LAW SITES

BY ROBERT AMBROGI

TRACKING NEW AND INTRIGUING WEBSITES AND PRODUCTS FOR THE LEGAL PROFESSION.

MARCH 16, 2015

~~13~~ ~~15~~ ~~17~~ ~~18~~ 20 States Have Adopted Ethical Duty of Technology Competence

by Robert Ambrogi

*[Update: As of Dec. 23, 2015, it is 20 states, with the **addition of Iowa and Utah**.]*

*[Update: As of Dec. 17, 2015, it is 18 states, with the **addition of Virginia**.]*

*[Update: As of Nov. 11, 2015, it is 17 states, with the **addition of two more**.]*

*[Update: As of Oct. 15, 2015, it is 15 states, with the **adoption of the rule** in Illinois.]*

*[Update: It is now 14 states. See my **3/27/15 post** on the rule's adoption in Massachusetts.]*

In 2012, something happened that **I called** a sea change in the legal profession: The American Bar Association formally approved a change to the **Model Rules of Professional Conduct** to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology.

More specifically, the ABA's House of Delegates voted to amend Comment 8 to Model Rule 1.1, which pertains to competence, to read as follows:

> Maintaining Competence
>
> 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. (Emphasis added.)

Of course, the Model Rules are just that — a model. They provide guidance to the states in formulating their own rules of professional conduct. But each state is free to adopt, reject, ignore or modify the Model Rules. For the duty of technology competence to apply to the lawyers in any given state, that state's high court (or rule-setting body) would first have to adopt it.

So, roughly 30 months after the ABA approved this amendment, how many states have adopted the duty of technology competence? By my count, ~~13~~ 15 states have so far formally adopted the revised comment to Rule 1.1. They are:

- Arizona, **effective Jan. 1, 2015**.
- Arkansas, **approved June 26, 2014**, effective immediately.
- Connecticut, **approved June 14, 2013**, effective Jan. 1, 2014.
- Delaware, **approved Jan. 15, 2013**, effective March 1, 2013.
- Idaho, **approved March 17, 2014**, effective July 1, 2014.
- Illinois, **approved Oct. 15, 2015**, effective Jan. 1, 2016.
- Iowa, **approved Oct. 15, 2015**, effective Oct. 15, 2015.
- Kansas, **approved Jan. 29, 2014**, effective March 1, 2014.
- Massachusetts, **approved March 27, 2015**, effective July 1, 2015.
- Minnesota, **approved Feb. 24, 2015**.
- New Hampshire, **approved Nov. 10, 2015**, effective Jan. 1, 2016.
- New Mexico, **approved Nov. 1, 2013** (**text of approved rules**), effective Dec.

31, 2013.
- New York, **adopted on March 28, 2015**, by the New York State Bar Association.
- North Carolina, **approved July 25, 2014**. Note that the phrase adopted by N.C. varies slightly from the Model Rule: "… including the benefits and risks associated with the technology relevant to the lawyer's practice."
- Ohio, **approved Feb. 14, 2015**, effective April 1, 2015.
- Pennsylvania, **approved Oct. 22, 2013** (**text of approved rules**), effective 30 days later.
- Utah, **adopted March 3, 2015**, effective May 1, 2015.
- Virginia, **approved Dec. 17, 2015**, effective March 1, 2016.
- West Virginia, **approved Sept. 29, 2014**, effective Jan. 1, 2015.
- Wyoming, **approved Aug. 5, 2014**, effective Oct. 6, 2014.

On Feb. 28, 2015, the Virginia State Bar Council **voted to adopt** the Rule 1.1 change. However, the change does not take effect unless and until it is approved by the Virginia Supreme Court.

~~In Massachusetts, where I am located, the Supreme Judicial Court has **issued a notice** stating that it will adopt a package of proposed rule changes that includes Comment 8. However, the SJC said that it will not issue a formal order adopting the rules or set an effective date until it announces its decision on other proposed changes for which it has scheduled oral arguments. More information on the proposed changes and their status **can be found here**.~~

Some other states, while not having formally adopted the change to their rules of professional conduct, have nonetheless acknowledged a duty of lawyers to be competent in technology. For example, the New Hampshire Bar Association, in **Advisory Opinion #2012-13/4** concerning cloud computing, **said**:

> Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes.

And in California, a proposed ethics opinion of the State Bar of California (**Proposed Formal Opinion Interim No. 11-0004**) would require attorneys who represent clients in litigation either to be competent in e-discovery or associate with

others who are competent. The opinion expressly cites the ABA's Comment 8 and states:

> Maintaining learning and skill consistent with an attorney's duty of competence includes "keeping abreast of changes in the law and its practice, including the benefits and risks associated with technology."

If you know of other states I have missed, please let me know.

What does all this mean to you? It is simple. You cannot assess the benefits and risks associated with various kinds of technology if you know nothing about the technology. Even if your state has yet to adopt this change, it is only a matter of time before it does. Don't be a Luddite who fears or resists technology. Neither do you have to become a geek. Make an effort to understand the basics of the technology you use. Get on social media, if you're not already. Ask questions. Learn. When it comes to technology, there is no more burying your head in the sand.

Posted in: General
Tagged: legal ethics

actually approve "including the benefits and risks associated with relevant technology."

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Robert Ambrogi carole levitt • 9 months ago

I find the Minnesota order confusing. It said that the bar's petition "asked the court to approve the proposed rule amendments and acknowledge the proposed amendments to the comments." Later, after approving the rule amendments, the order said, "The comments to the rules are included for convenience and do not reflect court approval or adoption." So was that an acknowledgement, even if not an express approval?

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Paul Spitz • 10 months ago

Responding to Sam Glover's comment about knowing the difference between file encryption and SSL, I guess the issue is, how much do we have to know about any individual technology? Some of these can get pretty complex, pretty fast. Do we need to know exactly how SSL works, or do we just need to know that it is X amount better than not having SSL? And then, if I understand this article correct, it's still in our judgment to decide whether we need it or not.

My frustration as a solo comes from seeing these data breaches at Target, JP Morgan, Home Depot, Sony Pictures, etc. These are huge corporations with millions of dollars to spend on technology and security every year, and with probably dozens if not hundreds of tech people on staff, and yet they still suffered a security breach. If a $100 billion multi-national corporation can't defend itself, what is a solo practitioner with revenues of say, $600,000 or less, supposed to do? As a practical matter. It's not like I can call up Dropbox or Box and negotiate the terms of cloud storage with them. (and if the NSA has a view on this, and I know you are reading this, please chime in). Data security is just too much of a moving target for a significant part of the profession to do anything about.

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Michelle • 10 months ago

I applaud the ABA for doing something as a starting point. However, as a longtime law firm trainer, it annoys me how little the bars seem to understand the technology needs and concerns of their members. Also, when I continually see "apps for iPads" as the technology offerings at attorney-focused conferences, it frightens me for those who do not have good IT resources at their beck and call. Perhaps, more attorneys need to join the Intl. Legal Technology Assn. instead.

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Will • 10 months ago

Brian, Sam, Bob:

I look at it as a "gateway drug": failure to understand the tech leads to risky behavior re

Hook at it as a "gateway drug". Failure to understand the tech leads to risky behavior re other rules (like 4.4(b) - not really knowing what compromises ESI leads to claimed ignorance why one didn't give notice, etc)

Craig • 10 months ago

I was thinking of an example where Lawyer sues on an unpaid bill, and Client defends the refusal to pay on the grounds that the lawyer breached this emerging "duty of technical competence" by not leveraging available technologies to reduce the bill.

It's very different from a sanction by the bar for a breach of an ethical duty; but, I was thinking the existence of this language might embolden disgruntled clients wanting to make such an argument.

Brian Tannebaum • 10 months ago

Craig,

I'm not sure I understand your question. Fee disputes are only governed by 1.5 where a lawyer cannot charge a clearly excessive or illegal fee. This usually comes up where a lawyer charges $100,000 and the case is dismissed in one day with no work, or a lawyer charges a higher contingency percentage than allowed for and there is no court approval. I can't see how competence in technology would relate to a fee dispute.

Bradey Miller • 10 months ago

Ohio has recently amended its Rule 1.1 to include comment 8. The amendment goes into effect April 1, 2015. The language of the amendment can be found here on page 3: http://www.supremecourtofohio.....

Robert Ambrogi ↗ Bradey Miller • 10 months ago

Thanks! I've added Ohio to the post.

Craig Newton • 10 months ago

Brian,
Honest question here: bar discipline notwithstanding, in your opinion would the existence of an express duty impact, for example, a fee dispute where the client says counsel failed to use technology competently?

Sam Glover • 10 months ago

Okay, while I agree that basic technological competence is intertwined with professional

competence, let's be clear about what the ABA did. It added a comment; it did not change Rule 1.1. And that comment says "should," not "must." In the report, I believe the committee explained that it was just trying to point out the obvious, but I'm not sure it's a straight line from what the comment says to a duty of technological competence. Isn't it the same for states that adopt the changes as-is?

Maybe I'm wrong. I'd be happy to be wrong, as it would be a lot easier to explain to lawyers that, yes, they need to understand the difference between file encryption and SSL and which are used by their cloud services at what points, if there were a clear duty of technological competence. But I'm not sure there is. And even if there is a clear duty, I think Brian is probably right that it is vague enough to give plenty of comfort to the Luddites.

Robert Ambrogi Sam Glover • 10 months ago

I think you're right Sam. Admittedly, I'm using "duty of technology competence" as a shorthand reference. That said, we are clearly evolving towards an actual and substantive duty. As I noted in another comment here, at least a couple of ethics opinions and a few more sanctions rulings have expressly found lawyers at fault over circumstances resulting from their lack of understanding of technology. While the ABA Model Rule may not have created a hard-and-fast duty, I think we are seeing that duty become a reality.

Sam Glover • 10 months ago

Minnesota is on board.

Robert Ambrogi Sam Glover • 10 months ago

Thanks Sam. I've added Minnesota.

Brian Tannebaum • 10 months ago

Bob, that case was disguised as a tech case. That lawyer flat-out violated a court order to preserve evidence. He can claim it was due to a lack of knowledge as to e-discovery, but Rule #1, tech or not, is that an order to preserve evidence means just that. You don't tell a client that certain items can be scrubbed, regardless of your knowledge of the latest tech craze.

Brian Tannebaum • 10 months ago

I'm an ethics lawyer, and I'm not sure what these general statements mean in terms of disciplining lawyers. I know they are the darling of legal futurists and technology fans, but am I to believe that my clients will be disciplined because of these general

but am I to believe that my clients will be disciplined because of these general statements? Take New Hampshire for example: "Competent lawyers must have a basic understanding of the technologies they use. OK, so if they don't use any, they're in the clear? And then the second part: "Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes." OK, so lawyers need to know about tech regulation and privacy laws, about exactly what, the tech they use, or in general?

I look forward to the first ethics prosecution under this new language. To me, it appears that lawyers simply need to know that water is wet, or something. Other than it being a hammer for legal tech folks to scare lawyers, I'm not sure what it all means.

That being said, before anyone cries, I think technology is important.

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Robert Ambrogi Brian Tannebaum • 10 months ago

Brian - There was a lawyer in Mass. who was issued a public reprimand over circumstances that resulted from his lack of understanding of e-discovery. I do not know if there are other ethics cases, but there have been several court opinions issuing sanctions in cases where lawyers messed up because of their lack of understanding of the technology.

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