The Ethical Duty of Technology Competence: What Every Lawyer Needs to Know

June 10, 2019

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Connecticut Convention Center

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CT Bar Institute Inc.

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biographies

Brendon P. Levesque is the managing partner at Horton Dowd Bartschi & Levesque PC in Hartford, Connecticut. He is admitted to practice in Connecticut state courts as well as in the United States District Court for the District of Connecticut, the United States Courts of Appeals for the Second, Third, and Federal Circuits. In addition, he is admitted to practice before the United States Patent & Trade Office. Attorney Levesque joined Horton Dowd Bartschi & Levesque in August 2004 after serving as a law clerk for now Chief Judge DiPentima of the Connecticut Appellate Court. Attorney Levesque was made a principal of the firm on January 1, 2009.

Attorney Levesque represents clients in civil, family, and criminal appeals before the Connecticut appellate courts and the Second Circuit Court of Appeals. He also represents attorneys before grievance panels, in public hearings before the Statewide Grievance Committee and in presentments and appeals and candidates for bar admission before the Bar Examining Committee. Attorney Levesque presents seminars on risk management and ethics to law firms. Attorney Levesque is a member of the Association of Professional Responsibility Lawyers. Attorney Levesque is co-author of *The Wheeler Court* with Attorney Wesley Horton for the Quinnipiac University Law Review, an article focusing on the Connecticut Supreme Court from 1910 through 1930. With Attorney Horton, he co-authored *The Maltbie Court* for the University of Connecticut Law Review (Vol. 39, No. 5, July, 2007). Attorney Levesque authored *Preparing for your first Appellate Argument* which was published in the Connecticut Lawyer, Vol. 18, No. 12 and co-authored two chapters of Attorney Horton's book, The History of the Connecticut Supreme Court, Thomson/West, 2008.

Attorney Levesque co-authors the Connecticut Practice Book Annotated providing authors comments to the chapters on the Code of Judicial Conduct, the Rules of Professional Conduct, motions, and pleadings. He co-authors Connecticut Juvenile Law published by Thomson/West with Attorney Dana Hrelic. He also co-authored *Connecticut Insurance Law*, a publication of the Connecticut Law Tribune with Attorney Karen Dowd and Attorney Michael Taylor. Since 2009, he has co-authored the annual *Professional Responsibility Review* in the Bar Journal with the Honorable Kimberly A. Knox.

Michael S. Taylor is of counsel at Horton Dowd Bartschi & Levesque PC in Hartford, Connecticut. He is admitted to practice in Connecticut state court as well as in the United States District Court for the District of Connecticut, the United States Court of Appeals for the Second Circuit and Supreme Court of the United States.

Attorney Taylor represents clients at trial, on appeal and in professional responsibility matters. His appellate litigation has encompassed a wide range of issues including constitutional law, contract law, land use, and eminent domain, insurance coverage, criminal law, products liability and torts, dissolution of marriage, child custody and parental rights. Attorney Taylor also counsels clients and attorneys in attorney ethics matters and at the trial stage regarding the identification and preservation of issues for appeal.

Attorney Taylor co-authors Connecticut Insurance Law with Attorneys Karen Dowd and Brendon Levesque. He also co-authors The Encyclopedia of Connecticut Causes of Action. Attorney Taylor writes and lectures on appellate, insurance coverage and professional responsibility topics and was an adjunct professor at The University of Connecticut School of Law, teaching moot court.

The Ethical Duty of Technology Competence: What Every Lawyer Needs to Know
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Introduction (5 mins.)

Section 1: Benefits of Being Tech Savvy (10 mins.)

- Competence
- Diligence
- Communication
- Engagement Letters
- Confidentiality

Section 2: Areas of Particular Concern (45 mins.)

- Social Media
- Confidentiality
- When and How to Respond to Online Reviews
- Cloud Computing
- Overview of Data/Cyber Risks
- E-Discovery

Maintaining Competence

Technology and the Practice of Law

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Brendon P. Levesque, Esq.
Horton, Dowd, Bartschi & Levesque, P.C.
Hartford, Connecticut

Michael S. Taylor, Esq.
Horton, Dowd, Bartschi & Levesque, P.C.
Hartford, Connecticut

Introduction

- Should the Rules of Professional Conduct Include Specific Obligation Regarding Technology?

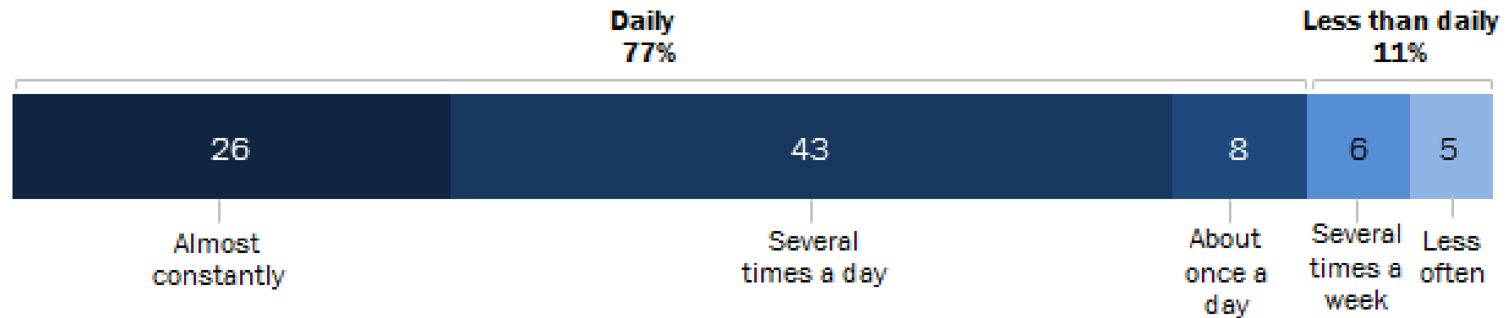
. . .

They Already Do.

Reasons to be Technologically Competent:

- Everyone Else Uses Technology
- Rules of Professional Conduct Requirements
- Security
- Leveling the Playing Field
- Increase Efficiency
- Improve Access to Justice
- Become Competitive with Online Based Lawyering

Everyone Uses Technology (almost)



People in Your Legal Life That Use Tech:

- Clients
- Opposing Parties
- Opposing Counsel
- Witnesses
- Jurors
- The Court

Everyone Uses Technology

Technology in the Courtroom

- The percentage of lawyers not using technology in the courtroom continues to drop: 20.6% in 2018 compared to 43% in 2017.
- There is a disparity in the use of technology in the courtroom based on firm size:
  - Solo Practitioners: 15%
  - Firms of 2-9 attorneys: 21%
  - Large Firms: 56%

Leveling the Playing Field

Rules You Use Every Day

1. Rule 1.1
2. Rule 1.3
3. Rule 1.4
4. Rule 1.5
5. Rule 1.6

Duty of Competence – Rule

Connecticut Rules of Professional Conduct – 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.

Duty of Competence – Commentary

Connecticut Rules of Professional Conduct – Rule 1.1, Comment

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.

How to measure current competency:

- **Are you comfortable using:**
  - Case management software
  - Document management software
  - Billing software
  - Email / Texting
  - PDF with redacting capabilities
  - MS Office Suite (most importantly, MS Word, Outlook).
  - Social Media

- **Do you understand**
  - How your data security works?
  - How e-discovery works?
  - How the tech lawyers in your practice are using works?
  - How the tech your clients are using works?
  - How the tech in the courtroom works?

What can you do to ensure you become technologically competent?

- Consult with online resources focused on changes in technology specific for the legal field.
  - https://www.lawsitesblog.com/
  - https://abovethelaw.com/technology/
  - http://www.futurelawyer.com
  - https://www.lawtechnologytoday.org/
  - https://www.mycase.com/blog/
  - https://blogs.findlaw.com/technologist
  - https://technology.findlaw.com
  - www.ltc4.org Legal Technologies Core Competences Certification Coalition
  - www.artificiallawyer.com/legal-tech-courses Colleges & Universities
  - www.procertas.com Legal Tech Assessment/Courses

Rule 1.3: Diligence

Under Rule 1.3, “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

This requires a lawyer to “carry through to conclusion all matters undertaken for a client” unless the lawyer's services are terminated.

Rules of Professional Conduct 1.3 official cmt.

Ways to Avoid Diligence Claims

- Calendaring System
- Block off a period of your day to return calls and emails
- Pay attention to your client
- Timely give your clients both good and bad news.

Rule 1.4: Communication

- Behaving "reasonably" is the key.
- Failing to comply with Rule 1.4 is the number one reason grievance complaints get filed.
- The rule requires that a lawyer "keep the client *reasonably* informed about the status of the matter," and "promptly comply with *reasonable* requests for information" from a client. (Emphasis added).

Violations of Rule 1.4

- An attorney was reprimanded for failing to respond communication to a client over the course of multiple months, *Ficarra v. Statewide Grievance Committee*, 2012 WL 3853672 (Conn. Super. Ct. Aug. 2, 2012).

- One year suspension from law practice affirmed, in part, because from the date of filing until the case was dismissed one year later the attorney did not inform client "of the developments in, or status of, her case, which she repeatedly inquired about through telephone calls and letters. *Statewide Grievance Committee v. Gifford*, 76 Conn. App. 454 (2003).

- A permanent disbarment was affirmed against an attorney, in part, for failing to keep appointments or reasonably communicate with clients, and "for a period of time, . . . not even maintain[ing] a working telephone number. *Statewide Grievance Committee v. Friedland*, 222 Conn. 131 (1992).

- *These are clear violations, many cases present closer calls.*

Best Practices for Communication

1. Emails and letters to your client.
2. Telephone call with client, followed up in writing.
   A. In order for these things to help, there must be either a physical copy or an electronic copy.
   B. Lawyers and Clients will rarely agree on the “facts” surrounding a grievance complaint.

Texting with Clients

It is a bad idea.

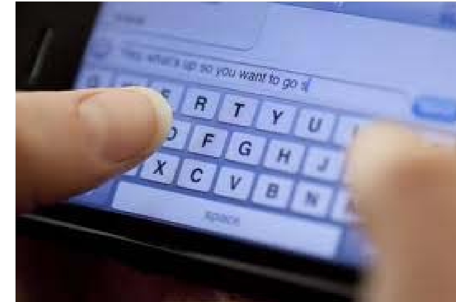
But if you must, safeguard yourself by:

- ✓ Purchasing software to remotely wipe your device if it is lost or stolen.

- ✓ Backing up text messages to somewhere besides your device.
  - Apps available for Android are far better than those available for iOS devices.

- ✓ Summarize your text communication in an email to the client memorializing the conversation.

Texting with Clients



Backing Up Text Messages

Options:

- Download an application that forwards text messages to email inbox.
  - Problems: Not all software applications send the text messages with the time stamp of the message.
- Screenshot
  - Problems: A long text conversation can span several screenshots and screenshots are easily manipulated.
- Social Media Ethics Guidelines of the NY State Bar Association, pg. 16 – General goal is to preserve like paper.
  - https://www.nysba.org/socialmediaguidelines17/

Rule 1.5: Engagement Letters

- Benefit now: preparing engagement letters requires you to:
  - identify your client(s)
  - identify your fee
  - clarify (so you can articulate it) the scope of the representation
- Benefit later: engagement letter memorializes these things, for clarity if/when things change

Engagement Letter Advice

- Prepare an engagement letter/email for each new matter
- Adopt by reference a master or “preferred” agreement
- Letter/email should specify:
  - Who you are (and are not) representing
  - What services you are (and are not) performing
  - How and when you will be paid
  - Who will pay you

Confidentiality – Rule 1.6

Connecticut Rules of Professional Conduct - Rule 1.6

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).

. . .

(e) 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.

Confidentiality – Rule 1.6 Commentary

Connecticut Rules of Professional Conduct - Rule 1.6, Comment

Acting Competently to Preserve Confidentiality. Subsection (e) requires a lawyer to act competently to safeguard information relating to the representation of a client 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. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of subsection (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. 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)

Confidentiality

Rule 1.6: Confidentiality of Information

- No disclosures unless client gives informed consent and disclosure impliedly authorized to carry out representation
- Exceptions:
  - Prevent death or SBH or fraud
  - Secure legal advice regarding compliance with the rules
  - To defend lawyer in controversy with client
  - To respond to allegations in any proceeding
  - To comply with court order
  - To do conflict checks

Note: Lawyer must make reasonable efforts to prevent inadvertent disclosure or unauthorized access.

Areas of Particular Concern Regarding Technology

1. Social Media
2. Confidentiality
3. E-Discovery

Social Media

Social Media – Duty to Investigate

A general understanding of how to review public information can be beneficial in collecting evidence for a case.

The New Hampshire Bar Association declared that criminal defense counsel, who has a duty to investigate, has the duty to be competent in collecting evidence directly or through an agent from social media.

See New Hampshire Bar Association Advisory Opinion 2012-13/05 ("Social Media Contact with Witnesses in the Court of Litigation").

Social Media as Part of Discovery

- When beginning to compose your discovery plan, ensure that social media is included at an early stage.
- Update your definition of Electronically Stored Information.
- Make sure that you include social media in your document preservation letters.
- Consider including social media in discovery requests and subpoenas.

Duty to Google?

- Collecting evidence from social media may not currently be a standard of care in all jurisdictions, but this will likely change.
- The duty to conduct internet searches has been the subject of several cases since the introduction of Google.
  - *Munster v. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005) – Appellate Court scolds attorney for failing to locate litigant after the Court conducted its own Google search and found information on how to track down the missing litigant.
  - *Weatherly v. Optimum Asset Management, Inc.*, 928 So. 2d. 118 (La. Ct. App. 2005) - Appellate Court finds that the sheriff's office failed to take reasonably diligent efforts to identify and provide notice to potential property owner after the trial court conducted its own cursory internet search locating said owner.
  - "Why, in short, doesn't the FBI just Google the two names? Surely, in the Internet age, a "reasonable alternative" for finding out whether a prominent person is dead is to use Google (or any other search engine) to find a report of that person's death." *Davis v. Dep't of Justice*, 460 F.3d 92, 102 (D.C. Cir. 2006).

Social Media Evidence

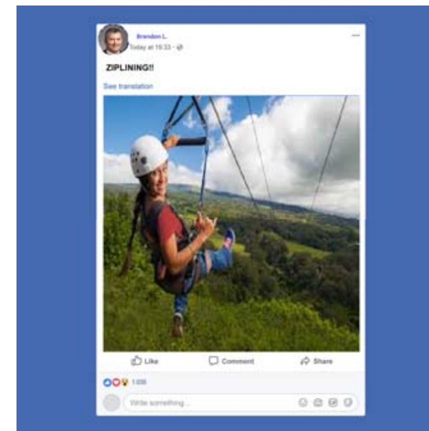
How Social Media Posts Can Help or Hurt Your Case:

Personal Injury – Extent of injury, emotional distress after an accident.

Family Law/Bankruptcy – Proof of assets or employment.

Employment Law – Workplace environment/culture, substantive facts, identifying witnesses.

Criminal Law – Motive, substantive facts, identifying witnesses.



Social Media Platforms You Should Know About:

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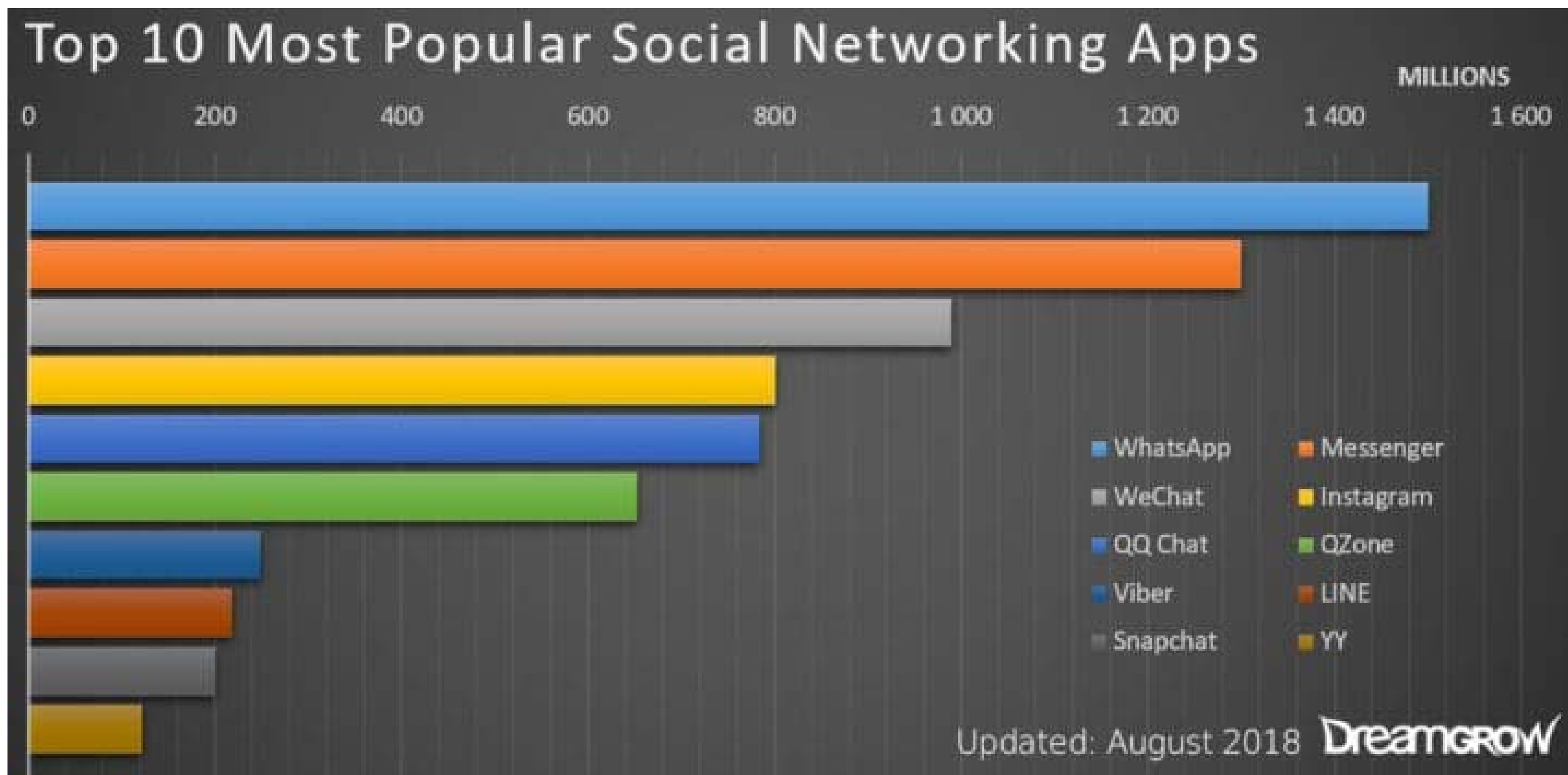
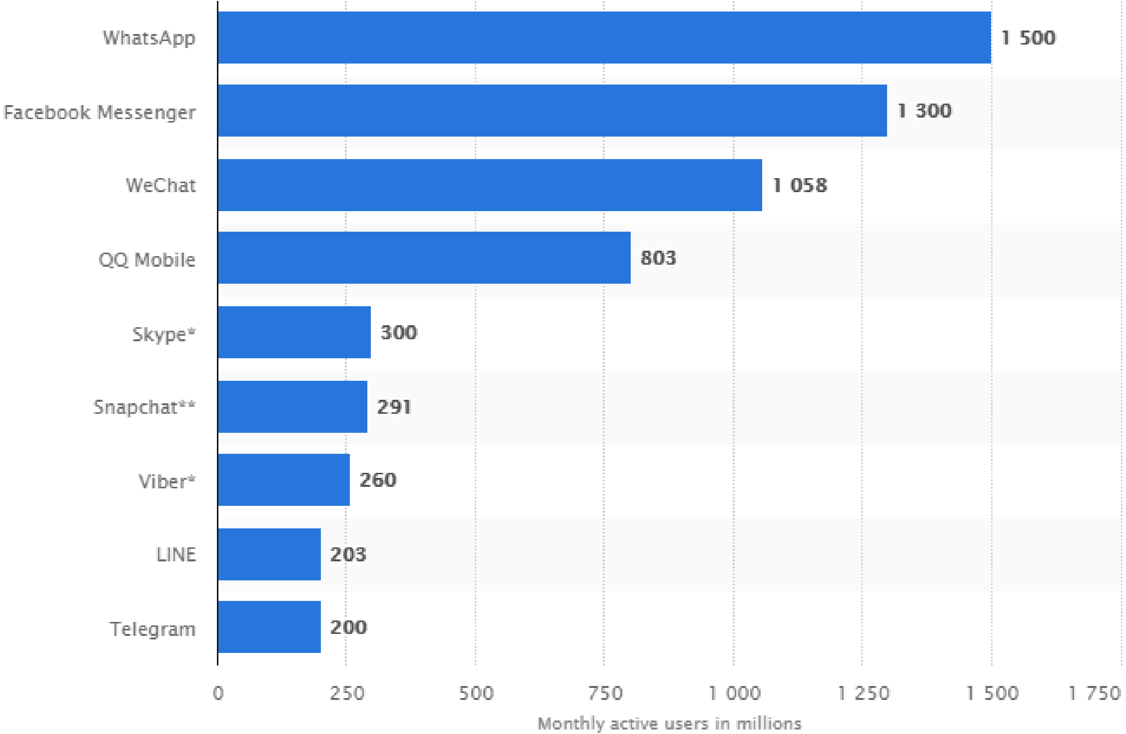


Most Popular Messaging Apps



Social Media – Ethical Tips

Preservation

- DO NOT delete or alter evidence!

Communications

- Communicating through social media is governed by rules of professional conduct.

Public v. Private

- Public content is fair game, but not private content. Do not try to be clever here.

Client's Privacy Settings

- Advice to increase privacy settings is fine, but not to delete or alter evidence.

Be Careful with Juror Searches

- DO NOT connect with jurors!

Collecting information on Social Media

- You may view public areas of social media accounts.
- NYSBA Opinion 843 (2010)
  - Relevant Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)
  - A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

Collecting information on Social Media

- SDCBA Legal Ethics Opinion 2011-2
- Facts: Attorney represents a plaintiff former employee in a wrongful discharge action. The plaintiff's attorney knows that the former employer is represented by counsel and who that counsel is. Plaintiff provides his attorney a list of all of Client's former employer's employees. Attorney sends out a "friend" request to two high-ranking company employees whom the plaintiff has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.
- Conclusion:
  - Attorneys are prohibited from gaining access to private information by asking a represented party to give them entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney.
  - The opinion also makes clear that the lawyer violated his duty not to deceive by making the request to a represented party without disclosing why he was making the request.

"Friending" a represented party, ethical pitfalls.

- Rule 4.2 prohibits communication with a party that the lawyer knows is represented about the subject of the litigation.
- Rule 4.3 prohibits attorneys from stating or implying that they are disinterested. Moreover, where the lawyer knows or reasonably should know that a party misunderstands the lawyers role, the lawyer is required to make "reasonable efforts" to correct the misunderstanding.
- Rules 4.1 and 8.4 prohibit the use of deception.
- Rule 5.3 works to prohibit attorneys from instructing a nonlawyer assistant to violate the rules by friending a represented party.
- NYSBA Ethics Op. 843 discusses the difference between friending someone and passively viewing their public page.
  - On the other hand, you can "friend" a party as long as the lawyer uses her real name and no deception. NYCBA Ethics Opinion 2010-02.
  - Philadelphia and San Diego both add an additional requirement, that the lawyer disclose her objectives. (Phil. Ethics Op. 2009-2, SDCBA Ethics Op. 2011-2.

Social Media Evidence - Admissibility

- Rules of admissibility of social media evidence follow the same rules of admissibility for traditional documents. Specifically, like traditional documents, social media evidence must be authenticated pursuant to § 9-1 of the Connecticut Code of Evidence.
- Authentication requires a showing that the author of the statement is who the proponent of the evidence claims it was.
- Authentication can be established through direct testimony or by circumstantial evidence of "distinctive characteristics" in the content that identify the author.
- Proving only that the content came from a particular social media account is not enough proof of authorship.
- *State v. Eleck*, 130 Conn. App. 632 (2011) (holding that the trial court did not err in refusing to admit a Facebook message after proponent of evidence failed to establish the purported declarant was the author, though it was established the message came from the purported declarant's account).

Social Media – Preservation

"I ♥ hot moms"

Allied Concrete Co. v. Lester, 285 Va. 295 (2013)

Social Media – Preservation

Attorney and paralegal instructed client "to "clean up" his Facebook page because "[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!"

Client subsequently deleted FB account entirely, then reinstated it following a motion to compel, but deleted a number of photographs. He lied about deleting anything.

Allied Concrete Co. v. Lester, 285 Va. 295 (2013)

What Happened?

- Lawyer Sanctions of $542,000
- Client Sanctions of $180,000
- Substantial adverse inference instruction:

  "The Court instructs the jury that the Plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.

  The Court further instructs the jury that the presumption from this inference should not affect any award due to the beneficiaries, Gary Scott and Jeanne Scott."
- Lawyer Resigned from his firm
- Suspended from Practice for 5 years.

Social Media – Preservation

- Failing to instruct your client to preserve properly their social media accounts could lead to a sanction.
- One possibility is an adverse inference instruction, allowing the jury to infer that social media evidence the plaintiff destroyed would have been harmful to his case.
    - *Gatto v. United Airlines*, 2013 WL 1285285

Social Media - Communications

- When the ABA changed Comment 4 of Model Rule 1.4 from "client telephone calls" to "client communications," they recognized that methods of communication have evolved and so must the rules of professional conduct.
- Your communications over social media are subject the Rules of Professional Conduct in the same manner as all other communications.
- Example: Failing to respond to a client message could be a violation of Rule 1.4. *See* Rule 1.4, Commentary ("A lawyer should promptly respond to or acknowledge client communications.").
- You must establish clear boundaries and expectations.

Social Media – Public v. Private

"[A] lawyer may not hire an investigator to "friend" an adverse party in litigation to develop evidence to be used against that party."

Conn. Bar. Assoc. Informal Op. 2011-4

Social Media – Privacy Settings

- While your client's private social media data could be discoverable, most opinions granting full access to a party's social media account required an initial showing of relevant information on the public portions.
- New York permits attorneys to tell their clients to turn on or maximize their private settings on social media accounts. NYCLA Ethics Op. 745 (July 2, 2013). One big caveat, there can be no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence.

Social Media – Juror Searches

"Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror."

ABA Formal Opinion 466 (Apr. 24, 2014)
("Lawyer Reviewing Jurors' Internet Presence")

Confidentiality

Confidentiality

- Learn the perils of modern technology
- Encryption
- When in doubt, seek your client's consent!

Confidentiality

- Scenarios where Confidentiality and Technology Intersect
  - Intentional Disclosure – Online Reviews
  - In the Cloud

When and How to Respond to Online Reviews

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What Response is Warranted?

- According to two **California Ethics Opinions**:

It is NOT inherently unethical to respond to negative online reviews if the lawyer's response is "proportionate and restrained."

- **NY State Bar Association Ethics Opinion** #1032 discussing Rule 1.6 Confidentiality:

It is unethical to disclose confidential information solely to respond to a former client's criticism of the lawyer posted on the web rating site.

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Best Practice

If you write a response

Be cautious for two reasons:

1) possible ethics violations &

2) legitimizing the review.

Simply responding to a negative review may trigger the website's algorithm to interpret the original post as meritorious.

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Confidentiality

Pennsylvania Model Response:

A Lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events. (2014-300)

Confidentiality in the Cloud

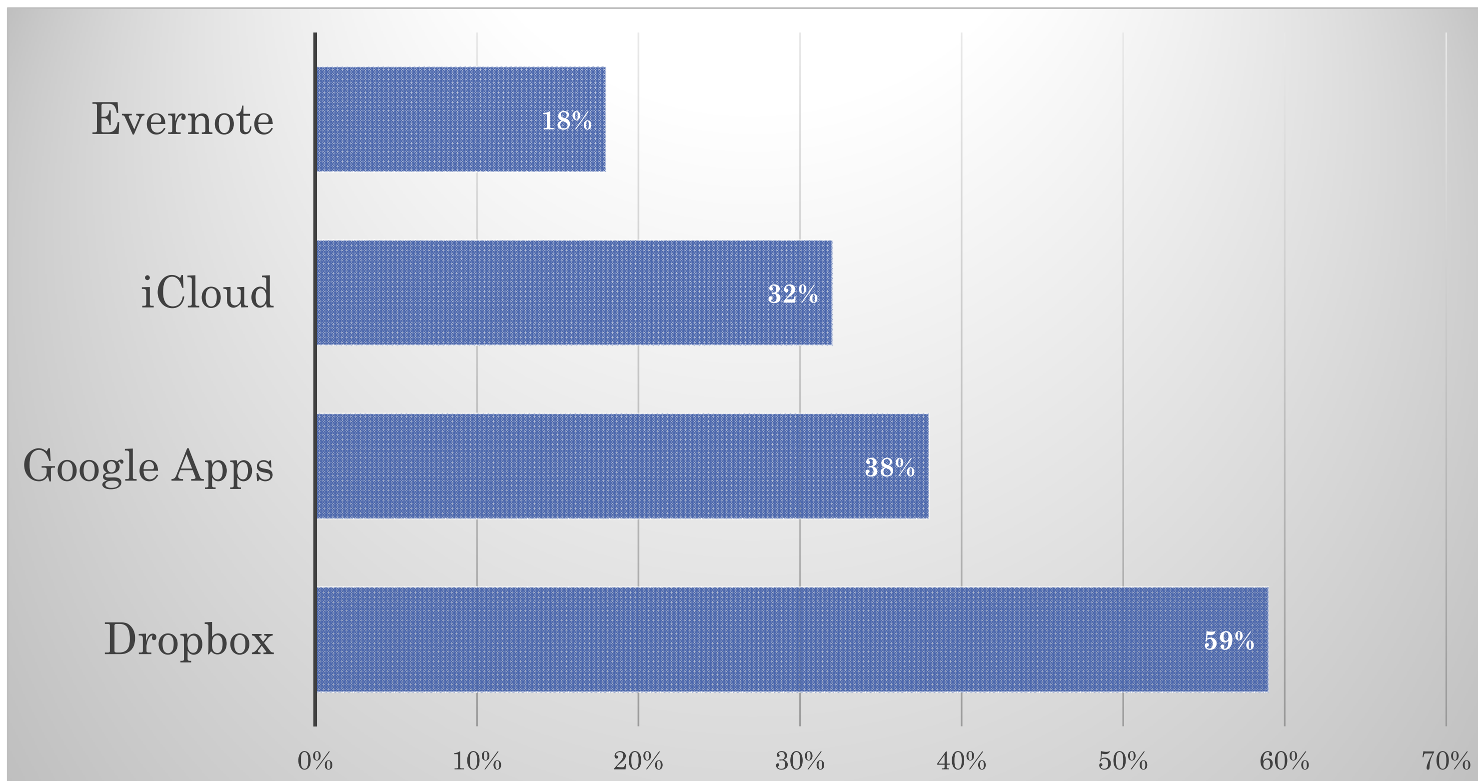
Lawyers may use cloud services in their practice to promote mobility, flexibility, organization and efficiency. However, lawyers must be conscientious to comply with the duties imposed by the Rules to knowledgeably and competently maintain confidentiality and supervisory standards. The Rules require that lawyers make reasonable efforts to meet their obligations to preserve the confidentiality of client information and to confirm that any third party service provider is likewise obligated.

-CT Informal Op. 2013-07 (Approved June 19, 2013)

Benefits of Cloud Computing:

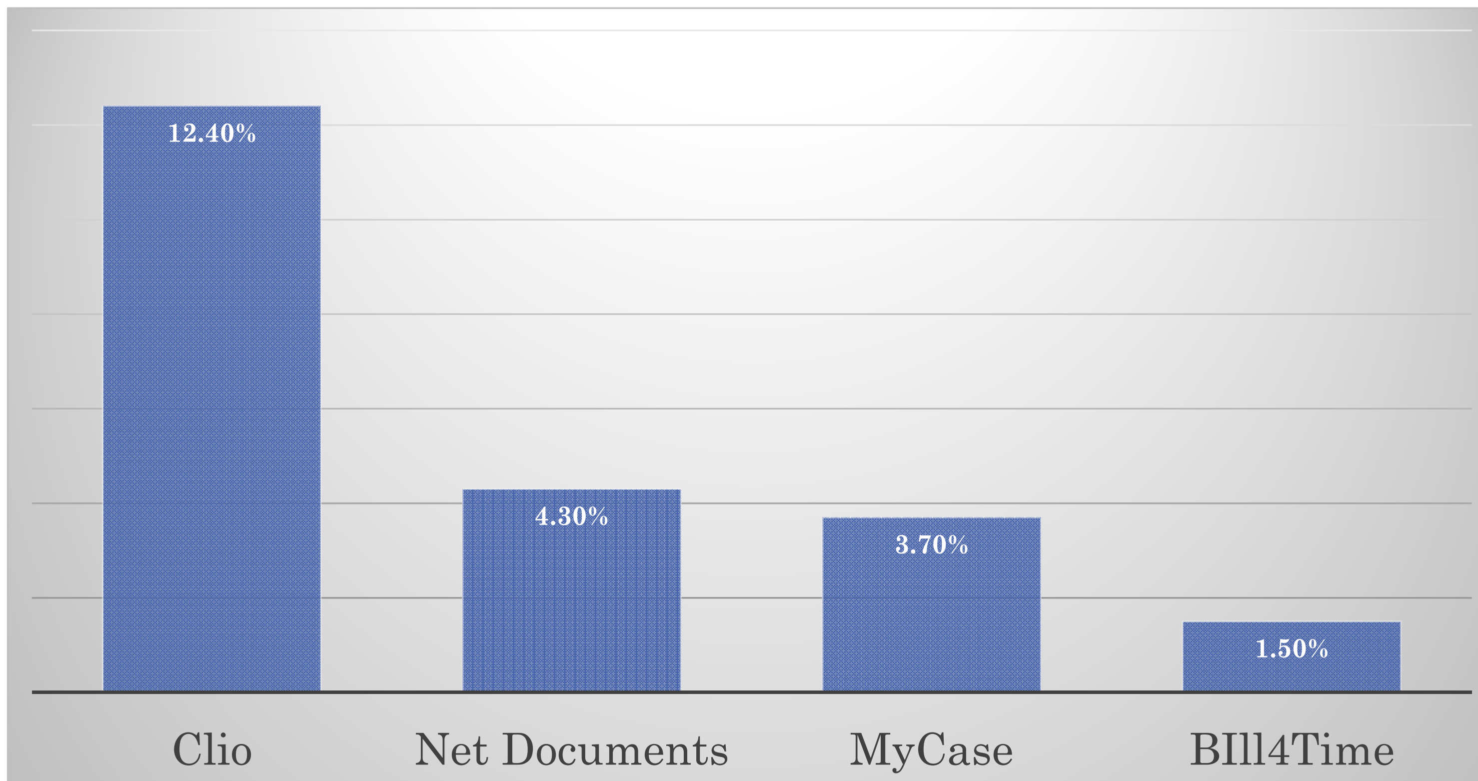
- Low upfront costs
- Easy mobile access
- Simple setup and configuration
- Built-in disaster preparedness
  - ABA Formal Opinion 482
- Constant updates (Office 365)

Popular Consumer Cloud Services Used by Lawyers



According to data collected in the ABA 2017 TechReport

Popular Legal-Specific Cloud Services



According to data collected in the ABA 2017 TechReport

Confidentiality

First Defense: Passwords on iOS

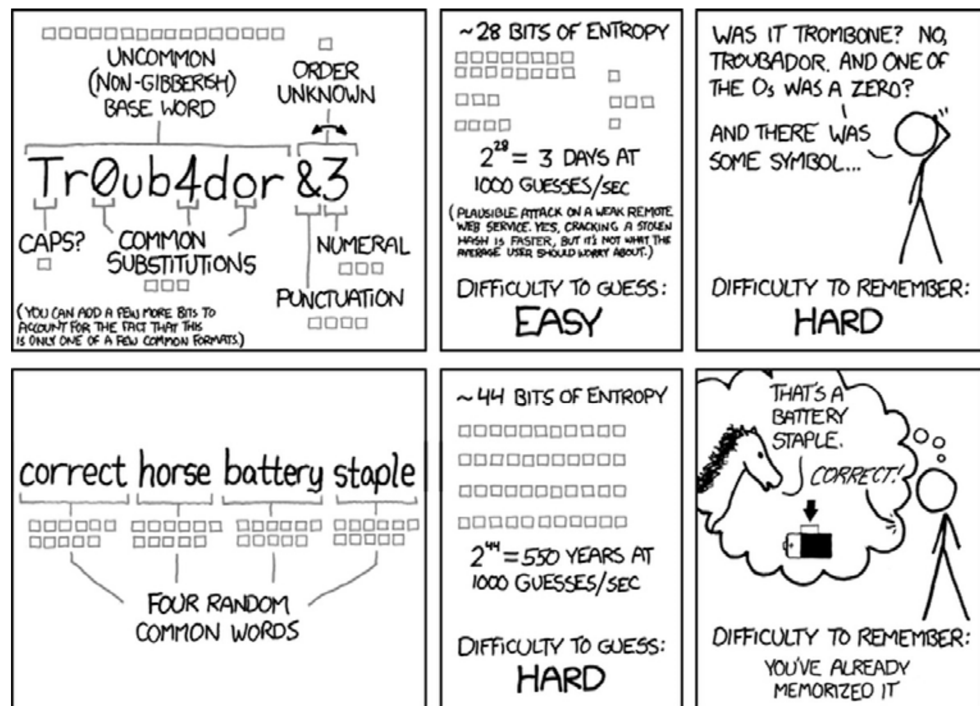
Using iOS:

Just because almost all mobile malware targets Android, it doesn’t mean iPhone users can be complacent. In fact, iOS 11 has recently downgraded its security. Best practices:

- ✓ A 6-digit passcode is better than 4.
- ✓ Enable Touch ID?
- ✓ Require a passcode immediately.
- ✓ Enable Face ID?
- ✓ Turn on remote data erase.

First Defense: Passwords

According to cartoonist Randall Monroe (with math confirmed by the *WSJ),* the password **“correct horse battery staple”** written as a single phrase, would take 550 years to crack, while its predictable counterpart using standard numeric and special character substitution techniques such as **“Tr0ub4dor&3”** would be cracked in about 3 days.



First Defense: Passwords

Don'ts:

Don't use easily guessed passwords, such as "password" or "user."

Don't use confidential details, such as birth days, Social Security number, phone number or names of family members.

Don't use simple adjacent keyboard combination, such as "qwerty" and "asdzxc" and "123456."

Don't use your email account password at an online retailer.

Second Defense: Common Sense

- Never download files from a commercial web email or entertainment sharing sites.

- Never open emails from unknown users.

- Never open suspicious emails.

- Never assume security is enabled on public WIFI access points.

- Never click on pop-up messages or unknown links.

Third Defense: Two Factor Authentication

Whenever possible, turn on two-factor authentication (2FA) on your mobile device. 2FA adds an additional authentication step to your basic log-in procedure. Apple, Google, Microsoft, Slack, Twitter, LinkedIn and Amazon are among some of the platforms where 2FA is available.

2FA requires two out of three types of credentials before being able to access an account:

1. **Something you know**: PIN, password, or pattern
2. **Something you have**: ATM card, phone, or fob
3. **Something you are**: Biometric like a fingerprint, voice print or facial recognition

Conclusion

- Have a strong password.
- Use Common Sense.
- Use 2 Factor Authentication.
- Lock & secure all devices when not in use.
- Immediately report lost or stolen wireless devices.

Confidentiality

ABA Recommended Considerations Into Reasonable Steps Lawyers Should Take:*

1. Understand the Nature of the Threat
2. Understand How Client Confidential Information is Transmitted and Where It Is Stored
3. Understand and Use Reasonable Electronic Security Measures
4. Determine How Electronic Communications About Client Matters Should be Protected
5. Label Client Confidential Information
6. Train Lawyers and Non-lawyer Assistants in Technology and Information Security
7. Conduct Due Diligence on Vendors Providing Communication Technology

*ABA Formal Opinion 17-477 ("Securing Communication of Protected Client Information"), available at https://www.americanbar.org/content/dam/aba/administrative/law_national_security/ABA%20Formal%20Opinion%20477.authcheckdam.pdf.

Overview of Data Risks for Law Firms:

- Why are law firms a target?
  - Rich collection of confidential information
  - Sub-standard security
- Frequency of law firm data breaches
  - Lack of reporting requirements
  - Failure to detect a breach

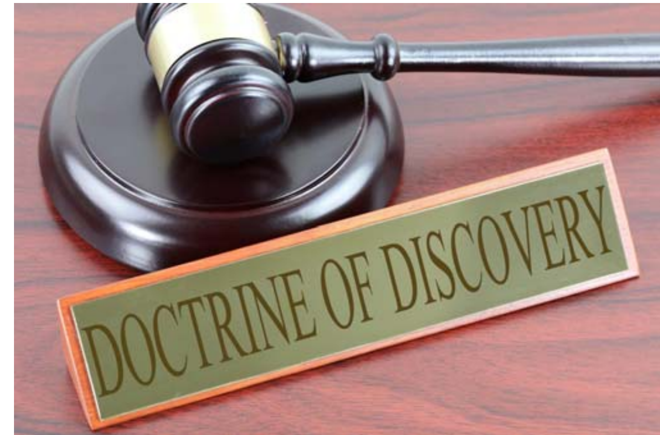
Business Reasons to Address Information Risk:

- Increased cyber security regulation of law firms and clients

- Clients increasingly making data security a key criterion for their vendor relationships

Opportunities to Heighten Security

1. Encrypt, encrypt, encrypt
2. Use Caution in the Cloud
3. Beware of BYOD
4. Vet Your Vendors
5. Staff Training is Critical
6. Be Wireless Savvy
7. Have a Password Policy
8. Consider Cyber Liability Insurance



E-Discovery

"In life, there are many things to be scared of, including, but not limited to, spiders, sharks, and clowns – definitely clowns, even Fizbo. ESI [(electronically stored information)] is not something to be scared of."

City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 492 n.2 (N.D. Ill. 2018).

E-Discovery

What is E-Discovery?

- Electronic discovery (E-Discovery) is the discovery of electronically stored information (ESI).
- According to the ABA's 2018 Tech Report, 38% of lawyers do not use any sort of e-discovery review and case analysis solution.

How ESI differs from traditional documents?

- Deleting a digital document, unlike destroying a traditional document, does not actually erase the data from the computer's storage devices.
- Digital documents are not generally fixed, like traditional documents, and can be easily changed or moved.
- ESI contains metadata. Metadata is useful in finding information about generation, handling, transfer and storage of data.

Connecticut Practice Book:

13-1 (a)(5) - "electronically stored information" means information that is stored in an electronic medium and is retrievable in perceivable form."

13-1(c)(2) - "A request for production of "documents" shall encompass, and the response shall include, electronically stored information, as defined in subsection (a) above, unless otherwise specified by the requesting party.

E-Discovery

Ethical Issues in E-Discovery:

- Obstructing a party opponent's access to discoverable evidence in violation of Rule 3.4.
- Releasing confidential or privileged material in violation of Rule 1.6.
- Not communicating litigation holds with clients in violation of Rule 1.4.
- Failing to properly supervise other lawyers or nonlawyers in violation of Rules 5.1 and 5.3.

E-Discovery – Obstruction

A lawyer must not obstruct another party's access to discoverable electronically stored information.

Rule 3.4(1) provides that a lawyer shall not "[u]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;"

Rule 3.4's commentary explains that "[s]ubdivision (1) applies to evidentiary material generally, including computerized information."

E-Discovery – Communication Litigation Holds

"The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Bagley v. Yale Univ.*, 318 F.R.D. 234, 239 (D. Conn. 2016) (citing to *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001))

Litigation holds have the purpose of avoiding 'spoilage,' which is the destruction of material evidence.

The ramifications for failing to preserve discoverable evidence are not only potential ethical violations, they could cost your client the case.

See *James v. National Financial, LLC*, No. 8931-VCL, 2014 WL 6845560 (Del. Ch. Dec. 5, 2014) (court held that "professed technological incompetence is not an excuse for discovery misconduct[;]" and ruled that a fact the plaintiff was seeking to prove is established due to the defendant's discovery violation).

E-Discovery - Duty to Supervise

- **Experts in E-Discovery:**
  - While employing an expert in e-discovery can be beneficial, an attorney still has the duty to supervise that expert.
  - This includes taking reasonable efforts to ensure that the expert's conduct is compatible with the professional obligation of the lawyer.
- **An Expert's Failure is Your Failure.**
  - Court scolds counsel for not following up with his e-discovery consultant to confirm production was completed in a timely manner. *HLV, LLC v. Page & Stewart*, No. 1:13-cv-1366, 2018 WL 2197731 (W.D. Mich. Mar. 13, 2018).

"This Court is very much aware of the e-discovery issues which arise in civil litigation and believes that e-discovery experts can make the e-discovery process more efficient and cost-effective."

\- *Tillman v. Advanced Pub. Safety, Inc.*, No. 15-CV-81782, 2018 WL 5768570, at *8 (S.D. Fla. Nov. 2, 2018).

E-Discovery – Guidance

- **How Much Competence is Required?**
  - This is to be decided on a case-by-case basis.

- **What Can I do if I Don't Have Necessary Competence?**
  1. Acquire the necessary competence by obtaining training and education.
  2. Associate with someone who does have the necessary competence.
  3. Decline representation.

See State Bar of California Formal Opinion No. 2015-193.

Questions

That's all Folks!