11 Habits of Successful Law Firms Updated for the Digital Age

E-Book | Volume 2

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LEAP

Introduction

Law firms that introduced the 11 Habits, particularly Habits 1 and 2, have suddenly received a massive competitive advantage. They will be able to capitalize on that. Those firms that have not yet done so, need to. The threat is existential.

This version of 11 Habits is informed by the 2020 Pandemic and highlights some of the areas where firms were ready for it, but more importantly it is for firms that are taking a long term view of their future as we believe the 11 Habits remain sound for the long term.

The most frequent question being asked at the moment is what the 'new normal' is for law firms.

The new normal isn't working from home; it is working digitally.

The top three impacts are:

- The way lawyers interact with their clients has changed forever.
- The way law firm owners run and manage their people has changed forever.
- Many court hearings will be online instantly and forever.

These changes are profound and each one raises complex human problems.

Practicing law is by its nature a very stressful career choice. These shocking new circumstances have introduced a host of new stresses that are going to have to be professionally managed to ensure that the mental health of lawyers and their staff is maintained. Because of the importance of having good habits around the maintenance of mental and physical health, I invited Amanda Mead, a lawyer who specializes in coaching and advising lawyers in these areas to join me as co-author in this update to the 11 Habits, sharing some of her observations from the coalface.

The issues around stress and mental health cannot be ignored. Stress and depression are closely related and it is not possible to provide good advice or achieve sound legal outcomes if you are distracted by stress.

> **No law firm will survive if it does not urgently adopt the digital practices that the circumstances now demand.**

Isolation illness is real. We need to recognize it and take active steps to manage it otherwise firms will fall apart.

Because of the urgency, I have also re-sequenced the habits, because no law firm will survive if it does not urgently adopt the digital practices that the circumstances now demand. I cannot emphasize the urgency enough.

Let's turn to the Habits now.

The Habits

‘A habit is an acquired behavior pattern regularly followed until it has become almost involuntary; it is a result of repetition.’

Over the past 25 years, I have visited hundreds of small law firms throughout seven different countries. I have been fortunate enough to speak to the successful, the unsuccessful, the happy and the not so happy! This has seen me uniquely placed to understand what makes for a successful small law firm (1-100 people by my definition). All these successful firms have habits that are ingrained into their culture.

If you are frustrated at the situation in your firm, perhaps you wanted to modernize your systems but were prevented from doing so by partners approaching retirement, are planning a start-up, have an entrepreneurial instinct to improve your firm, or if you feel your life is out of balance, we believe that implementing these 11 Habits will help you succeed.

As is so often the case, most of the habits on this list will seem like common sense. But that makes sense too! Because these are the ‘actions’ we tend to take for granted, rather than make our focus. The tendency is to say ‘I know that’, the secret is to actually do what you know.

This E-Book includes checklists for the habits to help you with the planning and operation that is required to be successful. These checklists are your tools for action.

These are the Habits that we will consider:

1 Decide to be efficient.

2 Be an early adopter in the use of technology.

3 Enjoy practicing law.

4 Employ smart people and treat them really well.

5 Select the areas of law you like and focus on them.

6 Dedicate time to building the firm as a business and take the time to care for yourself as well.

7 Confront the challenges of getting paid to solve ‘problems’.

8 Have standard processes and procedures in place for all matters.

9 Make compliance a natural consequence of running a firm well.

10 Become an expert in the client experience.

11 Understand the finances of your firm.

A common lament, usually from non-lawyers, but often from lawyers themselves, is that lawyers are poor business people. However, what is not sufficiently recognized is the entrepreneurial nature of almost every small law firm. To me 'my firm' and 'legal entrepreneur' often mean the same thing. The women and men who own and run small law firms don't have anyone to assist them financially. Frequently they start with no previous management experience either. Many of them start practice as solo or junior partners with very little experience. They rely entirely on their own skills and determination, not just for success, but for survival. They (that's you!) are courageous entrepreneurs.

These small law firms provide the operational framework for families and small businesses in our societies. Apart from helping clients with the law, they are increasingly required to play the role of alternative dispute resolver which was once the remit of the Church until its influence diminished in our society. Small law firms are increasingly important helping maintain the fabric of our civilization.

The word 'trust', i.e. 'fides' has been associated with the law so long ago that the concept was a principle of Roman Jurisprudence well before it was codified in the Institutes of Justinian published in Constantinople in the mid-6th Century amidst another pandemic.

Although seldom recognized by lawyers themselves, people approach lawyers because they trust the profession as a whole. They know there are consequences for a breach of trust. In many ways it lies at the very heart of the lawyer/client relationship. Your whole approach to the new client experience needs to be informed by this idea. Building client trust online requires a whole new approach.

Building client trust online requires a whole new approach.

It can also seem that regulators pick on small law firms and that brings them into disrepute. Given that 89% of all law firms are small law firms (of 1-5 partners), it makes sense that this will be the case from a volume perspective, but all too often, like all small businesses, they are under-resourced. Many lack training in the 'business side' of their firm or even rudimentary bookkeeping skills. Despite these challenges, the overwhelming majority of the small firm lawyers I have met are genuinely dedicated to the calling of their profession – to help people in need. These under-trained and under-resourced lawyers generally persevere and survive.

We are offering these updated 11 Habits to help small law firms become more successful in the new normal. But as Amanda says, success is also about achieving your own personal goals and in being happy with the result, i.e. to become happier you also need to focus on yourself as well as your practice. You need to remain connected to the world outside of law as the historical divide between work and relaxation becomes blurred. Work at night now compensates for workdays interrupted by home life.

To succeed in your practice, you need to find the people in the firm keen on progress (they will probably be the ones who complain about poor equipment!). Get them on your side. They are ambitious and you should harness that ambition.

Introducing change is hard. It is unrealistic to expect that you could create all these Habits in your firm overnight or even simultaneously. But some are urgent. If you make a start and keep working on them, using the 11 Habits Checklists, you will be amazed at how the fortunes of your firm and your own life will transform for the better.

Decide to be efficient

Large law firms, with large corporations and government agencies for clients, are often rewarded for inefficiency. We once showed a partner in a large firm how document automation could dramatically reduce the amount of time taken to produce a standard commercial lease. His response was 'why would I want to do that?'. Hourly billing rewards inefficiency in many of those firms. Not so for firms with private clients in the common areas of law.

> **Smaller firms understand that their very survival depends upon efficiency.**

Those smaller firms understand that their very survival depends upon efficiency. Without efficiency it is possible to survive if you work every night and probably weekends too and be a martyr to the cause, but that is not a sustainable model for a happy life.

You need to be efficient to make money.

Despite the importance of the other ten habits, unless the principal lawyer or owner in the firm makes a personal commitment to efficiency and is prepared to lead and help others to follow, success cannot really occur. Only a few brilliant lawyers in specialized niches can charge day rates high enough to make efficiency irrelevant.

Contrary to arguments that time is better spent 'lawyering' for clients than worrying about efficiencies, I believe it is impossible to 'lawyer' confidently and well in a disorganized and inefficient environment. Efficiency also delivers an in-built competitive disadvantage against other firms who are not efficient.

Efficient and effective use of technology can also provide tremendous opportunities for you to create the most efficient and successful small law firm in your area. Changed circumstances are going to drag the most recalcitrant of firms into the digital era. It will be up to the leadership of each firm to ensure that the digital tools are used fully. But if you have already moved into the digital world you have a clear advantage because that is what your clients now expect from their lawyer.

Most lawyers seem to think that putting effort into compliance and bookkeeping is a good place to start. Consider this: bookkeeping is typically done by one or two, usually non-billable people in a small firm. But revenue is generated by lawyers. It therefore makes sense to make the lawyers as productive as possible and to give them the tools to provide wonderful client service. That's why efficiency must start with the firm's lawyers and their support staff, the producers of wealth, not the back office.

My own research and research conducted by others is that efficiency in the production of documents is the number one concern of most firms. Finding the right accurate document template quickly, capturing core data once only, being able to create and share documents is critical to achieving this. Even when the internet is down, lawyers and their staff need to be producing documents to be productive. Start here.

Efficient billing comes second. The accurate recording of every attendance and the time record when appropriate is essential. Time is your stock. It is shifting off the shelves every day and cannot be retrieved. If you don't capture it accurately, you and your firm will always be inefficient. With accuracy, billing is easy and efficient and what it does is it accelerates your cash flow and reduces working capital requirements. The most sophisticated management reports cannot compensate for lousy record keeping. Success starts with having every fee earner in your firm accurately record their 6 minute time records, every day.

Action Checklist

- [ ] Brief your lawyers on your plans and goals.
- [ ] Select the area where technology can instantly provide the biggest productivity boost for your lawyers.
- [ ] Identify staff to help with the project (outside consultants will never get as good a result as your own people).
- [ ] Find the software needed to have maximum impact.
- [ ] Focus on document production.
- [ ] Record time accurately.

Be an early adopter in the use of technology

Like it or not, if your firm does not keep up with technology, it will quickly become uncompetitive. Imagine for example a firm that has stuck with using typewriters. There is just no way that such a firm could have been competitive – it would have too many people and be too slow. It wouldn't even be able to attract great staff.

The technology shift to mobility and cloud computing is arguably as far reaching for small law firms as the shift to computers was 30 odd years ago. Fate in the form of a virus has now removed that choice.

Leaders of successful firms are always looking for ways to use technology to provide better service, faster and at a lower cost. In this way they stay ahead of their competitors and quickly gather clients from the firms that haven't adopted advanced technology.

Successful firms use technology to focus on:

- Having a single database of information for their firm;
- Having their productivity systems (practice and case management) and legal accounting and trust (client) accounting in one application. They also understand that it is inefficient and expensive to try to bolt applications together from different suppliers;
- Having libraries of highly automated legal forms, letters and agreements to maintain consistency and produce accurate documents quickly without needing special typing skills;
- Recording every activity as they go, (whether they time record or not) so that they can bill accurately and simultaneously comply with their legislated record keeping obligations;
- Using a fully featured compliant trust (client) accounting system. Trust accounting is easy if you have a good system and your staff know how to use it!
- Knowing their numbers;
- Providing a great online client experience so that clients feel involved in the firm and in their matters.

By running their operations on a low-cost, cloud-based system, tech-savvy law firms can use their computers at home and their smartphones and tablets in exactly the same way as in the office.

When writing version 1 of the 11 Habits this was a nice to have and the successful firms were out front.

It is now essential.

The 2020 pandemic will create many new challenges for law firms. In the past with a physical presence clients and potential clients had a sense of where your firm is and what sort of work it does. In the future it is likely that firms that wish to expand and prosper will have to undertake far more active marketing then they have in the past.

One of the ways of doing this is to use social media. There are a variety of ways of doing this that can be affective and subtle. In recent years, numerous Facebook groups have grown around special interests. Female founded law firms frequently and successfully use social media as a platform on which to build awareness of their firms. This is an alternative to face to face meetings, which can be challenging and time consuming in normal times, but now even more so with social distancing in place. Another approach to take is to build your professional digital network using a platform like LinkedIn, which allows you to connect online with your existing clients and prospects. It is a free and effective way for you to build your thought leadership and credentials in the areas of law that you practice, and in particular what you're good at. If you want to engage with colleagues there are also Community groups on LinkedIn for most legal topics.

We believe that you will find that technology becomes an integral part of attracting new clients.

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Technology also allows you to have more time for hobbies, walks and exercise and most importantly spending more time to connect with friends/family and sharing some of those better meals you have created in lockdown!

Good leaders navigate through uncertainty, partners, lawyers and staff should be encouraged to embrace change and technology, as it will be part of the new normal moving forward.

Action Checklist

- [ ] Do you have a single database? i.e. one version of the truth?
- [ ] Do you have a great library of automated legal forms that you don't need to be constantly updating?
- [ ] Can you easily record every attendance with full descriptions on every device?
- [ ] Can you reliably bill as soon as you are entitled to, trusting the data you entered when you recorded the activity?
- [ ] Does your trust (client) accounting system enable you to comply with regulations and provide your clients with a reliable and safe accounting service?
- [ ] Are you running your firm with the best cloud-based mobile technology?
- [ ] Do you have enough time built into your day for self-care?

Enjoy practicing law

It is said you can't succeed if you don't enjoy what you are doing. The lawyers who run and work in successful small law firms genuinely enjoy what they do. They have organized their firms and made conscious choices about the work they want to do and the clients they enjoy working with. Most importantly they are not stressed.

> **Their firms have made conscious choices about the work they want to do and the clients they enjoy working with.**

From our observations there are major causes of stress, each of which needs to be managed and they include:

- Practicing law in areas outside your area of expertise without appropriate support;
- Setting unrealistic prospects of success in litigious matters;
- A lack of organization in the office and client files, with constant nagging fear of malpractice;
- The absence of clear financial arrangements every time instructions are accepted;
- A sense that you are not building something of real value;
- Taking on too much work and feeling swamped;
- Not having a person/mentor to discuss issues with when you are unsure of procedures.

These problems are often compounded by a very commonly held view that 100% of lawyer time needs to be spent on client related billable hours in order to succeed and running the firm can be done part-time. This is nonsense. Time needs to be set aside to meet with clients to garner feedback from them, to lead the firm, to manage firm affairs, to meet regularly with staff, to learn and to work on practice development as well as keeping a focus on the client experience. A leader probably needs to spend at least 20% of her/his time on these management issues, otherwise the whole business will suffer. Time efficiency is the key to success!

Successful small law firm managers recognize the important role this type of legal practice plays in our communities. People naturally seek objective truth and they trust that they can get that from lawyers. These leading lawyers also tend to be proud of the role they play in upholding the rule of law and helping people in need. In short, they like the choice they made to go to law school and read law.

Action Checklist

- [ ] Do the type of law that interests you.
- [ ] Set realistic expectations, particularly in civil litigation.
- [ ] Organize your client matters with a good case management system.
- [ ] Establish clear Retainer and Cost Agreements for every matter.
- [ ] Set aside time (an hour a day at least) to work on business development, people, systems, clients and potential clients.

Employ smart people and treat them really well

Our new world has made this habit even more important than it has ever been. So many people are now working in isolation and without close supervision. The smarter the people, the less stress and the less time you need to invest in guiding your people. Smart people tend to make good choices on their own.

Your staff are your biggest single expense other than yourself. It just does not make sense to treat staff badly, and yet so many small firms undervalue them and they are often subjected to abuse and bullying by stressed lawyers. However, the successful firms we have visited, treat their staff exceptionally well. They don't just pay their staff well (although they frequently do because they are successful and can attract better people), they also treat them well in their interactions. Their staff have good chairs, up-to-date equipment and clean work areas. If they are working from home they are properly set-up. Everyone is treated with respect. Their staff are cheerful and motivated and perform better in their work. Quality work delivered with cheerfulness also seems to attract new clients who will also recommend your firm to their friends. Make sure you have a system so that you can thank them!

Successful firms don't hold on to staff out of misplaced loyalty or fear of dealing with underperformance. Sentiment must be put aside if you are building a business because poor staff performance drags everyone else down. Leaders of successful firms understand that every staff member who doesn't fit in or is underperforming is not only costing money but probably damaging the firm's reputation as well. They are also probably personally unhappy or threatened. It is often in the interests of the staff member to move on too.

The more you train your staff the more they can do for you.

One of the biggest differences between successful and unsuccessful firms is their attitude to staff training. A partner in a firm once said to me that he did not want to spend money on training staff because they might leave! Unfortunately, this attitude is quite common. But, what a waste of people and their talents.

The more you train your staff the more they can do for you. Most people love being given more responsibility and clearly the more work you can delegate to lower cost lawyers or support staff, the more profitable your firm will be. So many small firms try to operate without trained bookkeeping help. Modern systems mean that very few firms need full time bookkeeping services, and most para-legals are perfectly capable of being trained in basic client accounting. Despite this, firms put their very existence in peril by not arranging even basic bookkeeping training for themselves or their staff.

Providing your staff with the very best tools enables them to do their job better and will ensure they are happy and effective employees. This applies to both hardware and software technologies. You simply cannot attract or keep great young lawyers and other staff unless you provide them with the best tools. Would you join an airline as a pilot if the airline had not upgraded its planes for 20 years? Probably not. The same applies to smart graduates.

Technology has become so cheap that firms can now afford the best systems, but it is overcoming inertia that all too often makes change hard. Your staff should be given the best systems to work with because it will make them even more valuable to you.

Action Checklist

- [ ] Organize regular training for your staff.
- [ ] Recruit the very best people you can find and afford.
- [ ] Provide a comfortable chair for everyone.
- [ ] Provide clean work areas.
- [ ] Encourage staff to take on more responsibility.
- [ ] Provide the best tools for them to do their job.

Select the areas of law you like and focus on them

In small law firms, particularly when just starting out, there is the temptation to do any work that walks in through the door. We understand the imperative of simple financial survival, but success also requires making choices. It is hard to build a reputation today as a generalist unless you perhaps have a monopoly in a region; the law is increasingly complex, it is risky; especially if you want to provide excellent legal advice which requires some specialization, and you also need to manage your risks.

A major cause of stress for lawyers is accepting instructions in areas of law they are unfamiliar with. It probably also leads to lots of bad advice and bad outcomes for clients. It can also waste a lot of time as well as efficiency. That's why successful firms:

- Develop deep expertise in defined areas of law thereby supporting higher professional fees;
- Select areas of law that sit together comfortably, e.g. residential property, estate planning and probate and family law;
- Are resourceful – they have systems in place to identify and get involved in new and emerging areas of law that they can capitalize on;
- Create a great reputation for the work they do thereby attracting more profitable work;
- Ensure their marketing is aligned with the services they provide;
- Have research materials available to help in their specializations;
- Mentor young lawyers (and paralegals) by constantly improving the skills of those around them.

It is of course possible to take a specialization too far. One of the great advantages the legal profession has, is that it is possible to build a very recession proof business. Relying too heavily on the property market is a classic case. In good times the temptation to just specialize in property is enormous. The danger of this is unfortunately being re-learned by many law firms, particularly those in the United Kingdom and Australia today.

Good firms don't expose themselves in this way; these firms make sure they have multiple revenue streams to cushion them when the economy changes by choosing to practice in areas of law that will be counter-cyclical, or which are consistent irrespective of economic cycles. Lending and debt collection are the obvious two that come to mind. Family Law and crime perform consistently and often counter cyclically.

The most successful firms during the economic downturn of 2008 were able to slightly change their business by continuing to work in their specialist areas, but by being more adaptable too. For example, if they practiced real estate, they focused on foreclosure work. If they specialized in family law, they acknowledged the increase in divorce rates that comes with economic stress and changed their systems to be more efficient. Firms around the world are being challenged in 2020 to make similar choices but in profoundly more complex circumstances.

It is essential to think strategically and understand what is going on around you – and the environment in which you operate. Strategic thinking like this also gives you choices so that your firm will prosper and grow in both good times and bad. Once chosen, focus all your marketing and training on the selected areas of law you have chosen. Your reputation will build, and the work will follow and your networks will grow.

Action Checklist

- [ ] Carefully select the areas of law in which you want to practice.
- [ ] Combine areas of law that mutually support each other.
- [ ] Cross-sell your services.
- [ ] Invest in the software, content systems and research materials that enable your staff to do work for you reliably.
- [ ] Train and delegate as much as possible to junior staff.
- [ ] Strategize creative ways to insulate your business against a recession by continuing to practice your favorite areas of law.

Dedicate time to building the firm as a business and take the time to care for yourself as well

The leaders of successful firms understand that building a firm takes time and it is the leader who must do this. In many small firms the principal is often the largest fee earner and the chief rainmaker. But from the observations we have made over the years, these leaders seem to get more done by delegating work effectively and setting time aside to work on their firms. Many have also stated that they dedicate about 20% of their time to building their businesses.

It is also important to realize that relying on 'word of mouth' to build a business is not a strategy. Although it is essential that you build a good reputation, to build a business you need to take action. It is not enough to think you can get away with a bit of marketing, although you do have to do that. The leaders of successful small law firms all realize that they must also properly package and sell their services. Their leadership makes them become, the 'go to person' in building important relationships, writing topical articles and running Q&A sessions.

Leaders of successful small law firms all realize that they must also properly package and sell their services.

For many lawyers the word 'sales' is anathema. But this is an issue which needs to be confronted. You can't sell anything without understanding sales. If you want more clients, you need to sell your firm. However, if you can consistently provide an exceptional client experience, that delivery of excellent service will do most of the weightlifting for you.

Successful firms ensure that there is constant alignment between the legal services offered, what their marketing material says across all mediums, and what they and their staff say when speaking to clients and prospective clients.

It is this alignment and consistency of messaging that builds a powerful reputation. It also makes it much easier for everyone in your firm to stay on message. And remember it is not enough to say you care on your website. People need to know you care from your behavior and that you genuinely want to help rather than wanting to just make money. When you go the extra mile, clients know you care. This is especially important in small rural and regional communities.

Firms that treat their staff and clients well become empowered as well as happy. Clients will take notice and will prefer bringing, as well as referring, work to that firm. There is an aphorism that states, “If you don’t know where you are going, then you aren’t guaranteed to get there!”. Successful firms have a clear vision for where they want to go and how they are going to get there.

This means good leaders pay particular attention to:

- The vision which they share with their staff and clients;
- Employment Policies;
- Staff skills and happiness;
- Billing processes (from start to finish);
- Client satisfaction with the quality of service;
- Marketing.

They also ‘know their numbers’. They count everything. A good practice management system will help you with this, but it’s also very much a habit. For example, they will be able to track how many new clients they get per month and what the average client is worth, how many new matters they address per month and what the average matter is worth. They will also be able to instantly distinguish new clients from repeat, or existing ones.

Self-care for everyone in the firm is important and doubly so with isolation and distancing. Knowing how and who to ask for support when required and how to allow enough time for yourself and your family is also vitally important. So don’t neglect laughter and doing more of what you love. Breathe deep – into your diaphragm – move – get fit – tidy – gain a sense of control – learn something new – have passion and be grateful for what you do have. A healthy, happy mindset is infectious!

Action Checklist

- [ ] Have and share your vision for your firm with all your staff.
- [ ] Adopt encouraging employment policies and practices.
- [ ] Understand your cash flow and working capital requirements.
- [ ] Provide quality service and listen in particular to disgruntled clients.
- [ ] Have a coherent and consistent marketing plan.
- [ ] Take care of everyone in the firm and know how and when to switch off and reenergize to.

Confront the challenges of getting paid to solve 'problems'

Despite the popular impression, and misconception, that all lawyers are fee-obsessed, many lawyers are very uncomfortable discussing money with clients. This may be due to a fear that their client will decide not to proceed if told the truth about costs. Sadly, these lawyers usually condemn themselves to lives of stress.

The leaders of highly successful firms confront these money challenges head on. To do so, they:

- Make it easy for clients to make payments online;
- Ensure that there is an appropriate Retainer or Engagement/Costs Agreement in place for every matter AND that it is signed. Good systems make this easy;
- Whenever possible they get a deposit from their clients, ideally sufficient to cover the next 30 days of work;
- Where appropriate, they set monthly payment arrangements in place from the start so that bills never get out of hand;
- They make sure that the firm then does precisely what the Retainer Agreement says it will do regarding billing and payment, which may mean ceasing work beyond the scope of the Agreement;
- They immediately provide a revised Retainer/Cost/Engagement Agreement when the scope of work changes;
- They make sure that every activity of every lawyer is contemporaneously recorded into a system so that they can manage their matters properly, bill accurately and comply with their professional obligations. This needs mobility and discipline;
- They bill regularly for small amounts, never letting the debt get out of hand;
- They then make sure that every matter is billed as soon as the firm is legally entitled to bill, and request retainer top-ups if necessary;
- They DON'T operate under the illusion that Work in Progress or WIP is income - it needs to be billed. It is amazing how common this problem is, and is often a major cause of dissension amongst partners;
- They make sure that the same rules apply to every lawyer in the firm, irrespective of seniority;
- Most importantly, they stop work if the client stops paying without making alternative arrangements – for example, to pay by installments.

Although the above list seems pretty obvious, why then do lawyers find it so hard? I think it is because so many of them have poor systems, making the act of billing a personal responsibility rather than a necessary firm activity. With good time recording and billing systems, it becomes easier to explain and de-personalize the process, removing the idea of fee earner discretion – clients know that they need to pay, and should simply know how much and when.

There are some astonishing figures on the percentage of matters proceeding without a signed Retainer in place. With a good system this should become standard operating procedure using automated templates for each Matter Type recognizing all the subtleties of practice in the different areas of law.

If you choose to introduce just one habit to get started, make it this one as it will act as encouragement to do the rest.

When excellent firms address these challenges, they can:

- Charge more;
- Get paid faster;
- Have less stress;
- Have lower working capital requirements because of it; and
- Stop wasting time chasing unpaid fees.

If you choose to introduce just one habit to get started, make it this one as it will act as encouragement to do the rest. Recognize that how you retain and bill your clients is very possibly the most important part of the Client Experience. It is the moment your performance is judged.

Action Checklist

- [ ] Put standard Retainer Agreement arrangements in place for all matters.
- [ ] Update Retainer Agreements immediately upon any change in the scope of work.
- [ ] Establish a regime where every task done is accurately recorded on the go.
- [ ] Organize to bill regularly for small amounts in every matter.
- [ ] Make sure you bill as soon as you are entitled to.
- [ ] If you are not paid on time – stop work!
- [ ] Bill in plain English and plain arithmetic.

Have standard processes and procedures in place for all matters

This is what the opening paragraph stated in version 1 of 11 Habits: "Unfortunately, far too many small law firms are badly organized which is easy to see just walking into their offices. Usually they have physical files in piles on cabinets and sometimes even littering the floor. Often, they will say this shows how busy they are, but in reality, it just displays how disorganized they are. Physical disorganization has a massive negative impact on everyone in a firm, including clients who come in to see you."

It is only weeks ago we write this, but it feels like an age ago that was the norm. In a digital world this scenario is going to disappear quicker than otherwise, but many firms will probably return to their old ways once they return to the office. It is critically important not to replace physical chaos with digital chaos.

You need systems.

When operating with a fully Electronic Matter you instantly locate the client file in your computer system using the client's name, matter name or file number. You have the financial status of the matter and all incoming and outgoing correspondence immediately available to you. Within seconds you can start usefully helping your client, doing the work you love, and delivering what your client wants to pay you for.

In successful law firms this is the standard. Anything less represents a failure. Good leaders understand the full impact of organizational chaos as it:

- Is inherently inefficient;
- Creates and elevates risk;
- Creates unnecessary stress for lawyers;
- Does NOT impress clients;
- Results in a firm wasting time and making less money.

Successful firms are so organized that anyone, no matter where they are located, can literally 'pick up' a matter and understand it, because the entire firm has a standard approach. This also means that the information itself can be stored in both paper and electronic files. When good administrative processes are in play, lawyers devote most of their time to law, not to clerical work. This also removes a significant amount of stress on lawyers and enables them to enjoy their practice more. Best of all, clients notice this and are inspired by the organization and focus that they witness.

Successful firms are so organized that anyone, no matter where they are located, can literally 'pick up' a matter and understand it.

In summary, the following key areas deserve greater attention by small law firms if they are to become successful.

1. Have only one database of client and matter information for every client and matter. You cannot be efficient if your starting point is always wondering if the data you are looking at is accurate and up to date. This requires a good software solution that combines time recording, document production and management, legal and trust accounting and billing in one integrated application. If you do just one thing to get organized, do this.
2. Have just one way of opening a new client file and make sure that every member of staff accesses every client file the same way with no exceptions.
3. All standard documents should be electronically organized and easily available. This saves you from searching manila folders for the relevant information.
4. All information about a matter can be accessed instantly, and if necessary, client conflict checked.
5. Both lawyers, as well as staff can share matter information including documents with clients online.
6. All use plain English in every communication and ensure all communications are understood.
7. Standardize billing procedures then adhere to them religiously.

Action Checklist

- [ ] Figure out where in your firm negative client interactions are occurring and fix them.
- [ ] Investigate where you are wasting time within your own daily practice.
- [ ] Address and fix these issues with good software and procedures.
- [ ] Make sure your staff are well-trained, have access to and are on-board with these procedures.
- [ ] Watch the repeat and referral business roll in!

Make compliance a natural consequence of running a firm well

The leaders of successful small law firms implement systems with standard procedures, processes and checks and balances to ensure that compliance is a natural consequence of running a firm well.

They have professional rules relating to:

- How a file is run;
- How the lawyer conducts her/himself;
- Client (trust) money.

In well-run firms someone must be responsible for ensuring that everyone in the firm complies with the rules as well as applies common sense to the job at hand.

Successful firms ensure that research material is available when needed and guidance (rancor-free mentorship) is available and provided when needed. They also ensure that performance is routinely reviewed.

These firms also have systems in place for managing both client/trust money and do not require complicated bookkeeping knowledge. Just honesty.

It is worth noting that The Solicitors Regulatory Authority in the United Kingdom has created a regime that combines discipline and common sense and might be a good model for other jurisdictions to adopt. In the UK, every law firm is required to appoint:

- A Compliance Officer Legal Practice (COLP); and
- A Compliance Officer Financial Affairs.

In small firms these roles are often held by the same person. Responsibilities are clearly articulated and involve submission of an annual compliance report and an obligation to report any transgression that might have occurred between these reports. Having a structure within which to operate makes it a lot easier for a leader to manage. Requirements are known. Behavior is monitored.

Successful firms use modern systems and manage their firms diligently. This diligence also helps reduce the risks of having to face stressful disciplinary proceedings for failing to comply with ethical or regulatory compliance just because you are disorganized.

Successful firms use modern systems and manage their firms diligently.

Compliance should be a natural consequence of good systems, and is in successful firms.

Action Checklist

- [ ] Make sure each staff member has access to research and guidance materials.
- [ ] Put a staff member in charge of ensuring and reporting on compliance issues.
- [ ] Facilitate random file reviews.
- [ ] Enable random client (trust) money checks.
- [ ] Review compliance reports for the entire team and make and take suggestions to improve compliance.

Become an expert in client experience

We have hinted at this in some of the previous Habits. The bedrock of a good customer experience is embodied by establishing good communications and by building good rapport with your clients from their very first meeting with you. You need new skills. Many of these first meetings will be by phone and video in future. It will be the rule rather than the exception for many firms. Successful law firms effectively embed great customer service throughout their culture. They are also specialists in communication. From the start of an engagement, until the matter (no matter how big or small) is completed, you must keep the client fully informed about the progress of the matter they have brought you. Bill fairly and often to avoid 'bill shock'. By doing so, you will consistently demonstrate how your firm values them as a client.

Successful law firms effectively embed great customer service throughout their culture.

It is also well known that referrals from happy and existing clients are a law firm's primary source of referrals. Successful lawyers never overlook the importance of delivering outstanding customer service.

We previously mentioned the rapidly emerging importance of using social media to build your law firm and we think that it is an integral part of the new Client Experience. Whilst existing clients are the primary source of new work for established law firms, new firms need to find new clients. And increasingly, existing firms need to defend themselves from the inevitable attacks from the new firms. Products like LinkedIn are tremendously powerful but are not generally understood and are misused by most lawyers. The most important insight we can share is do not spend time connecting with other lawyers, after all, you do not get work from them! You need to connect with influential people in your client base, or in the market segment where you want to work. You need to understand how high-quality engagement (Likes/Comments/Shares) on the platform reflects the market's perception of your firm's thought leadership, pay close attention to detail and ensure only high quality content is posted by your firm.

The world has changed. You will be surprised by the number and value of relationships that are built online today.

Using social media in conjunction with a well-designed Web Portal, you can provide all your clients with a single point of access. This means clients can interact with your firm anytime it is convenient for them to do so. Best of all, these self-service portals allow your clients to complete intake forms, book appointments, pay bills, make deposits, view their matter financial and read and comment on documents, all at the clients' convenience 24 x 7.

Action Checklist

- [ ] Showing courtesy in every interaction is integral to the delivery of Customer Service.
- [ ] Training each of your firm's lawyers to be 'nice' is also key.
- [ ] Keeping in constant contact with matter updates demonstrates Customer Service.
- [ ] Create and maintain a client focused newsletter.
- [ ] Provide innovative ways for clients to work collaboratively online, and to interact with your firm using 'easy to use' self-service portals.

Understand the finances of your firm

Unfortunately, most lawyers receive no training in financial management or even basic bookkeeping.

But, the principals of successful small law firms are different. Without exception, they understand the finances of their firms. Even if they don't have a natural aptitude for numbers, they have taken steps to remedy this and as a result they:

- Understand the economics of the firms; AND
- Understand the economics of a matter.

Running a small firm is no different from running any business. To successfully grow a firm, understanding the sources of capital and the stock of available time and effectively managing them is critical.

To successfully grow a firm, understanding the sources of capital and the stock of available time and effectively managing them is critical.

The most important source of working capital, or cash flow, for small firms is the revenue generated from legal work and with stable working capital you have choices. Without it you have stress and uncertainty about the future. The best firms don't always charge the highest rates, though some may because of the quality of service they provide. Rather, they:

1. Ensure that they have a deposit in place to cover initial fees and disbursements whenever possible;
2. Ensure that every activity (in and out of the office) is accurately and contemporaneously recorded, eliminating guess work from the activity recording and billing process. N.B. A failure to accurately record billable work is the single biggest source of revenue loss in every law firm we have ever encountered;
3. Ensure that bills are generated as soon as appropriate;
4. Ensure that everyone in the firm - without exception, including principals and partners - generates bills using the same system;
5. Ensure that bills are actually sent! (And, yes, we have seen many generated bills resting peacefully on desks and windowsills in the offices of lawyers);
6. Make it easy for clients to pay using modern online payment methods;
7. Follow up debt to ensure it is paid on time.

With a good understanding of revenue, excellent firms also understand which matters are the most profitable. This also means they need to pursue profitable work or accept the fact that unprofitable work is a marketing expense. 'Loss leader' work. Measuring 'matter profitability' is not easy. But by keeping accurate time records for every matter (whether billable or not), you will be able to measure the time spent against the amount charged, and then measure it against the base cost of the lawyer providing the legal advice. In this way, you can adjust your firm's charge rates to achieve the desired profitability level.

Maintaining your firm's charge rates requires a deep understanding of the value of the services you provide and the means of the client base being serviced.

While it's true that no legal firm has ever 'saved' it's way to success, the leaders of these great firms are obsessive about understanding and maintaining cost controls and are particularly careful about managing expenses. These costs are so easily incurred, and yet, in the absence of discipline, easily overlooked when billing. This risks converting a client cost into a firm expense.

Successful firms have moved away from only looking at their financials as historical 'how did we do last month?' documents. But, it is still remarkable how many firms try to operate this way.

That's why successful firms monitor performance daily through automatically generated performance reports. This means that instead of being historians, you can immediately identify financial issues regarding a lawyer performance or client delinquency as soon as a problem appears and take action early. They are on top of the financial performance of their firm each day, not just once a month.

Action Checklist

- [ ] Understand the finances of your firm.
- [ ] Understand the profitability of different matter types.
- [ ] Ensure that every activity is recorded.
- [ ] Don't continue working if bills are not paid.
- [ ] Be proactive about managing revenue and costs and stop managing history.

Summary

These 11 Habits are the hallmark of all highly successful law firms because these Habits mean:

1. They are efficient.
2. They are early adopters of technology.
3. They enjoy practicing law.
4. They employ smart people and treat them really well.
5. They have selected areas of law they like and focus on them.
6. They dedicate time to building the firm as a business and take the time to care for yourself as well.
7. They confront the challenges of getting paid and solve them.
8. They have standard processes and procedures in place for all matters.
9. They make compliance a natural consequence of running a firm well.
10. They become experts in customer experience.
11. They understand their finances.

It is important to remember that transformation takes time and action, but you have to take the first step.

Of course, there are so many other things that successful firms do. But, these 11 Habits reflect the essence of what we have observed across a broad cross section of firms doing different types of law in different jurisdictions.

In conclusion, it is important to remember that transformation takes time and action, but you have to take the first step. Engaging a coach to help you overcome internal resistance and kick start the process of change is often the best way to do it.

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11habitsconsultancy.com/introduction

Rules of Professional Conduct Relevant to "Leveraging Technology to Implement the 11 Habits of Successful Law Firms"

Competence:

- ABA Model Rule of Professional Conduct 1.1
  - "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 ABA Model Rule 1.1
  - "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." [emphasis added]

- NJ Rule of Professional Conduct 1.1
  - "A lawyer shall not:
    (a) Handle or neglect a matter entrusted to the lawyer in such a manner that the lawyer's conduct constitutes gross negligence.
    (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally."

Diligence

- ABA Model Rule of Professional Conduct 1.3
  - "A lawyer shall act with reasonable diligence and promptness in representing a client."

- Comment [2] to ABA Model Rule 1.3
  - "A lawyer's work load must be controlled so that each matter can be handled competently."

- New Jersey Rule of Professional Conduct 1.3
  - Same as ABA Model Rule

Communication

- ABA Model Rule of Professional Conduct 1.4
  - "(a) A lawyer shall:
    (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
    (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;
    (4) promptly comply with reasonable requests for information; and
    (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

- Comment [4] to ABA Model Rule 1.4
  - "A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, then the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer shall promptly respond to or acknowledge client communications."

- New Jersey Rule of Professional Conduct 1.4
  - "(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

    (b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

    (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

    (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct."

Fees

- ABA Model Rule of Professional Conduct 1.5(b)
  - "(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

- Comment [2] to ABA Model Rule 1.5
  - "When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation.

A written statement concerning the terms of the engagement reduces the possibility of misunderstanding."

- NJ Rule of Professional Conduct 1.5(b)
    - "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation."

Confidentiality

- ABA Model Rule of Professional Responsibility 1.6(a), 1.6(c)
    - "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."
    - "(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] to ABA Model Rule 1.6
    - "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… 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… Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules."

- Comment [19] to ABA Model Rule 1.6
    - "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. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

- NJ Rule of Professional Responsibility 1.6(a), 1.6(f)

- "(a) A lawyer shall not reveal information relating to representation of a client unless the client consults after consultation, except for (1) disclosures that are impliedly authorized to carry on the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d)."
- "(f) 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."

Safeguarding Client Property

- ABA Model Rule of Professional Conduct 1.15(a)-(c)
  - "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

    (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

    (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

- Comment [1] to ABA Model Rule 1.15
  - "A lawyer should hold property of others with the care required of a professional fiduciary… All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order."

- NJ Rule of Professional Conduct 1.15(a)
  - "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record."

- NJ Rules Governing the Courts of the State of New Jersey – Rule 1:21-6 – Practice of Law
    - "(a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

      (1) A trust account or accounts, separate from any business or personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receive, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care shall be deposited; and

      (2) A business account into which all funds received for professional services shall be deposited.

      One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A."

    - "(c) Required Bookkeeping Records. (1) Attorneys, partnerships of attorneys, and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:
      …
      (H) copies of all records, showing that at least a monthly reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balance…"

Declining or Terminating Representation

- ABA Model Rule of Professional Conduct 1.16(a)
    - "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged."

- Comment [1] to ABA Model Rule 1.16
    - "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."

- New Jersey Rule of Professional Conduct 1.16(a)
    - Same as ABA Model Rule

Rights of Third Persons

- ABA Model Rule of Professional Conduct 4.4(b)

- "(b) 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."

- Comment [2] to ABA Model Rule 4.4
  - "Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent which it is accidentally transmitted, such as when an email or letter is misaddressed or ad ocument or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures … 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."

- New Jersey Rule of Professional Conduct 4.4(b)
  - "(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender, (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible."

Responsibilities of a Supervisory Lawyer

- ABA Model Rule of Professional Conduct 5.1(a)-(b)
  - "(a) A partner in a law firm, 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 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 confirms to the Rules of Professional Conduct."

- Comments [2]-[3] to ABA Model Rule 5.1
  - '[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters,

account for client funds and property and ensure that inexperienced lawyers are properly supervised."

- New Jersey Rule of Professional Conduct 5.1 (a)-(b)
    - "(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers confirm 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 confirms to the Rules of Professional Conduct."

Responsibilities Regarding Nonlawyer Assistance

- ABA Model Rule of Professional Conduct 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) 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; 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."

- Comments [1] – [3] to ABA Model Rule 5.3
    - "[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer."

- "[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline."

- "[3] 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. 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. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."

- NJ Rule of Professional Conduct 5.3
  - Substantially same as ABA Model Rule

___ N.J.L.J. ___

___ N.J.L. ___

Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

Opinion 701
Advisory Committee on Professional Ethics

Electronic Storage And Access of Client Files

The inquirer asks whether the Rules of Professional Conduct permit him to make use of an electronic filing system whereby all documents received in his office are scanned into a digitized format such as Portable Data Format ("PDF"). These documents can then be sent by email, and as the inquirer notes, "can be retrieved by me at any time from any location in the world." The inquirer notes that certain documents that by their nature require retention of original hardcopy, such as wills, and deeds, would be physically maintained in a separate file.

In Opinion 692, we set forth our interpretation of the term "property of the client" for purposes of *RPC* 1.15, which then triggers the obligation of a lawyer to safeguard that property for the client. "Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property." 163 *N.J.L.J.* 220, 221 (January 15, 2001) and 10 *N.J.L.* 154 (January 22, 2001). Such documents cannot be preserved within the meaning of *RPC* 1.15 merely by digitizing them in electronic form, and we do not understand the inquirer to suggest otherwise, since he acknowledges his obligation to maintain the originals of such documents in a separate file.

On the other hand, we also noted in Opinion 692 that a client file will likely contain other documents, such as correspondence, pleadings, memoranda, and briefs, that are not "property of the

client" within the meaning of *RPC* 1.15, but that a lawyer is nevertheless required to maintain at least for some period of time in order to discharge the duties contained in *RPC* 1.1 (Competence) and *RPC* 1.4 (Communication), among others. While traditionally a client file has been maintained through paper records, there is nothing in the RPCs that mandates a particular medium of archiving such documents. The paramount consideration is the ability to represent the client competently, and given the advances of technology, a lawyer's ability to discharge those duties may very well be enhanced by having client documents available in an electronic form that can be transmitted to him instantaneously through the Internet. We also note the recent phenomenon of making client documents available to the client through a secure website. This also has the potential of enhancing communications between lawyer and client, and promotes the values embraced in *RPC* 1.4.

With the exception of "property of the client" within the meaning of *RPC* 1.15, therefore, and with the important caveat we express below regarding confidentiality, we believe that nothing in the RPCs prevents a lawyer from archiving a client's file through use of an electronic medium such as PDF files or similar formats. The polestar is the obligation of the lawyer to engage in the representation competently, and to communicate adequately with the client and others. To the extent that new technology now enhances the ability to fulfill those obligations, it is a welcome development.

This inquiry, however, raises another ethical issue that we must address. As the inquirer notes, the benefit of digitizing documents in electronic form is that they "can be retrieved by me at any time from any location in the world." This raises the possibility, however, that they could also be retrieved by other persons as well, and the problems of unauthorized access to electronic platforms and media (i.e. the problems posed by "hackers") are matters of common knowledge. The availability of sensitive client documents in an electronic medium that could be accessed or intercepted by unauthorized users therefore raises issues of confidentiality under *RPC* 1.6.

The obligation to preserve client confidences extends beyond merely prohibiting an attorney from himself making disclosure of confidential information without client consent (except under such

circumstances described in *RPC* 1.6). It also requires that the attorney take reasonable affirmative steps to guard against the risk of inadvertent disclosure. Thus, in Opinion 692, we stated that even when a closed client file is destroyed (as permitted after seven years), "[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties." 163 *N.J.L.J.* 220, 221 (January 15, 2001) and 10 *N.J.L* 154 (January 22, 2001). Similarly, in ACPE Opinion 694 and CAA Opinion 28 (joint opinion), we joined with the Committee on Attorney Advertising in finding that two separate firms could not maintain shared facilities where "the pervasive sharing of facilities by the two separate firms as described in the Agreement gives rise to a serious risk of a breach of confidentiality that their respective clients are entitled to." 174 *N.J.L.J*. 460 and 12 *N.J.L*. 2134 (November 3, 2003).

And in Opinion 515, we permitted two firms to share word processing and computer facilities without becoming "office associates" within the meaning of *R.* 1:15-5(b), but only after noting that "the material relating to individual cases of each attorney is maintained on separate 'data' disks used only by their respective secretaries and stored (while not in use) in each of their separate offices." 111 *N.J.L.J*. 392 (April 14, 1983).

> We stress that whenever attorneys enter into arrangement as outlined herein, the attorneys must exercise reasonable care to prevent the attorney's employees and associates, as well as others whose services are utilized by the attorney, from disclosing or using confidences or secrets of a client.
>
> The attorneys should be particularly sensitive to this requirement and establish office procedures that will assure that confidences or secrets are maintained.

Id.

The critical requirement under *RPC* 1.6, therefore, is that the attorney "exercise reasonable care" against the possibility of unauthorized access to client information. A lawyer is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access. "Reasonable care," however, does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all

unauthorized access. Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.

What the term "reasonable care" means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure. Obviously, in this area, changes in technology occur at a rapid pace. In 1983, for instance, when Opinion 515 was published, the personal computer was still somewhat of a novelty, and the individual floppy disk was the prevailing data storage device. The "state of the art" in maintaining electronic security was not very developed, but the ability to prevent unauthorized access by physically securing the floppy disk itself satisfied us that confidentiality could be maintained. By implication, at the time we were less accepting of data stored on a shared hard drive, even one that was partitioned to provide for individual private space for use by different firms, because of the risk of breach of confidentiality under prevailing technology.

We are of course aware that floppy disks have now become obsolete, and that it is exceedingly unlikely in this day and age that different law firms would attempt to share hard drive space on a conventional desktop computer, given the small cost of such computers in today's market. New scenarios have arisen, however. It is very possible that a firm might seek to store client sensitive data on a larger file server or a web server provided by an outside Internet Service Provider (and shared with other clients of the ISP) in order to make such information available to clients, where access to that server may not be exclusively controlled by the firm's own personnel. And in the context originally raised by the inquirer, it is almost always the case that a law firm will not have its own exclusive email network that reaches beyond its offices, and thus a document sent by email will very likely pass through an email provider that is not under the control of the attorney.

We are reluctant to render an specific interpretation of *RPC* 1.6 or impose a requirement that is tied to a specific understanding of technology that may very well be obsolete tomorrow. Thus, for instance, we do not read *RPC* 1.6 or Opinion 515 as imposing a per se requirement that, where data is available on a secure web server, the server must be subject to the exclusive command and control of the firm through its own employees, a rule that would categorically forbid use of an outside ISP. The very nature of the Internet makes the location of the physical equipment somewhat irrelevant, since it can be accessed remotely from any other Internet address. Such a requirement would work to the disadvantage of smaller firms for which such a dedicated IT staff is not practical, and deprive them and their clients of the potential advantages in enhanced communication as a result.

Moreover, it is not necessarily the case that safeguards against unauthorized disclosure are inherently stronger when a law firm uses its own staff to maintain a server. Providing security on the Internet against hacking and other forms of unauthorized use has become a specialized and complex facet of the industry, and it is certainly possible that an independent ISP may more efficiently and effectively implement such security precautions.

We do think, however, that when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using "reasonable care" against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has

come to the prudent professional judgment he has satisfied both these criteria, then "reasonable care" will have been exercised.[1]

[1] In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.

Ahead of the Curve: Complying with your State's Technology Competence Rule

Jacquie West, Esq.

As nearly any lawyer would unabashedly (and perhaps proudly) admit, the legal profession is one of the slowest to adopt any form of technologic advancement. Fortunately, the American Bar Association (ABA) has stepped in to assist by adopting a technology competence requirement in the Model Rules. Since the ABA's adoption in 2012, thirty-six (36) states have followed suit in some form or another. This is great news for those of us who grew up on computers and smartphones, but probably a bit terrifying for those older school attorneys out there. What does it mean to be technologically competent? It probably depends on the state and we will not be able to cover them all, so this paper will focus on the more robust state requirements and discuss what this means for small firm attorneys.

In my own experience working with hundreds of small law firms in New York and New Jersey (and working at a few New York firms as an attorney) I have personally observed this lack of technology adoption. This can range from maintaining a typewriter (every firm I have worked at and almost every firm I have ever visited) to grossly outdated hardware and software (Windows XP came out in 2001 – it is time to let go). I have also observed quite a few firms that still utilize WordPerfect, a program created for the DOS operating system (remember that?!?) which went out of style in the mid-90s. Yes, that's right – WordPerfect became obsolete more than twenty (20) years ago with the introduction of the far more popular Microsoft Word application which has continued to move with the times (Office 365 for example). The reality is that the world is moving applications to the cloud and WordPerfect only integrates with server-based products[1] as far as I can tell. It is only a matter of time before WordPerfect goes the way of DOS.

Apart from U.S. legal market specifically, the Microsoft application is the clear standard in word processing globally. Inexplicably, WordPerfect continues to be utilized by firms everywhere, despite its lack of compatibility with most current programs.[2] I do not write this to insult those who use WordPerfect, rather I write to demonstrate why the adoption of the American Bar Association's Model Rule regarding technology competence is much needed.

In 2012 the American Bar Association (ABA) introduced a change to Comment 8 of Model Rule 1.1 (Competence).[3] While it is quite obvious that an attorney has a duty to competently represent their client in legal matters, this amended rule introduced the idea of technology competence.

The Comment states:

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[1] Corel Corporation, *WordPerfect Tools*, https://www.wordperfect.com/en/pages/900129.html (last visited June 12, 2019).

[2] *Id*.

[3] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt 8 (2012).

> [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.[4]

The language of the ABA Comment is quite vague, but a fair interpretation is that attorneys have a duty to keep up with the latest trends in legal technology and weigh the benefits and risks of utilizing such technology in their practice. The verbiage implies that attorneys must be proactive in their approach to technology, rather than reactive, only giving up a beloved program because it no longer functions alongside newer technology.

Since its adoption by the ABA, thirty-five (35) states have incorporated this or a similar requirement into their rules of professional conduct. Two additional states, California and Louisiana have quasi-adopted the requirement.[5] To date, two states have mandated technology-based Continuing Legal Education (CLE) credits[6] and one other state permits up to two (2) hours of CLE credit for Law Practice Management Programming.[7]

What is Technology Competence?

Of the thirty-seven (37) states that have adopted some form of the ABA Comment, the majority[8] have adopted the language exactly and without additional commentary. Some states, however, have created more specific rules which provide better guidance for the meaning and context of "technology competence" and "relevant technology."

The modified rules range from the mundane "[a]ttention should be paid to the benefits and risks associated with relevant technology"[9] to the more specific "including the benefits and risks associated with the technology relevant to the lawyer's practice."[10] The New York technology competence rule is the most specific and states in relevant part: "To maintain the requisite knowledge and skill, a lawyer should . . . (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information"[11]

So what technology is relevant to a lawyer's practice? New York attorneys are at an advantage here, as the rule lays out exactly what is relevant to a lawyer's practice. For other states, it may not be so clear. Relevance goes beyond the hardware and software utilized in the firm for word processing and document creation, though that is an important component. Consider the way we communicate with our clients and adversaries – through email most often or increasingly via text

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[4] *Id*. (emphasis added).
[5] California has cited the ABA rule in its opinion number 2015-193. CA Comm. On Prof'l Responsibility, Formal Op. 2015-193. Louisiana has incorporated the requirement into its Code of Professionalism, which states in pertinent part: "I will stay informed about changes in the law, communication, and technology which affect the practice of law." LA Code of Professionalism (April 11, 2018).
[6] Florida and North Carolina, discussed below.
[7] KS R. of Prof'l Conduct R. 1.1 Cmt 8 (2014).
[8] The following states have adopted the rule exactly: AK, AR, AZ, CT, DE, IA, ID, IL, KS, KY, MA, MN, MO, MT, ND, NE, NM, OH, OK, PA, TN, TX, UT, VT, WA, WI, WV, and WY.
[9] Rules of Integration of the VA State Bar, Part Six of the Rules of Court, Sec. 2, R. 1.1 cmt 6 (2015).
[10] NC R. of Prof'l Conduct R. 1.1 cmt 8 (2019)
[11] NY R. of Prof'l Conduct R. 1.1 cmt 8 (2018) (emphasis added).

messages. We send and receive medical and employment records (often digital), tax returns, estate documents, photos, videos, etc. It is quite relevant how those items are sent, received, and stored to maintain confidentiality and comply with not only legal ethics rules, but also such regulations as the Health Information Portability and Accountability Act (HIPAA). Throw in eDiscovery, eFiling, and general document storage and we've got ourselves a full suite of relevant technology to learn the risks and benefits of.

While eDiscovery may not necessarily be top priority for solo and small firm attorneys, but eFiling certainly should be. Both state and federal courts regularly utilize electronic filing services so any attorney who files court documents must keep abreast of the rules applicable to the state(s) and circuit(s) they practice in. I distinctly recall having a document or two kicked back from the NYSCEF system due to improperly uploaded PDFs. Thanks to technology innovations most word processing programs can convert documents to PDF and larger scanners now automatically format for optical character recognition (OCR). This is no longer a big issue, unless you do not know how to convert a document to PDF, what OCR is, or whether your state's eFiling system requires OCR formatted documents. Again, the necessity of a rule requiring basic technology competence for lawyers is apparent and technology is only going to get more advanced and integrated into our workplaces. Failure to keep abreast of advances in technology not only makes your firm less efficient, but it could also open you up to a malpractice claim.[12]

The New Hampshire Ethics Comment goes a bit further in requiring knowledge of the risks and benefits of the tech used by lawyers in similar practice, while acknowledging that the ABA Model Rule requirement is broad. New Hampshire provides reasonable and "realistic" guidance to ensure attorneys are not wasting time and resources trying to comply with the rule: "a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers similarly situated are using."[13]

The New Hampshire Comment acknowledges the difference between a solo practitioner and a 50+ attorney firm. Solo and small firm practitioners will not have the same needs or resources of a larger, more robust firm. Solo and small firm attorneys are also often generalists practicing in multiple areas of law without the support of paralegals, legal assistants, or an office manager. It makes sense to only require attorneys to compare their technology competence to those who are most like them. This does mean however, that if all your fellow solo and small firm attorneys are using Microsoft Word and you are the only one using WordPerfect you may need to rethink the tech you use in your firm.

Does being technologically competent mean you must be a tech wizard? Of course not. You went to law school, not computer programming school. It does mean that now is the time to act. It is no longer acceptable (or particularly wise[14]) to proudly declare the legal profession's lack of

[12] Cohen, Meredith, *Technology in Florida: An In-Depth Review* (March 22, 2018) https://abovethelaw.com/lawline-cle/2018/03/22/technology-in-florida-an-in-depth-review/ (last visited June 11, 2019).
[13] NH Ethics Comm. to ABA Model R. of Prof'l Conduct 1.1 cmt 8 (2016) (emphasis added).
[14] *See* Grey, Ivy B., *Exploring the Ethical Duty of Technology Competence, Part I,* May 8, 2017 (updated June 26, 2017), https://intelligentediting.com/ blog/exploring-the-ethical-duty-of-technology-competence-part-i/ (last visited on June 25, 2019).

technology adoption and would likely constitute an ethical violation.[15] In fact, a few states have even begun mandating or allowing technology training as part of the annual CLE requirements. It seems doubtful that after adoption of the technology competence requirement has reached so many states, more and more will begin to adopt or allow CLE credit in technology-based topics. For now, we will look at the three states that currently have such rules.

Technology CLE Programs

Florida

Florida's Competence Rule replicates the ABA Comment without additional commentary. That state currently requires thirty-three (33) CLE credits every three years. Three of the total "must be in approved technology programs."[16] Some approved technology programs offered by national CLE provider Lawline include the following titles:

- Beyond the Trash Bin: Proper Disposal of Electronic Data
- Cybersecurity: A Legal How-To Guide for Advanced Practitioners
- Wearable Technology: Key Legal Implications
- The Wired Workforce: Legal Issues with Social Media on the Job

To be approved, these programs must focus on assisting attorneys in the practice of law and can cover how-to of different technologies the attorney might use (i.e. case management or document preparation software, for example) or technology law itself (privacy, cybersecurity, etc.).[17]

North Carolina

North Carolina mandates twelve (12) CLE hours each year, with one devoted to technology training.[18] While the NC Comment to Rule 1.1 is quite similar to the ABA Comment,[19] "Technology Training" is very well defined:

> 1501(c)(17) (17) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 of this subchapter: specifically, the primary objective of the program must be to increase the participant's professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process or methodology designed to perform tasks that are specific or uniquely

[15] *Id.*
[16] FL State Bar Assn., *Announcements: CLE Requirements* https://www.floridabar.org/member/cle/ (last visited June 20, 2019).
[17] Cohen, Meredith, *Defining the Rules: Florida Technology* (March 21, 2018) https://blog.lawline.com/defining-the-rules-florida-technology (last visited on June 11, 2019).
[18] North Carolina State Bar, *CLE Requirements in North Carolina for Lawyers*, https://www.nccle.org/for-lawyers/requirements/renewing-lawyers/ (last visited June 14, 2019).
[19] NC R. of Prof. Conduct, *supra*.

> suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule .1602 of this subchapter for additional information on accreditation of technology training programs.[20]

As evidenced by the above, North Carolina provides broad opportunity for technology training. Importantly, the requirement allows for CLE credit to be earned for practice management software training.

While this may seem unnecessary to some, rules like this[21] could easily boost the adoption of technology in solo and small law firms. One of the complaints I heard most as a training consultant was that attorneys were too busy and didn't want to "waste time" learning their new case management software. Unfortunately for those attorneys, product adoption was a lot more difficult and the expected efficiencies were not realized. Solo and small firm practitioners expect the software to work like they saw during the demonstration but often do not take the time to learn how to make it work.

No attorney purchases practice management software with the intention of letting it get dusty on a proverbial shelf, yet that is just what happens when time is not devoted to learning to properly use the software purchased to make your firm more efficient. Imagine a world where you could get CLE credit for learning your new software! What a boon that would be to your practice. No longer would it be a "waste of time" to learn the features of your case management program, you would be getting CLE credit!

How LEAP Can Help Meet Your Ethical Obligation

Utilize Practice Management Software

The first step to being competent in relation to the technology used in your practice is to evaluate your current firm infrastructure. Below are a few questions to ask yourself in relation to your current technology:

- Are you using outdated programs and operating systems (I'm looking at you WordPerfect and Windows 7)?
- Do you pay someone to maintain an in-office server to store your client data?
- How do you track billable time when you are out of the office?
- Do you rely on a virtual private network (VPN) or terminal server to access client documents while in court or working from home?

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[20] *Id*.

[21] Unlike Florida and North Carolina, Kansas does not mandate technology CLEs. Rather, Kansas allows up to two credits in Law Practice Management Programming, defined as:

> **CLE Requirements (12 per year):** Rule 802(j) "Law practice management programming" means programming specifically designed for lawyer on non-substantive topics that deal with means and methods for enhancing the quality and efficiency of an attorney's service to the attorney's clients.

KS R. of the Sup. Ct., 802(j).

- Do you find yourself frequently emailing documents with sensitive client information?
- Do you pay a bookkeeper to come into your office regularly to sort out your Trust and Operating accounts?

If the answer to these questions is yes, you should begin to consider a cloud-based practice management solution for your firm.

LEAP is an integrated practice management software that utilizes fully redundant AWS servers to securely store your client's data in the cloud. That means no more cost to maintain a server and the peace of mind that your client's information is secure. Documents can be stored and shared via LawConnect, a secure file sharing portal included with LEAP. Staff will have access to client information and timekeeping on the go, at the touch of a button. That means no more forgotten billable time and the ability to work remotely without the added cost of maintaining a VPN or terminal server.

Receive One-on-One Training and Ongoing Support

Our Implementation Consultants are LEAP experts who will guide you and your firm through the change event. In addition, we work with IT Partners who are familiar with the requirements of LEAP and can help you make any necessary IT upgrades. Your dedicated consultant will provide all the training and support required to fully understand the benefits and risks of your new software, including:

- Managing your client matters from one central location
- Document management and Template production
- Email management
- Secure sharing of documents via LawConnect
- Time Recording, Trust Accounting and Legal Billing
- LEAP Mobile App

In addition, LEAP offers an Online Support Community, Training Videos, regularly scheduled Webinars, and HelpDesk live chat support.

The majority of states have already imposed an ethical duty to maintain technology competence, and I suspect more states will begin to require technology training as part of the attorney's annual CLE requirement. When you make the switch to LEAP, you will be ahead of the curve in fulfilling your ethical obligation of technology competence.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

April 10, 2020

FORMAL OPINION 2020-300

ETHICAL OBLIGATIONS FOR LAWYERS WORKING REMOTELY

I. Introduction and Summary

When Pennsylvania Governor Tom Wolf ordered all "non-essential businesses," including law firms to close their offices during the COVID-19 pandemic, and also ordered all persons residing in the state to stay at home and leave only under limited circumstances, many attorneys and their staff were forced to work from home for the first time. In many cases, attorneys and their staff were not prepared to work remotely from a home office, and numerous questions arose concerning their ethical obligations.

Most questions related to the use of technology, including email, cell phones, text messages, remote access, cloud computing, video chatting and teleconferencing. This Committee is therefore providing this guidance to the Bar about their and their staff's obligations not only during this crisis but also as a means to assure that attorneys prepare for other situations when they need to perform law firm- and client-related activities from home and other remote locations.

Attorneys and staff working remotely must consider the security and confidentiality of their client data, including the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged.

In Formal Opinion 2011-200 (Cloud Computing/Software As A Service While Fulfilling The Duties of Confidentiality and Preservation of Client Property) and Formal Opinion 2010-200 (Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in Pennsylvania), this Committee provided guidance to attorneys about their ethical obligations when using software and other technology to access confidential and sensitive information from outside of their physical offices, including when they operated their firms as virtual law offices. This Opinion affirms the conclusions of Opinions 2011-200 and 2010-200, including:

- An attorney may ethically allow client confidential material to be stored in "the cloud" provided the attorney takes reasonable care to assure that (1) all materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.

- An attorney may maintain a virtual law office in Pennsylvania, including a virtual law office in which the attorney works from home, and associates work from their homes in various locations, including locations outside of Pennsylvania;

- An attorney practicing in a virtual office at which attorneys and clients do not generally meet face to face must take appropriate safeguards to: (1) confirm the identity of clients and others; and, (2) address those circumstances in which a client may have diminished capacity.

This Opinion also affirms and adopts the conclusions of the American Bar Association Standing Committee on Ethics and Professional Responsibility in Formal Opinion 477R (May 22, 2017) that:

> A lawyer generally may transmit information relating to the representation of a client over the [I]nternet 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.

The duty of technological competence requires attorneys to not only understand the risks and benefits of technology as it relates to the specifics of their practices, such as electronic discovery. This also requires attorneys to understand the general risks and benefits of technology, including the electronic transmission of confidential and sensitive data, and cybersecurity, and to take reasonable precautions to comply with this duty. In some cases, attorneys may have the requisite knowledge and skill to implement technological safeguards. In others, attorneys should consult with appropriate staff or other entities capable of providing the appropriate guidance.

At a minimum, when working remotely, attorneys and their staff have an obligation under the Rules of Professional Conduct to take reasonable precautions to assure that:

- All communications, including telephone calls, text messages, email, and video conferencing are conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information;
- Information transmitted through the Internet is done in a manner that ensures the confidentiality of client communications and other sensitive data;
- Their remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form;

- Proper procedures are used to secure and backup confidential data stored on electronic devices and in the cloud;
- Any remotely working staff are educated about and have the resources to make their work compliant with the Rules of Professional Conduct; and,
- Appropriate forms of data security are used.

In Section II, this Opinion highlights the Rules of Professional Conduct implicated when working at home or other locations outside of a traditional office. Section III highlights best practices and recommends the baseline at which attorneys and staff should operate to ensure confidentiality and meet their ethical obligations. This Opinion does not discuss specific products or make specific technological recommendations, however, because these products and services are updated frequently. Rather, Section III highlights considerations that will apply not only now but also in the future.

II. Discussion

A. Pennsylvania Rules of Professional Conduct

The issues in this Opinion implicate various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, other parties, and counsel, primarily focused on the need to assure confidentiality of client and sensitive information. Although no Pennsylvania Rule of Professional Conduct specifically addresses the ethical obligations of attorneys working remotely, the Committee's conclusions are based upon the existing Rules, including:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers")
- Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney, and persons or entities supervised by the attorney, to disciplinary sanctions. Comments to the Rules assist attorneys in understanding or arguing the intention of the Rules, but are not enforceable in disciplinary proceedings.

B. Competence

A lawyer's duty to provide competent representation includes the obligation to understand the risks and benefits of technology, which this Committee and numerous other similar committees believe includes the obligation to understand or to take reasonable measures to use appropriate technology to protect the confidentiality of communications in both physical and electronic form.

Rule 1.1 ("Competence") states in relevant part:

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

Further, Comment [8] to Rule 1.1 states

> 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. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

Consistent with this Rule, attorneys must evaluate, obtain, and utilize the technology necessary to assure that their communications remain confidential.

C. Confidentiality

An attorney working from home or another remote location is under the same obligations to maintain client confidentiality as is the attorney when working within a traditional physical office.

Rule 1.6 ("Confidentiality of Information") states in relevant part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> …
>
> (d) 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.

Comments [25] and [26] to Rule 1.6 state:

> [25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) 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 (d) 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, 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, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].
>
> [26] 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. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Comment [25] explains that an attorney's duty to understand the risks and benefits of technology includes the obligation to safeguard client information (1) against unauthorized access by third parties (2) against inadvertent or unauthorized disclosure by the lawyer or other persons subject to the lawyer's supervision. Comment [26] explains that an attorney must safeguard electronic communications, such as email, and may need to take additional measures to prevent information from being accessed by unauthorized persons. For example, this duty may require an attorney to use encrypted email, or to require the use of passwords to open attachments, or take other reasonable precautions to assure that the contents and attachments are seen only by authorized persons.

A lawyer's confidentiality obligations under Rule 1.6(d) are, of course, not limited to prudent employment of technology. Lawyers working from home may be required to bring paper files and other client-related documents into their homes or other remote locations. In these circumstances, they should make reasonable efforts to ensure that household residents or visitors who are not associated with the attorney's law practice do not have access to these items. This can be accomplished by maintaining the documents in a location where unauthorized persons are denied access, whether through the direction of a lawyer or otherwise.

D. Supervisory and Subordinate Lawyers

Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers") states:

> (a) A partner in a law firm, 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 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.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with 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 other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance") states:

> 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) 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; 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 in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Therefore, a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect requirements that any staff, consultants or other entities that have or may have access to confidential client information or data comply with the Rules of Professional Conduct with regard to data access from remote locations and that any discussions regarding client-related matters are done confidentially.

III. Best Practices When Performing Legal Work and Communications Remotely[1]

A. General Considerations

In Formal Opinion 2011-200, this Committee concluded that a lawyer's duty of competency extends "beyond protecting client information and confidentiality; it also includes a lawyer's ability to reliably access and provide information relevant to a client's case when needed. This is essential for attorneys regardless of whether data is stored onsite or offsite with a cloud service provider." When forced to work remotely, attorneys remain obligated to take reasonable precautions so that they are able to access client data and provide information to the client or to others, such as courts or opposing counsel.

While it is beyond the scope of this Opinion to make specific recommendations, the Rules and applicable Comments highlight that the need to maintain confidentiality is crucial to preservation of the attorney-client relationship, and that attorneys working remotely must take appropriate measures to protect confidential electronic communications. While the measures necessary to do so will vary, common considerations include:

[1] These various considerations and safeguards also apply to traditional law offices. The Committee is not suggesting that the failure to comply with the "best practices" described in Section III of this Opinion would necessarily constitute a violation of the Rules of Professional Conduct that would subject an attorney to discipline. Rather, compliance with these or similar recommendations would constitute the type of reasonable conduct envisioned by the Rules.

- Specifying how and where data created remotely will be stored and, if remotely, how the data will be backed up;
- Requiring the encryption or use of other security to assure that information sent by electronic mail are protected from unauthorized disclosure;
- Using firewalls, anti-virus and anti-malware software, and other similar products to prevent the loss or corruption of data;
- Limiting the information that may be handled remotely, as well as specifying which persons may use the information;
- Verifying the identity of individuals who access a firm's data from remote locations;
- Implementing a written work-from-home protocol to specify how to safeguard confidential business and personal information;
- Requiring the use of a Virtual Private Network or similar connection to access a firm's data;
- Requiring the use of two-factor authentication or similar safeguards;
- Supplying or requiring employees to use secure and encrypted laptops;
- Saving data permanently only on the office network, not personal devices, and if saved on personal devices, taking reasonable precautions to protect such information;
- Obtaining a written agreement from every employee that they will comply with the firm's data privacy, security, and confidentiality policies;
- Encrypting electronic records containing confidential data, including backups;
- Prohibiting the use of smart devices such as those offered by Amazon Alexa and Google voice assistants in locations where client-related conversations may occur;
- Requiring employees to have client-related conversations in locations where they cannot be overheard by other persons who are not authorized to hear this information; and,
- Taking other reasonable measures to assure that all confidential data are protected.

B. Confidential Communications Should be Private

1. Introduction

When working at home or from other remote locations, all communications with clients must be and remain confidential. This requirement applies to all forms of communications, including phone calls, email, chats, online conferencing and text messages.

Therefore, when speaking on a phone or having an online or similar conference, attorneys should dedicate a private area where they can communicate privately with clients, and take reasonable precautions to assure that others are not present and cannot listen to the conversation. For example, smart devices such as Amazon's Alexa and Google's voice assistants may listen to conversations and record them. Companies such as Google and Amazon maintain those recordings on servers and hire people to review the recordings. Although the identity of the

speakers is not disclosed to these reviewers, they might hear sufficient details to be able to connect a voice to a specific person.[2]

Similarly, when communicating using electronic mail, text messages, and other methods for transmitting confidential and sensitive data, attorneys must take reasonable precautions, which may include the use of encryption, to assure that unauthorized persons cannot intercept and read these communications.

2. What is Encryption?

Encryption is the method by which information is converted into a secret code that hides the information's true meaning. The science of encrypting and decrypting information is called cryptography. Unencrypted data is also known as plaintext, and encrypted data is called ciphertext. The formulas used to encode and decode messages are called encryption algorithms or ciphers.[3]

When an unauthorized person or entity accesses an encrypted message, phone call, document or computer file, the viewer will see a garbled result that cannot be understood without software to decrypt (remove) the encryption.

3. The Duty to Assure Confidentiality Depends Upon the Information Being Transmitted

This Opinion adopts the analysis of ABA Formal Opinion 477R concerning a lawyer's duty of confidentiality:

> At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.
>
> Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

[2] https://www.vox.com/recode/2020/2/21/21032140/alexa-amazon-google-home-siri-apple-microsoft-cortana-recording

[3] https://searchsecurity.techtarget.com/definition/encryption

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c)[4] includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

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

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In addition to the obligations under the Pennsylvania Rules of Professional Conduct, which are based upon the Model Rules, clients may also impose obligations upon attorneys to protect confidential or sensitive information. For example, some commercial clients, such as banks, routinely require that sensitive information be transmitted only with a password protocol or using an encryption method.

C. There Are Many Ways to Enhance Your Online Security

[4] Pennsylvania did not adopt Comment [18] in its entirety.

While this Opinion cannot provide guidance about specific products or services, its goal is to provide attorneys and law firms with guidance about how they can meet their obligation of competence while preserving client confidentiality. The following subsections of this Opinion outline some reasonable precautions that attorneys should consider using to meet their ethical obligations.

1. Avoid Using Public Internet/Free Wi-Fi

Attorneys should avoid using unsecured free Internet/Wi-Fi hotspots when performing client- or firm-related activities that involve access to or the transmission of confidential or sensitive data. Persons, commonly called hackers, can access every piece of unencrypted information you send out to the Internet, including email, credit card information and credentials used to access or login to businesses, including law firm networks. Hackers can also use an unsecured Wi-Fi connection to distribute malware. Once armed with the user's login information, the hacker may access data at any website the user accesses.

2. Use Virtual Private Networks (VPNs) to Enhance Security

A VPN, or Virtual Private Network, allows users to create a secure connection to another network over the Internet, shielding the user's activity from unauthorized persons or entities. VPNs can connect any device, including smartphones, PCs, laptops and tablets to another computer (called a server), encrypting information and shielding your online activity from all other persons or entities, including cybercriminals. Thus, the use of a VPN can help to protect computers and other devices from hackers.

3. Use Two-Factor or Multi-Factor Authentication

Two-Factor or Multi-Factor Authentication is a security method that requires users to prove their identity in more than one way before signing into a program or a website. For example, a user might require a login name and a password, and would then be sent a four- or six-digit code by text message to enter on the website. Entering this additional authentication helps to ensure only authorized persons are accessing the site. Although these forms of enhanced security may seem cumbersome, its use provides an additional layer of security beyond simple password security.

4. Use Strong Passwords to Protect Your Data and Devices

One of the most common ways that hackers break into computers, websites and other devices is by guessing passwords or using software that guesses passwords, which remain a critical method of gaining unauthorized access. Thus, the more complex the password, the less likely that an unauthorized user will access a phone, computer, website or network.

The best method to avoid having a password hacked is by using long and complex passwords. There are various schools of thought about what constitutes a strong or less-hackable password, but as a general rule, the longer and more complex the password, the less likely it will be cracked. In addition, mobile devices should also have a PIN, pass code or password. The devices

should lock/time out after a short period of time and require users to re-enter the PIN code or password.

5. Assure that Video Conferences are Secure

One method of communicating that has become more common is the use of videoconferencing (or video-teleconferencing) technology, which allows users to hold face-to-face meetings from different locations. For many law offices, the use of videoconferences has replaced traditional teleconferences, which did not have the video component.

As the popularity of videoconferencing has increased, so have the number of reported instances in which hackers hijack videoconferences. These incidents were of such concern that on March 30, 2020 the FBI issued a warning about teleconference hijacking during the COVID-19 pandemic[5] and recommended that users take the following steps "to mitigate teleconference hijacking threats:"

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

6. Backup Any Data Stored Remotely

Backups are as important at home as they are at the office, perhaps more so because office systems are almost always backed up in an automated fashion. Thus, attorneys and staff working remotely should either work remotely on the office's system (using services such as Windows Remote Desktop Connection, GoToMyPC or LogMeIn) or have a system in place that assures that there is a backup for all documents and other computer files created by attorneys and staff while working. Often, backup systems can include offsite locations. Alternatively, there are numerous providers that offer secure and easy-to-set-up cloud-based backup services.

7. Security is Essential for Remote Locations and Devices

Attorneys and staff must make reasonable efforts to assure that work product and confidential client information are confidential, regardless of where or how they are created. Microsoft has published its guidelines for a secure home office, which include:

[5] https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic. Although the FBI warning related to Zoom, one brand of videoconferencing technology, the recommendations apply to any such service.

- Use a firewall;
- Keep all software up to date;
- Use antivirus software and keep it current;
- Use anti-malware software and keep it current;
- Do not open suspicious attachments or click unusual links in messages, email, tweets, posts, online ads;
- Avoid visiting websites that offer potentially illicit content;
- Do not use USBs, flash drives or other external devices unless you own them, or they are provided by a trusted source. When appropriate, attorneys should take reasonable precautions such as calling or contacting the sending or supplying party directly to assure the data are not infected or otherwise corrupted. [6]

8. Users Should Verify That Websites Have Enhanced Security

Attorneys and staff should be aware of and, whenever possible, only access websites that have enhanced security. The web address in the web browser window for such sites will begin with "HTTPS" rather than "HTTP." A website with the HTTPS web address uses the SSL/TLS protocol to encrypt communications so that hackers cannot steal data. The use of SSL/TLS security also confirms that a website's server (the computer that stores the website) is who it says it is, preventing users from logging into a site that is impersonating the real site.

9. Lawyers Should Be Cognizant of Their Obligation to Act with Civility

In 2000, the Pennsylvania Supreme Court adopted the Code of Civility, which applies to all judges and lawyers in Pennsylvania.[7] The Code is intended to remind lawyers of their obligation to treat the courts and their adversaries with courtesy and respect. During crises, the importance of the Code of Civility, and the need to comply with it, are of paramount importance.

During the COVID-19 pandemic, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a statement, which this Opinion adopts, including:

> In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. Accordingly, we remind lawyers that the Guidelines for Civility in Litigation … require that lawyers grant reasonable requests for extensions and other accommodations.
>
> Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations. Consistent with California

[6] https://support.microsoft.com/en-us/help/4092060/windows-keep-your-computer-secure-at-home

[7] Title 204, Ch. 99 adopted Dec. 6, 2000, amended April 21, 2005, effective May 7, 2005.

> Rule of Professional Conduct 1.2(a), lawyers should also consult with their clients to seek authorization to extend such extensions or to stipulate to continuances in instances where the clients' authorization or consent may be required.
>
> While we expect further guidance from the court system will be forthcoming, lawyers must do their best to help mitigate stress and health risk to litigants, counsel and court personnel. Any sharp practices that increase risk or which seek to take advantage of the current health crisis must be avoided in every instance.

This Opinion agrees with the Los Angeles County Bar Association's statement and urges lawyers to comply with Pennsylvania's Code of Civility, and not take unfair advantage of any public health and safety crises.

IV. Conclusion

The COVID-19 pandemic has caused unprecedented disruption for attorneys and law firms, and has renewed the focus on what constitutes competent legal representation during a time when attorneys do not have access to their physical offices. In particular, working from home has become the new normal, forcing law offices to transform themselves into a remote workforce overnight. As a result, attorneys must be particularly cognizant of how they and their staff work remotely, how they access data, and how they prevent computer viruses and other cybersecurity risks.

In addition, lawyers working remotely must consider the security and confidentiality of their procedures and systems. This obligation includes protecting computer systems and physical files, and ensuring that the confidentiality of client telephone and other conversations and communications remain protected.

Although the pandemic created an unprecedented situation, the guidance provided applies equally to attorneys or persons performing client legal work on behalf of attorneys when the work is performed at home or at other locations outside of outside of their physical offices, including when performed at virtual law offices.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R* **May 11, 2017**

Revised May 22, 2017

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.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for email communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook

*The opinion below is a revision of, and replaces Formal Opinion 477 as issued by the Committee May 11, 2017. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c) and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was

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3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> 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. (Emphasis added.)[7]

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant 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 create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "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."[10]

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7. *Id.* at 43.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they 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."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

Amended Comment [18] explains:

> 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.

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

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13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2016). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

14. See item 3 below.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

   A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

   Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As Comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

   A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived. Therefore, the lawyer should warn the client about the risk of sending or receiving electronic communications using a computer or other device, or email account, to which a third party has, or may gain, access.[18]

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

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17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011). Formal Op. 11-459 was issued prior to the 2012 amendments to Rule 1.6. These amendments added new Rule 1.6(c), which provides that lawyers "shall" make reasonable efforts to prevent the unauthorized or inadvertent access to client information. *See, e.g.*, Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which email communications should be afforded special security protections. *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, 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 all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and

- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- 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.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2016). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [19] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

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.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).