Legal Ethics
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Recent Changes to the Illinois Rules of Professional Conduct
Keep Pace with Technology

On January 1, 2016, recent amendments to the Illinois Rules of Professional Conduct took effect, which reflect the indelible impact that technology has had on the legal profession. Along with the widespread implementation of electronic filing and courtroom media coverage, these amendments reflect the Illinois Supreme Court’s appreciation for the fundamental ways in which technology has changed the practice of law. Indeed, the Court has declared that a lawyer’s professional competency is now based in part on a true understanding of the impact technology has on discovery, data security, and confidentiality.

This focus on the intersection of law and technology is not new. In 2012, the American Bar Association enacted several amendments to its Model Rules of Professional Conduct, which were aimed at raising awareness of the ethical problems that can arise when technology is used without a full understanding of its operation. Through amendments to Rules 1.1, 4.4, and 5.3 of the Illinois Rules of Professional Conduct, among others, Illinois has become one of approximately 20 states to have adopted the ABA Model Rules. While the changes themselves do not create new independent ethical duties on lawyers, they indicate a commitment by the Illinois Supreme Court to monitor the changing technology landscape and charge lawyers with doing the same.

Rule 1.1 of the Illinois Rules of Professional Conduct addresses a lawyer’s obligation to provide competent representation to a client. Competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment 8 to Rule 1.1 has long provided that the requisite legal knowledge and skill required of lawyers includes “keep[ing] abreast of changes in the law and its practice,” mainly through substantive continuing legal education. The newly amended Comment 8 now specifically acknowledges that maintaining legal competence requires a lawyer to also keep abreast of “the benefits and risks associated with relevant technology.”

Many lawyers may think that the use of technology in the law is limited to electronic discovery and electronically stored information (ESI). However, technology’s reach into legal practice is constantly expanding. For example, technological competence implicates the lawyer’s obligation to have a basic understanding of security issues implicated when using a mobile device to access client information or send documents. It concerns the preservation of the attorney-client privilege when sending documents by email. It encompasses issues of confidentiality and security of client information stored in a cloud-based data storage system. It also raises questions about the treatment of metadata attached to electronically transmitted information.

Amendments to Rule 5.3, entitled “Responsibilities Regarding Nonlawyer Assistance,” addresses some of the aforementioned concerns more directly. Traditionally, Rule 5.3 admonished lawyers that their nonlawyer employees, such as paralegals, legal assistants, and other support staff, must respect client confidentiality and otherwise act in accordance with the ethical obligations required of lawyers.
The newly added Comment 3 now provides additional obligations on lawyers to ensure that any nonlawyer vendors hired to provide legal support services also understand and abide by lawyers’ professional obligations under the Rules of Professional Conduct. For example, Comment 3 states that when a lawyer retains an investigator, a document management company hosting a document database, a vendor providing cloud-based storage, or a document duplication service, the lawyer must make “reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” The extent of the obligations under this Rule depend on the circumstances of the engagement, including the “education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality [of client information].”

Similarly, amendments to Rule 4.4(b), governing “Respect for Rights of Third Persons,” shine a light on the practical dangers of electronic discovery and other electronic transmissions. The Rule provides that a lawyer who receives a document or ESI “relating to the representation of the lawyer’s client” and knows that the information was inadvertently sent must notify the sender. In that case of inadvertent transmission, “as when an email or letter is misaddressed or a document or [ESI] is accidentally included with information that was intentionally transmitted,” the recipient must notify the sender so that person may take protective measures. Comment 2. As before, this Rule affects only the ethical obligation to notify the sender of the mistaken transmission and does not address the legal implications regarding waiver of privilege or admissibility of the information, which are governed by other legal rules. It also does not change the lawyer’s obligation to use professional judgment in deciding whether to return or destroy the inadvertently transmitted material.

Of particular note, Comment 2 to Rule 4.4(b) specifically defines ESI to include metadata, the “data about data” that is embedded into an electronic document. Metadata can reveal information about who authored a document, when it was created, what software was used, and a record of any changes made to a document. In many circumstances, this type of information may be confidential, privileged, or highly sensitive. Receipt of this type of information may trigger an obligation on the receiving lawyer if he knows that it was not intended to be sent. Without understanding what metadata is or the potential effects of its inadvertent disclosure, a lawyer cannot adequately protect his client’s interests.

As Rule 4.4 and Rule 5.3 demonstrate, it is imperative that as the legal profession moves toward routine use of electronic document production and other means of electronic transmission of information, lawyers must understand the mechanisms associated with these technologies. They cannot escape their primary professional obligation to protect client information, or to keep abreast of the “benefits and risks associated with relevant technology,” by simply hiring a vendor to handle the technological aspects of their practice. Rule 1.1. Lawyers retain ultimate authority to safeguard client information, which is now at the core of competent representation. Moreover, by keeping pace with technological advancements, lawyers will not only satisfy the new requirements of the Illinois Rules of Professional Conduct, but also will be more efficient and competitive practitioners.

**About the Author**

**Gretchen Harris Sperry** is an attorney in the Government and Appellate Practice Groups at *Hinshaw & Culbertson LLP* in Chicago. Her practice includes Constitutional and Commercial Litigation, White Collar Criminal Defense, and business counseling on a wide range of issues, from regulatory compliance to campaign finance matters. Ms. Sperry currently serves on the Illinois Supreme Court Committee on Character and Fitness by appointment of the Court. She is
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