

Spotlight on Professional Responsibility & Technology: What Every Attorney Needs to Know



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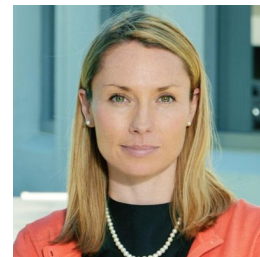
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The views expressed in this presentation do not serve as legal advice. Please contact an attorney for legal counsel on your specific matter or needs.

Your Presenter

Nicole Clark, CEO - Trellis Research, Inc.



- Business litigation and labor and employment attorney who has handled litigation in both state and federal courts
- Worked at a variety of law firms ranging from mid-size litigation boutiques to large firms, and is licensed to practice law in three states
- Deeply committed to helping lawyers leverage technology to gain a competitive advantage and achieve a more favorable outcome for their clients
- Graduate of University of Massachusetts, Amherst | Rutgers University School of Law

Your Presenter

Michael Swarz - Trellis Research, Inc.



- Michael Swarz is with Trellis Research, a legal analytics platform that uses AI and machine learning to provide state court litigators with strategic legal intelligence and judicial analytics.
- He has been published on the topics of electronic discovery, information governance, digital evidence, and legal technology. He is also a frequent speaker, having presented on legaltech and e-discovery before numerous legal, IT, records, and compliance audiences.
- Michael is a graduate of Brandeis University and New England School of Law in Boston.

The Importance of Communication

The background features a light blue gradient. In the upper half, there are several overlapping speech bubbles in various colors: red, orange, yellow, green, blue, purple, and pink. In the lower half, there are silhouettes of a group of people in various poses, some holding papers or devices, rendered in shades of blue and black. A dark grey rectangular box with a thin green border is positioned on the left side, containing text.

Before we get started....

“The single biggest problem in communication is the illusion that it has taken place”

-George Bernard Shaw

Agenda

- A Lawyer's Professional Responsibilities Towards Technology - ABA Rules
- What are the States Doing?
- Practical Strategies for Complying
- Best Practices and Takeaways
- Q & A



View from the ABA: Technology Duties & Ethics

Attorney Duty

ABA Model Rules

Competence

1.1

Confidentiality

1.6

Supervise

5.3

Communicate

4.1

Ethics Opinion

Formal Opinion 477

ABA Model Rule 1.1 [8] - Duty of Competence

COMPETENCE

[8] To maintain the requisite knowledge and skills, a lawyer should keep abreast of changes in the law and its practices, 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.

Clear attorney duty of competence relating to technology added in 2012 Amendments

ABA Model Rule 1.6 - Duty of Confidentiality

(a) A lawyer should not reveal information related to the representation of a client, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation.....

(c) A lawyer shall make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of the client.

*** (c) added in 2012 Amendments - 'reasonable efforts' is the attorney duty relating to preventing inadvertent or unauthorized disclosure of technology matters to preserve confidentiality***

Model Rule 1.6 [18] - Duty of Confidentiality

ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against:

- unauthorized access by third parties; and
- inadvertent or unauthorized disclosure by the lawyer; or

Model Rule 1.6 [18] - Confidentiality CONTINUED

- inadvertent or unauthorized disclosure by other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

Confidentiality duty includes 3rd party helping attorney and extends to all technology related matters and communications

Discussion Question: How should this duty be applied to communications made while travelling or remote via Zoom? Is it okay to communicate with a client using open wi-fi?

Model Rule 1.6 [18] Confidentiality - CONTINUED

[18] ...inadvertent or unauthorized disclosure of information relating to the representation of a client does not constitute a violation if the lawyer has made reasonable efforts to prevent the access or disclosure.

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to:

Model Rule 1.6 [18] Confidentiality - CONTINUED

- 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
- the extent to which the safeguards adversely affect the lawyer's ability to represent client's (e.g. by making a device or important piece of software excessively difficult to use)

Above are the factors to consider when determining whether your firms' efforts to avoid disclosure or to safeguard confidentiality of technology info is reasonable or not, and thus permitted or not.

Model Rule 5.3 - Duty to Supervise

SUPERVISION

Responsibilities Regarding Nonlawyer Assistance

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make *reasonable efforts* to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

Model Rule 5.3 - Duty to Supervise - CONTINUED

(b) a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable efforts* to ensure that the person's conduct is compatible with the professional obligations to the lawyer....

Attorney supervision over non-lawyers must ensure the non-lawyer is operating in a fashion consistent with the attorney's professional obligations - and that their firm has appropriate measures there as well.

Discussion Question: What steps does your firm take to meet its duty of supervision and to ensure conduct compatible with professional obligations? Ramifications of delayed bar exam?

Model Rule 5.3 [3] - Duty to Supervise

SUPERVISION OF LAWYERS OUTSIDE THE FIRM

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. When using such service 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. The extent of this obligation depends on the circumstances, including:

Model Rule 5.3 [3] - Duty to Supervise - CONT'D

- education, experience and reputation of the nonlawyer
- the nature of the services involved
- terms of any arrangements concerning the protection of client information, and
- the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality."

When an attorney engages and supervises nonlawyers outside of their firm on technology-related matters, the attorney must make sure the services being provided are consistent with their professional ethics and must make special efforts to preserve the confidentiality.

Model Rule 4.1 - Duty to Communicate

COMMUNICATIONS

(a) A Lawyer shall:

1. promptly *inform the client of any decision or circumstance with respect to which the client's informed consent...*;
2. *reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
3. keep the client reasonably informed about the status of the matter;

ABA Formal Opinion 477

Securing Communication of Protected Client Information

“A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law or when the nature of the information requires a higher degree of security.

ABA Formal Opinion 477 - CONTINUED

Attorney duty of communication to clients is maintained when an attorney takes reasonable efforts to prevent improper access to it, and if needed, takes special precautions.

Discussion Question: A lawyer should take reasonable steps to make computer systems more secure and limit the vulnerabilities.

When communicating with clients what are some of the areas your firm has implemented here to protect confidentiality?

What are the States doing?

- 38 states, including **New York**, have adopted the ABA Model Rules Duty of Technology Competence - so far. [See LawSitesBlog](#).
 - Most of the remaining states are considering it.
- **California** has not adopted the ABA rules, but still imposes the duty with its own ethics opinion requiring attorneys to be technologically competent by “keeping abreast of changes in the law and its practice, including the benefits and risks associated with technology”. [See Formal Opinion No. 2015-193](#).

What are the States doing? CONTINUED

- **Florida** adopted the ABA technology competency rules and have gone as far as requiring mandatory CLE for them - attorneys in FL need 3 CLE credits.
 - And takes the ABA up notch by saying lawyers should be:
 - “...keeping abreast of changes in the law and understanding its practice, including the benefits and risks associated with technology.” [See Florida Rule 4.1-1.](#)
 - emphasizing “competent representation may also involve the association or retention of a non-lawyer advisor of established

Tech to Support Professional Responsibilities

Important Considerations

- Leverage solutions that support automation of certain functions
 - Popular choice is automating Legal Analytics -- ALM's 2020 Legal Analytics Survey found 90% of users say Legal Analytics make them a better, more informed, more efficient and effective lawyer
- Test and adjust processes periodically to improve efficiencies

Tech & Professional Responsibilities - CONT'D

Important Considerations

- Implement solutions that enable the research and sharing of data across the enterprise
- Adopt solutions with users in mind and establish feedback points
- Search, audit and reporting across solutions

Office Best Practices

- Form interdisciplinary team to proactively address potential legaltech issues
 - Legal, Team IT and Records management personnel
 - Other professionals as necessary (Compliance, Audit etc.)
- Engage IT department for targeted programs and solutions
 - Focus on: network/server security, password permissions, access rights, technology vulnerabilities, cloud computing & due diligence with vendors
 - Designation of legaltech liaisons

Office Best Practices - CONTINUED

- Investment in the right technology to maximize legal intelligence
 - Legal research
 - Digital forensics
 - eDiscovery
 - Judicial analytics
 - Computer system security
 - Opposing counsel intelligence
 - State court record search

Trellis Highlights

- Legal analytics platform that uses AI and machine learning to provide litigators with strategic legal intelligence and judicial analytics
- Featured in leading legal industry periodicals including the American Bar Association, National Law Journal and Law.com
- Customer-centric roadmap aimed at allowing firms to easily adopt technology that will allow them to be more efficient, while simultaneously achieving better outcomes for clients.

Contact and Q&A

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