A Commentary Regarding the Section's Technology Task Force

By Gerard G. Brew

Recent developments in technology are presenting new ethical and legal challenges for modern lawyers. In relatively short order, these developments have changed fundamental notions of "property" and diluted the traditional form of the attorney-client relationship. In light of these changes, a lawyer is expected—and perhaps even obligated—to understand how technology affects the lawyer's practice.

The ABA Section on Real Property, Trust and Estate Law recently created a task force on technology and the profession to explore these issues. The author and Michael Goler co-chair the task force, which also includes members from a variety of practices in both the real property and trust and estate practice areas: James R. Carey, Hugh F. Drake, Nancy N. Grekin, Nancy L. Haggerty, Laura J. Lattman, Soo Yeon Lee, Benjamin Orzeske, John T. Rogers, and Karen S. Steinert. The members of the task force welcome input from Section members on the issues covered in this article.

This article seeks to highlight some of the areas where technology has affected the practice of law, with particular emphasis on artificial intelligence, documents generated by technology, and digital assets. This article also considers some of the articles, cases, and ethical considerations that inform these subject areas. Where appropriate, this article refers to the ABA Model Rules of Professional Conduct (Model Rules) to guide the discussion that follows.

On August 6, 2012, the ABA House of Delegates voted to approve an amendment to now Comment [8] (formerly Comment [6]) to Model Rule 1.1, emphasizing the importance of a lawyer's competence in technology. The House of Delegates acted on a report from the ABA Commission on Ethics 20/20, which explained that, although the original comment contained a general obligation to remain aware of changes in the practice of law, the Commission desired to make a lawyer's understanding of technology explicit by adding the phrase "including the benefits and risks associated with relevant technology." ABA Comm'n on Ethics 20/20 Rep. 105A (Aug. 2012). Model Rule 1.1 and its Comment [8] now provide that:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> [8] 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.)

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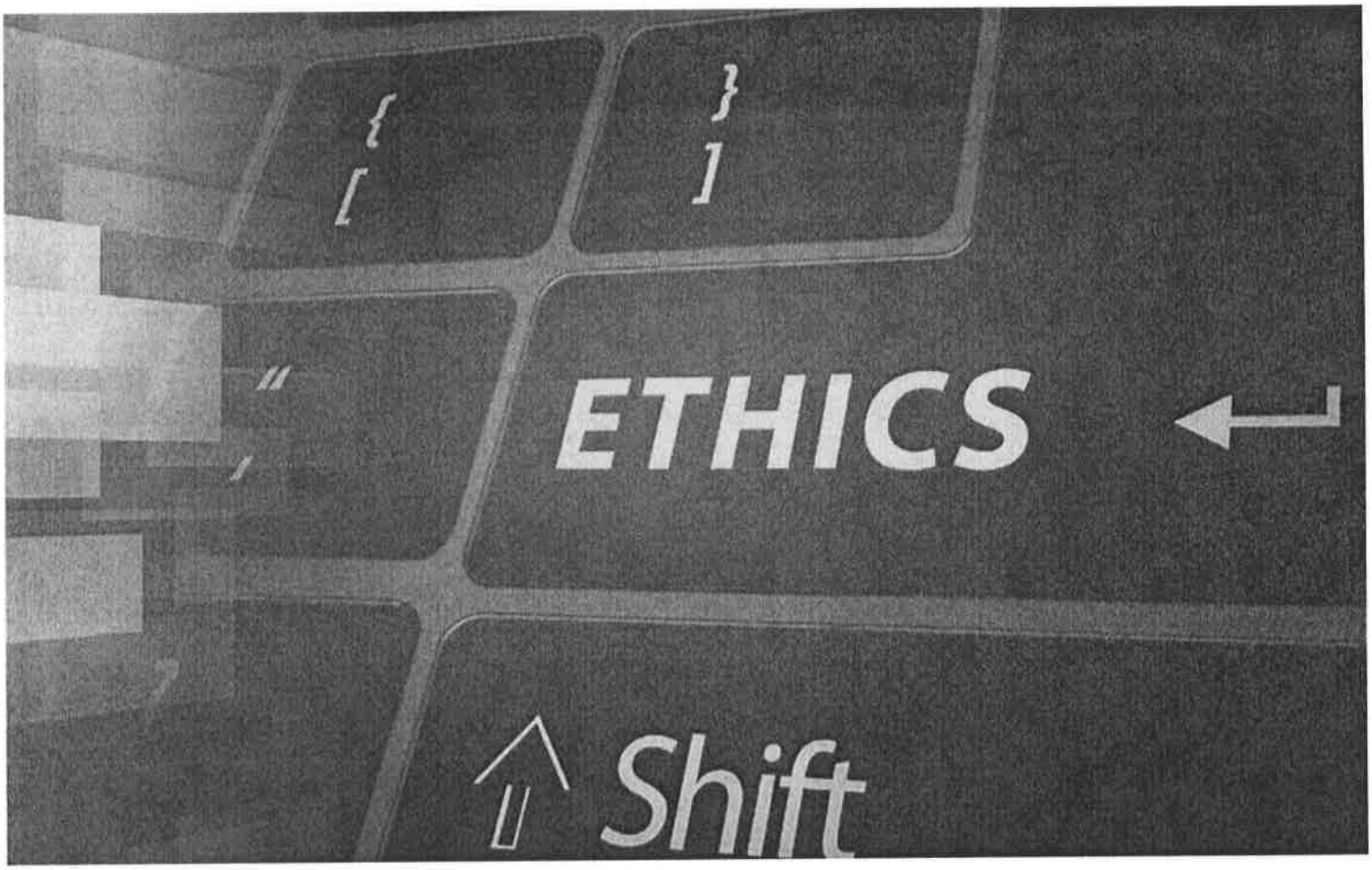


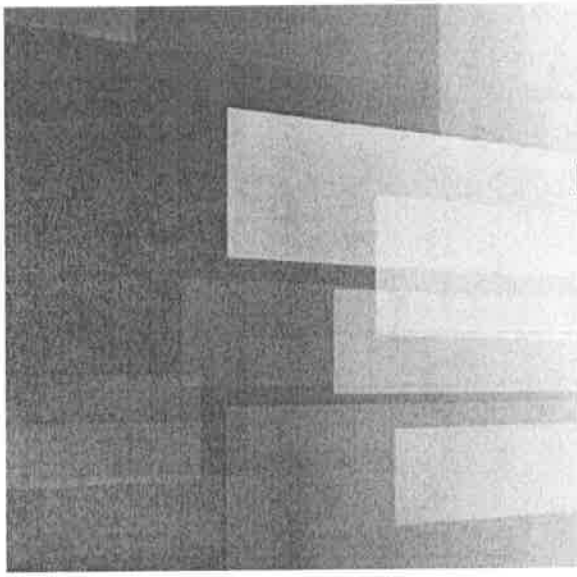
Since the revised comment was introduced in 2012, more than half the states have adopted some version of the duty of technology competence. These states include Delaware, Florida, New York, Ohio, Pennsylvania, and Virginia. Others, like New Jersey, have decided not to adopt the ABA's amendment for specific reasons. For those practicing in states that have adopted the amendment, the message is clear: lawyers must consider the benefits and risks associated with the integration of technology into their law practice. At a minimum, this analysis should include a review of the relevant ethical considerations.

More recently, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion on the lawyer's duty to preserve client information. The Committee's opinion recognizes, "[w]hile the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved [over time]." ABA Comm. on Ethics & Prof'l Resp. Formal Op. 477R (2017). Today, lawyers regularly use a variety of electronic means (including computers, smart phones, and cloud storage) to create, transmit, and store confidential information. As these means may present unique security issues, the Committee's opinion suggests that lawyers must exercise "reasonable efforts" when using technology to communicate about client matters. Id.

The 2012 amendment to Model Rule 1.6 added the "reasonable efforts" standard. ABA Rep. 105A. Subparagraph (c) now provides that "[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." ABA Formal Opinion 477R clarifies that "[w]hat constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors." ABA Formal Op. 477R. In that regard, Comment [18] to Model Rule 1.6 now provides that the following nonexclusive factors should be considered in determining the reasonableness of the lawyer's efforts, which in turn may depend on the nature of the information conveyed:

> [T]he 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).

At the same time, however, it bears noting that the inadvertent disclosure or unauthorized access to the client's information will not constitute a violation of Model Rule 1.6(c) if the lawyer made "reasonable efforts" to prevent the access or disclosure. The ABA 20/20 Commission's report reinforces this point: "To be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or



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without authority. . . . The reality is that disclosures can occur even if lawyers take all reasonable precautions." ABA Report 105A.

With these ethical guideposts in mind, the balance of this article addresses specific applications of technology in the legal community.

Artificial Intelligence

Recent advances in artificial intelligence technology have targeted the automation of legal work. Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.*, N.Y. Times (Mar. 19, 2017). Although the adoption of such technology has been measured, one study has estimated that 23 percent of a lawyer's job can now be automated. Id. Law firms are using this new technology primarily in "search-and-find type tasks" associated with research, electronic discovery, and contract review. Id. While other tasks such as advising clients, writing briefs, and appearing in court appear beyond the reach of automation (at least for now), research suggests that technology is becoming increasingly prominent in the modern law firm. Id.

At the forefront, some technology-savvy lawyers are experimenting with artificial intelligence software to analyze legal data and predict judicial outcomes. Id. This software includes, for example, legal analytics platforms that leverage court decisions and filing information to guide litigation strategy. Id. It also includes legal research programs that use natural language processing and machine learning capabilities to identify and rank legal authorities relevant to particular search queries. Id.

It appears the proliferation of artificial intelligence is due at least in part to a contraction in legal spending. The theory is that some clients are less willing to pay for what is perceived to be "routine" legal work. Id. As this reticence seems to be directed toward the bottom of the legal pyramid, current trends suggest that a portion of this work will be performed by new technology and nonlawyers to shave costs for such clients. Id. Although some law firms may be eager to exploit this new technology and the cost implications it presents, this article seeks to raise the lawyer's awareness as to potential legal and ethical pitfalls that may result from the increased use and reliance upon technology.

Applied to artificial intelligence, the relevant ethical considerations might include confidentiality of client information and attorney supervision of nonlawyer assistance. As artificial intelligence technology continues to develop, lawyers are advised to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of client information. Model Rule 1.6(c) & cmt. [18]. Moreover, lawyers have an obligation to supervise nonlawyers and now arguably technology in the performance of the lawyer's professional services. Id. at 5.3(b) & cmt. [2]. This means lawyers taking advantage of this technology should employ appropriate safeguards to ensure that the technology is compatible with the lawyer's ethical obligations. ABA Formal Op. 477R. Lawyers also may have an obligation to inform clients of the extent to which technology is used in the representation. Model Rule 1.4(a). This could become increasingly true as technology consumes low-level legal work, the details of which could be explained in an effective engagement letter: "I may be assisted in the performance of legal services by my associate, Lawyer A, and a machine."

Documents Generated by Technology

Documents generated by or with the assistance of technology represent another area in which technology has impinged upon the traditional practice of law. For purposes of this article, the phrase "documents generated by or with the assistance of technology" is limited to online self-help documents. Although similar in some ways to artificial intelligence, these self-help documents present a different challenge for lawyers—one that derives from outside the firm. Driven by society's appetite for increased access to information and transparency, research suggests that some consumers (and even some lawyers) are turning to online products for low-cost legal solutions. Victor Li, *Avvo, LegalZoom, and Rocket Lawyer CEOs Say Their Products Help Bridge Access-to-Justice Gap*, ABA Journal (Mar. 17, 2017).

In this digital revolution, the prominent players offer various products, including self-help legal forms, lawyer directories, and prepaid legal service plans. Although each of these products may raise separate legal and ethical considerations, this article focuses on the potential issues with using self-help legal documents. At the center of the debate between law and technology is a growing tension over the role of legal ethics. Some technology advocates argue that regulations will have a "chilling effect" on creative legal solutions, but some lawyers insist on the need for regulations to maintain the integrity of

the law. Id. This article takes no position on the propriety of cyber-law technology platforms; rather, it aims to identify specific issues created by computer-generated documents within the existing framework of attorney ethics.

One potential issue concerns the lawyer's duty in dealing with unrepresented persons. Model Rule 4.3 describes the lawyer's role as follows:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. *The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*

(Emphasis added.)

Model Rule 4.3 distinguishes between situations in which the interests of an unrepresented person may be adverse to those of the lawyer's client and situations in which the interests of an unrepresented person are not adverse to the lawyer's client. Id. at cmt. [2]. In the first situation, the rule prohibits the lawyer from giving any legal advice, except the advice to retain counsel. Id. Comment [2] states: "Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." Id. That comment follows the holding of the Mississippi Supreme Court in *Attorney Q v. Miss. State Bar*, 587 So. 2d 228 (Miss. 1991), which explains that the focus is not on what the attorney intended, but on what the unrepresented person "may reasonably have heard and misunderstood." Nevertheless, the rule generally does not prohibit the lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.

The duty of technology competence may require a basic understanding of digital assets with respect to a properly drafted estate plan.

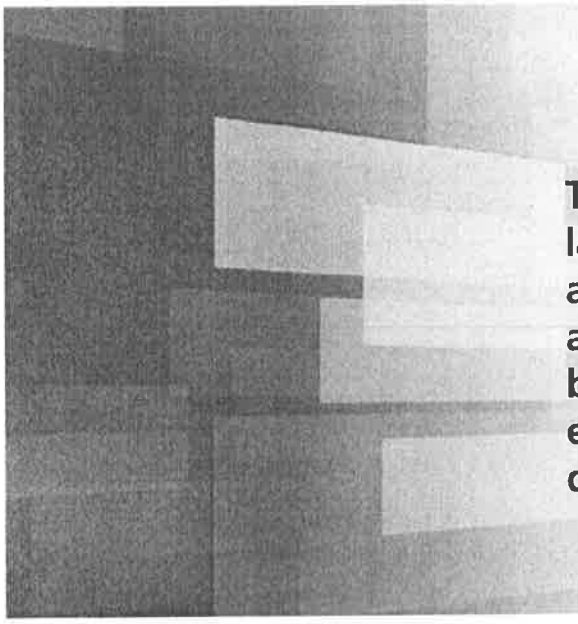
Consider the following example. Person A and Client B agree to make a contract for the sale of real estate. A, the seller, is not represented by counsel. B, the buyer, is represented by her attorney, Lawyer C. A insists on using a computer-generated form contract. A tells B that he thinks the contract will save time and money. At the closing, A, reviewing the contract, asks C about his obligation to convey "marketable title." How should C respond? In this example, Lawyer C reasonably should know that Person A misunderstands Lawyer C's role in the transaction. C should explain to A that C represents B in the transaction and advise A to retain an attorney. Since A's interests are not aligned with B's, C should not give legal advice to A. This example illustrates that lawyers must exercise caution in dealing with unrepresented persons.

Another potential issue concerns the lawyer's duty to preserve confidential client information. Id. at 1.6(c) & cmt. [18]. One common platform, for example, provides "free legal forms" on its website. If the lawyer uses these forms to prepare a last will and testament for the client (and the company's privacy policy indicates that when a form is generated, personal information may be stored in the company's database), what steps (if any) should the lawyer reasonably take to maintain the confidentiality of the client's information? Model Rule 1.6(c) suggests that "[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." But does the lawyer realistically have the ability to protect the client's information when the information is transmitted to a third party? And how far must the lawyer go to protect it? ABA Formal Opinion 477R suggests that the inquiry is fact-based and depends on the nature of the information conveyed.

A third issue concerns the hazards of "DIY" documents. Particularly relevant to this article is the complexity of estate planning. In modern law, it has been said that estate planning is one of the most complex tasks of the practicing lawyer, requiring "a wide range of knowledge, probably more than any other part of the practice of law." William D. Rollison, *History of Estate Planning*, 37 Notre Dame L. Rev. 160, 171 (1961). It has also been said that, "[i]n the well drafted estate plan there is no place for brevity, the use of elastic terms, lack of clarity, or lack of knowledge." Id. For these reasons, a measure of caution should be exercised in resorting to DIY estate planning.

Digital Assets

By now, digital assets have become a recognized form of property. Rev.



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Uniform Fid. Access to Digital Assets Act, prefatory note (Uniform Law Comm'n 2015). In fact, with technology's expanding footprint, they have become ubiquitous. The term "digital asset" means "an electronic record in which an individual has a right or interest." Id. at § 2(10). This includes online gaming items, photos, music, and the like. Id. However, until recently, there has been limited guidance regarding digital assets. Although a complete explanation of the law of digital assets is beyond the scope of this discussion, the duty of technology competence may require a basic understanding of digital assets with respect to a properly drafted estate plan.

In 2015, the Uniform Law Commission published the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). Since then, RUFADAA has been enacted in 41 states and territories and introduced in several others. RUFADAA seeks to facilitate "fiduciary" access to digital assets and electronic communications. Id. at prefatory note & § 2(14).At the same time, however, RUFADAA seeks to promote the "user's" reasonable expectation of privacy in electronic communications, unless the user specifically authorizes disclosure in an "online tool," power of attorney, or other record, such as a will or trust. Id. at § 4 & cmt; § 2(16), (26).

With the expansion of RUFADAA, lawyers should be thinking about the disposition of digital assets in the event of a client's death or incapacity. In many cases, internet service providers have terms-of-service agreements that address fiduciary access to digital records. But a client may wish to provide different instructions in a properly drafted estate plan. This plan should specifically address the fiduciary's right to access the content of electronic communications and other digital assets. In order to implement a proper plan, the lawyer should inquire about the client's digital presence as part of the initial estate planning conference. Thereafter, the lawyer should consult with the client and evaluate the extent to which provisions for digital assets should be included in the client's estate plan. As RUFADAA suggests, a thorough treatment and understanding of digital assets may now be required by the lawyer's duty of technology competence.

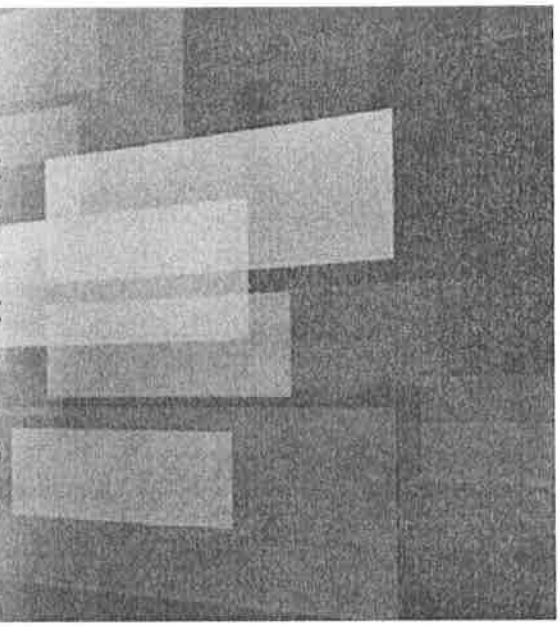
New Law Firm Business Models

In today's legal market, the traditional law firm structure is changing. Increased demand for technology and access to capital has prompted discussion of nonlawyer participation in law firm ownership and other alternative business models. Gabrielle Orum Hernández, *For Law Firms, It's from Alternative Fees to Alternative Business Models*, LegalTech News (Apr. 12, 2017). Moreover, as technology has become increasingly portable, so have lawyers (and their clients). Victor Li, *Have We Reached the End of the Partnership Model?*, ABA Journal (Aug. 1, 2015). This has led to significant lawyer movement recently, with one source estimating that over the last eight years, more than 50 percent of "biglaw" partners have lateraled firms at least once. Michael Allen, *The End of the "Partner" Era*, Above the Law (May 20, 2016). As each of these topics raises unique legal and ethical issues, they will be discussed in turn below.

The debate between lawyers and technology advocates over alternative law firm business models essentially boils down to ethics. Technology advocates argue that nonlawyer partners are "uncontroversial." Hernández, supra. One has even said, "[I]t's insulting to say that [attorneys] can't draw the line between what's ethical or not." Id. (alteration in original). But lawyers are apprehensive, and for good reason. The issue, it seems, is not so much about lawyer apprehension but client protection. Unlike lawyers, nonlawyers are not subject to rules of professional conduct. And if these nonlawyers are clients, the situation becomes even thornier. Model Rule 1.8 generally prohibits lawyers from engaging in business transactions with clients. Model Rule 1.8(a) & cmts. [1]-[4]. Similarly, the lawyer's representation of a client may be prohibited if there is a significant risk that the representation will be materially limited by the lawyer's personal interests. Id. at 1.7(a)(2). Lawyers, as fiduciaries, owe a duty of "undivided loyalty" to their clients. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

Other alternative business models might present different issues. Some law firms, for example, have created "autonomous" subsidiaries to invest in new technology. *How Artificial Intelligence Is Transforming the Legal Profession*, ABA Journal (Apr. 1, 2016). These subsidiaries have separate management and governance, but are "sponsored" by the parent law

firm. Id. But can autonomous really mean autonomous if the subsidiary receives its funding (in whole or part) from the parent? Model Rule 5.4(b) prohibits lawyers from forming a partnership with nonlawyers if any of the activities of the partnership constitute the practice of law. Might the spirit (if not the letter) of the rule be violated if the law firm, organized as a partnership, wholly owns the subsidiary comprised of non-lawyers? The rule is intended to preserve the lawyer's "professional independence of judgment," Model Rule 5.4, cmt. [1], but, at this stage, maybe it is too early to tell whether that judgment will be affected.



Law firms should adopt electronic-technology protocols to address the transition of client information and hire qualified information technology professionals to assist in that process.

Attorney movement also may raise specific ethical issues, such as when the firm's client follows a departing lawyer. This scenario was recently addressed in *Estate of Kennedy v. Rosenblatt*, 149 A.3d 5 (N.J. App. Div. 2016). In that case, the plaintiffs commenced a professional negligence action against various defendants, including an estate. The plaintiffs were represented by Attorney X; the estate retained Law Firm A. Nine months after the complaint was filed, the attorneys handling the estate's defense ("the departing lawyers") left Law Firm A and joined a new firm, bringing the estate's paper file with them. The following month, the negligence action was dismissed by consent order. The plaintiffs' lawyer (Attorney X) then left his prior firm and joined Law Firm A , where the estate's lawyers had previously worked.

Almost two years after the negligence action was dismissed, the plaintiffs, through Attorney X who was now at Law Firm A, commenced a new action against the estate, alleging similar causes of action. One of the departing lawyers contacted his former firm (Law Firm A) about the potential conflict of interest. In response, Law Firm A created an "ethical wall" to prevent Attorney X and his team from accessing the estate's electronic file remaining at Law Firm A. In addition, a Law Firm A senior attorney reviewed part of the estate's electronic file to determine whether anyone at Law Firm A had accessed the file, and the senior attorney determined that no one other than the departing lawyers had done so.

Two months after the second negligence action was filed, the estate (represented by one of the departing lawyers) filed a motion to disqualify Law Firm A as counsel for the plaintiffs. The trial court granted the estate's motion, and an appeal followed. Id. at 8-9. The appellate court, applying the equivalent of Model Rule 1.10(b), vacated the trial court's order. With respect to the estate's electronic file, the appellate court interpreted the phrase "has information" in subsection (b)(2) of the rule to mean "has actual knowledge or has accessed the electronic file." The appellate court explained: "Merely determining whether an electronic file contains protected information [such as accessing metadata or viewing document titles], as distinguished from reviewing the content of the information, does not result in an attorney having protected information proscribed by RPC 1.10(b)(2)." Therefore, the appellate court remanded the matter to the trial court to determine whether the Law Firm A senior attorney accessed substantive content in the estate's electronic file.

Rosenblatt is significant because ,in the current legal environment, lawyers and clients are switching law firms at a rapid pace. At termination, the departing lawyer should coordinate with the lawyer's former firm to reasonably determine which files (and appurtenant electronic information) will remain with the firm. For those files not remaining with the firm, residual electronic information may need to be deleted (to the extent possible) from the firm's database to protect client information and avoid future conflicts of interest. Given that this could be an onerous task, law firms should adopt electronic-technology protocols to address the transition of client information and hire qualified information technology professionals to assist in that process.

Conclusion

Technology has changed the practice of law in many ways. Although this article discusses only a few of them, it suggests that lawyers may have a broader duty of technology competence. Even in states that have not adopted such a duty, existing ethical considerations might inform the advent of new technologies. In either case, the prudent lawyer should weigh the benefits and risks associated with new technology to protect client interests. As this technology continues to develop, there will be a greater need for professional guidance. In the meantime, lawyers should refer to continuing legal education and other sources, including independent study, to promote successful practice. ■