Lawyer ethics for the 21st century

Due to dramatic enhancements in technology and its effect on the legal profession, new efforts are underway to modernize the ethical standards to which lawyers are held.

by Frank E. Quirk

The technology explosion of the last decade has dramatically impacted the way lawyers practice. From lawyers sitting at their desks scratching on a legal pad, we have moved to lawyers now seen facing away from their desks, tapping on a keyboard while looking at a monitor and moving a mouse. Or maybe they are using touch-screen technology and voice-recognition software and the documents they create are stored "in the cloud."

The impact of technology is inescapable. It is generally accepted that lawyers' standard of care now includes a working knowledge of the technology available to them and their clients. Most documents now are probably in the form of electronically stored information (ESI) and, rather than being accessed in filing cabinets and storage boxes, are located on servers, desktop and laptop computers, smartphones, tablet computers and storage devices such as flash drives.

New technology has had one of its most significant impacts on litigation discovery. The production of documents may now involve thousands of pieces of electronic information in formats and storage devices that did not exist just five years ago. Discoverable emails alone may number in four or five figures. The lawyers' burden of client confidentiality and preservation of the attorney-client privilege becomes a much more significant issue in modern-day discovery, leading to the greater recognition of the concept of "inadvertent disclosure" of confidential or privileged information.

In 2009, the American Bar Association sought to address these issues by appointment of the ABA Ethics 20/20 Commission, charged with examining the impact of technology and globalization on the legal practice and to specifically review the adequacy of the then-current ethics rules to guide lawyers in their competent and ethical practice. The commission first determined several issues to be addressed and appointed a number of working groups to assist the commission members in their efforts. Through public forums and other outreach the commission sought to gain a broad review of the issues.

In 2012, the commission completed its initial efforts and made recommendations to the ABA House of Delegates for modification of the ABA Model Rules of Professional Conduct to bring those rules into the 21st century. The commission also realized that the technology explosion is a dynamic force and presents a moving target in which to attempt to regulate. The commission's first recommendations were presented to the ABA House of Delegates in August for approval and adoption into the Model Rules. On Aug. 6, 2012, the House of Delegates adopted all of the commission's recommendations with only minor amendment.

The Model Rule amendments address four issues closely related to technology and the related impact it has had on the globalization of our practice, both domestically and internationally. The four areas addressed by the rule changes are:

- Technology and client confidentiality;
- Technology and client development;
- Lawyer mobility; and
- Outsourcing of legal functions.

Several model rules and comments impacted by these issues have been amended to provide guidance to lawyers in dealing with technology.

Technology and client confidentiality

All of the technology advances described previously, in hardware and software, have raised new problems for lawyers in the preservation of client confidential information and heightened the potential for its inadvertent disclosure, all to possible detriment to the client and exposure of the lawyer to liability or disciplinary sanctions. A number of rules and comments have been added or modified to address this issue.

The definition of "writing" or "written" in Rule 1.0 (Terminology) has been modified to specifically include electronic communications. A comment to the definition of "screening" now makes clear that screening includes isolation from information in electronic form. A comment to Rule 1.4 (Communication) that required lawyers to return phone calls now compels them "to respond to or acknowledge client communications."

More significant changes have been made to Rule 1.6 (Client Confidentiality). A new Section 6(c) requires lawyers to make reasonable efforts to "prevent inadvertent or unauthorized disclosure of, or unauthorized access to information" subject to the rule.

Lawyer competency and the obligation of lawyers to understand the available technology has been affirmed with language added to Rule 1.1 (Competency), to make clear that a lawyer's obligation to maintain a level of requisite knowledge and skill includes a basic understanding of the benefits and risks associated with relevant technology. Related language has been added to Comment [16] to Rule 1.6 to again relate the lawyer's confidentiality obligation to the lawyer's basic duty of competence. Other comments to Rule 1.6 have been modified by the addition of language to provide specificity and guidance to lawyers in fulfilling their added responsibilities arising from technology factors.

Finally, Rule 4.4 (Respect for Rights of Third Persons) has undergone substantial revision to include ESI within the scope of protected information in addressing a lawyer's obligations with respect to receipt of inadvertently sent documents. Comment [2] is amended to define "inadvertently sent" to include information accidentally transmitted, such as when an email is misaddressed or a document or ESI is accidentally included with information intentionally transmitted. The comment also addresses embedded data, generally characterized as metadata, and indicates that obligations under Rule 4.4 arise only if the receiving lawyer knows or should have known that the metadata was inadvertently sent to the receiving lawyer. This treatment of metadata is consistent with ABA Formal Opinion 06-442, even though a number of other jurisdictions have issued opinions to the contrary as to a lawyer's obligations with respect to access or use of an adversary's metadata.

Technology and client development

Before the advent of the Internet and related electronic tools, most lawyer efforts in client development were conducted through television, direct mailings and print media (phone directories, etc.). Now, lawyers and law firms communicate their messages to prospective clients through websites, blogs, social and business networks, pay-per-click advertisements and online videos. The former ethics rules addressing client development were clearly inadequate to provide guidance to lawyers in the electronic age.

For example, former Model Rule 1.18 (Duties to Prospective Client) assumed lawyer interaction with prospective clients in a face-to-face or telephone setting. The new amendments to Rule 1.18 and its comments have changed the former references from "interviews," "discussing" and "discussions," to "consulting and "consultations" to recognize that those communications may well be over Internet formats such as those referred to above, which may just as likely give rise to prospective client obligations under the rule. A new provision in a comment recognizes the practice of contacting lawyers to disqualify them from representing an opposing party (taint shopping). Such actions create no lawyer duties under the rule.

The rules directly addressing lawyer advertising, former Model Rules 7.1 (Communications Concerning a Lawyer's Services), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients), have undergone substantial revision to recognize the new means by which lawyers may ethically solicit legal work. Former references to "prospective clients" have been changed to the "public" to broaden the applicability of the rules in recognition of the broader reach of electronic communications. The title of Rule 7.3 has been changed to "Solicitation of Clients" from the former title referred to above.

Comments to Rule 7.2 have added references to the Internet and other electronic forms of lawyer advertising, adding email addresses and website information to the permitted forms of public dissemination of information concerning lawyers' practices. Comment [3] addresses pay-per-click advertising to make clear that they are permissible so long as the advertisements do not recommend a lawyer and are otherwise consistent with Rules 1.5(e) (division of fees) and 5.4 (Professional Independence of the Lawyer). Such advertisers are included in a category identified as lead generators. Comment [5] prohibits payment by a lawyer to a lead generator that states or implies that the lead generator is recommending the lawyer or that the lead generator has analyzed a person's legal problems when determining which lawyer should receive the referral. The comment refines the definition of "recommendation" to be "any communication that endorses or vouches for a lawyer's credentials, abilities, competence, character or other professional qualities."

A new comment to Rule 7.3 defines a "solicitation" as a "targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can be reasonably understood as offering to provide, legal services." Communications directed to the general public (billboard, website, television commercial) or responses to requests for information (for example, as when responding to an Internet search) and advertisements that are not directed to specific people are not solicitations.

Lawyer mobility

The days are long gone when lawyers were expected to spend their entire careers in a single firm or single location. It is now commonplace and an accepted reality for lawyers to relocate to another firm or to a different jurisdiction. The ABA House of Delegates has recognized the need for lawyer regulation to take account of this new mobility.

Accordingly, the ABA has adopted a new stand-alone Model Rule on Practice Pending Admission that would permit a lawyer who has been engaged in the active practice of law for three of the last five years to establish systematic and continuous presence in a new jurisdiction while diligently pursuing admission in the new jurisdiction through means permitted in the new jurisdiction (such as admission by motion or passage of a bar examination).

The existing ABA Model Rule on Admission by Motion, which was adopted in some form or another in all but 11 jurisdictions, has been amended to reduce the "time in practice" eligibility requirement from five of seven years to three of five years. The amendment recognizes that the most likely lawyers to relocate are younger, less senior lawyers, who will benefit from the reduction.

An almost universal problem when lawyers move from one firm to another is identifying potential conflicts of interest. The firm to which the lateral lawyer is moving wants assurance that acceptance of the new lawyer will not cause the firm to be disqualified from representation of current clients because of a potential conflict of interest that the lateral lawyer would bring with him or her to the new firm. Consequently, the new firm must know sufficient information about what client matters the moving lawyer has been working on and any conflicts of interest. Model Rule 1.6 (Confidentiality of Information) would prohibit the incoming lawyer from disclosing much information regarding client representation, without consent of the applicable clients, which would be unworkable in most lateral situations. This problem was recognized by ABA Formal Opinion 09-455, which permitted lawyers to disclose specific categories of client information to the new firm to ensure that conflicts of interest are detected before the lawyer is hired. The ABA House of Delegates adopted an amendment to Model Rule 1.6 by addition of a new paragraph 1.6(b)(7), which essentially codifies Opinion 09-455. However, disclosures under the new provision are not permitted if they could compromise the attorney-client privilege or otherwise prejudice a client. An amendment was adopted to a comment to Rule 1.17 (Sale of Law Practice) to refer to the new paragraph in Model Rule 1.6 that addresses a change in ownership of a legal practice.

Outsourcing

Lawyers and law firms are increasingly outsourcing legal and law-related work. Outsourcing has been made possible and practical by all of the technology discussed above. Legal process organizations are a major business in India, expected to generate a billion dollars in revenue by 2014.[1] The momentum for outsourcing was initially supplied by clients, who saw opportunities to cut legal costs for such things as document review.

The ethical issues arising in the outsourcing arena are competency, client confidentiality, potential conflicts of interest, reasonableness of fees and, obviously, the unauthorized practice of law. ABA Formal Opinion 08-451, addresses all of these issues in detail. The ABA House of Delegates adopted amendments to comments to several model rules, essentially codifying the guidance and protections offered under the opinion. New Comments to Rule 1.1 (Competence) list the factors that lawyers must consider when retaining lawyers outside the firm to meet their own obligation of competency. The comment also requires, in most situations, that lawyers obtain their clients' consent before entering an outsourcing arrangement retaining outside lawyers.

Because most outsourcing arrangements treat the outside service providers as nonlawyers to avoid unauthorized practice issues, the title of Model Rules 5.3 was changed from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Comments to the rule were adopted to provide guidance and boundaries in the engagement of nonlawyer outsourced services. Comment [1] to Model Rule 5.5 (Unauthorized Practice of Law: Multijurisdictional Practice) was also amended to assure that lawyers cannot engage in outsourcing that would comprise the unauthorized practice of law.

The commission's work

Although the bulk of the commission's recommendations were made and acted on by the House of Delegates last August, the commission has issued an additional report and recommendation to be taken up by the House of Delegates at its midyear meeting in February 2013. This recommendation proposes to modify Rule 1.7 (Conflicts of Interest) to permit lawyers and clients in limited circumstances to agree on what jurisdiction's ethics rules will govern their relationship.

The commission also filed reports with the House of Delegates on the issues of alternative litigation finance and the publication of ratings and rankings of law schools, law firms and lawyers. The commission had examined each area in detail and concluded that no action on its part was warranted at this time. However, it is likely that the commission may make additional recommendations in other areas before completing its work.

Impact for Ohio

The amendments to the Model Rules and comments will not be in effect in Ohio unless, and until, the Supreme Court of Ohio undertakes an effort to review them and approve their inclusion in the Ohio Rules of Professional Conduct.

The current Ohio rules were adopted by the Supreme Court in February 2007. It is entirely likely that, after five years in effect, the Court would undertake a review of the rules adopted by the court and, at that time, undertake a concurrent review of the 2012 amendments to the Model Rules to consider their adoption into the Ohio rules. ■

Author bio

Frank E. Quirk is the director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law, a position he has held since 2004. Currently of counsel at Brouse McDowell, Quirk has been with the firm since 1961 and served as the firm's managing partner from 1989 to 1998. He consults with lawyers and clients of the firm regarding matters involving ethics or malpractice, serves as an expert witness in lawyer malpractice cases and lectures frequently at legal seminars.

Endnote

[1] *New York Times*, Aug. 4, 2010.