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Ethical implications of technology on appellate practice



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Special to Minnesota Lawyer

Technological innovations have had a profound influence on the practice of law and the delivery of legal services. Today, virtual legal services, legal analytics, e discovery, electronic legal research databases and case management databases, among other advanced technologies, make it easier than ever to work more efficiently and deliver better value for clients.

While the opportunities created by technological innovation in the legal profession present clear benefits, lawyers have been forced to grapple with difficult ethical issues surrounding ever changing technology. Examining emerging ethical issues and developing an awareness of these ethical considerations will allow you to integrate the use of technology in your practice in a way that is strategic, productive, and ethical.

The duty of competence in a technological age

Minnesota Rule of Professional Conduct 1.1 outlines several core duties of all lawyers, including appellate lawyers, to be competent: having the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” These duties are particularly necessary for representation on appeal because appellate practice is highly technical and specialized and the stakes can be significant if errors are made. See, e.g., *Swenson v. City of Fifty Lakes*, 439 N.W.2d 758, 758 (Minn. Ct. App. 1989) (dismissing an appeal that was improperly taken from an order for judgment rather than from the judgment itself). Lawyers who are unfamiliar with the precise rules of appellate practice may not meet the standard of competence as defined in Rule 1.1.

Comment 8 to Rule 1.1, which was a direct response to technological advances,

extends the duties outlined in Rule 1.1: “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.”

This duty means that every attorney who handles matters in court must have at least a baseline level of competence in and understanding of relevant technology they use in their practice to satisfy their obligation to act competently. However, if you feel like you lack the required competence to handle certain technological issues, you can seek assistance from those with the technological savvy about the issues at hand, or you can limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Minn. R. Prof. Conduct 1.2(c).

The duty of communication in a technological age

Minnesota Rule of Professional Conduct 1.4 outlines several responsibilities to the client to allow the client to effectively participate in the representation: A lawyer shall promptly inform the client of any decision or circumstances with respect to which the client’s informed consent is required; reasonably consult with the client about the means by which the client’s objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the rules of professional conduct or other law; and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 4 to Rule 1.4 explains that a lawyer must promptly respond to or acknowledge client communications. Rule 1.0 defines “communication” broadly to include “electronic communications.” With the increasing role of technology in legal communications, “electronic communications” may not simply mean emails and text messages, but also social media messages. This obligation may pose challenges for lawyers who are unable to communicate effectively with clients because of outdated programs or inaccessibility to certain technology. Lawyers must be sure to communicate any constraints on accessibility to electronic communications so that they are able to communicate and be accessible to their clients with current technology.

The duty of confidentiality in a technological age

Minnesota Rule of Professional Conduct 1.6 outlines several responsibilities for a lawyer to protect confidential information, including the requirement that lawyers “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” This rule was amended in response to technological advances in order to require lawyers to take reasonable precautions to avoid inadvertent or unauthorized disclosure of client information.

Comment 17 to Rule 1.6(c) explains that a lawyer must “act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” Comment 17 clarifies that the “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.” Practically speaking, in order to be determined as making “reasonable efforts,” lawyers should be prepared to assess the likelihood of risk and impact of their use of legal technology.

Looking ahead: Evolving technology and ethical responsibilities

In light of the new Rules of Professional Conduct that require lawyers to be competent with regard to technology, lawyers are well-advised to embrace rather than fear modern technology. Lawyers representing clients on appeal already face extensive technical rule requirements and now must be technologically proficient in order meet their professional responsibility duties. While these changes to the Rules of Professional Conduct may appear minor, they represent an important shift in expectations on the role of technology in practice. Lawyers need to learn how to leverage technology and other innovations that facilitate the delivery of legal services in new ways in an increasingly competitive legal industry.

So what does all this have to do with appeals? A lot. Nearly all submissions to the Minnesota and federal appellate courts are now done electronically. The ease of electronic filing can lull an attorney into a false sense of security – after all, instead of rushing to the court before it closes at 5:00pm, you have until midnight to push a button and your filing is complete. But we all know that if something can go wrong, it likely will happen at the most inopportune time. This column has repeatedly warned against waiting until the last minute to do anything appeal-related. See, e.g., Eric J. Magnuson, *E filing May Be Easy, But It’s Not That Easy*, Minn. Lawyer (Apr. 13, 2017); Eric J. Magnuson & Chelsea A. Walcker, *What You Need to Know About New Appellate Rules*, Minn. Lawyer (June 17, 2016); Eric J. Magnuson, *The Ethical Duty of Competence on Appeal*, Minn. Lawyer (Jan. 25, 2016). This is particularly true with respect to jurisdictional filings such as notices of appeal and petitions for further review. Technological competence means not only that you (or your staff) know how to do the basics, but that you understand the limits and risks of the e-filing world. Take some time to reflect on the points we make in this column, and make sure you do not get trapped by unruly electrons.

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