

# SOME ETHICAL DOs and DON'Ts RE: TECHNOLOGY

1/22/16

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## Rule ER 1.0(n) Defines Electronic Communications As a "Writing"

### Dos

- E-mails are mail and must be preserved and given to the client. Practice Tip: include clause in engagement letter that client will receive copies of all E-mails and they should maintain them.

### Don'ts

- Neither lawyers nor staff should write E-mails, even internally, with anything less than professional vocabulary and comments. Practice Tip: train all firm staff and lawyers to write all communications so they could be viewed by a judge or the Bar.

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<sup>1</sup> Acknowledgement and great appreciation is given to Lynda C. Shely of The Shely Firm, PC, for much of the training and information in this presentation.

<sup>2</sup> Many thanks to Lindsay A.M. Olivarez, an associate attorney in Mr. Everts' office, for the legal research and collaboration on this presentation.

**ER 1.1[6] Requires  
a Lawyer to be “Competent  
in Relevant Technology”**

**Dos**

- Although lawyers are not required to personally understand all technology, lawyers must at least hire personnel who understand technology, competence and confidentiality.
- Case law requires that lawyers have current E-mail addresses.  
Practice Tip: Keep your E-mail addresses current.

**Don'ts**

**ER 1.6 Requires  
Confidentiality of  
Client Information**

**Dos**

- Remote storage (e.g. Cloud) permissible as long as lawyers take “reasonable steps” to investigate the provider’s security measures [22] [23]. Suggestions to do this include:
  - a. get client consent to remote electronic storage in engagement letter;
  - b. check with malpractice carrier for cyber insurance and identity theft coverage;
  - c. have procedure if servers go

**Don'ts**

- Warn clients about communicating from public computers.
- Warn clients to not use E-mail address where soon-to-be ex-spouse has password.
- Warn clients to avoid using work E-mail address.
- Practice Tip: Inform clients in engagement letter that the firm will communicate by E-mail, will use E-mail address that client provides,

- down;
  - d. read and negotiate Service Level Agreement or hire someone to do so;
  - e. confirm uninterrupted access and maintenance;
  - f. confirm encryption and security of data, plus employee screening and timing of notification of cyber incidents; and
  - g. get trusted recommendations about providers.
- Seek client permission before disclosing successful results on the internet.
  - Warn clients about communicating with firm lawyers or staff informally on Facebook.
  - Have a written policy for all lawyers and staff who have firm data on their devices about what to do if any electronic device is lost, stolen or exchanged.
  - Every person who uses any device with firm data must have a secure password.
  - Practice Tip: take steps to review electronic discovery before it is turned over in order to prevent privileged communications from being disclosed.
- and that they should only use E-mail addresses that maintain privilege and confidentiality.
- Although ER 1.6(4) allows limited disclosure of information to establish a claim or defense, case law prohibits disclosure of client information on social media to defend oneself. Therefore, do not respond to negative online reviews with any information about the representation.
  - Do not post winning results without client consent. Although not privileged information, it is confidential.
  - Do not post hypotheticals on listservs with specific information that could be identified by an opposing client or counsel.
  - Prohibit staff, lawyers and vendors from posting any information about clients on social media sites.
  - Do not write on a client's Facebook wall.
  - Do not friend clients.
  - Don't use fictional names.



- Don't tweet from courtroom without permission.

### ER 1.15 Requires Safeguarding Client Property

#### Dos

- Safeguard client property, including documents and files.
- Preserve firm records, including trust account records.
- May store documents and files electronically unless original has intrinsic value.
- May store electronically and remotely with warning about third-party access and client permission (Practice tip for engagement letters).

#### Don'ts

### ER 1.7 and 1.18 Address Conflicts of Interest with Current and Prospective Clients

#### Dos

- Train all staff to notify lawyers whenever they are friends (real or otherwise) with someone who is involved in a litigation matter.

#### Don'ts

- Do not give advice to "anonymous" people online.
- Do not friend witnesses, opposing parties, judicial staff or anyone involved in your practice.



- Do not accept friend requests from people involved in your litigation practice.

**ER 3.3(a), 4.1 and  
8.4 Require Candor  
and Honesty with Everyone**

**Dos**

- Always tell the truth online.
- Warn clients not to discuss the litigation or their personal situation on the internet – it is discoverable.
- Warn clients that deleted Facebook and other social media sites are discoverable. Also, sanctions may be taken against them for destruction or spoliation of evidence.
- Practice Tip: assess the need for electronic discovery early on in a case in order to advise the client about preserving electronic data.

**Don'ts**

- Don't allow staff or agents (e.g. private investigators) to lie about anything, including their identity or the purpose for which they are tracking someone online.
- Don't allow staff to "friend" someone to investigate them.

**ER 4.4(b)  
Addresses Misdirected  
Communications**

**Dos**

**Don'ts**

- Stop reading.
- Do not use.
- Notify sender.

**Miscellaneous**

**Dos**

**Don'ts**

- Provide regular firm training and updates on Internet scams.
- Don't click on links that you weren't expecting to receive.
- Don't allow device recordings in office conferences.
- Don't allow texting from the gallery or parties to witnesses in the hallway - that violates the rule of exclusion.

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