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Ethics: Are You Phoning It In?

The Ethical Perils of Practicing Law from Your Cell
Phone (*with or without a worldwide pandemic)

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I. Introduction

The practice of law has been – and continues to be – impacted by technological developments. A recent illustration is seen in the legal profession’s swift adaptation to the limitations on face-to-face communications caused by the COVID-19 pandemic. Now, more than ever, multiple methods of communication are commonplace in the attorney-client relationship. Technology has facilitated the ease of communication between clients and attorneys and as a result, greater opportunities for practical lawyering and client relations abound. However, technology can also pose unique challenges and risks that evolve as technological products continue to update and upgrade. The Texas Disciplinary Rules of Professional Conduct (“the Rules”) do not explicitly address text messaging between attorneys and clients; However, the ethics rules mandate other duties that inform the ethical expectations for attorneys when using cell phone for client representation purposes, namely arising from: Rule 1.01 Competent and Diligent Representation, Rule 1.03 Communication, and Rule 1.05 Confidentiality of Information. This paper and accompanying presentation provides (1) an overview of relevant ethics rules, (2) guidance from the Ethics Committee relating to technology in lawyering, and (3) recommendations for ethical practice when lawyering from your cell phone.

II. Ethics Rules and Standards

A. Texas Disciplinary Rules of Professional Conduct

The primary source for guidelines and rules of ethics in Texas is the Texas Disciplinary Rules of Professional Conduct.¹ Violations of the Texas Disciplinary Rules of Professional Conduct are handled in accordance with the Texas Rules of Disciplinary Procedure.² A failure by a lawyer to abide by the standards and rules set forth in the Texas Disciplinary Rules of Professional Conduct subjects the lawyer to disciplinary action, which may include sanctions, suspension, and revocation of the legal license. The Texas Rules of Professional Conduct set forth the minimum standards of practice for Texas lawyers and conduct that controverts the rules is considered a violation that could subject the lawyer to discipline. A violation of the Texas Disciplinary Rules of Professional Conduct is not in itself defacto proof of malpractice. Even though the Texas Disciplinary Rules of Professional Conduct do not create an automatic cause of action, they are frequently cited in malpractice cases when evaluating whether the appropriate standards for professional conduct have been observed.

The ease with which an attorney and client can communicate via electronic means easily allows an attorney to keep the client reasonably informed (as required by Rule 1.03), provides an opportunity for the attorney to promptly respond to requests for information (as required by Rule 1.03), and also promotes the intent of the confidentiality rule to encourage free discussion between an attorney and client (as required by Rule 1.05),

¹ Texas Disciplinary Rules of Professional Conduct may be accessed at:
<https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm>

² Texas Rules of Disciplinary procedure may be accessed at:
<https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=25766>

i. Preamble

“A lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.”

Attorneys have affirmative duties to be competent, communicative, and to maintain client confidentiality. Though the Rules themselves do not impose any ethical duties specifically as to technology-aided communication, there are several provisions within the rules that, read collectively, shed light on the ethical expectations for attorneys as it relates to lawyering via cellphones.

ii. Rule 1.01: Competent and Diligent Representation

The Texas Supreme Court confirmed that an Attorney’s ethical duty to “Competent and Diligent Representation” as expressed in Rule 1.01 means a lawyer’s striving to become and remain “proficient and competent” in legal practice, including the benefits and risks associated with relevant technology. See Misc. Docket No. 19-9016. On February 26, 2019 the Court ordered that Comment 8 to Rule 1.01 be amended to include the expectation that an attorney be competent in the benefits and risks associated with relevant technology; this amendment mirrors the language in the ABA model rule relating to maintaining competency.³ Though the Rules do not require an attorney to become experts in technology, there is a clear expectation that Texas lawyers be proficient and competent in connection with relevant technology. For purposes of the rules, “competent” or “competency” denotes possession of or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.⁴ Neither the rules nor ethics opinions prescribe what particular training or skills would constitute competency. Given that technology often and rapidly changes, an attorney should continuously expand his or her knowledge, skill, and training in the technology, software, and programs reasonably necessary for the representation of the client. A lawyer’s competence may be called into question and even found unethical if a lawyer does not proficiently use relevant technology in representing a client. Though the Rules do not require lawyers to use or adopt certain technologies and neither explain what technology is considered “relevant” to the practice, a 2018 Ethics Opinion clarified that lawyers should not “retreat unnecessarily from the use of new technology that may save significant time and money for the client.” Ethics Opinion No. 680 (2018). Accordingly, lawyers should remain proficient and competent including with respect to the benefits and risks associated with relevant technology and a failure to do so could, based on the factual circumstances, be a violation of ethical duties arising from Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct.

³ See ABA Model Rules of Professional Conduct Rule 1.1 Competence – Comment 8

⁴ See Section “Terminology” in Texas Disciplinary Rules of Professional Conduct

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