

PRESIDENT'S MESSAGE

2020 – Our Duty of Technology Competence

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Special thanks to the many contributors and authors who provided input for this month's content related to election law. In this edition, you will find a number of quality articles on topics that address an area generally defined as “the politics of law and the law of politics.” The various contributors have provided helpful information and hints to assist those of us with an interest in this dynamic area of the law. Many of these stimulating topics are of great importance to our clients—areas such as ballot initiatives, voting rights, political spending, redistricting, gerrymandering, political finance and many others.

In the meanwhile—it is on to 2020—our next election year! For our members, the dramatic and eventful political scene continues to be matched by the dramatic changes in the practice of law. Innovation and technology are at the forefront of these changes. The majority of our members have invested significant time and energy to educate themselves and evolve with ongoing technological advancements. All members are reminded of our



obligation to embrace and utilize these new technological advancements. Specifically, the Nevada Rules of Professional Conduct (NRPC) require each attorney to maintain a level of technological competence:

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.

The obligation of “competence” takes on various meanings and is subject to various interpretations. In an effort to provide clarity to this primary obligation of competency, the American Bar Association issued Comment No. 8 in 2012, which addresses this matter.¹ The comment provides, in part, as follows:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continued study and education and comply with all continuing education requirements to which the lawyer is subject.” (emphasis added).

Regardless of an attorney’s years of practice, each of us is obligated to maintain minimum competencies when it comes to technology. Technology continues to play a larger and more prevalent role in the daily practice of law. While none of us are expected to be IT specialists, we must all be able to act competently on behalf of our clients. The ancient adage that “ignorance is no excuse” certainly applies to an attorney’s obligation to maintain a level of technological competency. A simple example is the protection of electronic communications. Virtually all attorneys use e-mail in their practice—though some more than others. With this modern means of communication comes the obligation to competently protect confidential information. In addition to the general obligation to protect client information, attorneys have an obligation to act with due competence when sending (or receiving) sensitive or confidential information. The NRPC provides that:

Rule 4.4

- a) . . .
- b) 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.

Many ethics opinions address the ethical obligations of both the receiving party *and the sending party* as relates to inadvertent transmission of privileged or confidential information that harms the client’s position. It is imperative that all practitioners employ proper processes and procedures to protect sensitive client information. Protecting client information in

the digital age is a cornerstone of technological competency.

These same ethical obligations and technological competencies apply to the use of smart phones, text messaging, social media and Cloud computing. Many attorneys currently work in a “mobile environment” with our clients’ documents and information stored in the Cloud. Similar to the obligation to properly protect client information within each of our offices from data loss or data breach, the same obligation exists to protect client information and communications that may appear on our smart phones or in the Cloud.

Overall, attorneys maintain an obligation to take reasonable steps to understand how technology may affect their legal representation. Technological incompetence results in lost productivity on the part of attorneys and unnecessary expense to our clients. In writing about a lawyer’s duty of technical

“SPECIFICALLY, THE NEVADA RULES OF PROFESSIONAL CONDUCT (NRPC) REQUIRE EACH ATTORNEY TO MAINTAIN A LEVEL OF TECHNOLOGICAL COMPETENCE.”

competence, lawyer Steven Puiszis lists several broad areas in which lawyers are expected to demonstrate technological competency. These areas include cyber security, or safeguarding electronically stored client information; electronic discovery, including the preservation review and production of electronic information; leveraging technology to deliver legal services, such as automated document assembly; electronic court scheduling and file share technologies; understanding how technology is used by clients to offer services or manufacture products; technology used to present information and/or evidence in

the courtroom; and Internet-based investigations through simple Internet searches and other research tools available online. While not an exhaustive list, it provides an initial baseline for all attorneys to review and consider their technological competency.

The profession of law is replete with ever-changing demands and deadlines. Attorneys face internal demands, client deadlines and commitments to their personal lives. At times, the obligation to keep up with constantly evolving technology can seem daunting. Nonetheless, each of us has an

ethical obligation to maintain a level of competency as to technology that affects our practice. Having discussed this obligation with many attorneys whom are “tech-savvy,” they each confirm that taking the time and

commitment to learn new methods and update out-of-date technology makes the practice of law easier, improves efficiencies and eases the stressors that are part of our profession.

As each of us works through the doldrums of winter, let all the members of *our* Bar be mindful of the ethical obligation to openly embrace new technology. The commitment to improve our technological awareness will be returned tenfold. Continue to support *our* Bar, enjoy some time for yourself and consider making plans to join all of your fellow members in New Orleans for the 2020 Annual Conference!

1. American Bar Association (ABA) Model Rule of Professional Conduct 1.1 is identical in text to Nevada Rule of Professional Conduct 1.1.