Technology & The Model Rules of Professional Conduct: Ethical Issues In The Information Age.

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Presentation Outline

This is a terse outline summarizing some of the slides shown during Richard Dooling's presentation on Ethical Issues In The Information Age, given at the Eighth Circuit's Judicial Conference on 8 August 2014.

ABA Model Rules of Professional Conduct For Today

Rule 1.1 Competence.

Rule 1.6 Confidentiality of Information.

Rule 1.9 Duties to Former Clients.

Rule 1.15 Safekeeping Client Property.

Rule 1.18 Duties to Prospective Client.

Rule 7.1 Communication Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Solicitation of Clients

Explosive Growth of Technology

Lawyers may wish that technology would slow down just long enough for them to catch up and learn about cloud computing, Twitter, Facebook, WiFi encryption, iPads, securing smart phones and other mobile devices, records management and document retention, and metadata, but technology waits for no lawyer. The pace of technological change shows no sign of doing anything but continuing its headlong, exponential growth.

If state bar association opinions and the recent changes to the ABA Model Rules are any indication, lawyers already have a duty of competence when it comes to understanding the technologies that pervade the modern practice of law. A swelling chorus of opinions and rule changes suggest that duty is about to be emphasized and enforced.

ABA Commission on Ethics 20/20

Created by then ABA President Carolyn B. Lamm in 2009, the Commission was charged with performing a thorough review (using "20/20 vision") of the ABA Model Rules of Professional Conduct and the system of lawyer regulation in the context of advances in technology and global legal practice developments.

The Commission released for comments a series of resolutions and reports with their draft proposals covering (among other things) Technology (Confidentiality), as well as Technology (Client Development), Outsourcing, and other topics associated with the multi-jurisdictional practice of law. [1]

On 6 August 2012, the ABA's policy-making House of Delegates voted to approve the Commission's proposed changes to the Model Rules. Today's presentation gives an overview of the changes to the Model Rules in two major areas: (1) Technology and Confidentiality; (2) Technology and Client Development.

Competence

Model Rule 1.1 provides:

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

[1] You may find the Commission's latest resolutions, reports, proposals, and comments at `http://tinyurl.com/3op6tx3`

Under the subheading "Maintaining Competence," former comment 6 of Model Rule 1.1 provided:

> [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

The lawyer's obligation to "keep abreast of changes in the law and its practice" may be fairly read to include the lawyer's duty to understand the importance of technology to modern law practice. Nevertheless, the ABA Commission on Ethics 20/20 proposes adding language explicitly highlighting the new obligations for *technological* knowledge and skill, as indicated in the italicized language of the new rule below:

> [6] 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 technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

The Commission's Explanation for the Proposal:

> The Commission concluded that, in order to keep abreast of changes in law practice, lawyers necessarily need to understand basic features of technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or to create or edit an electronic document.
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> Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that the addition of the phrase "including the benefits and risks associated with technology" would offer greater clarity regarding a lawyer's obligations in this area and emphasize the importance of technology to modern law practice. The proposed amendment does not impose any new obligations on lawyers. Rather, the amendment is intended to emphasize that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent.

Competence, including a minimum level of technological competence, is a prerequisite to complying with the other ethical rules increasingly affected by the exponential growth of technology and computerized electronic communications.

Confidentiality

Model Rule 1.6(a) commands that: "A lawyer shall not reveal information relating to the representation of a client unless . . . " (and exceptions ensue). The lawyer's ethical duty of confidentiality is much broader than either the attorney-client privilege or the work product doctrine. According to Rule 1.6(a) Comment 3: "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to ALL information relating to the representation, WHATEVER ITS SOURCE."

Model Rules 1.9 and 1.18 essentially impose the same obligations on the lawyer when it comes to protecting the confidential information of former clients and prospective clients.

Confidentiality & Computer Technology

Lawyers constantly send, receive, and store client information. The manner or method of transmitting or storing information does not affect this duty; however electronic communications and computer networks, including wireless networks, require special attention to protect client information.

Former comment 16 to ABA Model Rule 1.6 provided:

> [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.

The comment then refered to Rule 1.1 (Competence), Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) explicitly extending the lawyer's duty of competence in protecting confidential client information to the lawyers and nonlawyers under her supervision.

All of these duties, formerly provided only in the comments, have now been elevated to black letter Model Rule 1.6(c):

> 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.

New comments to Rule 1.6 make clear that the Commission is concerned about security of client information and supervision of others charged with the safekeeping of client information:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

Outsourcing

New comments to Model Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance") emphasize a lawyer's duty to supervise others to insure client confidentiality. Under the subheading "Nonlawyers Outside the Firm," new comment 3 provides:

> A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and 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.[2]

Again, the duty of confidentiality arguably already includes the duty to supervise nonlawyers to whom the lawyer outsources the care and protection of client information. Changes to the rule underline and emphasize this obligation, and particularize it using examples that include information technology.

[2]The new comment continues: "The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the 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."

This means that the competent, ethical lawyer must know enough about the storage and retrieval of computer information and data security to ensure that the necessary precautions are taken to protect client information. This would apply to everything from so-called "e-discovery" service companies to litigation support services, as well as to more obvious nonlawyers, such as private investigators or paraprofessionals.

"Cloud Computing," Mobile Devices & Wireless Networks

The duties of competence and confidentiality (reexamined in the context of information technology) raise interesting questions, only recently being addressed by various state bar associations and the ABA Commission on Ethics 20/20.

What about the lawyer's obligations to protect confidential information stored in the following devices or networks, or to supervise those charged with protecting it:

- A server in "the cloud"?
- A lawyer's smartphone penetrated by a hacker in a WiFi "hotspot"?
- A lawyer's home computer on a network not protected by hardware or software firewalls?
- A paralegal's iPad operating on a hotel's unsecured, unencrypted wireless network?
- A text message sent from the lawyer's phone to the client's phone?

Metadata

Metadata is data "embedded" into an electronic document, which may include the identity of the author, the software used to create it, the date of creation, modification, and last access. Depending on the computer program used to create the document, the metadata may include a complete record of all tracked edits and who made them, comments, and prior drafts. This sensitive information may be inadvertently produced to and harvested by parties adverse to the client.

Ethical opinions addressing the subject of document metadata generally alert lawyers to the nature of metadata and that it may contain confidential client information. Producing such information to opposing parties obviously may implicate the lawyer's duties of confidentiality and competence.

As for whether a lawyer may review and use metadata contained in documents sent to her client by an opposing party, ABA Formal Opinion 06-442 (2006) made the following observation at the outset:

> The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing" metadata from documents or by sending a different version of the document without the embedded information.

Model Rule 4.4(b) has been amended to explicitly address electronically stored information:

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

And comments to the rule now explicitly address metadata:

> For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

As always, under rule 4.4(b), a lawyer has a duty to notify the sender if the lawyer receives "a document" inadvertently sent, but what if a *document* containing metadata is intentionally sent (and it includes metadata, which may or may not have been inadvertently sent)? The lawyer must inform the sender only if she "knows or reasonably should now that the metadata was inadvertently sent."

So it would appear that lawyers who send documents containing metadata do so at their peril. Even though Rule 4.4 now explicitly applies to document metadata, Comment 3 indicates that, unless applicable law requires otherwise, a lawyer who receives an inadvertently sent document (or its metadata) ordinarily may, but is not required to, return it unread, as a matter of professional judgment.

Hence the spate of bar opinions stressing that attorneys should educate themselves about ways to eliminate or "scrub" metadata from documents. Documents may also be converted to image files or pdfs.

Prospective Clients

Model Rule 1.18(a) defines a "prospective client" as any "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Rule 1.18(b) provides that, even if no lawyer-client relationship ensues, a lawyer "shall not use or reveal information learned in the consultation [with a prospective client], except as Rule 1.9 would permit [as to former clients]."

As a practical matter, lawyers must limit the amount and kind of information they receive from prospective clients. What if the lawyer or the lawyer's firm represents an opposing party? What if the lawyer does not take the type of case the prospective client is seeking advice about?

Electronic communications complicate these precautions because the lawyer may open an e-mail from an unknown prospective client and be treated to way too much confidential information, with no practical way of limiting its receipt. The horse is out of the barn.

Comment 2 advises that a person who communicates "unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship" is not a prospective client within the meaning of the rule and therefore is not entitled to have the information supplied kept confidential. But what if the lawyer arguably "solicited" the communication via web advertisements or by providing an e-mail form or link at the lawyer's website?

Prominent disclaimers appear to be the best protection, but opinions vary from state to state.

Information About Legal Services

The Model Rules regulating a lawyer's communications with others have worked well, even on the Internet. For the most part, the changes to the Rules

are cosmetic and made to clarify their application to spoken, written, electronic, chat, social media, text messaging and other forms of communication.

Rule 7.1 Communication Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Solicitation of Clients

The term "prospective client" is now confined explicitly to Rule 1.18 dealing with a person who consults a lawyer, as opposed to targets of solicitation or advertising. The comments to these rules also clarify what it means to pay others for referrals, especially in the context of "lead generators" and such services as Google Ad Words.

New comments to Rule 7.3, make it clear that a solicitation is a "targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide . . . legal services," whereas "a lawyer's communication . . . does not constitute a solicitation if it is directed to the general public . . ."

Resources For The Resourceful & Ethical Lawyer!

You may find the complete text of the ABA Model Rules, the Missouri Rules, and other useful resources at the following urls.

The ABA Model Rules of Professional Conduct

An online hyperlinked edition of the rules and comments, as amended in August 2012:

`http://tinyurl.com/4omg5ch`

The ABA/BNA Lawyers' Manual On Professional Conduct

The mother lode! This has it all: Full text of ABA Ethics Opinions, State ethics opinions, annotated Rules of Professional Conduct, Practice Guides. You name it. If you are the go-to person in your firm when it comes to ethical problems and conflicts, you need this. Unfortunately it is also a subscription only site:

`http://lawyersmanual.bna.com/mopw2/`

Conclusion

The ABA is well aware that attempting to edit the Model Rules to keep abreast of technological changes is a losing game when technologically moves at an exponential pace and lawyers simply can't keep up. Plans are in the works for a website resource that will provide information about technology and particular issues, such as cloud storage and WiFi encryption. Until then, the ABA's latest Rule changes are really a matter of sending up a flare warning lawyers to pay more attention to technology and its impact on the practice of law. And, yes, a warning to keep reading the rules!