

# Updated Rules of Professional Responsibility:

What IT Professionals Need To Know About Them



# Agenda

- ◆ Recent ABA Amendments
  - ◆ Lawyer Technological Competence
  - ◆ Communication
  - ◆ Confidentiality
  - ◆ Nonlawyer Assistance
- ◆ Impact on IT
- ◆ How Can IT help?

# Recent ABA Amendments

- ◆ Commission on Ethics 20/20 created by then ABA President Carolyn B. Lamm in 2009 “to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments”

# Recent ABA Amendments

- ◆ August 6, 2012 the ABA's policy-making House of Delegates voted to approve changes to the Model Rules, including Resolution 105A (Technology & Confidentiality)
- ◆ ABA Model Rules do not define ethics requirements for lawyers, states do. State review and adoption of recent ABA amendments is underway.

# Rule 1.1 Competence Comment 6

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.

# Rule 1.1 Competence

## Law Technology News, Aug 2012

“Though the Commission used the phrase, ‘[b]ecause of the sometimes bewildering pace of technological change,’ the transition to widespread use of digital technology has been in effect since 1985, more than 25 years ago. This is hardly a “bewildering” pace of change, unless you have stayed in a cave and remained a Luddite. Now more than ever is the time to commit to understanding digital change and ensure that you can competently handle your client’s needs.”

# Rule 1.1 Competence

## What does it mean?

- ABA report states this is not new obligation, but reminder to lawyers
- Awareness of technology is part of general ethical duty - can't just delegate; can't hide from technology
- Lawyers may need to consult with “experts” to understand benefits and risks of certain technology
- “Experts” within the law firm are the IT professionals

# KIA Motors Skills Test

- ◆ Corporate Counsel, frustrated with high legal fees, decided to test skills of 9 law firms
- ◆ Firms had option of sending associate of choice
- ◆ ALL firms failed - test should have taken 1 hour; firms took average of 5 hours!
- ◆ Skill tests included manipulating PDFs, using Excel sort/filter, formatting motion in Word
- ◆ KIA Motors is working to standardize test; it will be freely distributed to other in-house counsel



# Impact on IT

- ◆ Whether adopted by states or not, ABA rules state obvious requirement of technical competence
- ◆ Clients are auditing firms; testing basic technical competence
- ◆ Firms face potential damage to reputation and business loss
- ◆ It's a business issue for firms to establish minimum standard. IT, GC, risk partner, technology committee define firm's goal.

# How can IT help?

- ◆ Lawyers can't "figure it all out"
- ◆ IT brings expertise to table
  - ◆ Help prioritize important technology requirements for lawyers; help assess risks and benefits of technology
  - ◆ Provide training on technology topics; consider adding CLE ethics credits
  - ◆ Provide training/refreshers on basic skills
  - ◆ Provide updates on relevant technology to educate lawyers
- ◆ Monitor and manage compliance

# Rule 1.4 Communication Comment 4

- ◆ A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. ~~...Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.

# Rule 1.4 Communication

- ◆ Comment broadens scope of communication
- ◆ Includes ALL forms of communication, such as email, text, and other forms of electronic communication between client and lawyer

# Rule 1.6 Confidentiality

- ◆ 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.
- ◆ This is and entirely new sub-section

# Rule 1.6 Confidentiality

## Reasonable Efforts

- ◆ Sensitivity of information
- ◆ Likelihood of disclosure without additional safeguards
- ◆ Cost of additional safeguards
- ◆ Difficulty of implementing additional safeguards
- ◆ Impact on lawyer's ability to represent client (i.e. excessively difficult to use)

# Rule 1.6 Confidentiality Reasonable Efforts

- ◆ Client may require special security measures
- ◆ Client may give informed consent to forgo security measures otherwise required by Rule
- ◆ This rule does not relieve lawyer of state or federal requirements

# Rule 1.6 Confidentiality Impact on IT

- ◆ Constantly assess security requirements across organization
- ◆ Policies must be in place to define storage and usage
- ◆ Entire IT staff must adhere to policies
- ◆ Lawyers cannot “demand” exceptions without following protocol



# Rule 1.6 Confidentiality Impact on IT

- ◆ Routinely monitor and assess compliance
  - ◆ Mobile devices
  - ◆ DM storage - open model may not work in all cases
  - ◆ Storage in “unofficial” repositories - network drives, local storage
  - ◆ Ethical wall enforcement
  - ◆ IT must monitor and control access per policies
  - ◆ IT monitors security breaches

# Rule 4.4

## Respect Rights of 3<sup>rd</sup> Parties

- ◆ A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

# Rule 4.4

## Respect Rights of 3<sup>rd</sup> Parties

- ◆ Rule expanded to include electronically stored information
- ◆ “[m]etadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.”

# Rule 5.3 Nonlawyer Assistance

- ◆ Rule 5.3, Comments - amended to address outsourcing issues, including the use of cloud computing providers for the purpose of storing confidential client data.
- ◆ Rule title was changed from Nonlawyer Assistants to Nonlawyer Assistance

# Rule 5.3 Nonlawyer Assistance

- ◆ Examples of 3rd party non-lawyer providers covered by this requirement
  - ◆ investigative or paraprofessional service
  - ◆ document management company to create and maintain a database for complex litigation
  - ◆ vendor for printing or scanning
  - ◆ Internet-based service to store client information
- ◆ Lawyer must make “reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s ... obligations”

# Rule 5.3 Nonlawyer Assistance

- ◆ Query the competence of vendors, check references, audit or send RFIs before dealing with vendor
- ◆ Require vendors to be transparent with their processes, handling of firm's data, issues/resolution, modes of handling secure info
- ◆ Lawyers should consult with IT for their expertise and ability to evaluate vendor competence and qualifications
- ◆ Monitoring required - client and law firm

# Rule 5.3 Nonlawyer Assistance

- ◆ *New Hampshire Ethics Committee Advisory Opinion #2012-13/4 “The Use of Cloud Computing in the Practice of Law”*
- ◆ Discusses the areas of Competence, Confidentiality of Information, Safekeeping Property, Responsibilities Regarding Nonlawyer Assistants
- ◆ Agreed with consensus among states that a lawyer can use cloud computing, and must take reasonable steps to protect client data

# Choosing Cloud Vendor

## NHBA Advisory Opinion - 10 consideration on choosing Service:

- Is the provider of cloud computing services a reputable organization?
- Does the provider offer robust security measures?
- Is the data stored in a format that renders it retrievable as well as secure?
- Does the provider commingle data belonging to different clients and/or different practitioners such that retrieval may result in inadvertent disclosure?
- Do the terms of service state that the provider merely holds a license to the stored data?



# Choosing Cloud Vendor

- ◆ Does the provider have an enforceable obligation to keep the data confidential?
- ◆ Where are the provider's servers located and what are the privacy laws in effect at that location?
- ◆ Will the provider retain the data when agreement between the lawyer and provider is terminated for another reason?
- ◆ Do the terms of service obligate the provider to warn the lawyer if information is being subpoenaed by a third party, where the law permits such notice?
- ◆ What is the provider's disaster recovery plan with respect stored data? Is a copy of the digital data stored on-site?

# Summary

- ◆ ABA Amendments while advisory, reflect trend in many states already. Numerous state bar opinions are consistent with ABA changes.
- ◆ ABA rule changes reflect “common sense” standard - to be competitive and successful, firms must be technologically adept
- ◆ Presents a business issue to firms - IT, Risk Partners, Information Governance, Technology Committees all need to define firm’s standard to avoid reputational or business loss and be competitive

# Summary

- ◆ Firms must be proactive, not reactive
- ◆ Technological competence of lawyers
  - ◆ Technology professionals have important role
  - ◆ Educate lawyers on changes in industry
- ◆ ABA Rules give guidance on security and confidentiality that is consistent with recent case law - IT professionals play key role in meeting requirements

# Summary

- ◆ Law Firm policies should be reviewed and updated to define technology usage and related security practices
- ◆ Policies must be clearly communicated to firm and training should be ongoing
- ◆ IT must work closely with risk management to constantly evaluate technology risks and benefits