

Technology and Legal Ethics for In-House Counsel

2021 Winter Webinar Series

January 13, 2021

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Legal Ethics in a Virtual World

Roadmap

- **Duties to be Technologically Competent**
 - Sources
 - Applicability to In-House Counsel
- **Individual and Organizational Considerations in an Increasingly Virtual Work World**
- **Remote Working Ethics Challenges**
- **Best Practices, Tools, and Tips**
- **Ethics Credit**

The Importance of Understanding How to Effectively Use Technology in Legal Practice

- Transmission of information electronically is pervasive. It's used to transact with customers and employees, to advertise, and in litigation.
- California Formal Opinion No. 2015-193: "Not every litigated case involves e-discovery. Yet, in today's technological world, almost every litigation matter potentially does. **The chances are significant that a party or a witness has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute.**"

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The Importance of Understanding How to Effectively Use Technology in Legal Practice (Cont'd)

- Technology can get lawyers, including in-house lawyers, into trouble.

January 23, 2008 FEATURE

Attorney Error Results in Massive Leak of Privileged Client Data

Understanding the technical side of e-discovery can help avoid inadvertent production

By Catherine M. Chocoma

May 01, 2019 TECHNOLOGY

Embarrassing Redaction Failures

By Judge Herbert B. Dixon Jr.

Law firm's automatic deletion of spam emails is blamed for failure to file timely appeal

BY DEBRA CASSENS WEISS

SEPTEMBER 28, 2017, 7:00 AM CDT

Law firm fell victim to phishing scam, precipitating \$336K overseas wire transfer, bank suit alleges

BY DEBRA CASSENS WEISS

Legal services company shuts down systems after ransomware attack

BY AMANDA ROBERT

MARCH 3, 2020, 10:35 AM CST

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Sources of Duties to be Technologically Proficient

- Ethics Rules
- Common law
- Standard of care
- Fiduciary duty
- Contracts
- Statutes
- Rules of Civil Procedure
- Court-specific requirements (e.g., e-discovery, e-filing)
- COVID-driven court changes

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Ethics Rules Apply to Both Outside and In-House Counsel

- Rules of Professional Conduct apply to **all** members of the State Bar
 - “Law firm” definition includes in-house counsel if more than one lawyer in the “department”
 - “Registered In-House Counsel” under California Rules of Court, Rule 9.46
 - Work for “qualifying institution”
 - Be a member in good standing of some state bar
 - Provide services only for institution, not employees
 - Register, renew annually, notify CA State Bar of any change in employment
 - Meet MCLE requirements
 - Litigation, and activities “**in anticipation of litigation**,” implicate a number of Rules of Professional Conduct involving competence and communication (CRPC 1.1, 1.6; ABA Model Rules (“MR”) 1.1, 1.6)

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Duty of Competence – The “Technology” Amendments to the Model Rules of Professional Conduct

- ABA Rule 1.1 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.”
- Comment 8. **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**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- 38 states have adopted the Duty of Technology Competence, however...
- California is not (yet) one of those states.

Duty of Competence – The “Technology” Amendments to the Model Rules of Professional Conduct (Cont’d)

- California Rule 1.1 Competence:
 - (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
 - (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
 - (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
 - (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Duty of Competence – E-Discovery

- California Formal Opinion No. 2015-193: “**The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney’s duty to provide the client with competent representation.** If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with expertise to assist.”

ESI Retention Planning

- Does your company have a Records Retention Program?
 - If not, why not?
- Is it updated?
- Legal department may have ethical obligation to advise on implementation (CRPC 1.1; M.R. 1.1; Comm. 8)
 - Implement **before** your next audit, governmental investigation, litigation, etc.

Duty of Competence – Being a Luddite is No Excuse

Counsel: “I have to confess to this Court, **I am not computer literate**. I have not found presence in the cybernetic revolution. **I need a secretary to help me turn on the computer**. This was out of my bailiwick.”

The Court: “Professed technological incompetence is not an excuse for discovery misconduct.”

James v. Natl. Fin. LLC, No. 8931-VCL 2014 WL 6845560 (Del. Ch. Dec. 5, 2014)

What does it mean to be “Technology Competent”?

Individually

- You don’t have to be the expert, but know what you don’t know
- Take a Legal Technology Assessment:
<https://www.procertas.com/offerings/legal-technology-assessment/>
- Consider trainings for technology you use regularly
- Ask your outside counsel their procedures and competencies
- Befriend your IT department

What does it mean to be “Technology Competent”? (Cont’d)

Organizationally

- Secure communication
- Remote working
- Secure data
- Organized data
- Retained data
- Vendor security
- Social media

Secure Communication – Rules

- ABA 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.
- Comment 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 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. See Rules 1.1, 5.1 and 5.3. **The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.....**

Secure Communication – Best Practices

- **Encryption** is not required as a bright-line Rule of Professional Conduct, but it is **recommended**.
 - It also may be required--**and significantly limit your exposure**--under statutes such as the CCPA, HIPAA
 - Video conferencing tools: Zoom, Webex
 - Instant messaging: Slack, Microsoft Teams
 - **Text messages are not recommended**

Secure Communication and Remote Working

- **Remote working can endanger privilege.**
- Counsel your organization's employees about the risk of:
 - Working in the same office space as a roommate
 - Forwarding privileged information or work product to a family member or a personal email address to print
 - Using video chatting software without understanding privacy protocols
 - Working using non-company devices

Secure Communication and Remote Working

- Planning for your organization:
 - Additional cybersecurity training for employees
 - Network security audits
 - Network segmentation to keep personal and professional separate
 - VPNs
 - Balance giving appropriate access with preventing over-privileged users

Data Security

- **Map your data!** To protect your data, **you need to know where it is.**
- Know **what** data you collect, **where** it is stored, **who** (including third-parties) has access, what data you've **shared**, and **how those parties** handle the data.
- Ask your vendors (including your outside law firms):
 - **Who** has access to my company's information -- both **inside** and **outside** the vendor?
 - When is my information **encrypted**?
 - **How** is the **physical security** of my data ensured?
 - How do you **avoid phishing** and other risks arising from social engineering?
 - How are you ensuring that **other vendors** protect my information?

Data Security – Best Practices

- Remember your best friend, your company's internal technology expert?
- Patch and update company software promptly and consistently
- Use settings within existing software that enhance security
- Encrypt data at rest and data in transit
- Good passwords and multifactor authentication
- Metadata scrubbers
- Dangers of public wifi

Data Security – Best Practices

- Regular security reviews of the office's technology
- Training to spot phishing and other email attacks
- Employees should keep Alexa in a different room from their workspaces, or unplug it when working
- Avoid using voice-to-activate function of Siri.

Duty to Supervise Third-Party Service Providers

Model Rule 5.3.

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

- (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;
- (b) the 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; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Duty to Supervise Third-Party Service Providers (*cont'd*)

California Rule 5.1. With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) **a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;**
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Examples of Third-Party Service Providers

- Discovery vendors
- Cloud storage providers
- Settlement administrators
- Consultants
- Experts

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SolarWinds

Highly Evasive Attacker Leverages SolarWinds Supply Chain to Compromise Multiple Global Victims With SUNBURST Backdoor

December 13, 2020 | by FireEye

SEC filings: SolarWinds says 18,000 customers were impacted by recent hack

In SEC documents filed today, SolarWinds said it notified 33,000 customers of its recent hack, but that only 18,000 used a trojanized version of its Orion platform.

SolarWinds hackers also guessed passwords of many victims

By Anthony Spadafora 4 hours ago

SolarWinds Hack Compromises U.S. Courts Electronic Filings

Jan. 6, 2021, 11:51 AM

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Duty to Supervise Third-Party Service Providers – Best Practices

- Due diligence
 - Reputation
 - Experience
 - Interview
- Terms of Service
 - Indemnification
 - Insurance requirements
 - Liability caps or limitations
 - Scope of access
 - Leverage

Social Media – Potential Pitfalls

- Creating business records or discoverable information through messaging
 - But: spoliation if deleting/taking down
- Disclosure of confidential or privileged information (including by departed employees)
- Communicating with represented parties
- Inadvertent creation of attorney-client relationships

Social Media – Potential Pitfalls

- Interactions with judges, and other jurists and jurors
- Fictitious accounts
- Taking positions adverse to your client/organization
- Copyright issues with embedded content
- Remember: employees' First Amendment rights

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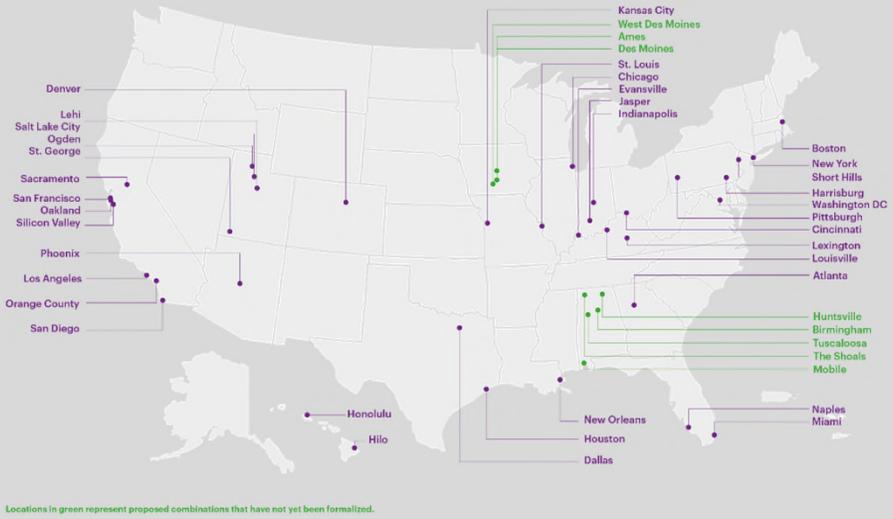
Questions



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Thank you



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