

Legal Ethics in Digital Practice of Law: Duties of Competence, Candor, Fairness, Supervision, Communications

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Legal Ethics in Digital Practice of Law

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Ethics in a Digital Age

- 1.1 Competence
- 1.6 Confidentiality
- 3.3 Candor
- 3.4 Fairness
- 4.2, 4.3 Non-Clients
- 5.1, 5.3 Supervision
- 7.1 Communications

Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Model Rule 1.1

Competence and Technology

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.

Comment [8] to ABA Model Rule 1.1

Rule 1.1 Technology Clause

- Comment 8 amended in 2012
- 38 states have adopted
- A few other states have issued formal opinions on tech competence
- Nascent movement to require technology CLE

Defining “Relevant Technology”

“Relevant technology” in law practice and litigation:

1. Law practice tech
2. eDiscovery
3. Data security
4. Social media

Competence and Law Practice Tech

Law Practice Tools

- Online legal research
- Document management systems
- Cloud storage
- E-signatures
- Time and billing software
- E-filing

Communications

- Email
- Messaging
- Collaboration tools
- Videoconferences

Discovery and Trial

- Depositions
 - Video depositions
 - Remote depositions
- eDiscovery software
- Digital forensics
- Presentation technology

How to Learn Law Practice Tech

- Background reading
- Comparison shopping
- Training
- Practice, practice, practice

Competence and eDiscovery

All Document Discovery Is eDiscovery

- ESI comprises the vast majority of records
- Paper is digitized for business and discovery

Project Scoping and Negotiations

- Initially assess eDiscovery needs and issues
- Engage in competent and meaningful meet and confer with opposing counsel concerning an eDiscovery plan

State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193

Identification

- Analyze and understand a client's ESI systems and storage
- Identify custodians of potentially relevant ESI

CA Formal Opinion No. 2015-193

Preservation

- Implement/cause to implement appropriate ESI preservation procedures

CA Formal Opinion No. 2015-193

Effective Preservation

- Identify ESI to be preserved
- Select the best preservation method
 - Legal hold or preservation collection
- Suspend routine destruction
 - Retention schedules
 - Auto-delete settings
- Employee separation procedure

Spoliation Sanctions

Terminating sanctions against Deft under Fed R Civ P 37 for spoliation and associated misconduct including

- Intentionally deleting files
- Reformatting a key custodian's laptop
- Failing to turn off auto-delete settings on company email server
- Distributing legal hold notice nine months after receipt of cease-and-desist letter
- Using ephemeral messaging after a preliminary injunction had been issued

WeRide v. Huang, 2020 WL 1967209 (N.D. Cal. April 24, 2020)

Data Collection

- Advise the client on available options for collection of ESI
- Collect responsive ESI in a manner that preserves the integrity of that ESI

CA Formal Opinion No. 2015-193

Review

- Perform data searches

CA Formal Opinion No. 2015-193

Search Methodology

- Pre-search filtering
 - *e.g.*, date ranges, custodians, file types
- Search terms
- Syntax
- Sampling and validation

Advanced Analytics

Understand technology options and select the best analytics tools for the data and case needs

- Structured analytics
- Conceptual analytics
- TAR/predictive coding

Production

- Produce responsive non-privileged ESI in a recognized and appropriate manner

CA Formal Opinion No. 2015-193

Tech Competence Meets Candor and Fairness

Candor toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

ABA Model Rule 3.3

eDiscovery Candor

Make accurate representations:

- Meet and confer
- Discovery plan
- Initial disclosures
- Written discovery responses
- Motions and hearings

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value

ABA Model Rule 3.4

eDiscovery Fairness

- Preservation

Fairness to Opposing Party and Counsel

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party

ABA Model Rule 3.4

eDiscovery Fairness

- Collection
- Review
- Production

Competence and Data Security

Data Security

- Data resides in many locations
 - Firm systems
 - Cloud storage
 - Vendors
 - Experts
 - Opposing counsel
- Keep data secure in transit and at rest

Confidentiality of Information

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Model Rule 1.6

Law Firms Are Attractive Targets and Soft Targets

- Legal sector lags other industries in cyber preparedness
- 23% of law firms have experienced a data breach
 - Based on survey conducted for ABA 2018 TechReport
 - Adjusted for firm size, percentages are higher for mid-sized and small firms
- Law firm is one stop shop for vast quantities of business and personal information

Common Attack Types

- Viruses and malware
- Phishing/spear-phishing
- Ransomware
- Data exfiltration
- Data theft and monitoring
- Hacktivism
- Denial of service

Security Incident Prevention: Technical Safeguards

- Updates (o/s, software, apps)
- Antivirus protection
- Auto-lock on inactivity
- Encryption (full-disk, file)

Security Incident Prevention: What You Can Do

- Use strong, unique passwords
- Make sure data is regularly backed up
- Never connect to unsecured wifi
- Follow information security policies and procedures
- Be vigilant and use common sense

Incident Response Basics

- Act immediately
- Disconnect to limit intrusion
 - Remove device from network
 - Log out of application
- Raise the alarm!

Technology Competence for Better Client Service

- Cost control
 - Reduce volume with targeted collection
 - Effective use of analytics and other technology
- Streamline discovery
 - Meaningful meet and confer, proactive discovery
- Automate lower-value tasks to reassign lawyers to higher-value work

Tech Competence Meets Supervision

Satisfying the Duty of Technology Competence

- Acquire sufficient learning and skill

CA Formal Opinion No. 2015-193

Tech Competence for Everyone

- Legal education
 - CLE, conferences, in-house education
 - Articles and blogs
- Software training

Satisfying the Duty of Technology Competence

- Associate with or consult technical consultants or competent counsel

CA Formal Opinion No. 2015-193

Tech Competence by Association

- Rely on associate lawyers with eDiscovery knowledge and experience
- Hire technology support staff for internal resource
- Engage qualified vendors
 - Evaluate on professional services

Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm...shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ABA Model Rule 5.1

Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) [law firm measures to assure ethics compliance];
- (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 of the lawyer

ABA Model Rule 5.3

Failure to Supervise Has Consequences

- Information deficit
 - Project status
 - Problems
- Inefficient collaboration
- Increased risk of sanctions
- Potential malpractice allegation
 - *J-M Mfg. Co. v. McDermott Will & Emery*

Supervision Strategies

- Conduct thorough project set-up and planning
- Get regular status updates
- Be a good communicator
 - Expectations, objectives, deadlines
- Know enough to ask the right questions
 - Don't be afraid to ask!

Satisfy the Duty – or Decline the Representation?

- Acquire sufficient learning and skill
- Associate with or consult technical consultants or competent counsel
- **Decline the client representation**

CA Formal Opinion No. 2015-193

Competence and Social Media

Social Media in Legal Practice

Social media is an ethics minefield

- Competence
- Supervision
- Communications
- Dealings with represented and unrepresented persons

Social Media and Competence

Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] requires a lawyer to understand how social media work and how they can be used to represent a client zealously and diligently.

District of Columbia Ethics Opinion 371

Social Media and Competence

We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

District of Columbia Ethics Opinion 371

Viewing Public Information

General consensus exists that a lawyer or the lawyer's agent may view

- Public portion of a person's social media profile
- Any public posts or other activity

Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a [necessary fact].

ABA Model Rule 7.1

Core Principles Are Unchanged

The core ethical principles upon which the profession has relied for generations – honesty and fairness -- remain unchanged.

Kentucky Bar Association Ethics Opinion KBA E-434

Guidance Under Rule 7.1

- Lawyer (or agent) may use the lawyer's real name and profile to send a connection request to an unrepresented party
- Ethical boundaries “are not crossed when an attorney or investigator uses only truthful information to obtain access to a website”
- Fake profiles and other “trickery” strictly prohibited

*The Association of the Bar of the City of New York
Formal Opinion 2010-2*

Misleading Communications

- Anonymous/pseudonymous posts and comments
- Using company account or fake profile
- Any interaction without full disclosure
 - Friend and connection requests
 - Private messages
 - Follows, comments, likes, shares

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2

Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

ABA Model Rule 4.3

Guidance Under Rule 4.3

- A lawyer for a party may “friend” an unrepresented party if the lawyer has sent a message that discloses the lawyer’s identity as the party’s counsel
- If the lawyer later learns the adversary has become represented by counsel, then any further communication becomes subject to Rule 4.2

MassBar Association Opinion 2014-5

New Tech, Old Rules

- Lawyer admonished for instructing paralegal to “friend” opposing party, without disclosing her affiliation, after party changed his Facebook profile settings to private
- Multiple rule violations
 - Communication with represented person
 - Misrepresentation by omission
 - Failure to supervise non-lawyer assistant
- “The standards that Respondent was required to adhere to remain the same, regardless of the medium at issue. ...Ignorance [of how social media works] cannot be used as a shield.”

In the Matter of John J. Robertelli, Supreme Court of New Jersey Disciplinary Review Board

Ethics of Social Media in Legal Marketing

#1 Protect Client Confidentiality

- Rule 1.6 Confidentiality of Information
- Rule 1.9 Duties to Former Clients
- No disclosure without consent
 - Client confidential information
 - Fact of representation
 - Any information relating to representation

#2 Honest and Accurate

- Rule 7.1 Communications Concerning a Lawyer's Services
- Honesty and accuracy – whatever the medium

#3 Care in Advertising

- Rule 7.2 Communications Concerning a Lawyer's Services: Specific Rules
 - 7.2 (a) permits communication "through any media"
 - 7.2 (d) mandates including contact info
- Many types of electronic "advertising"
 - Firm website
 - LinkedIn: firm page; lawyer's personal page
 - Blogs, forums, message threads
- Comment 1 lists permitted subjects

#4 Few Lawyers Are “Experts” or “Specialists”

A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

[the lawyer has been certified by an approved organization and the name of the certifying organization is clearly identified]

ABA Model Rule 7.2 (c)

#5 Avoid Unintended Attorney-Client Relationships

A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

ABA Model Rule 1.18 (a)

Five Rules for Legal Marketing with Social Media

1. Protect client confidential information
2. Keep it honest and accurate
3. Stay within the scope of permitted subjects of advertising and include contact information
4. Follow your state's rules on asserting "expert" or "specialist" status
5. Be mindful of creating an unintended attorney-client relationship

Q&A

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