



## Are You Still A Good Lawyer?

If you think you can still practice law the way we did in the last century (that was only 15 years ago by the way, but who's counting), you may want to talk to lawyer Kenneth Reisman. He was publicly reprimanded by the Massachusetts State Bar for failing to advise a client against "scrubbing," and for failing to assure that the client had not scrubbed, files on a laptop computer that held, among other matters, information belonging to his former employer that his client had transferred to the computer after he had resigned from his former employer and joined one of its competitors.<sup>1</sup> When the former employer sued, alleging theft of trade secrets and other proprietary information, discovery orders required the preservation and production of all documents relating to the case, including information on the laptop, which also contained information about the client's new employer. Not understanding the scope of the court's order, Reisman not only failed to advise his client that he had to preserve everything on the laptop's hard drive but also advised him that he could delete files belonging to the new employer. The court found the client guilty of spoliation of evidence. Worse yet, the Bar found that because of his lack of experience in electronic discovery, Reisman failed to appreciate the importance and the breadth of the discovery orders affecting his client.

Even though there was no finding of intent on the part of Mr. Reisman, the Bar found he had violated Massachusetts' equivalent to ER 3.4(a) (preventing access to evidence), ER 1.4 (inadequate communication to client about obligations imposed by discovery order), and ER 1.1 (incompetence for failing to know issues, or to associate with competent counsel, concerning electronic discovery).

More recently, an Indiana lawyer was disciplined for statements contained in a national lawyer website, Law Tigers, which listed his name as a "licensee" lawyer to contact for representations involving motorcycle accidents and related matters in Indiana.<sup>2</sup> The website included representations about favorable settlements and verdicts involving Law Tigers lawyers, as well as client testimonials, which the Indiana Supreme Court found violated Indiana's ethical rules regarding lawyer advertising. These violations included failure to give an office address in the advertisement, accepting referrals from an unapproved referral service, and improperly giving something of value for a professional rec-

ommendation. This, even though the lawyer had his own website that was in full compliance with Indiana's lawyer advertising rules. The court found that that a visitor to the

Law Tigers website was not required or advised to access the link to the lawyer's personal website and could not differentiate between them, making the Law Tigers website effectively, and by implication, the lawyer's own.

These are examples of what can happen to the lawyer who has not kept up with how the practice is changing, just as the way our clients' businesses and personal lives are changing, as a result

of what is generically known as "technology." If you have not yet read Patricia Sallen's excellent article in about the changes to Arizona's Rules of Professional Conduct,<sup>3</sup> do so. There, she points out several important changes to our ethics rules, among them the addition to Comment [6] to ER 1.1 (Competence), which now includes "the benefits and risks associated with relevant technology" in the "changes in the law and its practice" that we are required to keep abreast of. "Electronic communications" have now crept into the ways we can acquire a prospective client,<sup>4</sup> "electronically stored information" is now among the items protected from inadvertent disclosure,<sup>5</sup> and "Internet-based advertisements" are now specifically included in our lawyer advertising rules.<sup>6</sup>

Technology's effects are already finding their way into the way "good lawyering" is

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You must understand what can happen to the lawyer who has not kept up with how the practice is changing.

Ethics Opinions and the Rules of Professional Conduct are available at [www.azbar.org/Ethics](http://www.azbar.org/Ethics)



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defined. A recent Pennsylvania ethics opinion<sup>7</sup> comes right out and states that a lawyer must, as part of the duty of competence, acquire a basic understanding of social media websites so that, in the appropriate situation, a client can be advised about social media issues arising with respect to a matter in litigation.

Remember that what a client e-mails to a friend or writes on her Facebook page may be discoverable, and there may be consequences for both lawyer and client if it's destroyed after it has

been formally requested. Finally, be advised that “technology” also includes cybersecurity issues in cloud-based document storage and Internet-based investigations and will ultimately be part and parcel of the demands of clients that we deliver legal services more effectively.<sup>8</sup>

The bottom line is we need to keep abreast of what technology has done to the practice. If we can't or won't, we need to associate with a lawyer who can assist us in the New World now redefining lawyer competence. 

### endnotes

1. Public Reprimand No. 2013-21, Kenneth Paul Reisman, Board of Bar Overseers, State Bar of Massachusetts (October 9, 2013).
2. *In the Matter of Anonymous*, No. 45500-1301-DI-33, Indiana Supreme Court (April 11, 2014).
3. Patricia Sallen, *A Roundup of Supreme Court Rule Changes*, ARIZ. ATT'Y (Jan. 2015), at 44.
4. See new Comment [2] to ER 1.18 (Duties to Prospective Client).
5. See new 4.4(b) and Comment [2] to ER 4.4 (Respect for Rights of Others).
6. See new Comment [5] to ER 7.2 (Advertising).
7. Phila. Bar Ass'n Op. 2014-5 (Social media; Internet; Evidence; Discovery; Advice to clients; Competence; Candor toward tribunals) (July 2014).
8. For more on these issues, see Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF. L. 4 (2014).