

# CHICAGO LAWYER®

## CLIFFORD'S NOTES

**A**s I write this column, the medical-malpractice group at our firm is just coming off a monthlong trial that resulted in a record \$100.6 million verdict — the mother will receive \$51 million after a settlement agreement — for a baby whose brain was injured by lack of oxygen due to medical negligence.

Every day the courtroom was packed, closing arguments even requiring extra folding chairs and still there was a waiting line outside of the courtroom at the Daley Center. The jury result once again reinforces faith in the civil justice system.

Twelve people in this case gave a month of their lives, heard all the evidence and determined reasonable damages based upon the facts. Many took copious notes throughout the process, paid close attention to experts, medical terms, timeliness of procedures and credibility of witnesses.

One thing is for certain — as we enter a new decade, technology is critical. I have seen lawyers at trial tell the jury they prefer to do it the “old-fashioned way.” They also use the large, sometimes cumbersome poster boards. While these techniques may still be effective in the eyes of some lawyers, technology and the expectations of juries seem to require more. No matter what level of experience, every lawyer must be prepared to examine, cross-examine and impeach a witness with deposition testimony and other evidence at the push of a button. Highlighting and enlarging it for the jury makes for a clear and transparent presentation about the points being made.

Illinois Rules of Professional Conduct 1.1, Comment 8, requires that “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 ...” Rule 1.6 also imposes on lawyers the duty to treat client information in a confidential manner. Subparagraph (e), added in 2016, provides, “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.”

This task may be getting more difficult. Given that new technology continues to evolve with facial recognition, biometrics, metadata and electronically stored data, lawyers are required to keep on top of these changes and how they impact the practice of law and their clients whether it be through anti-hacking security tools, search technology, iCloud protection, thumb drives and other methods to secure client information.



## NEW DECADE, NEW ISSUES

Technological advancements need to be addressed

By **BOB CLIFFORD**

In an effort to educate lawyers on these cutting-edge issues, my firm is sponsoring its 12th annual Continuing Legal Education program Feb. 20.

Lawyers from across the state can participate in a webinar with panelists who have dealt with these issues: Mark C. Palmer, chief counsel for the Illinois Supreme Court Commission on Professionalism; Wendy Muchman, former chief of litigation and professional education for the Illinois Attorney Registration & Disciplinary Commission and now professor at Northwestern Pritzker School of Law; and Cook County Circuit Judge Clare Quish.

I will moderate the discussion through a series of hypotheticals and polling questions. Issues to be discussed include: The right way to start a blog, researching jurors on social media platforms, lawyers and judges as social media friends, responding to negative online reviews of a lawyer or law firm and post-trial juror communication.

Email tracking is another hot topic at the program. It's an issue that has become increasingly important with e-filing and e-service (e.g. Illinois Supreme Court Rule 11). Some law firms around the country have installed a software tool that can track emails sent to clients and nonclients, observing how long and how often a recipient has viewed the email in monitoring engagement and if the email was forwarded to others or if

attachments were opened or downloaded.

As for sending blog items or other mass emails to subscribers, the Illinois State Bar Association issued an advisory opinion saying this is analogous to sending certified mail when it involves only the confirmation of receipt of information and recipients are aware of what it means when clicking on links involving a lawyer's business matters.

However, in the case involving hidden email tracking software of confidential client matters, ISBA Opinion No. 18-01, January 2018, the ISBA agrees with at least three other jurisdictions (Alaska Bar Association Ethics Opinion No. 2016-01, New York State Bar Association Ethics Opinion 749 and Pennsylvania Bar Association Formal Opinion 2017-300) that found that such conduct would be unethical.

The ISBA opinion cites Illinois Rules of Professional Conduct 1.6, 1.9 and 4.4 where this type of tracking could amount to a violation of preserving confidential information and respecting the rights of third parties because the recipient is unaware of the tracking. Permission of the client or recipient of the email that contains confidential information is necessary to avoid deceit or unethical conduct. CL

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