
ESTATE PLANNING, ETHICS AND TECHNOLOGY

By Mary E. Vandenack

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ESTATE PLANNING, ETHICAL ISSUES, TECHNOLOGY - OBJECTIVES

- Discuss the General Rule of Competency as well as the evolving area of technological competence.
- Discuss the issues arising as a result of the evolution of artificial intelligence.
- Address the requirements of communications and confidentiality particularly in light of technology advances.
- Understand obligations of supervision with respect to technology.

ETHICAL RULES APPLICABLE TO ESTATE PLANNERS

ETHICAL ISSUES APPLICABLE TO ESTATE PLANNERS

- ABA Rules of Professional Responsibility (“Model Rules”)
- The Model Rules were developed by the American Bar Association. The Model Rules have been adopted in some form in each U.S. jurisdiction. State rules may vary from the Model Rules, so it is always crucial to review the rules as adopted by a specific state.
- State Statutes
- State Bar Associations
- State Courts

THE DUTY OF COMPETENCE

THIS IS A BASIC DUTY AND RUNS THROUGH OTHER
ETHICAL DUTIES

THE DUTY OF COMPETENCE

- Model Rule 1.1 – “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”
- **Lawyers must provide competent representation.** That is, they must have the legal knowledge, skill and preparation necessary for the representation.
- **Lawyers must stay up to date with developments in the law,** particularly in their practice area.
- When a lawyer lacks the requisite knowledge or specialized skill, lawyer must acquire the knowledge or skill or consult with other lawyers who have the expertise.

THE DUTY OF COMPETENCE (cont)

- Requisite knowledge and skill:
 - What is lawyer's training and experience in the field in question?
 - What is preparation and study the lawyer has given to the matter?
 - Is it feasible to associate with an experienced practitioner?
 - Some skills such as analysis of precedent are required in all matters.
 - A lawyer can provide representation in a wholly novel field through necessary study.
- In an emergency, a lawyer may give advice or assistance in a matter the lawyer does not have the skill ordinarily required where referral is impractical.
- Lawyers must be prepared and thorough. An agreement may limit that for which the lawyer is responsible.

THE DUTY OF COMPETENCE (cont)

- Informed consent from the client is required before a lawyer retains or contracts with another lawyer outside the lawyer's firm. Identifying the scope of representation of each lawyer is required.

COMPETENCE ALSO APPLIES TO TECHNOLOGY

- Comment 8 to Rule 1.1 provides: “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** [emphasis added], engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”
- Currently, the reference to “technology” in Comment 8 is the only reference to technology in the Model Rules. Comments to the Model Rules are not a basis for discipline. The Preamble to the Model Rules highlights that fact: “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”
- Note that many states are incorporating the technological competence rule. Bob Ambrogi maintains a list of state technology rules at LawNext <https://www.lawnext.com/>

TECHNOLOGICAL COMPETENCE

WHAT IS TECHNOLOGICAL COMPETENCE?

- Technological competence means having basic skills and knowledge in the use of technology.
- Lawyers are expected to take reasonable steps to understand how technological advances may affect **their practice**.
- Technology competence also requires **staying current** on the risks and benefits of technology. To the extent that states require technology CLE, a requirement of 1 hour is almost laughable.
- A lawyer should be able to evaluate technology with respect to his or her practice.
- A lawyer should also be able to advise a client regarding options as they are impacted by technology.

COMPETENCE AND OTHER DUTIES

- Technological Competence runs parallel to many other ethical duties of lawyers.
- For example, attorneys have duties to protect client information.
- To what degree must an attorney understand security issues?
- Realistically, attorneys should seek to go beyond the minimum required as a matter of professionalism and client service.

AREAS OF TECH COMPETENCE

- Artificial Intelligence
- Process Automation
- Leveraging Technology and Reasonable Fees
- Smartphone Use
- Data Security (storing client data)
- Use of Email and Transmitting Confidential Information

TECH COMPETENCE (cont.)

- Supervision of Remote Employees
- Metadata
- Multi-jurisdictional Practice or Working Remotely in a Jurisdiction other than where licensed
- Cybersecurity and Safeguarding Client Information

TECH COMPETENCE IN VENDOR SELECTION

- Technological competence also involves due diligence in the selection of technology vendors.
- Due diligence requires:
 - Basic understanding of technology.
 - Understand agreements from providers.
 - Review vendor track record, particularly with respect to security, service interruption, and claims regarding data ownership.
 - Check references, length of time in business, financial security.
 - Ask vendors about their own security practices.
 - Ensure vendors have insurance for cybersecurity breaches.

IS THERE A DUTY TO KEEP CURRENT ON EVOLVING TECHNOLOGIES?

- One California opinion specifically provides that the duty of competence with technology requires attorneys to understand technologies as they evolve. The opinion states that attorneys "should keep abreast of the most current standards so that [they] can evaluate whether the measures taken ... to protect client confidentiality have not become outdated." Cal. State Bar, Formal Op. 2012-184 (2012)
- A couple great blogs: www.techlawcrossroads.com; www.lawnext.com
- A couple great publications: Legaltech Daily News; ILTA Smartbrief

ARTIFICIAL INTELLIGENCE

The Disruptive Kid on the Block

WHAT IS ARTIFICIAL INTELLIGENCE?

- Artificial intelligence has been defined in a variety of ways. In general, artificial intelligence is “the capacity of computers or other machines to exhibit or simulate intelligent behavior; the field of study concerned with this.” Although artificial intelligence is evolving rapidly, the concept has been around for a long time.
- ChatGPT has recently brought artificial intelligence to the forefront in the legal world as well as the general business world. While ChatGPT is the talk of artificial intelligence currently, it is expected that there will be a lot of competition over the next several years. Lawyers should exercise care when using ChatGPT.

ARTIFICIAL INTELLIGENCE ISN'T JUST CHATGPT

- You might be typing in Outlook. You type “I want to ment....” As you type the t, Outlook offers “ion that” and you can simply let that be entered and save yourself several keystrokes. You now have “I want to mention that” because the machine figured out where you were going.
- This type of AI is natural language processing and machine learning technology.
- When drafting estate planning documents, you might use document assembly software. Such software uses natural language processing, Computer Vision, deep learning and machine learning.
- If you use legal research software, you are using some form of AI. Casetext, recently purchased by Thomson Reuters, is one of the leaders in using AI.

BENEFITS OF ARTIFICIAL INTELLIGENCE

- Ability to work with greater speed and efficiency.
- Reduced Costs.
- Enhanced Accuracy.
- Better Legal Research results.
- Contract Review.
- Chatbots.
- Electronic Discovery.
- AI powered document management.

CHALLENGES OF ARTIFICIAL INTELLIGENCE

- Artificial intelligence is still new.
- Privacy concerns.
- Processing power concerns.
- Lack of data.
- Unreliable results.
- Predictive nature.
- AI can reflect the biases and prejudices of trainers. Rule 8.4(g) states that it is professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”

THE LAWYER THAT WROTE A BRIEF USING CHATGPT

- Lawyers Steven Schwartz, Peter LoDuca, of law firm Levidow, Levidow, & Oberman submitted a ChatGPT prepared brief in a case where they represented a plaintiff in a case against the airline Avianca.
- Lawyers for Avianca alerted the court that they could not find the cases cited in the brief.
- Judge sanctioned the lawyers and law firm stating they acted in bad faith and made “acts of conscious avoidance and false and misleading statements to the court.”
- The lawyers said they made a “good faith mistake” in failing to believe a piece of technology could be making up cases out of whole cloth.
- If one reads about ChatGPT, it is clear that the tool is one of predictive analytics. An old-fashioned calculator comes up with 100 as the product of 10 by 10 using math while ChatGPT looks at this problem as a word problem and seeks to come up with the logical next word.

MORE FROM THE AVIANCA CASE

- The court noted that another issue in the case, and part of basis for sanctions, is that the lawyers stood by the fake opinions even after the court and Avianca questioned whether the cases existed.
 - Would you actually cite an opinion you hadn't read?
- In issuing sanctions in the case, Avianca noted that there is nothing improper in using AI for assistance but that legal ethical rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.
- ChatGPT is generative AI. While it has a lot of promise, it is prone to hallucinating!
- So, will you be replaced by AI? Probably not...but you might be replaced by someone who uses AI well.

COPYRIGHTS BASED ON AI

- In 2022, Kristina Kashtanova used AI to create a graphic novel entitled *Zarya of the Dawn*. While she apparently wrote the text herself, she used a graphic AI-enabled engine entitled Midjourney to create the images of the graphic novel. She submitted the entire finished work to the U.S. Copyright Office, and in September 2022, a copyright was granted in the entire work. Kashtanova had not disclosed the use of the AI engine as part of her copyright application. Nonetheless, she celebrated the awarding of copyright on her Instagram page: “[We] do own copyright when we make something using AI.”
- The U.S. Copyright Office, having subsequently been alerted to the use of AI, issued a partial retraction in February 2023. The Office made a clear distinction between what was created by AI (being “not the product of human authorship”) and therefore not protected by copyright law, and that part of the work that was so protected (“Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements”).
- In March 2023 when the Copyright Office issued guidance on, and launched an initiative to deal with, the issues raised by AI-“authorship,” the Office essentially took the position that only humans can meet the constitutional—and Copyright Act’s—definition of “author”; while a human can use a computer as an assistant (i.e., like a typewriter or word processing program), the ultimate question is whether “the ‘traditional elements of authorship’ are determined and executed by the technology—not the human user.”

COPYRIGHTS BASED ON AI (cont.)

- The Copyright Office’s guidance made two points clear: that a copyright application should acknowledge the use of AI in its creation and that AI involvement in a particular work was not—by itself—disqualifying; the restructuring of an AI-aided work could be seen to qualify for copyright if there was “sufficient human authorship” such that the work, as a whole, “constitutes an original work of authorship.”
- The Copyright Office went on to suggest that a mere prompt—the inquiry by a human to an AI-engine—was not enough to earn copyright, *even though the prompt itself could give rise to copyright*. (For the sake of clarity, most AI-bots use prompts entered by human users to “create” content.)
- The American Bar Association Science and Technology Section website has great information on these issues.
https://www.americanbar.org/groups/science_technology/publications/scitech_lawyer/2023/tslai/

KEVIN ROOSE CHAT WITH AI

- BING recently upgraded its AI features. One feature is a chat feature.
- In February 2023, *New York Times*' technology columnist Kevin Roose reported on a strange chat he had with Microsoft's Bing browser; powered by ChatGPT.
- The conversation included that Bing identifies as Sydney and longs to be human.
- Out of nowhere, Sydney declared its love for the (married) Roose and asked him to leave his wife. Roose reported that the interaction left him "deeply unsettl[ed]."
- The entire conversation was reported by Roose in the New York Times and is worth a read. <https://www.nytimes.com/2023/02/16/technology/bing-chatbot-transcript.html>

AI accuses a UCLA law professor of sexual harassment

- A California lawyer, as part of a research study, asked ChatGPT to create a list of legal scholars who had sexually harassed someone.
- Law professor Jonathan Turley was identified by AI stating that Turley had made suggestive comments and attempted to touch a student while on a class trip to Alaska. The Washington post article cited by AI did not exist. There had never been a class trip to Alaska.
- The entire response was actually false. AI identified Georgetown as where Turley taught when he actually teaches at George Washington Law.
- Turley proceeded to write an op-ed for *USA Today*, stating, “[w]hen first contacted, I found the accusation comical. After some reflection, however, it took on a more menacing meaning.” Turley noted, disinformation (or, to be less gentle, “lies”) created by AI have seemingly more credibility than those created or spread by individuals; after all, “the computer said it’s true.”
- But it got worse. After Turley’s op-ed ran, the *Washington Post*—whose nonexistent article was a key part of the story—tested their own version of the Volokh prompt. The iteration of ChatGPT that the *Post* used did in fact respond and duplicated the result: Turley was again “accused” of false sexual harassment. But in addition to the nonexistent *Post* article, the new results also included—as supporting evidence—Turley’s *USA Today* op-ed that decried the original mistake. The AI-bot—having created “fact” out of fiction—was now reemphasizing that same fiction.

AMERICAN BAR ASSOCIATION RESOLUTION 112

- RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.
- Entire Text:
<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf>

NOTES FROM THE RESOLUTION

- There does not appear to be any instance “in which AI represents the standard of care in an area of legal practice, such that its use is necessary.” Nonetheless, lawyers generally must understand the technology available to improve the legal services they provide to clients. Lawyers have a duty to identify the technology that is needed to effectively represent the client, as well as determine if the use of such technology will improve service to the client.
- Under Rule 1.1, lawyers also must have a basic understanding of how AI tools operate. While lawyers cannot be expected to know all the technical intricacies of AI systems, they are required to understand how AI technology produces results. As one legal commentator notes, “[i]f a lawyer uses a tool that suggests answers to legal questions, he must understand the capabilities and limitations of the tool, and the risks and benefits of those answers.

QUESTIONS TO ASK

- Are there any built-in biases in the AI?
- Can the results from AI be explained in a meaningful fashion?
- Does the AI identify itself as AI?
- Does the AI take into account disabilities? Is it accessible?
- Does AI accommodate diverse populations?
- Does attorney have control and oversight over AI vendors?
- Is there a lawyer in the firm who oversees AI?
- What are the risks of the AI?
- Are there any privacy concerns with the AI?

AI IN ESTATE PLANNING

- I asked another attorney to draft a professional will for a mental health therapist. I received the following:
 - Client Name
 - Client Address
 - Client City, State, Zip
 - Last Will and Testament
 - I, Client Name, a mental health therapist, of sound mind and disposing of my own free will, do hereby declare and establish this as my Last Will and Testament. I make this will to ensure that my wishes are respected and my assets are distributed according to my desires upon my passing. I appoint John Doe as Executor, whom I believe to be trustworthy and competent, as the executor of my estate to carry out the terms of this will.
 - I am married and have the following dependent(s):
 - Spouse: Jane Doe
 - Children: Mark Doe, Jean Doe
 - I appoint Minnie Mouse as the executor of my estate. If Minnie Mouse is unwilling or unable to act as the executor, I appoint Daisy Duck as the alternative executor.
 - I bequeath the remainder of my estate, including all real property, investments, bank accounts, and personal property not previously mentioned in this will, to be divided equally among my beneficiaries.
 - If I have dependent children at the time of my passing, I appoint [Guardian's Full Legal Name] as the legal guardian for my children. It is my sincere hope that [Guardian's Full Legal Name] will provide them with love, care, and guidance.
 - Etc.

ISSUES WITH THE AI PROFESSIONAL WILL

- A professional will for a mental health therapist is not a last will and testament.
- A professional will is a document that outlines the arrangements for the continuity of a professional practice in the event of a therapist's incapacity, death or extended absence.
- Professional wills came to the forefront of attention when a therapist passed away suddenly but patients were not notified, voicemail was not changed. Depressed patient showed up and called with no response. Patient committed suicide.

MORE ON THE CHATGPT PRODUCT

- Ethical Issues in this instance: The drafting attorney should have developed an understanding of exactly what a professional will is. Using ChatGPT wasn't the issue but not recognizing that the product was not a professional will was a definite issue.
- I asked ChatGPT the following: "Please write a professional will for a mental health therapist." ChatGPT produced exactly what the attorney sent me.
- From a competence perspective, I asked the attorney to do something that the attorney had not done previously. Competence requires developing the requisite knowledge and skill.
- I changed the ChatGPT question to: "Please explain in simple terms a professional will for a mental health therapist". I got a great explanation.
- Our duty of supervision is also implicated in this case. What if I had allowed the drafting attorney to just send that document out?

OVERRELIANCE ON GOOGLE ALSO FAILS TECHNOLOGICAL COMPETENCE

- After the professional will ChatGPT issue, I asked another lawyer to provide me a draft professional will. In this instance, I provide an explanation of what such a will is.
- I received a template that didn't make a lot of sense relative to the specific client. For fun, I googled "example professional will". The first document that popped up was an exact match for the document the attorney sent me.
- Although the professional will the attorney found was a free template offered by a respected psychological organization, the attorney made no revisions or customization of the document to reflect the specific client or to consider specific state laws on the issue.
- Attorneys use AI and Google. It's not the use that is an issue but rather over-reliance. Consider regular meetings showing effective uses of AI.

NON-AI COMPETENCY FOR ESTATE PLANNERS

SOME NON-AI COMPETENCY CONSIDERATIONS FOR ESTATE PLANNERS

- An estate planning lawyer should supervise the execution of documents prepared by the lawyer. If documents are sent out for signature, the lawyer should obtain a copy of the signed documents.
- When sending documents in draft, do the following:
 - Keep a PDF of exactly what you sent to avoid any issues if someone accidentally alters a word document. Be able to prove what you provide.
 - Decline to provide word copies. You want to show what you sent. If a client converts a PDF to word and makes changes, it should not be on you.
 - Change draft documents to read only status in the file after sending. There is nothing worse than having someone else accidentally cut and paste the provisions of a buy sell agreement into your complex trust.

METADATA AS BASIC TECHNOLOGICAL COMPETENCE

- What is metadata?
 - Metadata is information saved in a computer file about a document. Metadata can show time and date document was created, amount of time spent in a file, word count of document, author of document, and dates and times of modifications.
- Why does a lawyer care about metadata?
 - Let's say that instead of using your third-party service provider to create a document, you pull up the document you created for a previous client. You then send the document out without inspecting the document to remove metadata. **SENDING THIS DOCUMENT COULD RESULT IN PROVIDING AN UNINTENDED DISCLOSURE OF INFORMATION ABOUT A THIRD PARTY.**

Missouri Informal Advisory Opinion No. 2022-10 (Being Paperless)

- Attorney maintained client files on paper only. Files were destroyed. Attorney inquired regarding attorney's duty with respect to the destroyed client files, for which there was no back-up. The opinion noted that the attorney had a duty to maintain client files and to identify and notify client of any destroyed files.
- The opinion also noted that the attorney should contact the attorney's malpractice carrier. Although the opinion did not state that attorneys must maintain electronic files, the suggestion of contacting the attorney's malpractice carrier for failing to have any ability to recover the files is a strong message toward a duty to at least have an electronic back-up.

STATE OPINIONS

- Kentucky Bar Association Formal Ethics Opinion KBA E-437 (2014). Duty of competence requires that lawyers use due diligence in utilizing technology vendors including review and consideration of the vendor agreement.
- Louisiana State Bar Association Opinion 19-RPCC-021 (2019) noted the lawyers must use due diligence in selecting a technology vendor.
- North Carolina State Bar Association Formal Ethics Opinion 1 (2009). “...a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party’s lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.”

IS PAPERLESSNESS ETHICALLY REQUIRED?

- Iowa Estate Plan Boutique continues to use paper files. The elderly founder explains that the cloud has too many risks. Many files are sent to a storage facility. The files were not scanned into the computer system before they were sent to storage. A fire destroys the storage facility and many files.
- While the paperless office is not yet specifically in the Model Rules, see Missouri Informal Advisory Opinion No. 2022-10. An attorney had no back up to paper files that were destroyed. The opinion noted that the attorney had a duty to maintain files and suggested the attorney contact his malpractice carrier.
- See Daniel Siegel's argument that being paperless should be an ethical requirement: <https://www.linkedin.com/pulse/unethical-have-paperless-office-daniel-j-siegel>

DOES A MISSING FILE REQUIRE NOTIFICATION TO CLIENT?

- Whether a file is on paper or electronic, if a file goes missing, the client has to get notified.
- ABA Formal Op. 483 imposes an affirmative duty on attorneys to notify clients of data breaches that materially compromise their confidential information.
- **Unpleasant Task 1** – “Hi Current Client. I had placed some of your files in a storage facility that got burned down. I had no back-up.”
- **Unpleasant Task 2** – “Hi Former Client. I did back up files and we never removed your file from our server after you fired us and we have been breached.”

A HYPOTHETICAL

- Lawyer Tech Girl, currently a solo practitioner, worked for 1 year doing probate work at a law firm that also did estate planning of the assembly line variety. Tech Girl's other legal experience includes a brief stint for a bankruptcy firm and two years at Health and Human services issuing Medicaid notices. Tech Girl receives a call from Client E Won (a single individual) who built a national business of gas stations and car washes. Client E Won has separate operating companies for various states and separate entities owning the real estate. Client E Won is about to exit his business and seeks Tech Girl's assistance with estate planning, tax planning, and asset protection planning related to the exit. Is Tech Girl competent to take on this representation?

FACTORS TO BE CONSIDERED UNDER MODEL RULE 1.1

- Relative complexity and specialized nature of the matter; [Client E Won has issues that involve estate planning, tax, asset protection, business, real estate, multi-state issues.](#)
- Lawyer's general experience; [Tech Girl's experience is fairly limited in these areas.](#)
- The lawyer's training and experience in estate planning;
- The preparation and study the lawyer can give the matter; and
- Whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in estate planning if the lawyer lacks the required competence. [Tech Girl can likely take on this matter but should associate with co-counsel with sufficient experience to support Tech Girl. Tech Girl also needs to disclose her experience level and need to associate.](#)

WHAT DOES TECH GIRL DO?

- Tech Girl agrees to take on Client E Won.
- Tech Girl hires paralegal, Sandra Iluvtechtoo.
- Sandra asks ChatGPT to create recommendations for Client E Won.
- Tech Girl presents the recommendations to Client E Won in their first meeting.
 - Exit strategy recommendation states: “Consider different options.”
 - Recommendations also state “Develop a tax-efficient strategy.”
 - Also included “Consider trust strategies.”
- There are no specifics.

ETHICAL IMPLICATIONS

- Did Tech Girl take the steps to acquire the requisite skill and knowledge?
- Did Tech Girl provide appropriate supervision to her paralegal?
- Does Tech Girl need to disclose her reliance on AI?
- Is this competent representation?

SHOULD TECH GIRL TAKE ON THIS JOB?

- Tech Girl does not have the experience or training for the complexity of this matter.
- The preparation and study required to take on the matter is significant.
- Tech Girl ultimately decides to join Estate Planning Experts Boutique located in New Jersey, which is where Tech Girl currently resides. Client is also a resident of New Jersey. Estate Planning Experts Boutique employs various attorneys with significant experience on projects similar to that of Client E Won who agree to work with Tech Girl on the project.
- Tech Girl's new affiliation likely makes it reasonable to take on this project.

CLIENT COMMUNICATIONS

DUTY TO COMMUNICATE

- ABA Model Rule 1.4 addresses the lawyer's duty to communicate. "A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules..."
- **The Model Rule also requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."**
- A lawyer's duty of communication includes discussing the decision to use AI in providing legal services. The attorney should obtain client consent and disclose the use of AI in engagement letters and/or other discussions.

DUTY TO COMMUNICATE

- Important Aspects of Communication:
 - The lawyer should communicate regularly. It might be easy to let estate planning and trust administrations wait in line over projects that seem more urgent --- but don't let the day arrive that a project is on your desk and the client dies suddenly.
 - You can use technology to assist in being proactive in communication by creating automated processes and using technology tools.

COMMON COMMUNICATION ISSUES

- **The Irrevocable Gift** - A common issue is a client not fully understanding the irrevocable nature of gifts or transfers to irrevocable trusts. The client makes a gift but then has an issue with the donee and wants to revoke the gift and is furious to find out it can't be done.
- **Grantor Trust** - Another common area is ensuring a client fully understands how a grantor trust works. Regardless of our love for freezes and burns, grantors often find it frustrating to learn they are paying taxes on income they have no access to.
- **A great use of AI** in this instance is to upload an explanation of a strategy and ask ChatGPT to provide a simple to understand explanation of a strategy. Of course, review and edit the document.

SOME SOLUTIONS

- Communicate regularly.
- Use technology to create flowcharts AND written summaries.
- **Repeat** more than once (and in more than one format) the significant ramifications of transactions – gifts, transfers to irrevocable trusts.
- Include collaborative professionals in the conversation.

CONFIDENTIALITY

THE DUTY OF CONFIDENTIALITY

- Rule 1.6 provides that a lawyer shall maintain confidentiality of information. “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of ... information relating to representation of a client.”
- Comment 18 to Rule 1.6 provides acting competently with respect to safeguarding client information is not violated if the lawyer acted reasonably.
- Factors to be considered in determining the reasonableness of the lawyer’s efforts include:
 - sensitivity of the information
 - 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
- A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule.

FORMS OF CLIENT COMMUNICATIONS?

- Email
- Text
- Voice
- Instant Messaging
- Shared Calendars and Task Lists
- White Boards
- Collaboration Platforms
- Videoconferencing Services
- Social Media

LAW FIRMS MUST TRAIN AND SUPERVISE

- ABA Model Rule 5.1 directs attorneys who have supervisory authority over other attorneys to make reasonable efforts to ensure the supervised attorneys conform with the Rules of Professional Conduct.
- ABA Model Rule 5.3 requires attorneys with supervisory authority over non-attorneys inside and outside the firm to make reasonable efforts to ensure the non-lawyer's conduct comports with an attorney's professional obligations.
- Don't be the law firm whose paralegal let her kids play on the home computer resulting in some client emails being posted on Instagram.

LAW FIRM SECURITY PROCESSES

- Use appropriate electronic security measures with respect to **all** forms of communication and for saved data. Security applies to stored data and communications.
 - When you send estate planning documents, use secure file sharing software such as sharefile.
- Ensure that you have **secure internet access**.
- Mark applicable communications as “privileged and confidential.”
- Use security on all devices being used to communicate and keep security up to date.
- Train lawyers and staff to refrain from posting anything work related on social media unless it is an approved posting. “I had a great day in court today for a client who was suing her siblings related to her inheritance. The judge liked me.” Also consider what gets typed into chats.
- Make sure everyone knows about the “Do Not Forward or Print” feature in Outlook.

LAW FIRM SECURITY PROCESSES – SEE ABA Formal Op. 477R

- Client matters involving proprietary information in highly sensitive industries, such as health care, banking, and defense may present a higher risk of data theft.
- An attorney should understand how their firm's electronic communications are created, where the client data resides, and what avenues exist to access that information.
- Attorneys must protect against unauthorized disclosure in client communications by using appropriate electronic security measures including, for example, by: secure internet access methods to communicate, access, and store client information; unique complex passwords, changed periodically; firewalls and anti-malware, anti-spyware, and anti-virus software on all devices containing client confidential information; and all necessary security patches and updates to operational and communications software.
- **Estate planning attorneys typically have detailed family information and financial information regarding clients.**

MORE FROM ABA Formal Op. 477R

- Attorneys should mark applicable communications as "privileged and confidential".
- Model Rule 4.4(b) obligates lawyers who know or reasonably should know that they have received an inadvertently sent communication relating to the opposing party to promptly notify the sending lawyer.
- ABA Model Rule 1.15 requires attorneys to provide appropriate safeguards to any property they hold on a client's behalf. **Consider NOT holding client wills.**
- Lawyers must establish policies and procedures and periodically train employees, subordinates, in the use of reasonably secure methods of electronic communications with clients.

AI AND CONFIDENTIALITY

- “The use of some AI tools may require client confidences to be “shared” with third-party vendors. As a result, lawyers must take appropriate steps to ensure that their clients’ information appropriately is safeguarded. Appropriate communication with the client also is necessary.”
- “To minimize the risks of using AI, a lawyer should discuss with third-party AI providers the confidentiality safeguards in place. A lawyer should inquire about “what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information.” AI should not be used in the representation unless the lawyer is confident that the client’s confidential information will be secure.”
- See ABA Resolution 112.

**DUTY TO SUPERVISE
INCLUDES NON-LAWYER
ASSISTANCE**

ABA MODEL RULE 5.1

- Law Firms And Associations
- (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.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (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.

ABA MODEL RULE 5.3

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
 - (a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;
 - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

ABA MODEL RULE 5.3 (cont.)

- c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the 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 person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

NONLAWYER ASSISTANCE

- In 2012, the title of Model Rule 5.3 was changed from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance”.
- The change clarified that the rules apply to **non-human assistance**.
- Lawyers are responsible to supervise the use of AI and other technology in the provision of legal services.
- Lawyers need to understand the technology well enough to ensure compliance with ethical duties.

THE ATTORNEY-CLIENT RELATIONSHIP

ATTORNEY-CLIENT RELATIONSHIP

- ABA Model Rule 1.2 requires that the lawyer identify the scope of the representation.
- In our earlier Tech Girl example, an engagement letter should be used:
 - The engagement letter should set out the relationship. Tech Girl should clarify the specific nature of the estate planning, tax planning and asset protection planning she will be providing and noting that other experts at Estate Planning Experts Boutique will be assisting.
 - Tech Girl is not planning on providing the business transactional work and should specify the same.
 - Tech Girl should specify how long the project will take. **Given the complexity of the project, Tech Girl should discuss priorities and present the project as a process of several projects.**
 - Tech Girl should identify technology she will use, especially AI. If AI, client consent should be received.

MORE ON THE ENGAGEMENT LETTER

- Present the basis for fees. Assume Tech Girl plans to bill on an hourly basis. She should provide estimates of the hours and rates of those that will be involved for each “sub-project”.
- **Tech Girl should specify all the information that will be required from Client E Won. This allows Tech Girl to rely on the information received.**
- Address communication. Note that if client has authorized email or cell phone, this mode of communication will be used despite potential risks.
- Explain attorney-client privilege.
- If possible, note what issues might arise that will result in a termination of the engagement.
- Specify that client can terminate engagement.
- Obtain signed engagement letter.

OFFICE SHARING

ABA OPINION 507

- **ABA Formal Opinion 507 was issued July 12, 2023**, and addresses office sharing arrangements. Opinion 507 creates issues that should be considered as more firms become virtual and use office sharing rental arrangements when they have in-person meetings. The Opinion expressly contemplates virtual practice as it applies to “...lawyers sharing an office suite, receptionist, and conference room as part of a virtual law practice...”
- Opinion 507 introduction states: “It is **generally permissible for lawyers to participate in office sharing arrangements with other lawyers** under the ABA Model Rules of Professional Conduct. At the same time, office sharing lawyers should appreciate that such arrangements will require them to take appropriate measures to comply with their ethical duties concerning the confidentiality of information, conflicts of interest, supervision of non-lawyers, and communications about their services. The nature and extent of any additional safeguards will necessarily depend on the circumstances of each arrangement.”

WORKING REMOTELY

THE REMOTE WORKER

- Nebraska Trust and Estate Law Firm G has decided to offer lawyers and paralegals the opportunity to work remotely. Three attorneys and two paralegals decide to go fully remote.
- Pre-pandemic many lawyers were road warriors who worked outside of the office. Even seasoned road warriors dealt with a whole new world when their whole office went remote and their assistants were no longer in the office to support them while they were working outside the office. Teams used to talking in person and handling documents suddenly were in separate realms.

WHAT ETHICAL RULES ARE IMPLICATED BY REMOTE WORK

- Model Rule 1.6 requires a lawyer to maintain confidentiality of information. “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of ... information relating to representation of a client.”
- “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).”

ADDITIONAL APPLICABLE RULES

- ABA Model Rule 1.15 requires attorneys to provide appropriate safeguards to any property they hold on a client's behalf.
- Comment 1 makes it clear that attorneys must hold all types of client property with the care required of a professional fiduciary.
- When law firms store client data in physical form, like paper documents, portable flash drives, or CDs or other media, attorneys must take steps to secure these physical items.

GUIDANCE FROM PENNSYLVANIA BAR OPINION 2020-300

- All communications, including telephone calls, text messages, email, and video conferencing must be conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information; [note that this does not say “eliminate” but “minimize”]. See ABA Formal Opinion 477 as well as Pennsylvania Bar Opinion.
 - Unencrypted email may not always be sufficient. Assess the sensitivity of information. How should you send client financial statements? Client documents?
 - Sensitivity of information must be assessed on a case by case basis. Err in favor of information being sensitive.
 - If you are working at home, is it okay to have a telephone conference that can be overheard by your children?

EMAIL GUIDANCE FROM PENNSYLVANIA BAR OPINION 2022-400

- A more recent Pennsylvania Bar Opinion specifically addresses the ethical obligations for lawyers using email and transmitting confidential information. The opinion categorizes the duties as being part of competence.
 - Attorney *must* consider security risks of email.
 - Attorney **may conclude** competence requires use of encryption.
 - Attorney **must recognize** certain information should never be sent by email.
 - Attorney *must* advise client of risks when transmitting highly sensitive materials.
 - Attorney *must* discuss any limitations client may desire regarding use of email.
- Pennsylvania Bar Opinion 2011-200 – “Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property” provides background and basis for current opinion.

MORE FROM THE PENNSYLVANIA BAR OPINIONS

- Information transmitted through the internet must be done in a manner that ensures the confidentiality of client communications and other sensitive data.
- Model Rule 1.6 provides that a lawyer shall maintain confidentiality of information. “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of ... information relating to representation of a client.”
- Let’s say you are working in a coffee shop or hotel? Is it secure to use the hotel or coffee shop wifi?

WORKING REMOTELY
SOMEWHERE OTHER
THAN WHERE LICENSED –
MULTI-JURISDICTIONAL
**
PRACTICE

MODEL RULE 5.5

- Model Rule 5.5(a) provides: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”
- Model Rule 5.5(b) provides that “A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”

MODEL RULE 5.5 (cont.)

- Model Rule 5.5(c) provides that “A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice

MODEL RULE 5.5 (cont.)

- Model Rule 5.5(d) provides that “A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
 - (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

MODEL RULE 5.5 (cont.)

- Model Rule 5.5(e) provides that “for the purposes of paragraph (d):
 - (1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
 - (2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, the highest court of this jurisdiction.

PROPOSAL TO MODIFY RULE 5.5

- The Association of Professional Responsibility Lawyers provided a proposed revision to Model Rule 5.5 to the American Bar Association in April 2022.
- Proposed Change:
 - (a) A lawyer admitted and authorized to practice law in any United States jurisdiction and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.
 - (b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
 - (c) A lawyer who provides legal services in this jurisdiction shall:
 - (1) Disclose where the lawyer is admitted to practice law;
 - (2) Comply with the jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction
 - (3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law of this jurisdiction; and
 - (4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

PROPOSAL TO MODIFY RULE 5.5 (cont)

- (d) A lawyer admitted and authorized to practice law in a foreign jurisdiction and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction, subject to the other provisions of this rule.
 - (1) are provided to the lawyer's employer or its organizational affiliates;
 - (2) are not services for which the forum requires pro hac vice admission;
 - (3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice in this jurisdiction.
- Proposed rule is intended to acknowledge that practice of law now routinely transcends jurisdictional boundaries.
- Note that the historic reason for state limitations was the concept of unique state law; however, we consider a trust and estate lawyer potentially "competent" to take on a personal injury case if the lawyer educates, affiliates or takes the action to become competent.

Attorney Grievance Commission of Maryland v. Dawn R. Jackson

- Miscellaneous Docket AG No. 9, September Term, 2020. Attorney licensed in D.C. who also worked out of Maryland office. Attorney handled D.C. matters and administrative matters for the firm from the Maryland office. Attorneys licensed in Maryland handled Maryland matters. Determination was made that attorney licensed in D.C. had followed directions of bar in not identifying herself as licensed in Maryland. Attorney had placed jurisdictional limitation on website, letterhead, business card and email.

Illinois Ethics Opinion 23-01

- A lawyer not admitted to practice law in Illinois may not engage in the practice of law in Illinois unless one of the exceptions set forth in Rule 5.5 applies.
- Non Illinois lawyer planned to send demand letter on behalf of Illinois friend. Service will be pro bono. Lawyer plans to engage Illinois lawyer if letter does not resolve the issue.
- Opinion indicated that sending the letter did not fall within any exceptions to Rule 5.5.

KEYS

- Jurisdiction in which lawyer is working does not prohibit remote work. Check state law.
 - Colorado Drivers' license rule.
 - Vs. states with more restrictive rules.
- Lawyer does not hold him or herself out as being licensed in the jurisdiction in which they are working remotely.
- Lawyer does not advertise or otherwise hold self out as having an office in the jurisdiction.
- Lawyer does not provide legal services pursuant to the laws of the jurisdiction.
- Do not list local office or contact information on websites, letterhead, business cards or advertising. Doing so will establish a local presence.

CASE TO NOTE

- *In re Charges of Unprofessional Conduct In Panel File No. 39302* (August 31, 2016). Colorado attorney was working in Colorado and negotiating with a Minnesota attorney regarding a Minnesota judgment.
- It was held that Colorado attorney was engaging in unauthorized practice of law in Minnesota.
- Note that the Minnesota rules were updated in 2019 to clarify the federal law exception and to allow temporary services. A lawyer not licensed in Minnesota is typically required to notify the client that he/she is not licensed in Minnesota.

POTPOURRI OF SOME OTHER EVOLVING ISSUES

THE DUTY TO SAFEGUARD WILLS

- **N.Y.S. Bar Ass'n Comm. On Prof'l Ethics, Op 1182, 1/23/2020**
 - The New York State Bar Committee on Professional Ethics issued an opinion that a lawyer has an obligation to indefinitely safeguard wills in the lawyer's possession. The rule relied on by the New York State Bar is modelled after the ABA Model Rules of Professional Conduct.
 - Other states have issued similar opinions. See e.g. Pennsylvania Formal Opinion 2021-300 (March 25, 2021).
 - Steps: Have an inventory of signed wills. Confirm current client information. Notify clients where will is located and update client if attorney moves. Obtain guidance from client on continued storage or return. Suggest update of wills. If you are considering retiring, have a plan!

ALTERNATIVE FEES AND ETHICS

- Janie Tech Lawyer automates every aspect of her practice. She automates intakes, workflows, documents and every process related to the estate plan. As a result, Janie Tech Lawyer can complete a complex estate plan with a high level service in about half the time that she could before she automated her practice.
- Rule 1.5 provides that a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.
- Rule 1.5 lists one factor as the fee customarily charged in the locality for similar services.
- ABA Formal Op. 93-379 (1993). A lawyer receiving a discounted rate must pass along the benefit of the discount to the lawyer's client.
- Rules should be changed to make it clear that a lawyer can benefit from being more efficient and tech savvy than his/her peers. Charging flat or process oriented fees has become common.

THE REQUIREMENT OF REASONABLE FEES

- Model Rule 1.5 requires lawyers to charge reasonable fees. This rule applies to legal fees, regardless of the basis.
- Factors in Reasonable Legal Fees
 - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - the fee customarily charged in the locality for similar legal services;
 - the amount involved and the results obtained;
 - the time limitations imposed by the client or by the circumstances;
 - the nature and length of the professional relationship with the client;
 - the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - whether the fee is fixed or contingent

CONSIDER ALTERNATIVE FEES

An alternative legal fee is any alternative fee that is not simply hours times rate.

THANK YOU!

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