

By **Mary E. Vandenack** & **Martin M. Shenkman**

Next Generation Tech for Estate-Planning Lawyers

Employ lessons learned from going remote to make permanent changes

Lawyers have long heard that they'll be replaced by technology; however, over the past years, law firms have remained busy. The reality, however, is that lawyers who embrace technology won't likely become obsolete, but will be more efficient and effective. New technology has found its way into law firms, but the advances and changes have moved slowly. When the COVID-19 pandemic arrived in the United States in early 2020 and entire law firms were suddenly working remotely, many lawyers found themselves unprepared for the issues that surround remote work. Even those lawyers accustomed to working remotely themselves faced the challenge of having their staff working remotely. As the profession moves into 2021, the lessons learned from remote lawyering can be applied to permanently move trust and estate practices into a more efficient realm with different forms of delivery.

Ethics Issues

Rule 1.1 of the ABA Rules of Professional Conduct (Model Rules) provides that lawyers must provide competent representation to a client. Comment 8 to Rule 1.1 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 con-

tinuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

Can a lawyer provide competent representation without maintaining current technological skills?

Rule 1.6 provides that a lawyer shall maintain confidentiality of information. "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of ... information relating to representation of a client." Can a lawyer maintain confidentiality without addressing technological issues?

Rule 5.1 provides that partners, managers and supervisory lawyers are required to take reasonable efforts to ensure that all lawyers in the firm comply with the Model Rules. Rule 5.3 extends the responsibility for compliance to non-lawyer assistants. Can lawyers efficiently or effectively monitor associates and staff without understanding and using technology?

When a law firm is primarily housed in an office space with a reception desk, conference rooms, secured entries, network printers, network scanners, shredders and offices where computers are located, complying with rules related to professional conduct can pose a challenge. When the same law firm transitions suddenly to lawyers and staff working from home, the ethical issues become much more complex and significant than one lawyer traveling to a remote location. And, this issue won't change post-COVID-19, only accelerate.

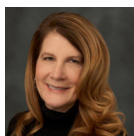
Pennsylvania Bar Opinion 2020-30 provides guidance on the ethical issues of remote work:

- All communications, including telephone calls, text messages, email and video conferencing must be conducted in a manner that minimizes the risk

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of inadvertent disclosure of confidential information. Note that this doesn't say "eliminate" but rather "minimize";

- Information transmitted through the Internet must be done in a manner that ensures the confidentiality of client communications and other sensitive data. Note that this doesn't say "guarantee" but rather "ensures";
- Remote workspaces must be designed to prevent the disclosure of confidential information in both paper and electronic form;
- Proper procedures must be used to secure and backup confidential data stored on electronic devices and in the cloud. What do "proper procedures" entail? Consider how what's proper will differ based on circumstances and change as technology advances and costs of procedures that may be prohibitive today become reasonable tomorrow;
- Remotely working staff must be educated about and have the resources to make their work compliant with the Model Rules. What can practitioners do to corroborate what efforts to educate have been made?; and
- Appropriate forms of data security must be used.

Remote-Ready Office

Technically, to work remotely, you simply need a computer. Law firms with desktops in their offices sent many of their employees home to work from a personal laptop or desktop. Working on personal devices outside of offices resulted in myriads of efficiency, functionality and security issues. By having employees use personal devices, law firms created the opportunity for employees to save documents on personal thumb drives, on home laptops shared with children and other unauthorized users or in consumer applications such as Dropbox (note that Dropbox has business applications as well).

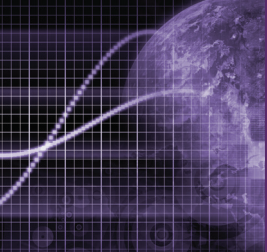
Get new equipment. One approach to minimize the use of personal devices for remote work is to reconsider the equipment provided by the law firm. Instead of a desktop in the office, consider using docking stations with a laptop. When a lawyer or staff member needs to work remotely, the laptop can simply be removed from the in-office docking station and taken along. The laptop can be connected to the system in a way that ensures functionality and securi-

ty. The law firm has more control over the laptop the firm owns than personal devices of employees. For example, firms can install and monitor their antivirus software and other protections they use on their work laptops used remotely. In contrast, firms likely have no control over non-firm personal devices.

Go paperless. If your law firm still uses paper (material manufactured in thin sheets from the pulp of wood used for writing), now's the time to make the move to a paperless office. One key to going paperless is to take steps incrementally. Falling off a paperless cliff is rarely going to be comfortable for lawyers or staff. Figure out what will work in your firm, and start now. The first step is to go paperless from today moving forward. Evaluate incoming physical mail and develop a plan to have more documents come in electronically. To the extent incoming physical mail can't be eliminated, scan mail on arrival. Consider distributed scanning by providing scanners to everyone in the law firm who touches paper. Alternatively, develop a plan that ensures everything is scanned immediately by a smaller group.

Educate lawyers on practical and easy ways to transition certain tasks from paper to electronic.

Many professionals will find it a challenge to work completely paperless. If some lawyers still require paper files, identify the limited paper that's absolutely needed, and eliminate everything else. For example, the last step that some lawyers might want to hold on to is reviewing a paper or hard copy of certain documents. But, perhaps they'll be willing to immediately eliminate paper for a client balance sheet or family data, as those can be viewed on screen. Also, educate lawyers on practical and easy ways to transition certain tasks from paper to electronic. For example, lawyers who grew up using yellow highlighters and colored pens to review a complex trust can mimic the same task using yellow highlights and colored text in Word. Figure out what works and start the process, and if you were partially or largely paperless in the



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past, accelerate the process forward. The efficiencies are tremendous, and COVID-19 has made it clear that we all need to be adept at remote work.

Institute a document-management system. A well-organized document-management system (preferably an electronic document-management system) will prevent lost documents and will enhance the lawyer's ability to review a file quickly and efficiently. The system should consider and address the different ways that lawyers and staff think about finding and saving documents. Lawyers who are used to paper files may benefit from a system that has underlying folders structured similar to paper. This structure allows lawyers to sort through their files in the same manner electronically that they did with paper. Make sure you have a good search function for an electronic system. If the search doesn't find everything, the searching lawyer will miss documents. Use naming, filing and document conventions for everything that's saved. Train everyone in the office on consistent use. Consistency is vital to success. If every partner has their own approach to saving electronic files, optimal use can't be achieved. Create templates for regularly saved documents to reduce errors and inconsistencies.

If your law firm isn't on the cloud, consider moving away from in-office servers to the cloud when you're nearing your next server replacement.

Move to the cloud. If your law firm isn't on the cloud, consider moving away from in-office servers to the cloud when you're nearing your next server replacement. A cloud-based system allows fairly simple access from almost anywhere. Those who can't quite contemplate a system entirely on the cloud can consider a hybrid approach. For example, they can use the cloud-based Office 365 for email. But to be clear, there's no escaping the cloud. Even if your firm continues using its own server, and there are some reasons

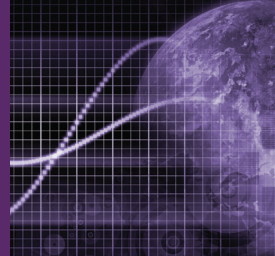
why that may make sense, you should back up your server regularly to the cloud. Even if you have layers of local backups, a cloud-based back up is essential.

Update and upgrade cybersecurity policies. Be certain all devices have current antivirus protection. Designate a staff individual or outside IT consultant to monitor the security software to be certain it's kept current. "Current" means not only that updates are installed but also that as new security steps become affordable, they can be added to the existing devices. For example, if your firm doesn't use email monitoring services to identify suspicious activity, you may want to add those services. Cybersecurity shouldn't be limited to what was used last year. Create an inventory of hardware and software. Also create an inventory of user permissions. Evaluate data that might be available to a hacker. Ensure that information from clients who've left the law firm isn't part of that data. Train everyone at the law firm on phishing, social engineering, suspicious links, email spam and password security. Follow up training by sending out a suspicious link. Provide additional training to those who clicked on the link.

Evaluate policies and procedures regarding personal devices and office devices that are used remotely. Maintain an audit trail of data access. Use multi-factor authentication. Have an incident response plan. Create a process for regular audit of cybersecurity risks. For example, ABA Ethics Opinion 477 requires that lawyers must take "reasonable" efforts to ensure that communications with clients are secure and not subject to inadvertent or unauthorized security breaches. What are "reasonable" efforts? Consider having an internal IT department director, or the outside IT consultant for smaller firms, prepare an annual review memorandum that identifies changes that were proposed in the prior year and whether they were implemented (and if not, why) and new suggestions for improvements, protocols and safety measures to implement in the current year. Having a regular review process that's documented may be helpful if the lawyer or firm is ever challenged.

Document Automation

The day when any lawyer or paralegal pulled up a document prepared for another client and used that document to create a document for a different client



should be a thing of the past. Using a document created for another client creates many issues. It's very easy to leave something in the document that shouldn't be in it. It's also easy to fail to put something in that should be included. Additionally, there's the issue of metadata.

Document automation allows lawyers to be more independent, more accurate and more efficient. The pandemic illustrated for some lawyers their dependence on staff members for document creation.

Estate-planning law firms can subscribe to excellent subscription services. Such services provide a vast array of trust and estate documents, which are kept up-to-date. Such services also provide resources to practitioners as well as a network connecting practitioners to share information and questions.

Practitioners who want to continue to use their own documents can use document automation software. Complex automation can be achieved through software such as Hot Docs. Other options include Word templates and automation options in practice management software.

Nonetheless, situations will arise in which the commercially sold document generation software programs can't create an unusual document, and you may not have the time or skills to create your own automated document in Hot Docs. So, as an interim step before marking up another client document for a new matter, create a form. First review the old client form and remove all relevant data and add notations where additional provisions or matters should be addressed as if creating a more generic form. Then search the document for all identifying information from the old client to confirm it's been removed. Spell check to identify not only spelling errors but also client-specific information that's been missed. Finally, use Word's "inspect function" to clear metadata out of the document. Only then can that form be modified and renamed and used for the new client matter. That approach is safer than a direct markup and creates a template for future use. If the template is used again, consider creating a form in Hot Docs.

Process Automation

Not every process should be automated—only those that are repeatable and predictable. To identify what processes to automate, consider the steps you take in every estate plan. For example, for a new client, you

would typically run a conflict check, set up a new matter, obtain certain client information, meet with the client to discuss objectives for planning, draft documents, send documents for review, meet with the client to sign documents and send copies of those signed documents to the client. You can automate some portion of these processes. For example, most estate-planning lawyers have a standard information request form. An automated process can be created whereby you email the information form to a new client. On return of the information, you can automate the process to incorporate the information into the client file.

At a minimum, law firms should use electronic document signing software such as DocuSign, EchoSign or RightSignature.

It's easiest to start by identifying and automating a fairly simple process. Create a checklist or a process map to help you have a clear picture of the process. Many practice management systems allow users to create automated workflows.

Document Signing

The shutdowns of the pandemic changed the process of signing documents in the estate-planning process.¹ Most states enacted some provisions to facilitate signing of documents. For example, they accelerated effective dates of online notary statutes. The signing of wills posed the biggest challenge because many states still required in-person presence.

The Uniform Law Commission finalized the Uniform Electronic Wills Act 2019 (the Act) in December 2019. When the pandemic swept into the United States, state legislatures weren't yet considering the legislation. The Act has now been passed in Utah and introduced in Ohio. Many other states are likely to introduce the Act as a response to the pandemic.

Regardless of the passage of the Act in a particular state, it's likely that clients will expect the changes in signing estate-planning documents to continue. At

a minimum, law firms should use electronic document signing software such as DocuSign, EchoSign or RightSignature. These products are easy to use and provide a detailed certificate confirming the date and time of signing, even when the document was opened and read. In many ways, this detail is superior to information that's preserved with a traditional paper signing. Also, consider using electronic signatures on minutes, *Crummey* powers, retainer agreements and other documents that don't have the legal formalities of a will.

Offer sophisticated client portals that also provide smartphone applications that allow clients to keep their health care directives on their phone.

Law firms might also consider offering online notary services. To the extent a personal presence is still required for some aspect of will signing, drive-by will signings may remain a desirable service.

Online Payments

Online payment options have long been available to law firms. As a result of the pandemic, no-touch payment options have evolved rapidly. Many cloud-based practice management systems offer online payment systems that are integrated with third-party software. Choose an online payment system that makes it simple for the client to make the payment.

Online Legal Services


Are you still having a first meeting with clients, obtaining a handwritten list and having someone type in that information? Instead, obtain the information you need prior to the first meeting using online intake forms that integrate with your practice management and document automation systems. By doing that, you can show up at the first meeting with a client summary.

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smartphone applications that allow clients to keep their health care directives on their phone. During the pandemic, some clients were patients in hospitals that didn't allow visitors who could have provided health care information. Health care information and directives can be made readily available on smartphone apps. In some cases, law firms may already have software with portals and smartphone app availability. For example, sharefile can be used for client portals. Be aware of the need to have security policies in place related to any client portals.

Customer relationship management software assists law firms in managing client relationships. A primary use of such software is in the sales cycle, but this software can also be used to facilitate ongoing relationships by organizing information about clients and the law firm's relationship with them.

Importance of Innovation

The pandemic required us to think differently about how we provide services and connect with clients. The House of Delegates of the American Bar Association adopted Resolution 115 in 2019 encouraging innovation in the legal industry. As the legal industry evolves, it's important for lawyers to consider how and where they add unique value and how they can join forces with technology to continue to do so in a manner that meets changes in the way consumers want to consume services and have them delivered. Harnessing technology will drive efficiency, enhance profitability and permit lawyers to focus more of their time on value added and creative services reducing time spent on mundane and routine tasks. 

Endnote

1. See Martin Shenkman, Jonathan Blattmachr, Andrew Wolfe and Thomas Tietz, "Different Approaches to Signing/Executing Estate Planning Documents," *LISI Estate Planning Newsletter #2803* (July 1, 2020), www.leimbergservices.com.