and explain why that vendor was chosen for the firm. Lawyers need to communicate with their clients about the technology the firm uses and get permission from the client to use that technology. The lawyer "is also guided by personal conscience and the approbation of professional peers" in maintaining ethical competence.¹⁷ The lawyer should continue to learn about ways to appropriately use technology to enhance the practice of law.

¹⁶ See, e.g., Cloud Ethics Opinions Around the U.S., available at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last accessed November 29, 2015).

¹⁷ ABA Model Rules Preamble: A Lawyer's Responsibilities, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (last accessed November 29, 2015).