

## Ethics and Technology

Technology is constantly evolving and changing the practice of law. Lawyers' practices and the tools they use have changed over time. Consider typewriters versus computers, or regular mail and fax machines as compared to email. Some reasons for a lawyer to consider the benefits of accepting technological changes and adopting different methods to practice law include "saving money, saving time, or improving quality".<sup>1</sup> Technology and the internet can modify a way a lawyer practices, affecting communication, practice management, handling evidence and data storage. How a lawyer should handle various aspects of technology, including but not limited to, email communication with clients or others, and the handling of digital or electronic client files or information has been discussed in ethics opinions and articles around the country.<sup>2</sup> The consensus is that if a lawyer is going to use technology, that lawyer has a duty to comply with Rules 1.1, 1.3, 1.6 and 1.15 of the ABA Model Rules of Professional Conduct. Lawyers must use technology competently and diligently. Lawyers also have an obligation to protect client information and confidentiality.

Some ethical issues and Rules that may be implicated include but are not limited to:

### (1) Competence and Diligence

- Pursuant to Rules 1.1 and 1.3 lawyers need to be aware of technological advances and any repercussions stemming from the use or lack of use of same.

### (2) Communication

- Pursuant to Rule 1.4 lawyers need to be aware of technological advances and risks when communicating with clients and about how they practice

### (3) Confidentiality

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<sup>1</sup> *Cloud Computing for Criminal Lawyers: It's Not the Future Anymore (2016)*, Dane S. Ciolino, Alvin R. Christovich Distinguished Professor of Law, Loyola University New Orleans College of Law.

<sup>2</sup> Law Sites, *25 States Have adopted Ethical Duty of Technology Competence* (March 16, 2015), ABA Formal Opinion 06-442, *Review and Use of Meta Data*; Ethics Opinion 2011-200 from Pennsylvania; Ethics Opinion 2012-13/4 from New Hampshire; and Informal Advisory Opinion 2013-03 from Ohio.

- Consider Rule 1.6 obligations to protect confidential information.

(4) Safekeeping property

- Pursuant to Rule 1.15 lawyers need to be aware of technological issues surrounding how they protect and take care of client property/information. How do you store and transmit information?

(5) Supervising Nonlawyer Staff and Others

- Pursuant to Rule 5.3 lawyers need to be aware of how technological changes affect how they use and monitor non-lawyer staff or contractors

(6) The Unauthorized Practice of Law

- Be aware of jurisdictional limitations, and Rule 5.5. especially lawyers having a presence on the internet via websites, blogging and responding to email.

(7) Advertising and Solicitation

- Be careful how you promote/market yourself and consider Rules 7.2 et. Seq., 7.4, and 7.6

(8) Improper Contact

- Lawyers have limitations on communication whether based on social media or other traditional types of communication. Consider Rules 7.4, 4.2(a), 4.3

A lawyer's modern practice involving technology could implicate numerous Louisiana Rules of Professional Conduct including but not limited to Rules 1.1, 1.3, 1.4, 1.6, 1.15, 1.18, 4.2, 4.3, 4.4, 5.5, and 7.4.

Rule 1.1(a) of the Louisiana Rules of Professional Conduct, in pertinent part, provides:

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

Rule 1.3 of the Louisiana Rules of Professional Conduct, provides:

*A lawyer shall act with reasonable diligence and promptness in representing a client.*

Rule 1.4 of the Louisiana Rules of Professional Conduct, in pertinent part, provides:

*“Communication. (a) A lawyer shall:...(3) keep the client reasonably informed about the status of the matter;...(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued...”*

Rule 1.6 of the Louisiana Rules of Professional Conduct provides:

*...(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”*

Rule 1.15 of the Louisiana Rules of Professional Conduct provides:

*...(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...Other property shall be identified as such and appropriately safeguarded...*

Rule 1.18(a) and (b) of the Louisiana Rules of Professional Conduct provide:

*(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.  
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned*

*in the consultation, except as Rule 1.9 would permit with respect to information of a former client...*

Rule 4.2(a) of the Louisiana Rules of Professional Conduct, provides:

*Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order, a lawyer in representing a client shall not communicate about the subject of the representation with: (a) a person the lawyer knows to be represented by another lawyer in the matter; ...*

Rule 4.3 of the Louisiana Rules of Professional Conduct states:

*...In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client...*

Rule 5.5 of the Louisiana Rules of Professional Conduct provides:

*...(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so...*

Rule 7.4(a) of the Louisiana Rules of Professional Conduct states:

*...(a) Solicitation. Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer's request or*

**ETHICS AND TECHNOLOGY**

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**Louisiana State Bar Association**

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*on the lawyer's behalf or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this Rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase "prior lawyer-client relationship" shall not include relationships in which the client was an unnamed member of a class action.*

## **Competence and Diligence**

When a lawyer contemplates the use of technology, that lawyer should remember Rules 1.1 and 1.3, of the Louisiana Professional Conduct requiring competence and diligence. The lawyer should carefully evaluate whatever technology is being considered and whether client information will reasonably secure and retrievable by the lawyer. Whether it might be a disaster like a flood or fire or a breach by a hacker, a lawyer using technology needs to evaluate risks to client's files and information, as well as, the lawyer's ability to practice without an incapacitating interruption. Does the lawyer have redundant "back-up" systems to retain/recover digital information?

An article in GPSOLO Magazine quotes the Director of the FBI in 2012 when he stated at a conference that "I am convinced there are only two types of companies; those that have been hacked and those that will be."<sup>3</sup> Lawyers need to be aware of potential issues. As an example of current risks, in 2016 a District Attorney's office in Pennsylvania paid ransom to get access to its

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<sup>3</sup> *What to Do When Your Data is Breached*, GPSOLO Jan./Feb. 2016, Nelson, Ries and Simek.

computers. The criminals using malware to hold the DA's office computer network hostage were later arrested<sup>4</sup>. In 2012, the American Bar Association amended comment 8 to Rule 1.1 to add language requiring competent representation to expect a lawyer to be knowledgeable of both the benefits and risks of the use of technology<sup>5</sup>. While Louisiana does not have comments to its Rules, Rules 1.1(a) and 1.3 are straight-forward without a specific technological competence/diligence requirement. If a lawyer is not comfortable working with technology, the lawyer should consider the benefits of obtaining advice from another lawyer or consultant knowledgeable about both technology and a lawyer's ethical and professional responsibilities. If relying on a non-lawyer, Rule 5.3 provides "*With respect to a non-lawyer employed or retained by or associated with a 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;...*" Accordingly, when a lawyer decides to use a non-lawyer technology service provider or computer consultant, that lawyer should take reasonable steps to ensure that ethical standards and responsibilities of the lawyer are also met by the conduct of the service provider or consultant. Failure to use technology competently could put a law firm at risk not only ethically but financially if malpractice is involved.

## **Communication**

Lawyers have a duty to communicate with their clients. Rules 1.4(a)(2) and (3) of the Louisiana Rules of Professional Conduct state the communication obligations of a lawyer "...*a lawyer shall...(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished...*"; and "...*(3) keep the client reasonably informed about the status of the matter;....*" How lawyers choose to communicate with clients is changing, with emails and text

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<sup>4</sup> *Prosecutors Office Paid Ransom to Regain Access to Computers; International Network Busted*, ABA Journal, 12/6/2016.

<sup>5</sup> [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 a lawyer is subject.*

messages sometimes replacing phone calls and letters. A lawyer may want to advise clients regarding the risks associated with using email, public computers or having an inadequate password, as compared to in-person consultations or traditional communication options. In some instances, with sensitive information it may be appropriate to consider encryption, as well as to provide the option of communicating by means of more traditional methods. The Texas State Bar issued an ethics opinion on the topic of whether a lawyer can use email to send client confidential information<sup>6</sup>. The opinion stated “Under the Texas Disciplinary Rules of Professional Conduct, and considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email. Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication.” Some data like social security numbers, account information or medical records may need more security than other regular data. If a lawyer elects to use technology, a lawyer has an obligation to use that technology in a manner that meets all reasonable ethical and professional standards. Many lawyers use computers to transmit email or pleadings or other documents. Whether using computers at the office or using a mobile device, a lawyer should always consider whether client information is reasonably secure and retrievable by the lawyer. Failure of a lawyer to use basic minimum standards for security, such as secure passwords, firewalls, and encryption, may put a lawyer at risk of civil liability and/or a potential violation of the Louisiana Rules of Professional Conduct. Strong passwords should be used on all computers and mobile devices, such as smart phones, tablets, etc. When using mobile devices such as a smart phone or tablet or laptop, etc., a lawyer should consider how secure a network might be and whether the option to delete data remotely will be available if the mobile device is misplaced or stolen.

## **Confidentiality**

The modern law practice is evolving with the use of technology, such as “cloud computing”,

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<sup>6</sup> The Texas State Bar’s Opinion 648.

allowing a lawyer to be more mobile and potentially reducing overhead costs. With internet access, lawyers can access client data and/or store data practically anywhere. Cloud computing could be defined as using the internet for the electronic transfer of data and/or storage on a computer or server that is not located in a lawyer's office but in an offsite location. As cited in Pennsylvania's ethics opinion, a *Maximum PC* magazine article described "cloud computing" as "a fancy way of saying stuff is not on your computer."<sup>7</sup> As client information is sent offsite using the "cloud", a lawyer has delegated some control and security of that data. Thus, the American Bar Association modified its rules in recent years to address technological changes affecting the way lawyers practice. Louisiana following the ABA's lead on this issue, amended Rule 1.6 of the Louisiana Rules of Professional Conduct in January 2015 specifically to add Part "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*"<sup>8</sup>. Rules 1.6 and 1.15 of the Louisiana Rules of Professional Conduct require a lawyer to protect client confidentiality and client property, stating: "*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)...*", and "*...(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...Other property shall be identified as such and appropriately safeguarded...*"

While there are always risks with the use of technology, a lawyer should weigh the benefits of using technology versus any risks. For example, sending digital files in a non-secure format could allow the inadvertent release of information a lawyer or client would not want shared by the unintentional disclosure of "meta data," which is information embedded in electronic

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<sup>7</sup> Quinn Norton, "Byte Rights," *Maximum PC*, September 2010, at 12.

<sup>8</sup> This provision was first adopted by the ABA after an Ethics 2020 report which considered changes in the practice due to technology.



documents. The ABA issued an ethics opinion regarding those risks in 2006.<sup>9</sup> Additionally, email “web bugs” could also track lawyer-client communications. A recent Alaska ethics opinion rightfully has suggested that a lawyer’s surreptitious use of email “bugs” or tracking of opposing counsel’s email communications with counsel’s client would be ethical violations.<sup>10</sup> There is always a risk that a lawyer’s computer system could be breached. Law firms are the same as other companies when it comes to defending against cyber-attacks or hacking and protecting confidential data. Additionally, lawyers have ethical rules that require confidentiality of client information. Thus, if a lawyer chooses to use technology in the lawyer’s practice, basic issues must be addressed. A simple decision to get new equipment may trigger ethics obligations. What happens to the old computers or devices? Has client information been removed or professionally scrubbed? The ABA suggests that if you are not going to remove the hard drives and keep them an alternative is to use a “wiping program” to remove sensitive data.

The onus is on the lawyer to have technological competence or competent assistance to make sure a client’s confidential information or file is reasonably secure and readily accessible, asking questions such as: Are fundamental security measures being met? Are there redundant back-up methods for the storage and retrieval of digital data? Has due diligence research been conducted on prospective service providers?

### **Supervision, Delegation or Outsourcing**

Some people are more comfortable working with and understanding technology than others. While a lawyer cannot relinquish the ultimate responsibility over a client’s case, nothing prohibits a lawyer from receiving assistance with technology and related issues from a lawyer’s staff, or consultants. For example, a lawyer may need assistance regarding eDiscovery or prevention of the spoliation of evidence involving technology. However, if relying on a non-lawyer, Rule 5.3 provides “*With respect to a non-lawyer employed or retained by or associated*

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<sup>9</sup> ABA Formal Opinion 06-442, *Review and Use of Metadata*.

<sup>10</sup> Alaska Bar Association Ethics Opinion No. 2016-1

*with a 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;...*" Accordingly, when a lawyer decides to use a non-lawyer technology service provider or computer consultant, that lawyer should take reasonable steps to ensure that ethical standards and responsibilities of the lawyer are also met by the conduct of the service provider or consultant. A lawyer should due his or her due diligence before hiring a consultant. Define the lawyer's goals and costs associated with the potential changes. Is the consultant full or part time? Is the consultant independent or vendor specific? Determine if it will be a good fit. Additionally, always allow for the time and expense of training staff.

### **Some Issues to Consider When Using a Vendor**

Technology is evolving and a lawyer must use due diligence when considering various technological options or providers. For example, when using various technology vendors for things such as a cloud based practice management system or for data storage, a lawyer must review and consider the service agreement. Some issues and questions a lawyer may want to consider were outlined in an ethics opinion from the Ohio State Bar:<sup>11</sup>

- What safeguards does the vendor have to prevent confidentiality breaches?
- Does the agreement create a legally enforceable obligation on the vendor's part to safeguard the confidentiality of data?
- Do the terms of the agreement purport to give "ownership" of the data to data to the vendor, or is the data merely subject to the vendor's license?
- How may the vendor respond to governmental or judicial attempts to obtain disclosure of your client data?
- What is the vendor's policy regarding returning your client data at the termination of its relationship with your firm?
- What plans and procedures does the vendor have in case of natural

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<sup>11</sup> Ohio State Bar Opinion 2013-03, p.4

- disaster, electronic power interruption or other catastrophic events?
- Where is the server located (particularly if the vendor itself does not actually host the data, and uses a data center located elsewhere)? Is the relationship subject to international law?

The questions listed above are just a few examples or a starting point for a lawyer to consider when deciding whether to use a particular type of technology or software or service provider. Updated information about various types of technology and a lawyer's practice can be found at the ABA's Legal Technology Resource Center:

[http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html)





Additional resources and information about technology can be found at the LSBA's website:

<https://www.lsba.org/PracticeManagement/TechCenter.aspx>

**ABA Solo, Small Firm and General Practice Division  
Technology Survey  
(as of March 2015)**

**TECHNOLOGY USE**

*What is the single most important technology issue facing your firm?*

Answer		Response	%
Knowing what to buy or use		180	40%
Finding the time to learn		153	34%
Having the budget to purchase		94	21%
Other		28	6%
Total		455	100%








Subject	Resource
Cloud Computing	<a href="#">Resource</a>
Data Security	<a href="#">Resource</a>
Finding Right Tech to Buy	<a href="#">Legal Technology Resource Center (LTRC)</a>

**LAW PRACTICE MANAGEMENT**

*Do you use law practice management software/service in your practice?*

Answer		Response	%
No		248	54%
Yes		209	46%
Total		457	100%

*If yes, which one?*

Answer		Response	%
Other*		89	43%
Clio		48	23%
Amicus		21	10%
MyCase		20	10%
Tabs3		15	7%
AbacusLaw		10	5%
Rocket Matter		4	2%
Total		207	100%

Other Law Practice Management Service	Resource
PC Law	<a href="#">Comparison Chart</a>
Time Matters	<a href="#">Comparison Chart</a>
ProLaw	<a href="#">Comparison Chart</a>

\* All of the following comparison charts, along with others, can be found on our [Resource Centers' Technology](#) page.

**ABA Solo, Small Firm and General Practice Division  
Technology Survey  
(as of March 2015)**

***Do you use a standalone billing software program?***

Answer	Response	%
No	139	60%
Yes	92	40%
Total	231	100%

**FILE STORAGE**

***Which cloud-based file storage services do you use? (Select all that apply)***

Answer	Response	%
Dropbox	186	43%
None	156	36%
Google Drive	88	21%
Other	62	14%
OneDrive/SkyDrive	48	11%
Box	40	9%
SpiderOak	10	2%

Information Regarding Cloud Backup

[Data Backup Solutions](#)

**FILE BACKUP**

***Do you backup your data?***

Answer	Response	%
Yes	396	92%
No	33	8%
Total	429	100%

**MOBILE TECHNOLOGY**

***Which of the following devices do you currently own or are likely to own in the next year?***

	Android Smartphone	iPad	iPhone	Kindle	Laptop (PC or Mac based)	Netbook/Chromebook	Other Android Tablet	Total Responses
Currently Own	149	221	245	123	382	35	73	1,228
Likely	11	37	14	7	12	14	17	112
Not Likely	126	82	103	148	16	188	162	825

**ABA Solo, Small Firm and General Practice Division  
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**SOCIAL MEDIA**

*Which social media platforms do you employ in your law practice?  
(Select all that apply)*

Answer	Response	%
LinkedIn	288	68%
Facebook	156	37%
Do Not Use Social Media	108	25%
Twitter	103	24%
Google+	92	22%
YouTube	34	8%
Instagram	17	4%
Other	6	1%

**BLOGGING**

*Do you have a Blog?*

Answer	Response	%
No	364	85%
Yes	63	15%
Total	427	100%

**TECHNOLOGY WEBINARS**

*What webinar topics would be of interest to you? (Select all that apply)*

Answer	Response	%
Law Practice Management	283	70%
Tech Tips	267	66%
Technology Product Review	255	63%
Software Demos	183	45%
Latest Gadgets	163	40%
Latest Technology News	149	37%
Other	31	8%