



PROGRAM MATERIALS

Program #32124

July 8, 2022

Technology Competence: Ethical Implications Presented by Technology

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Technology Competence: Ethics

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- 2013
 - IBM estimated that 2.5 exabytes of new data was created every day
 - 1 billion gigabytes or 75 trillion pages of information
- Discovery of 1 terabyte of data (35 million pages)
 - 1 iPhones

Collection

Use

Disclosure

Retention

Two Halves to Privacy

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■ What

- Myriad of U.S. and International Laws
 - GDPR
 - CCPA
 - COPPA
 - FTC Act

■ How

- Privacy Compliance Programs
- Cybersecurity

Information is the new oil

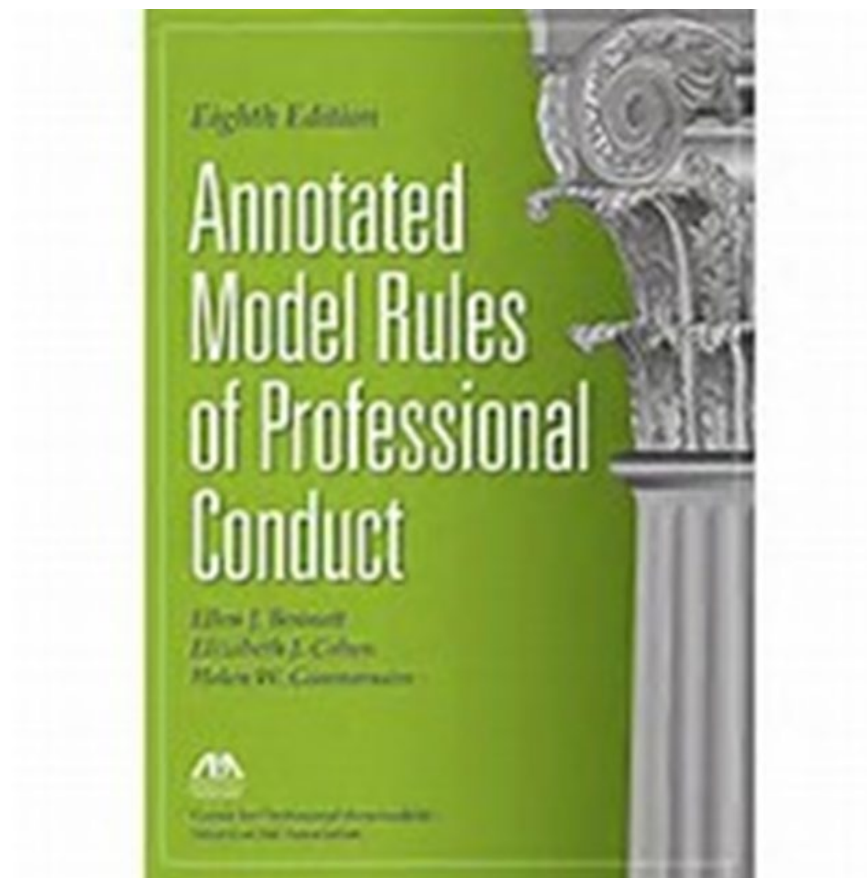
Why Do We Care?

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- Law firm of Grubman Shire Meiselas & Sacks victim of ransomware
 - Lady Gaga
 - Madonna
 - Bruce Springsteen

- Example of technology failure:
 - 1.8.19
 - Paul Manafort's attorneys filed a response to claims made by Special Counsel Robert Mueller. It was soon discovered that whomever redacted the document failed to do so properly, allowing anyone to read the "redacted text" by copying and pasting the blacked out sections.

- What is privacy?
 - New laws
- What do we need to be advising clients on
- Rules that Apply to Lawyers
- How does supervisor role come into play?
- Changing Landscapes



Technology and the Law

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- Approximately 38 States have expressly included knowledge of technology as a requirement of the Rules of Professional Conduct
 - 2012 ABA approved a change to the Model Rules of Professional Conduct to make clear that lawyers have a duty to be competent in technology

Alaska	Arizona	Arkansas
Colorado	Connecticut	Delaware
Florida	Idaho	Illinois
Indiana	Iowa	Kansas
Kentucky	Louisiana	Massachusetts
Michigan	Minnesota	Missouri
Montana	Nebraska	New Hampshire
New Mexico	New York	N. Carolina
N. Dakota	Ohio	Oklahoma
Pennsylvania	South Carolina	Tennessee
Texas	Utah	Vermont
Virginia	Washington	W. Virginia
Wisconsin	Wyoming	

- Model Rule 1.1, Comment 8
- Maintaining Competence
 - 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.

Some Relevant Ethical Rules

- Nevada Rule 1.1 (Competence)
- Nevada Rule 1.6 (Confidentiality of Information)
- Nevada Rule 1.4 (Communication)
- Nevada Rule 1.15 (Duty to Safeguard Client Property)

Rule 1.1

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.

- September 30, 2016- every lawyer admitted to Florida Bar must take three hours of technology-related CLE during a three-year cycle.
- 9/20/2018- North Carolina Supreme Court approved the requirement

Duty of Confidentiality

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- Illinois Rule 1.6(e)(amended October 15, 2015, effective January 1, 2016)
 - – “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.”

- Acting Competently to Preserve Confidentiality
- **Comment to Model Rule 1.6, now in comments to Illinois Rule, effective January 1, 2016**
- [18] 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).

Illinois Rule 1.6, Comment [19]

“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.”

Warning to client?

- ABA Formal Op. 11-459 (8/4/11)
 - A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access.
- Texas Opinion No. 648

Duties of a Lawyer

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- Peers
- Subordinate attorneys
- Support staff of all types
 - Paralegals
 - Legal assistants
 - Non-Legal personnel
 - IT
 - HR
 - Etc.

Rule 5.1

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- Rule 5.1: Responsibilities of a Partner, Manager or Supervisory Lawyer

Duty to supervise (Rules 5.1 and 5.3)

Nevada Rule 5.1(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.”

Rule 5.1(c)

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(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 5.2 – Subordinate Lawyer

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- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Regulatory Compliance

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- Is the client subject to industry regulations?
 - GLBA
 - SOX
 - HIPAA
 - State requirements

- Six core cybersecurity functions:
 - Internal and external cybersecurity risks
 - Policies and infrastructure to protect information systems
 - Detection of cybersecurity events
 - Response and mitigation of cybersecurity events
 - Recovery and restoration after a cybersecurity event
 - Compliance with applicable reporting obligations.

E-Mail

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- Social Engineering
- Spoofing
- Data Breaches
- 2017:
 - 75% of firms cited email as greatest risk area
- 2018:
 - 70% solo firms and 63.2% of small firms lacked adequate security

- Ignore emails that are sent with your name in the sender field
- Make sure incoming and outgoing addresses match
- Use spam filter – check settings
- Use email encryption
- Disallow automatic downloading of images
- Delete any emails asking for personal information

How the bad guys operate

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- “Deep searches” on the internet for email addresses of your firm
- Publicly available information
- Phishing attacks

- Select products created for lawyers
- Check on compatibility
- Encryption
 - Secure
 - Control communications
 - Allows for inbound security
 - Large file secure transfers

Metadata

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- Data that describes other data
 - Time
 - Location
 - Type of Device
 - 3 types
 - Descriptive (title, author, subject, creation date, etc.)
 - Rights metadata (copyright, owner, license permissions)
 - Technical (file size, creation date, time, etc.)

Protecting Stored Data

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- Firewalls – protecting from inbound attacks
- Hard Drive Encryption
- Email Encryption
- Mobile Security (VPN?)
- Wi-Fi Security – protect the network
- Security Patches
- Multi-factor authentication

- Cloud Computing
 - General answer is that it is permitted
 - Reasonableness of provider
 - Enforceable provision of duty to maintain confidentiality
 - Notify law firm of served with process of service
 - Ability to transfer data to new provider

- Voicemail
 - Can be subject to attack just like any other data
 - Secure messaging system

- Texting
 - Not preserved in the same fashion as email
 - Not appropriate for complex legal discussions
 - Messages coming up on screen
 - Outline parameters of use
 - Use third party app that is encrypted
 - WhatsApp
 - Signal
 - Limited use

- Geolocation
 - Could be tied to texts
 - Pictures, videos, audio files
 - Stalkerware

- Visitor Policies
 - Sign in
 - Confidentiality Agreements
 - Walking to the Conference Room

- Physical Barriers
 - Confidential information
 - Where is it stored?
 - Passcards?
 - Access to computers?
 - Only those who need access should be granted access.
 - Access to accounts?
 - User v. administrative account access

State Laws

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- State Laws
 - Apply to data collected from state residents, does not matter where company is located
 - All states have requirements for data breach notification and response
 - Can vary greatly
 - Most also provide some protection of personal data, but it varies substantially

- Minimize access to personal data within company
- Understand where the personal data resides and if it is transferred outside of company
- Ensure vendor compliance through contractual provisions and right to audit

Security (CIAR)

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- Encryption
- Pseudonymization
- Confidentiality
- Integrity
- Availability
- Resilience
- Testing

General Accepted Privacy Principles

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- Management
- Notice
- Choice and Consent
- Collection
- Use and Retention
- Access
- Disclosure
- Security
- Quality
- Monitoring and Enforcement

- Keep system updated with patches
- Research status of your device – still patchable?
- Software to detect intrusions
- Remote enterprise software
- Sandboxing
- Passwords
- Education

Auto Removal of Metadata

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- Scrubbing Software
 - 3Bclean
 - BatchPurifier
 - cleanDocs
 - ConfidentSend
 - Document Metadata Cleaner
 - Doc Scrubber
 - iScrub
 - Metadact
 - MetaReveal
 - Workshare Protect

Smartphones and Mobile Devices

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- Data Leakage
 - 28% of mobile devices will suffer data leakage in the next 2 years
 - Phishing attacks are 3 times more likely
 - At least 1/3 devices routinely connect to unsecure networks
 - Updated?

- Anti-virus software
 - Avast
 - McAfee
 - AVG (android)
- VPN Access
 - Bitdefender
 - ExpressVPN
 - CyberGhost

- Use complex passwords
- Use biometrics
- Use MDM (Mobile Device Management)

Free Apps

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- Software often comes in multiple versions:
 - Free
 - Business
 - Enterprise
- Often each different version will come with different levels of built-in technology

■ ZOOM

- Schools terminated the use of ZOOM meetings
- Many businesses stopped using ZOOM including many law firms
- Different levels of data protection
 - Free version – unencrypted
 - Business version – very secure

Wi-Fi

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- Free Wi-Fi comes with big risk
- Use a mobile hotspot or secure Wi-Fi connection
- Secure VPN
- Open Wi-Fi
 - WEP and WPA are not adequate – use WPA2 or WPA3
- Wi-Fi device is older than 3 years old – Replace it.

What should I update

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- Operating system
- Browser Software
- Software Suite (Microsoft Office, Apple, etc.)
- VPN
- Wi-Fi
- Firewall
- Mobile Device

Free Apps

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- Data Collecting and Sharing
 - Online activity will be monitored
 - Customized ads
 - Use of cookies
- Read the Terms of Agreement

■ Pros

- No cost – might sample a product
- Auditability – open source

■ Cons

- Hidden malware
- Lack of Support and documentation
- Developer loses interest and abandons

Risks of Failing to Delete Data Properly

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- Often overlooked area is how to safely discard or replace devices/hardware:
 - Laptops
 - Desktops
 - Phones
 - Tablets
 - Multi-function Machines

- Have a policy as to what information you will acquire
- How long will you keep it
- How will you discard it
- Where will data be stored

Overview/Best Practices

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- Determine the privacy regulations that apply to your company
 - Look at:
 - Industry
 - Where individuals are located
 - Where services/products are marketed
- Data inventory and data mapping of personal data collected
 - Minimize collection of personal data where possible

- Minimize access to personal data within company
- Understand where the personal data resides and if it is transferred outside of company
- Ensure vendor compliance through contractual provisions and right to audit

Cyber-Insurance

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- **Network Security and Privacy**
 - (a) failures or breaches of the company's network security
 - (b) electronic disclosure of confidential information.
- **Digital Asset Protection**
 - loss of intangible physical assets, like software or data
- **Breach Event Expenses**
 - costs the insured incurs while responding to a cyber event.

- Business/Network Interruption
- Errors and Omissions (E&O) insurance may cover claims related to technology services like software and consulting.
- Directors and Officers (D&O) policies
- Reputational coverage

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- Ransom or Cyber Extortion
 - data or network capabilities are held hostage pending payment of a ransom, often in bitcoin or other cryptocurrency.
- Legacy/Traditional Coverages
 - general liability policies, errors and omissions policies, crime policies, and property policies, etc. Newer general liability policies tend to include exclusions that preclude coverage for cyber-related losses.

Office Locations

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