



THE THREE Cs OF LEGAL TECHNOLOGY AND ETHICS

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As I sit at my desk writing this article, there is a computer with a hard drive directly in front of me, a scanner to my left, a router and Wi-Fi extender to my right. Immediately behind me is a teenage son with a gaming system; hanging over our heads is something called a cloud. The covid-19 pandemic ushered in many changes for all lawyers, including remote work. Kitchen tables became desks, dining rooms became conference rooms, and pajama pants became office wear as we merged our home and work lives. The same Wi-Fi connection my daughter uses to stream Netflix or Hulu may suddenly become the connection I use to appear in court and argue a motion.

The evolving technology of the modern law office is rapidly redefining how and where we work. The law office is no longer a place where we lock client files in fireproof cabinets, hit the server backup button, and know that as we lock the door and leave for the night, a security guard will remain outside protecting our confidential data.

But while the habits and habitats of contemporary law practice have changed, the Rules of Professional Conduct and our obligations as lawyers under these rules have not. As lawyers we remain bound by these rules in all aspects of our work, including our knowledge and skill in using legal technology. Now more than ever, it's important for lawyers to keep in mind the rules of ethics as they relate to legal tech. Let's take a look at the three Cs of legal technology and ethics: competence, confidentiality and communication.

THE DUTY OF COMPETENCE INCLUDES COMPETENCE IN LEGAL TECHNOLOGY

Competence is an essential rule for lawyers and that requirement includes the technology used in the practice of law. A lawyer must provide competent representation to the clients he or she represents.¹ This degree of competency requires "...the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Leaving nothing to doubt in the area of technology, the rules offer clear guidance for lawyers that the skills required to stay on top of an evolving and changing law practice include "the benefits and risks associated with relevant technology."²

Technology has become an essential tool in the practice of law, irrespective of setting. From the largest of firms on down to solo practices, lawyers use technology for tasks such as document management and office operations (client management systems, cloud storage, file sharing, time and billing software), communications and collaboration (Zoom and other video-conferencing software, email, messaging systems, internet phone systems), and trial advocacy and litigation practices (e-filing of cases, online legal research, e-discovery, video depositions, document storage and file preservation).

So what does technical competence mean for lawyers and what do lawyers need to do to comply with this duty? As lawyers we are obliged not only to know a few details about the systems we use, but to *understand* those systems. Staying informed about relevant risks and benefits allows us to select the best tools for the job. This can be particularly challenging owing to the speed with which technology changes and the fact that the disclosures and disclaimers we seek out are often hidden and vague. Staying up to date seems impossible at times, but the effort must be made. A lawyer needs to take any and all reasonable steps to understand the technology and to use it competently and as intended.

The obligation of competence is broader than it seems at first glance. If we expect our client to use these tools, there are times we will need to educate the client to make sure these tools are used properly. We must also know when and how to delegate and make sure that any assistants or agents we ask to use the technology understand the systems. (Keep in mind that rule about a lawyer's duty to supervise.) And, most importantly, we need to understand the technology to make sure that parties who should not be accessing our technologies are not invited or allowed into our law offices, remotely or otherwise.

The duty of competence applies to the technology we're using now, but it also applies to the changes and advances that are inevitably coming. Our ongoing obligation is to be aware of technological developments and to understand how changes impact ethical obligations.

CONFIDENTIALITY AND DATA SECURITY: LEGAL TECHNOLOGY ESSENTIALS

Keeping secrets is what lawyers do. Keeping personal and business information confidential is at the very core of the legal profession. The law practice in which pieces of paper are placed in red rope file folders and locked in fireproof file cabinets has now been replaced by systems in which we copy, transfer, access, and store confidential and sensitive client information on "cloud" platforms that are shared and thus a source of some abiding risk.

Data is valuable. Scammers, hackers, and adverse parties know that nothing is more valuable than data pre-selected by lawyers and law firms for its value. The obligation on the part of lawyers to secure and protect that data is great—and becoming even greater as technology advances. Lawyers have a duty to protect confidential and privileged information under common law. Lawyers must take reasonable steps to "...prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."³

Integrating technology with the practice of law creates many data security risk points that open the door to possible loss, breach, theft, and disclosure, to name just a few of the perils. These risks are especially problematic for lawyers who lack awareness of how their technology works and the steps necessary to safeguard the data.

The use of technology in legal practices is not something that was ushered in by the pandemic. Law practices have regularly shared and transported data (file sharing, email, texts, etc.) and stored that data (servers, cloud storage, shared copies of information with clients and experts). It has always been important to consider how to protect data and how to safeguard the storage systems we employ. What covid-19 ushered in was an entire frontier of new processes and technologies. Zoom and Teams have become part of our everyday vocabularies as we video conference, take online depositions, and argue motion hearings. Slack now allows us to instantly message and collaborate. Dropbox, Google Drive, and

SharePoint allow us to immediately share and transfer documents.

The age of remote work has highlighted the importance of keeping data safe and secure. As we navigate online networks, it becomes important that we keep the privacy and security settings up to date in the video communication, streaming, and conferencing tools that are now part of our everyday communication and collaboration systems. The failure to do so creates vulnerabilities and exposes systems to leaks and data breaches.

While it would be nice if every law firm had an IT person or an entire IT department devoted to this process, that is not realistic. That does not mean, however, that there is nothing that lawyers can do to protect the data entrusted to them.

What are some simple steps we can do to protect the data we are expected and required to keep confidential?

- Use passwords. Protect data with passwords that are strong and unique. Do not write the password on a post-it note stuck to your laptop or in a Word document that resides on your desktop. Avoid common password "themes" (dog names, house numbers, etc.)
- Back up your data. Regularly back up all your data and make sure you store it in a secure and safe location. As part of my law practice, for example, I create regular backups that are stored on separate external drives stored in a fireproof safe.
- Be aware of scams and phishing emails.
- Use secured Wi-Fi systems and file transfer systems that are part of a network you have created. Avoid public systems and Wi-Fi networks.
- Create a separate network that is virtual and private for your work. (In other words, make sure the teenage gamer or social media butterfly in the house is not allowing uninvited guests onto the same network on which you store confidential information or conduct legal business.)
- Regularly update settings to keep security protocols in place. Don't ignore the reminders to update when they pop up—often at the most annoying moment possible. Rather, embrace them, install them, and safeguard your data.

COMMUNICATION: KEEPING CLIENTS INFORMED

Lawyers have obligations to communicate with clients and keep them informed. The tools available to do so have advanced from the days of the corded phone and the postage stamp to an endless chain of options that include email, voicemail, texts, and online portals. More and more we are using systems that embrace paperless electronic methods to keep our clients informed. Ironically, the easier it becomes to communicate, the more difficult it can be.

The Rules of Professional Conduct require that a lawyer take proactive steps to communicate with one's clients.⁴ The rules won't help you select a computer, tell you whether you should email or text your clients, or provide direction on cloud storage or system providers. It is easy to get lost behind the technology that helps us process our legal work and makes our lives easier—so easy that we sometimes forget about client communication in this process. Communication with clients has never been more important.

Effective communication is an essential lawyering skill. Today's legal environment is constantly changing and with that come changes to the ways we can communicate with clients. Clients often will express strong preferences for their preferred mode of communication, be it text messages, emails, or phone calls. Many clients today are well versed in how to use tools like online portals

and video conferencing, and text messaging is increasingly one of the most popular ways for people to communicate.

Lawyers need to be prepared to communicate with clients in the manner(s) clients prefer. They also need to know and comply with all ethics rules that cover client communications. Keep in mind that not all lawyers or clients will have the same level of experience or understanding in how to use technology.

Therefore, it is important to clarify and agree on such information as:

- How do the lawyer and the client want to communicate?
- What information will the lawyer and client be exchanging using that medium?
- What are the terms and conditions of the platforms connected to such mediums? For example, what are the privacy or data-mining requirements of email servers or cellular providers?
- Who else will have access?

In communicating with clients and others, we need to be mindful of taking reasonable precautions in how information is transmitted and do our

best to protect confidentiality. It is also important to remind assistants and staff about requirements and responsibilities, since the ethics rules also impose obligations on the supervising lawyer.

CONCLUSION

We have become increasingly dependent on technology tools. Clients communicate with us digitally and information is often kept and shared electronically. Technology is an inescapable part of the modern-day law practice. Lawyers should be mindful of the three Cs—competence, confidentiality, and communication—while using legal technology. Understanding the Rules of Professional Conduct can help prevent problems and keep us away from the fourth C in the lexicon of legal technology ethics: consequences. ▲

NOTES

¹Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.1.

²*Id.* at Comment 8.

³Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.6.

⁴Minnesota Rules of Professional Conduct 1 and ABA Model Rules of Professional Conduct Rule 1.4.



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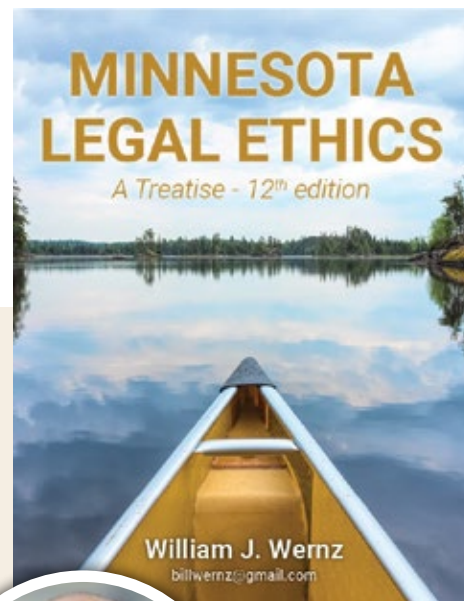
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columns

- 4 **President's Page**
Renewing the wellness call to action
By Paul D. Peterson
- 6 **MSBA in Action**
The passing of the gavel
- 8 **Professional Responsibility**
Due diligence on lawyers
By Susan Humiston
- 10 **Law + Technology**
What critical infrastructure efforts can teach us about cyber resilience
By Mark Lanterman
- 12 **Colleague Corner**
Who's your favorite fictional lawyer or law firm?
- 36 **Notes + Trends**
Landmarks in the law
- 45 **People + Practice**
Member announcements
- 47 **Opportunity Market**
Classified ads



features

- 14 **Building a better bar admissions process**
A look at what the Minnesota State Board of Law Examiners is doing in its two-year study of the bar exam—and what other jurisdictions are considering.
By Leanne Fuith
- 20 **The three Cs of legal technology and ethics**
By Kristi Paulson
- 24 **The rise of SPACs and corresponding developments in securities litigation**
By Kyle Willems and Bryce Riddle
- 30 **The lawyer as an inclusive leader**
By Dr. Artika R. Tyner
- 34 **Road to nowhere**
2022 Minnesota legislative session recap
By Bryan Lake