

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



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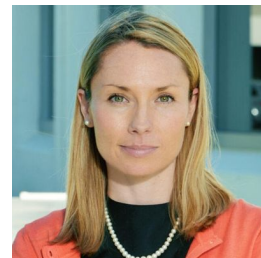
# **Disclaimer**

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.**

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- 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

# The Importance of Communication

Before we get started....

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

-George Bernard Shaw

# Agenda

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- Technology Legal Ethics - ABA Rules and State Approaches
- Legal Ethics Obligations During Covid-19
- Professional Responsibilities When Working Remotely
- BYOD Security Practices to Comply w/ Takeaways
- Q & A



# Technology Legal Ethics Rules



# View from the ABA: Technology Duties & Ethics

## Attorney Duty

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Competence

Confidentiality

Supervise

Communicate

Ethics Opinion

## ABA Model Rules

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1.1

1.6

5.3

4.1

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 tech added in 2012 Amendments\*\**

*\*\*This ABA Rule is also CRPC 1.1. (old Ca. Rule 3-110)\*\**



# 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, info 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

*\*\*This ABA Rule is also CRPC 1.6 (old Ca. Rule 3-100)\*\**

# 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 client communications made while travelling or remote via Zoom? Is it okay to communicate via 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 firm's 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

## 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;

*\*\*This ABA Rule is also CRPC 5.1, 5.2 and 5.3 (New rules in Ca.)\*\**

## 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*

# 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

*\*\*This ABA Rule is also CRPC 1.4. The Duty to Convey Settlement Offers is 1.4.1 and the Duty to Disclose Liability Insurance is 1.4.2\*\**

# 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 an established non-lawyer advisor”

## Legal Ethics Obligations During Covid-19



# Legal Ethics Obligations During Covid-19

- Although the pandemic is having a palpable effect on how attorneys are practicing, it's important to realize that the [ABA] Rules of Professional Conduct (the “Rules”) and the duties they set forth *are not suspended*.
- At all times, and same goes for other professional responsibility duties, an attorney should perform legal services with “competence,” defined in Rule 1.1 as “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of [required legal] service.”



# Legal Ethics Obligations During Covid-19

- Covid-19 related personal issues - such as family health concerns, lack of child care, school closures, or other responsibilities - normally would not excuse an attorney's duty of competence to their client. Attorneys are expected to put client interests ahead of their own personal interests or issues.
  - See *Smith v. State Bar* (1987) 43 C3d 525 (“even in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his client’s interests.”).
  - Even amidst a crisis, attorneys are bound by their ethical obligations and must protect their clients’ interests. (See ABA Special Committee on Disaster Response and Preparedness (February 12, 2011), and note Model Rule 1.1, Comment [3]

# Legal Ethics Obligations During Covid-19

- During Covid 19 attorneys must continue to competently and diligently represent clients, communicate relevant information, keep client confidential information safe, adhere to court issued filing deadlines, fulfill fiduciary duties and appear remotely for court appearances.
- Law firms should have business continuity plans (BCPs) in place that spell out just how the firm will be providing critical business operations during or in the aftermath of a disaster.

# Legal Ethics Obligations During Covid-19

The ABA Special Committee advises that law firms take the following steps in the event of an emergency:

- Prepare internal/external messaging regarding the firm's ability to operate;
- Work with records management to ensure that incoming docs are being stored securely and that records are accessible as needed;
- Confirm that attorneys are performing analyses to identify and prioritize urgent matters, including docketing litigation deadlines and court appearances; and
- Identify firm leadership responsible to respond to q's re: essential firm function

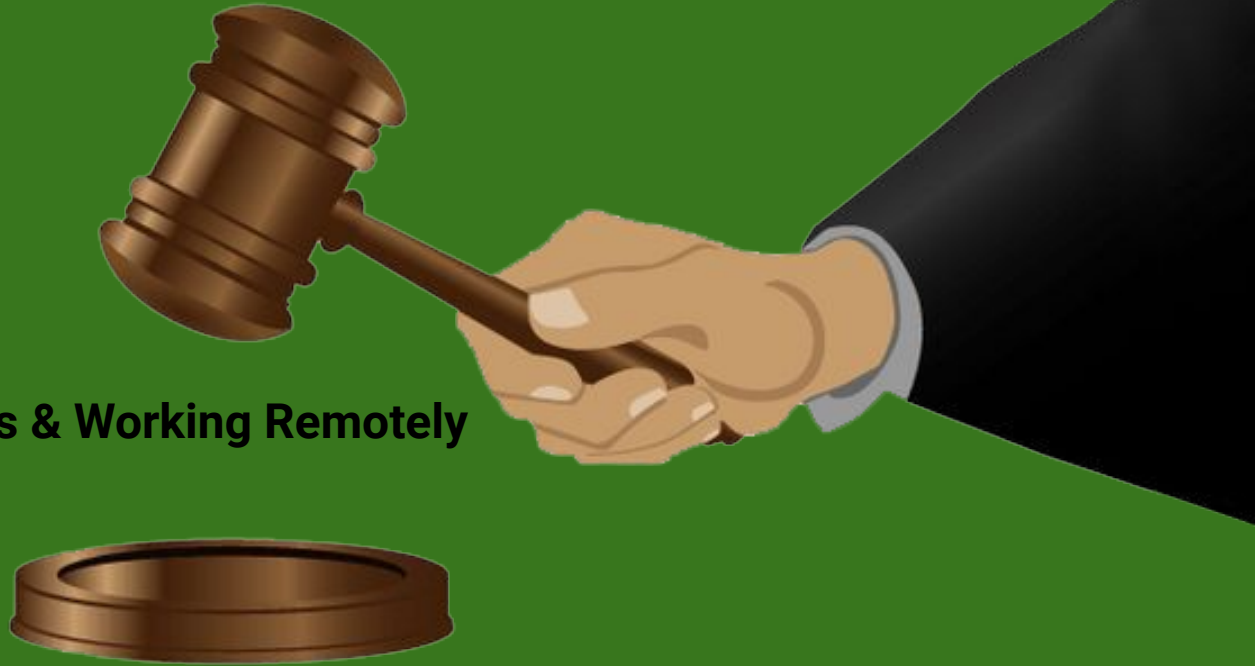
*(See, Surviving a Disaster: A Lawyer's Guide to Disaster Planning (2011)).*

# Data Breach Ethics During Covid-19 + Beyond

NEW California State Bar's Committee on Professional Responsibility & Conduct (COPRAC) formal opinion, 2020-203:

- Speaks to issues connected to lawyer Data Breach responsibilities!
- Attorneys have a **duty of confidentiality** and **competence** when using electronic devices in their firm **and have a duty of disclosure** to their client regarding data breaches that are detrimental to their client's interests.
- Lawyers must understand the risks of unauthorized access to their electronic devices, learn methods they can guard against unauthorized access and apply related safeguards.

## **Professional Responsibilities & Working Remotely**



# Professional Responsibilities Working Remotely

Best practices for legal teams to take when working remotely during the current Covid-19 crisis to meet legal ethics obligations include -

- Keep your laptop, computer or tablet charged and available
- To make sure you don't miss any client-related or filing deadlines, keep good track of your calendar
- Be mindful of court, agency and other closures or limitations, and the impact they may have on such deadlines (or your ability to comply with such deadlines while working remotely)

# Professional Responsibilities Working Remotely

- Ensure that you have the ability to access to necessary client files and other client-related data when working remotely and in your office staff is not available to assist
- Make sure that your means of remote access is sufficiently protected against potential hacking and other cyberattacks (e.g., by use of a secure private network or VPN)
- Think about ways to have incoming hard-copy mail rerouted or scanned and / or electronically delivered
- Make sure your clients know how to reach you by email/phone, so they and essential staff have a good way to reach you while working remotely.

## BYOD Security Practices Takeaways





# BYOD Security Practices and Takeaways

When using personal devices and networks to manage sensitive or confidential information, at a minimum, “reasonable efforts” to address data breach or cyberattack risks must include:

- Installing basic cybersecurity systems like anti-virus software, encryption, VPNs, firewalls, and the like on your firm’s computer system.
- Comprehensive system assessment; cyber awareness training for employees, including proper email etiquette and how to avoid infected websites; and sporadic testing of employees.

# BYOD Security Practices and Takeaways - CONT

- Law firms should conduct some simple and basic due diligence of its vendors who may be hosting their clients' data to ensure they have adequate security systems, training, and testing in place

*Most client sensitive or confidential information breaches by law firms using personal devices are not the result of technological shortcomings, but instead are the result of user error or lack of training.*

# 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

## *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 state trial court 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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