

Ethics and Technology -

Or, How Not to Commit Malpractice with Your Computer

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Who has Time to Learn about Technology?



Soon, however, this may not be an option.

Kia Motors Audits Senior Associates

What was tested

- Basic functions of Word, Excel, and Acrobat
- Print to PDF, Bates Stamp Pages
- Excel's sort/filter - generate from spreadsheet list of exhibits associated with witnesses on topics

Results

- Expected completion time = 1 Hour
- Average completion time = 5 Hours
- Nine firms audited – all nine failed
- Some firms not hired - Others agreed to price reduction (5% across the board) until they could pass audit



KIA MOTORS
The Power to Surprise™

Preparing for New Ethics Rules: Basic Rule of Competence

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

-- ABA Model Rule of Professional Conduct 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.

-- Comment 8, Rule 1.1

4

Duty of Confidentiality

New model rule 1.6(c):

“A lawyer shall make **reasonable** efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

So what is “reasonable”...?



MANAGING EMAIL



Check the address field before hitting “Send”

- Nebraska Case - Warren Whitted, Jr. e-mailed lawyers who argued his case and referred to “ill conceived and uninformed questions” from the bench
- Also sent to Nebraska Bar Association Exec. Council, which included Chief Justice who heard the case
- Desperate backtracking note hours later
- CJ disclosed both e-mails as ex parte communications about a case pending before him





If You Overbill, Don't Brag about it in Email

- Sued client for unpaid fees
- Client counterclaimed for sweeping overbilling

The Email Trail:

- "I hear we are already 200K over our estimate – that's Team DLA Piper!"
- "Now Vince has random people working full time on random research projects in standard 'churn that bill, baby!' mode."
- "That bill shall know no limits"



Meanwhile, as these emails come to light....

- May 2013
- Partner meeting
- Royal Caribbean's Liberty of the Seas
- \$3.1 million



The Angry Email, one step too far...

- Florida lawyer (Roper) sued another (Dinning) for fraud
- Emails during case included words like “Junior” “jerk” “asinine” “Old Hack” “scum-sucking” “retard”
- Dinning later indicted for fraud – Roper sent email:
 - Hoped he would enjoy 20-30 years in prison
 - Roper would comfort Dinning’s wife
 - Alluded to Dinning’s sexual victimization in prison
 - “Laughing still, Jason C. Roper”
- Public Reprimand
- Anger Management Class



Never compose an e-mail in anger



- Your first response is typically not the best
- Save as “Draft”
- Walk away
 - Take a break
 - Go to Starbucks for a latte
 - Wait a day
 - Vent to someone else
- Don’t post anything online in anger either!

Don't e-mail your client at work

- Most employers have a “no expectation of privacy on our network” policy
- Courts in have gone both ways on this issue
- The attorney-client privilege has been lost on multiple occasions
- Some decisions are beginning to say that the privilege will remain if the employee has made a clear attempt to preserve privacy



Address e-mail in your retainer



- E-mail is not always private – client should consent to its use
- Retainer should admonish client not to transmit sensitive data
- Should advise them not to e-mail from work
- Make them initial that paragraph

Don't Miss Those Important Emails...Whitelist!

- Colorado case – court email of hearing went into spam folder
- Court assessed sanctions, including payment for opposing counsel's time
- Court suggested it was malpractice not to whitelist the e-mail address of a court
- Whitelist one attorney or whole firm?



Cloud Computing, In a Nutshell



- “...a fancy way of saying stuff’s not on your computer.”
- If you use Gmail or Yahoo, you already use cloud services
- File sharing tools like Dropbox, Box, iCloud
- Benefits
 - Anywhere access to documents
 - Share and collaborate with others
 - Synchronization on all computers

Is Cloud Computing Ethical?

- 21 state bars have issued opinions – not Texas
- In **all 21 opinions**, “Reasonable Care” is the standard
- Factors that determine Reasonable Care
 - How sensitive is the information being stored?
 - How likely would disclosure be without adequate safeguards?
 - Are the costs of additional safeguards unreasonable?
 - Do additional safeguards adversely affect the lawyer’s ability to effectively represent the client?

Cloud Computing Due Diligence

- Satisfy yourself about the vendor's stability, and examine policies for handling confidential information
- Evaluate vendor security – if there's a breach, will you be notified?
- If there's a disaster or you go out of business, how do I get my data back?
- Negotiate SLA or contract with confidentiality agreements
- Learn how to properly use the tool



SOCIAL MEDIA



People say the craziest things on Facebook...

- Virginia Beach Attorney Daniel Miller snapped photo of Jason Swango and client in court at bench
- Posted picture to Facebook with caption:

“Notice the stain on this guy’s jail suit when he realized who he had as an attorney”

Results:

- Defamation lawsuit against Miller
- Crackdown on electronic usage in court



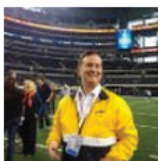
Potential Areas of Risk

Are LinkedIn Endorsements Ethical?

Tom, you have 1 endorsement waiting!

Your connection Bryan has endorsed you for a new skill or expertise. Add them to your profile and show what you're great at.

[Add to profile](#)



Bryan Dunklin 1st Connected in Aug 2009

Litigation

Can You Post These to Facebook*?

“Case finally over. Unanimous verdict! Celebrating tonight.”

Not Covered

“Won a million dollar verdict. Tell your friends and check out my website.”

Covered

“Won another personal injury case. Call me for a free consultation.”

Covered

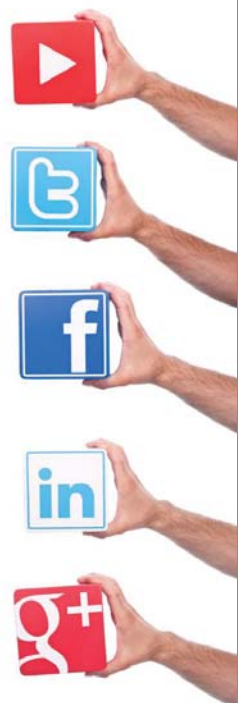
“Just published an article on wage and hour breaks. Let me know if you would like a copy.”

Not Covered

*based on California law

Other Good Questions

- Is it okay to blog about my cases as long as I don't name my clients?
- Are there any ethical concerns about lawyers using Twitter?
- Can I answer questions in online Q&A forums?
- Do I need to keep copies of my social media activities?
- Is it a good idea to friend clients or judges on social media?



SECURITY



Data Breaches are the New Normal



- Alexandria law firm hacked by Anonymous
- Wiley Rein hacked by Chinese
- 7 Canadian firms hacked
- Over 150 law firms hacked in 2011-12
- FBI says most large firms have been hacked
- But it's not just hackers:
 - Maryland law firm lost medical data (unencrypted)
 - Lost laptops, phones, and tablets with firm information

How Data Can Leave Your Firm



- Web-based e-mail
- USB Drives
- Dropbox or other cloud services
- 59% of departing employees acknowledge that they take data
- Make them sign statement that they have not taken data and that they know doing so would be a criminal act
- Consider securing USB ports or logging activity

Protect client data – encrypt your computer

- Laptops stolen every 53 seconds
- 1 in 10 chance yours will be stolen this year
- Encrypt and rest easy – a few options to consider:
 - PGP Whole Disk Encryption (www.pgp.com)
 - McAfee SafeBoot (www.safeboot.com)
 - WinMagic SecureDoc Disk Encryption (www.winmagic.com)
 - GT SecuriKey (www.securikey.com)
 - Check Point Full Disk Encryption (www.checkpoint.com)
 - Encryption File System (EFS) by Microsoft (free in Win XP)
 - BitLocker Drive Encryption by Microsoft (free in Vista & Windows 7 Enterprise and Ultimate)



Protect client data – encrypt e-mail

- Not required, but **very** good idea
- Benefits:
 - Ensures only intended recipient received e-mail & attachments
 - E-mails can self-destruct at your option
 - Reel back in e-mail even after you hit “send”
 - Receipt notice to you that recipient cannot stop
- A few to consider:
 - Mail It Safe – www.mailitsafe.com
 - PGP Desktop E-mail or Universal Gateway E-mail – www.pgp.com
 - MessageGuard – www.networksolutions.com



Encrypt Thumb Drives if used for Client Data!

- How many of you have lost your cell phone?
- These are much easier to lose
- Encryption isn't hard!



SanDisk Extreme 64GB
\$69.99



IronKey Personal
\$109-\$599

Have a PIN for your cell phone



- Common in the days of smart phones to have data on the phones
- Too lazy to punch in a password???
- Can you remotely wipe data if you lose the phone?
- Fingerprint Sensor on iPhones
- Advanced passwords on Android

Use passwords – and make them strong

- Adobe hack:
 - #26: Monkey
 - “rhymes with *ssword”
 - What was the number one password?
- No names of kids, dogs, sport teams
- Alphanumeric phrases are helpful
 - lL0v3th3Da11asBarAss0c1at10n!
- Use a Password Manager
 - LastPass (www.lastpass.com)
 - 1Password (<http://agilebits.com/onepassword>)



Use Secure Wi-Fi, Wherever You Are

- Home, Work, and Traveling
- Change the SSID and default password
- Enable encryption
- Free open networks are not secure – even hotels with a firewall
- Use a VPN (www.proXPN.com)



Be Careful with Native Word Files



- Clients change and THEN sign documents
- They do not tell you they do this
- Opposing counsel COULD do the same thing
- Send with tracked changes as needed, but when finalized
- PDF and lock documents

LAW FIRM MANAGEMENT

Duty to supervise subordinate lawyers



- How much do your colleagues know about this stuff?
- Ensure client confidentiality is being maintained
- Develop and enforce policies:
 - Technology Use (that includes prohibition against downloading programs)
 - Social Media
- Duty to supervise office staff

Create an employee termination plan – and follow it

- They can and do take your client contact info and your forms – and maybe your client's proprietary data
- Make them sign a form acknowledging that all data has been returned to you
- Do not allow access to a computer
- Cut remote access
- Forward their e-mail to someone else



Don't leave your computers on at night



- They need to clean up resources
- May have an exception for remote access, but then use password protected screensavers
- Can you vouch for your cleaning people?

Create a disaster recovery plan

- This invites a disaster
- You can't figure out a good plan in the midst of a disaster
- Most states now say these plans are ethically required
- If you have a good plan, you can simply follow it, or modify it for the circumstances
- Practice – don't wait for an event!



Questions?

