Professionalism as a Moving Target: The Blurry Line Between "Best" and "Required" Practices, Part 1

By Tom C. Vincent II

One of the reasons I became a lawyer, other than the fact that it allowed me to stay in school and avoid the real world for at least a few years more than undergraduate school, was the aspirational nature of the profession – lawyers just seemed to want to be *better*. In my limited experience, whether in the media or in the real world, attorneys worked to better themselves, their clients, and the practice of law itself. This effort to go beyond the minimum – typically referred to as "professionalism" – is distinguished from what is explicitly required in that lawyers are not *required* to be "professional," but they are *expected* to be. [1]

A continual issue in pursuing professionalism, however – i.e. "going beyond the minimum requirements" – is the changing nature of those minimum requirements, which can result in a particular practice being "professional" one year, "the minimum" the next, and "insufficient" after that. This fluidity of a minimum standard can be seen in the difference between the "minimum" and "professional" standards for lawyer education. The Oklahoma Rules of Professional Conduct (the "**Rules**") require that, at a minimum, a lawyer must have the skill and preparation "reasonably necessary" to represent the client, while a lawyer upholding the Oklahoma Bar Association's Standards of Professionalism (the "**Standards**") must affirmatively recognize their limitations with respect to the representation.[2] This difference, and its implications, was recently manifested in the American Bar Association's (the "**ABA's**") Formal Opinion 477R (the "**Opinion**") regarding the protection of client information. While ABA guidance is at times seen as more aspirational than essential for lawyers, the specifics outlined in the Opinion speak to not only the level of technology understanding and implementation lawyers should have, but also where the minimum standards for such understanding and implementation *actually are*.

Probably more than any other attorney obligation, client confidentiality depends not only upon the lawyer engaged by the client, but on the additional personnel engaged by the lawyer. While technology and its accompanying issues have traditionally been seen as outside the day-to-day practice of law, the increasing variety of formats in which client information is received and distributed have pulled such technology more and more into the realm of the "skill…and preparation necessary for [client] representation"[3] The Opinion recognizes this in its explicit application of technical and technological requirements to the duties of *competence* and *confidentiality*. With regard to the former, the Opinion cites one conclusion of the ABA Commission on Ethics 20/20 Report 105A – "in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features

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1 *See e.g. OBA Standards of Professionalism* - Preamble (accessed December 10, 2017 at http://www.okbar.org/members/ethicscounsel/standardsprofessionalism.aspx): "While the Rules of Professional Conduct establish the minimum standards a lawyer must meet to avoid discipline, the following Standards of Professionalism represent the level of behavior we expect from each other and the public expects from us in our dealings with the public, the courts, our clients and each other."

2 For the minimum, see e.g. Rule 1.1 of the Oklahoma Rules of Professional Conduct:" A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. " Compare to the aspirational Standard of Professionalism 2.1: "[Lawyers]" will continually engage in legal education and recognize our limitations of knowledge and experience." Accessed December 11, 2017 at http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=479335.

3 *Id.* at Rule 1.1.

of relevant technology" – to highlight an *affirmative* duty of lawyers to understand not just the substance of their practice but the tools used in that practice. Similarly, regarding the duty of confidentiality, the Opinion reminds lawyers of their duty not just to refrain from revealing client confidences but to *proactively* take reasonable efforts to prevent such revelation.[4] As clarified by the Opinion, the result of these clarified and combined duties is the responsibility of lawyers to "exercise reasonable efforts when using technology in communicating about client matters…What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent on a set of factors" which may vary based on the information communicated and the technology available.[5] In other words, lawyers should be familiar not only with the type of information they are communicating, but also with particular security measures which may be appropriate for that type of information.

The Opinion goes on to provide seven considerations for lawyers when communicating (and storing) electronic client information:

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 Clients Matters Should Be Protected;

5) Label Client Confidential Information;

6) Train Lawyers and Nonlawyer Assistants in Technology and Information Security; and

7) Conduct Due Diligence on Vendors Providing Communications Technology.

4 *See e.g.* Opinion, pp. 3-4 (citing ABA Model Rule 1.6 and Comment 18).

5 Opinion, p. 4.

As discussed above, some ABA guidance is seen as aspirational – however, please note that many protections have been established by statute or regulation for particular types of information – as well as particular clients – which may be required independently of the lawyer's duties of competence and confidentiality. Any determination of "reasonable efforts" should recognize not only when such protections apply specifically to lawyers, but also when lawyers are not specifically excluded – and, also, when they apply to those individuals supervised by lawyers in representing their clients.

In the second part of this discussion, we'll review the specific considerations provided by the ABA – both as "above and beyond" and "at a minimum" – and go over different ways to address them depending on the size and complexity of your firm and practice areas.

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