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Can Lawyers Be Luddites? Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology

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Can Lawyers Be Luddites?*

Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology

By Darla Jackson

Technology affects almost every aspect of the practice of law.¹ In August 2012, the American Bar Association House of Delegates, recognizing the influence of technology, voted to amend the ABA Model Rules of Professional Conduct.² While only Delaware and the Virgin Islands have incorporated these changes into their rules,³ other states such as Massachusetts have begun the process of amending their rules or have established committees to study and make recommendations regarding the changes.⁴ As a result, legal professionals have begun to comment on how the rules changes may affect lawyers in every area and size of practice.⁵ Even those attorneys who have expressed the sentiment that they did not go to law school to learn about technology will “need to know enough [about technology] to be sure they’re not overlooking important issues.”⁶ One solo practitioner and technology consultant has commented that once attorneys have developed enough knowledge to identify important issues, they may “need a colleague or expert they can rely on” to provide additional assistance.⁷ This article focuses on some specific areas in which technological knowledge is necessary, including computer assisted legal research (CALR), e-discovery, courtroom technology and measures to ensure the maintenance of confidentiality. It also offers some suggestions regarding the availability of assistance in gaining these new skills.

MODEL RULE 1.1 AND THE MODIFIED COMMENT

While Model Rule 1.1 regarding attorney competence remains unchanged, the modifi-

cation of Comment 8 to the rule makes it clear that lawyers authorized to practice in a state adopting the new language have an affirmative obligation to acquire and maintain an

* Use of “Luddites” in the title phrase was suggested by review of Debra Cassens Weiss, “Lawyers Have Duty to Stay Current on Technology’s Risks and Benefits, New Model Ethics Comment Says,” *ABA Journal Law News Now* (Aug. 6, 2012 2:46 p.m. CDT), <http://goo.gl/uTkstf>.

awareness and understanding of developments in technology. Comment 8, as modified provides:

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.⁸

Christopher Popper, a Delaware attorney, suggests that, based on Delaware's adoption of the new language in Comment 8:

[A] Delaware lawyer is now compelled to at least consider implementing certain types of technology, and whether the benefits of such technology outweigh the risks. One form of technology in that category would be legal research resources ... Research done exclusively through hard copies ... is a[n] extinct exercise in the legal profession. The benefits of cutting edge legal research resources clearly outweigh the apparent lack of any risks associated with this type of technology.⁹

LEGAL RESEARCH

As pointed out by one legal malpractice insurer, "Conduct and competence is the best risk management for avoiding malpractice claims. As the Internet has blossomed as a tool for research and conducting investigations, a lawyer not competent at CALR [computer-assisted legal research] is increasingly at risk for being found negligent when failing to find relevant authority and information on the Internet."¹⁰

The use of keyword searches by inexperienced legal researchers to locate an isolated statutory provision is insufficient. Competent CALR results only when the researcher comprehends the need to understand the context and applicability of a statutory provision.¹¹ CALR researchers need to be aware of section browsing and table of contents functions, which have traditionally been available in print and make it easier for users to develop contextual understanding. Similarly, text searching of case law is not an "adequate" means of identifying legal authority because important decisions may be overlooked by a researcher using this as a sole method of research.¹² Further, because print citation tools are now out of date before they are ever received, there is a growing

demand for access to electronic citator tools. Competent researchers must develop an awareness of the shortcomings of even these electronic citator tools¹³ and how using a table of authorities may help ensure current legal authority is being cited.¹⁴

Where should practitioners go for help with CALR? Law librarians are the experts in legal research and firm or academic law librarians may be able to provide assistance.¹⁵ Premium legal research service providers, such as Bloomberg Law, Lexis and Westlaw provide subscription-based access to treatises and other secondary sources, which provide in-depth legal research and analysis by respected authorities,¹⁶ as well as instruction on how to use their products. Finally, the Oklahoma Bar Association routinely coordinates training for conducting legal research using Fastcase or the Oklahoma Supreme Court Network at the bar association's Annual Meeting.

E-DISCOVERY

Electronic data discovery (EDD), a term often used synonymously with the term e-discovery,¹⁷ is another area often mentioned in recent discussions of technological changes affecting both the practice of law and the evolving ethical rules. Because evidentiary materials are increasingly born digital, e-discovery continues to be an area of growth. Predictive coding is a quickly developing subject in the e-discovery discussions.¹⁸ Predictive coding "is the use of computer algorithms and machine learning to conduct the review of electronically stored information (ESI)."¹⁹

The use of predictive coding has itself been the topic of ethical debate. Howard Sklar, senior corporate counsel at Recomind Inc., a leader in predictive coding services, anticipates that the use of predictive coding will become an ethical obligation.²⁰ Jim Calloway, director of the OBA's Management Assistance Program, suggests that while some anticipate that predictive coding will become an ethical obligation, others predict "ethical and malpractice horrors ahead for any lawyer who dared 'out-source' their duties to machines or non-lawyers."²¹ Yet Mr. Calloway doesn't "really see predictive coding becoming an ethical requirement" because predictive coding will "gain ... more acceptance as a business requirement long before ethics rule-making bodies have a chance to consider it."²²

The debate regarding predictive coding centers on the benefits and risks of the process. The benefits and goals of predictive coding are “accurate, cost-effective and expedited document review.”²³ The cost-effective nature of predictive coding is one of the factors that must also be considered. In determining whether the use of predictive coding is consistent with the requirement of Rule 1.5 that an attorney charge a reasonable fee and not collect an unreasonable amount for expenses, its cost-effective nature would certainly weigh in favor of its use.²⁴ However, while it may be cost-effective, even advocates acknowledge that predictive coding may not always be inexpensive or result in substantial cost savings.²⁵ In fact, while there had been support for use of predictive coding, even in smaller cases,²⁶ at least one court has recognized the limited value predictive coding may have in some cases. The court modified a previous ruling that predictive coding would be used by both parties, acknowledging that because of the small volume of documents the plaintiff would need to review, the “cost of predictive coding (to the plaintiffs) would likely be outweighed by any practical benefit of its use.”²⁷ Notwithstanding, lawyers must understand enough about technology or computer-assisted review and predictive coding to appreciate the benefits and risks.²⁸

Predictive coding is not without risks. It retains significant potential for human error because the “process is only as good as the input criteria, and a missed keyword or key concept could lead to entire categories of relevant or privileged documents being inadvertently missed.”²⁹ Although the potential for human error is also present in a manual review, there is the perception that a manual review permits a greater degree of understanding and control by the reviewing attorneys,³⁰ thereby reducing the risk that complete categories of relevant documents will not be properly identified. Under the Federal Rules of Civil Procedure, there is also the risk of sanctions for failing to produce electronic information.³¹

“Because each courtroom may have different systems, there is no guarantee that new lawyers who have received such training will end up practicing in a courtroom with familiar systems.”

Also of note is the assertion that manual review may be less likely to result in the disclosure of privileged information. Thus, there is room to question whether the use of predictive coding meets the requirement that reasonable steps be taken to protect against the disclosure of privileged material, as well as rectify errors in compliance with Federal Rule of Evidence 502³² and the newly modified Rule 1.6, which is discussed in more detail below.

How can attorneys gain adequate understanding of technology-assisted review and predictive coding? One way to start is by reading some basic text regarding the subject. For example, Reccomind’s *Predictive Coding for Dummies*, may be a starting place.³³ E-discovery treatises, including *Arkfeld on Electronic Evidence and Discovery*,³⁴ also provide an introduction. Additionally, condensed information sources, such as law review articles, on the topic are beginning to become available.³⁵ E-discovery updates, such as that provided by Brett Burney at the 2013 Annual Meeting, and vendor training webinars are also useful sources of information.³⁶

COURTROOM TECHNOLOGY

Even absent the new language in the rules of professional conduct about risks and benefits, some have reasoned that the requirement in Model Rule 1.1 that a lawyer maintain an awareness of changes in the law and its practice establishes a competency obligation for the use of courtroom technology, since use of this technology has become the standard.³⁷ The comments to Rule 1.1 regarding thoroughness and preparation can also be used as support for this position.³⁸ Notwithstanding, there are some unresolved questions and risks associated with the use of courtroom technology that must be considered. It is certainly not unusual for users of technology to experience technical problems. In such cases, should attorneys have the ability to undertake repair or be adequately prepared with a backup to meet their ethical obligations?³⁹ Even if using expensive courtroom technology increases the likelihood of the successful presentation of evidence, is the

acquisition, maintenance and use of such equipment consistent with the duty to keep fees reasonable under Rule 1.5?

Because each courtroom may have different systems, there is no guarantee that new lawyers who have received such training will end up practicing in a courtroom with familiar systems. Therefore it may be advisable to instead adapt already familiar technology to courtroom uses.

The OBA Management Assistance Program provides advice on office and courtroom technology use.⁴⁰ The OBA Law Office Management & Technology (LOMT) Section is another resource addressing mobile system courtroom technology. The 2012 OBA Technology Fair, which was held at the OBA Annual Meeting and sponsored by the LOMT Section, highlighted tools for the “High Tech Trial,” featuring applications and Apple products for use in trial presentations. In May 2013, a LOMT listserv was also established to provide a forum for members of the section to request and provide assistance and advice on legal technology and other related matters.⁴¹ Finally, blogs may also explain how mobile devices, including the iPad, can be used with Apple TV, a projector and several applications to create an inexpensive, adaptable and highly-functional mobile system for courtroom presentations.⁴²

MODEL RULES 1.6 AND 4.4

Model Rule 1.6, which deals with the confidentiality of information, has undergone some change as well. The modified Rule 1.6 now includes subsection (c), which states: “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.”⁴³ Comment 18 to Rule 1.6 has also been modified and sets forth the factors to consider in determining if a lawyer has made reasonable efforts to prevent unauthorized access to or disclosure of confidential information.⁴⁴ The ABA Commission on Ethics 20/20 report accompanying the technology-related changes to the Model Rules suggests that the change to Rule 1.6(c) was intended to clarify that lawyers have an ethical obligation not only to not reveal confidential information but to make reasonable efforts to prevent disclosure, such as might occur if the lawyer’s network was “hacked” by a third party.⁴⁵

The risk of third-party attempts to access electronically stored confidential information

is increasing. One white paper indicated that law firms are increasingly targeted by cyber criminals and that firms are even more at risk for breach than financial institutions.⁴⁶ Despite reluctance of law firms to confirm the growing number of attacks, reports of security breaches of law firm networks are becoming more frequent.⁴⁷ Under the new rules, lawyers must develop competent knowledge of the risk and of the measures to prevent intrusions.⁴⁸

Similarly, Rule 4.4 and Comment 2 to the rule have been amended to provide for further protections for confidential information maintained as ESI. As modified, Rule 4.4(b) provides: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”⁴⁹ Comment 2 then emphasizes the inclusion of metadata as confidential information.⁵⁰

The OBA Management Assistance Program as well as the Law Office Management and Technology Section listserv are excellent sources for recommendations for software that can be used to protect confidential client information by removing or “scrubbing” metadata from electronic documents. MAP and LOMT members may also be able to recommend materials or refer lawyers to experts specifically qualified to address security concerns. The ABA has established the Cybersecurity Legal Task Force, initiated programming to help lawyers and firms understand cyber threats;⁵¹ and ABA publications, including the *ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* and *Locked Down: Information Security for Law Firms*, are also offering information about procedures to help firms prevent unauthorized access to confidential client information.⁵²

CONCLUSION

While few jurisdictions have adopted the changes to the Model Rules of Professional Conduct, lawyers must act in anticipation of the changes. In the tightening profession and business of law, it is essential that attorneys “act now, if not to anticipate technological rules, then to match the experience and expectations of . . . technologically competent clients, associates, or staff.”⁵³ The recent tech audits instituted by KIA Motors counsel, D. Cassey, are evidence that clients are going to insist on

counsel who can competently work with technology.⁵⁴ Similarly, Bank of America is requiring the outside law firms with which it does business to establish cybersecurity procedures and auditing firm compliance with these procedures.⁵⁵ The modified ethical rules and the expectations of clients seem to go hand in hand. Lawyers can no longer ignore technology and must develop competence with changing technology to meet the both client expectations and adapting ethical standards.

Author's note: Portions of this article were originally published in the Summer 2013 issue of *Law Library Journal*.

1. Christopher C. Popper, "Embracing Technology in the Legal Profession: Technology-Related Changes to the Delaware Lawyers' Rules of Professional Conduct" (April 2, 2013), <http://goo.gl/mFWM3>.

2. Am. Bar Ass'n, Resolution 105A (Aug. 6-7, 2012), available at <http://goo.gl/F2i4no>. Resolution 105B also addressed changes to the ABA Model Rules of Professional Conduct regarding technology, but those changes are not the focus here.

3. Del. Supreme Court, Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Delaware Lawyers' Rules of Professional Conduct (Jan. 15, 2013), available at <http://goo.gl/m2HLk6>.

4. Massachusetts rules changes have been proposed and comments were to have been submitted by December 2, 2013. Massachusetts Supreme Judicial Court, Notice Inviting Comment: The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Amendments to the Massachusetts Rules of Professional Conduct, www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html. Other states which have recommendations pending in their Supreme Courts or have study committees established include Alaska, Connecticut, Idaho, Illinois, Maine, Minnesota, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, and Wyoming. E-mail from Natalia M. Vera, Senior Research Paralegal, Center for Professional Responsibility, American Bar Association to Darla Jackson, Director, University of South Dakota Law Library (Aug. 6, 2013 09:44 CST) (on file with author).

5. See, e.g., G.M. Filisko, "Reality Bytes: New Rules Require You to Get with Tech Program — Like It or Not," *A.B.A. J.*, April 2013, at 27.

6. *Id.*

7. *Id.* at 28.

8. Model Rules of Prof'l Conduct R. 1.1 Comment 8 (2012) (added text in bold).

9. Popper, *supra* note 1, at 2.

10. Lawyers Mutual Ins. Co. of Kentucky, "Are You Competent in Computer-Assisted Legal Research - CALR?" *The Risk Manager*, Fall 2011, at 3.

11. See Barbara Bintliff, "Context and Legal Research," 99 *LAW LIBR. J.* 249, 260, 2006 *Law Libr. J.* 15, ¶43; Patrick Meyer, "Law Firm Legal Research Requirements for New Attorneys," 101 *Law Libr. J.* 297, 329, 2009 *Law Libr. J.* 17.

12. Ross Kodner & Jim Calloway, "How (NOT) to Commit Malpractice With Your Computer (and 'The Word Metadata Horror'): Remarks at the Solo and Small Firm Conference" (June 9-11, 2005) (presentation slides available at <http://goo.gl/eGcIm0>).

13. "Bad Law Bot determines negative case history by using algorithms, and that it is not intended to be a complete replacement for a full editorial citator or for reading all later-citing cases ... If a case has been overturned but no court opinion has cited to it yet, Bad Law Bot won't be able to find any citation signal information." Fastcase, "Meet Our Newest Team Member, Bad Law Bot!" Fastcase Blog (n.d.), www.fastcase.com/badlawbot/. See also Carol Levit & Mark Rosch, "Are All Citators Created Equal?" *Internet for Lawyers* (2012), <http://goo.gl/KrEMyx>.

14. See e.g., Alan Wolf & Lynn Wishart, "A Tale of Legal Research: Shepard's and KeyCite Are Flawed (Or Maybe It's You)," *N.Y. ST. B.A. J.*, September 2003, at 24, 30 (discussing how using a table of authorities can assist in overcoming the risk of relying on citator information).

15. Academic law libraries also often provide research guides that will provide written instruction and links to assist with research. Okla-

homa City University Law Library provides such guides called libguides via the internet, <http://law.okcu.libguides.com/index.php>.

16. Ross Kodner & Jim Calloway, *supra* note 12.

17. One e-discovery provider suggests the following meaning of the synonymously used terms: "e-Discovery, ED, Electronic Discovery, EDD, ESI, Electronic Data Discovery—whatever you call it, it's all the same. Whether it's packaged as a product, service, solution or a confusing combination of the three, quite simply put, Electronic Discovery is the collection, preparation, review and distribution of electronically stored information including emails, web pages, word processing files, databases or other ephemeral data that is stored electronically." "E-nough Already," XACT DATA DISCOVERY, www.xactdatadiscovery.com/services-electronic-discovery.asp (last visited Dec. 2, 2013).

18. In 2012, one-third of the ABA Legal Technology Survey respondents indicated that they had used or were using predictive coding; however, of those not yet using predictive coding, 28 percent indicated they would begin to do so in the next 12 months. Barry Murphy, "2012: the Year of Technology-Assisted Review in eDiscovery," *Forbes* (Jan. 17, 2012), <http://goo.gl/y8a75Y>. See also Reginald F. Davis, ed., "Computerized Review on Trial: Predictive Coding on the Rise in Courts," *A.B.A. J.*, April 2013, at 30.

19. Bill Henderson, "Predictive Coding is a Disruptive Innovation that Will Change How Law Is Practiced," *Legal Whiteboard* (Dec. 5, 2012), <http://goo.gl/PKhMnY>. Predictive coding and technology-assisted review (TAR) are terms that are also often used interchangeably, but "Predictive Coding does not equal Automated Review; it is simply one of several techniques to accomplish it." Sandra E. Serkes, "What's the Difference Between Automated Review and Predictive Coding?" *Valora Tech. Blog* (Apr. 4, 2012, 3:00 PM), <http://goo.gl/Hm4LPT>.

20. Debra Cassens Weiss, "Lawyer for E-Discovery Company Predicts Predictive Coding Will Become an Ethical Obligation," *ABA Journal Law News Now* (Dec. 6, 2012, 7:15 A.M. CDT), <http://goo.gl/n7DDCY>.

21. Jim Calloway, "Will Predictive Coding in E-Discovery Become an Ethical Requirement?" *JIM CALLOWAY'S LAW PRACTICE TIPS BLOG* (Dec. 19, 2012), http://jimcalloway.typepad.com/lawpracticetips/electronic_discovery/.

22. *Id.*

23. R. Eric Hutz, "E-Discovery: Using Predictive Coding to Manage E-Discovery Costs and Risks," *Inside Counsel* (Feb. 23, 2012), <http://goo.gl/QT7n0M>.

24. This is similar to the factors that an attorney must consider when determining whether the outsourcing of document review is consistent with the ethical requirements of Rule 1.5. See Danielle S. Fitzpatrick & Elizabeth Jones, "Outsourcing Document Review: Pros, Cons and Ethical Considerations," *Bus. Torts & RICO News*, Spring 2012, at 15.

25. See, e.g., Matt Miller, "Order Highlights Potential Costs of Predictive Coding," *Discover Ready* (March 19, 2013), <http://goo.gl/y5L7Mx>. One technology-assisted review (TAR) platform vendor, Catalyst, has developed an app that is designed to assist attorneys in determining the amount of savings that can be expected by using TAR rather than traditional review methods. Message From Catalyst: Free App Calculates the ROI of Technology-Assisted Review, *ABA Journal Law News Now*, (December 3, 2013), http://www.abajournal.com/advertising/article/free_app_calculates_the_roi_of_technology-assisted_review/.

26. See, e.g., Gary Torgersen, "The Best Litigation Support Software Tools for Predictive Coding," *DSICOVERY* (July 16, 2013), <http://goo.gl/jk8ywZ> (advocating for use of predictive coding in cases with a "relatively small data set of 50,000 documents").

27. Order, *HOA Holdings v. EORHB, Inc.*, C.A. No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013), also available at <http://goo.gl/nLx4nS>.

28. Factors to be considered in the case-by-case analysis of the appropriateness of computer-assisted review or predictive coding include "type of case, sophistication of the parties, document volumes and types, budgets, vendor relations, and the issues to be decided..." Robert Hilson, "Bizarre Delaware Predictive Coding Saga Casts Doubt on New Technology's Viability in Small Cases," <http://goo.gl/h0IZf4>.

29. Hutz, *supra* note 23.

30. *Id.* However, when attorneys are expected to review 80 documents an hour, it is questionable if the potential for human error is actually lessened. Bruce Carton, "Document Review: When 'As Fast as I Can' Doesn't Cut It," *Legal Blog Watch* (Oct. 20, 2009, 09:56 AM), <http://goo.gl/mu2LBP>. See also Nicholas M. Pace & Laura Zakaras, Rand Corporation, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery" 97 (2012) (available for download at <http://goo.gl/8xft15>) (concluding that empirical research supports the assertion that predictive coding is as accurate as traditional human review in large-scale projects); Debra Cassens

Weiss, "Is Predictive Coding Better Than Lawyers at Document Review?" *ABA Journal Law News Now* (Jan. 22, 2013, 6:30 a.m. CDT), <http://goo.gl/Y2ERP6>, (noting a *Richmond Journal of Law and Technology* article stating predictive coding identifies about 77 percent of relevant documents, while human reviews find only about 60 percent).

31. See FED. R. CIV. P. 37. However, proposed changes would limit the situations under which sanctions or an adverse jury instruction would be imposed. Debra Cassens Weiss, "Will Federal Discovery Be Streamlined? Proposals Would Limit Depositions, Emphasize Proportionality," *ABA Journal Law News Now* (April 23, 2013, 5:40 a.m. CDT), <http://goo.gl/Rp9gJL>.

32. Hutz, *supra* note 23.

33. *Predictive Coding for Dummies* is available for download after registration at www.recommind.com/accelerate-your-discovery. However, it should be noted that this title has received some criticism for oversimplifying a complex topic.

34. Michael Arkfeld, *Arkfeld on Electronic Evidence and Discovery*, (3rd ed. 2010).

35. See, e.g., Charles Yablon & Nick Landsman-Roos, "Predictive Coding: Emerging Questions and Concerns," 64 S.C. L.Rev. 633 (2013).

36. "Getting it Right the First Time: Training and Certification in Predictive Coding" was sponsored by Recommind in October 2012 and the on-demand video version is available after registration at <http://goo.gl/SLP46P>. The Arizona State University Center for Law, Science & Innovation also offers an Ediscovery and Digital Conference, <http://goo.gl/BhMwWS>.

37. Michelle L. Quigley, "Courtroom Technology and Legal Ethics: Considerations for the ABA Commission on Ethics 20/20," 20 *Prof. Law.*, no. 3, 2010, at 18, 19.

38. *Id.*

39. *Id.*

40. Free phone and in-person consultations with the MAP program staff are available to address courtroom and office technology or management issues. Okla. Bar Ass'n *Management Assistance Program Services*, www.okbar.org/members/MAP/MAPservices.

41. Using the lomt@okbar.org address, members of the OBA Law Office & Management Technology Section can post questions and responses to the site.

42. Peter Summerill, "iPad Wireless Presentation," *MacLitigator* (Oct. 16, 2011), <http://goo.gl/Z2hEzy>.

43. Model Rules of Prof'l Conduct R. 1.6(7)(c).

44. Comment 18, as modified, provides in pertinent part:

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 paragraph (c) 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). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

Id. comment 18.

45. The report provides:

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

Am. Bar Ass'n Comm'n on Ethics 20/20, Report to the House of Delegates: Resolution 105A, app. to Resolution amending Rule 105A, at (August 2012), available at <http://goo.gl/6vXs0o> [hereinafter ABA Report].

46. Pricewaterhousecoopers, *Safeguarding your Firm from Cyber Attacks 3* (2012), available at <http://goo.gl/9jAsUR>.

47. Al Saikali, "Law Firms: How Are You Securing Your Clients' Information?" *Data Security L.J.*, <http://goo.gl/js6ac6> (discussing

numerous instances of cyber-attacks on law firms in 2011 and the ethical concerns involved).

48. Some firms have also begun to purchase cyber liability coverage from malpractice insurers. Oklahoma Attorney Mutual Insurance Company began to offer cyber liability and data breach endorsements to their policy holders. "OAMIC Cyber Liability and Data Breach Endorsement," Okla. Attorney Mutual Ins. Co., <http://goo.gl/QZ4PGS> (last visited Dec. 3, 2013).

49. MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

50. Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. *Id.* comment 2.

51. See, e.g., Am. Bar Ass'n, "Cyber Threats and Network Security Countermeasures: Keeping Your Intellectual Property and Secrets Safe," <http://goo.gl/SlcoEi>.

52. See e.g., Jody R. Westby, "Cybersecurity & Law Firms: A Business Risk," *Law Practice* (July/August 2013), <http://goo.gl/Xkd2AI>; recommending Sharon Nelson, David Ries, John Simek, Locked Down: Information Security for Law Firms (2013); Jill D. Rhodes & Vincent I. Polley, *The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* (2013).

53. Joseph Jacobson & Robert A. "Tony" Ray, "Ethics Compliance Pushes Senior Lawyers into Canyon of Technological Divide," 76 *Tex. B. J.* 123, 125 (2013), <http://goo.gl/w0QbEX>.

54. Martha Neil, "Asked to Demonstrate Computer Skills, 0 of 9 Law Firms Passed In-house Hiring Test," *ABA Journal Law News Now* (May 23, 2013, 7:40 AM CDT), <http://goo.gl/4puZB0>.

55. Catherine Dunn, "Outside Law Firm Cybersecurity Under Scrutiny," *Corporate Counsel* (June 6, 2013), <http://goo.gl/UqhFI4>.

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