

ACREL Roundtable
2019 Annual Meeting
Montreal, Canada

**Going Paperless for the Law Office
with Ethical and Practical Considerations**

Presented by

Pamela ("Pam") E. Barker
Lewis Rice, LLC
600 Washington Avenue, Suite 2500
St. Louis, Missouri 63101
(314)444-1390
pbarker@lewisrice.com

and

Sam W. Irby
Irby & Heard, P.C.
Post Office Box 1031
Fairhope, Alabama 36533
(251)929-2225
samirby@irbyandheard.com

Going Paperless for the Law Office with Ethical and Practical Considerations

A. What is a paperless office?

- The term "paperless office" means different things to different people.
- Most lawyers are drowning in paper.
- Storage of paper files is a big problem.
- How much time is devoted to locating files?
- The term "paperless office" does not necessarily mean literally that there will be absolutely no paper in your office.
- To me, a paperless office is an office at which the use of paper is limited or wisely used.
- Going paperless saves money, boosts productivity, saves space, and makes electronic documentation and information sharing easier.
- Going paperless changes the way you practice law and in some cases your lifestyle. This simply means that attorneys will not be tied to the desk but will be able to practice law at anytime and anyplace they choose.

Going Paperless for the Law Office with Ethical and Practical Considerations

- B. The goal of Irby & Heard, P.C.
- My law partner and I realized that we were drowning in paper and it was very expensive. We concluded that we wanted to substantially limit the amount of paper in our office.
 - Our goal is to limit the waste of paper and to increase our efficiency. We wanted to stop buying reams of paper every month.
 - In 1992 we began saving to the hard drive our entire work product.
 - In 2005 we purchased a good scanner/copier which allowed us to effectively and efficiently scan all documents coming into our office.
 - In 2010 we fully committed to the concept of a paperless office.
 - We no longer open paper files.
 - We no longer need to pull files from storage.

Going Paperless for the Law Office **with Ethical and Practical Considerations**

C. Why paperless?

- Because it was the right thing to do for us.
- We estimate that by reducing the amount of paper and printing that we save a substantial amount of money every year.
- Going paperless can reduce the number of clerical employees needed.
- In the old days, we spent hours looking for files. I have been practicing for many years and have saved every file ever created. Many of the files are in storage. Some of the files are in my office and some are in a separate storage facility.
- As you know, many times when you look for a file, it is missing and therefore, you have to spend a lot of time looking for the file. We would shut down the office and an all-points bulletin was issued to scramble to find a file. The file was always found, but not before losing a lot of time and decreasing efficiency. Now all we do is open our computer and search for the file. All documents we produce in-house or that we scan can be found in our computer.

Going Paperless for the Law Office **with Ethical and Practical Considerations**

- You save money on paper, letterhead, envelopes, file folders, folder tabs and stickers, postage, toner, storage boxes, storage cost and employee time copying and searching for documents, and more.
- No sticky notes, no telephone message pads, (we use instant messages and e-mail) no rubber bands, no paper clips. Everything is saved in the computer.
- No more searching or losing paper documents.
- No more secretaries leaving their desks to pull files.
- No more inefficient use of time.
- We scan and shred almost everything.
- We do our best to limit using the U.S. Post Office.

D. Getting started-computer and scanner.

- All of us should have modern computers and networks with as much ram and hard drive as you can afford.

Going Paperless for the Law Office with Ethical and Practical Considerations

- After the computer, the first thing you will need to do is get good scanning equipment. There are many types of scanning equipment out there, from the small one piece of paper at a time scanner, to the desktop scanner, to the large, fast, multi-function printer/scanner. The large printer/scanners are super-fast and they interface directly with your computer or network.
- Do not skimp on your scanner. You want to make sure that you do not purchase a scanner that requires putting each page, one at a time, on a flat bed.
- We have a Konica-Minolta C552. Copies, Scans and Faxes. Does color and black/white copies. We also have several other scanners in the office.
- One word of caution when buying new equipment. Research which machines will suit your needs. Each manufacturer is different and has different capabilities. Always get a demonstration before buying. Also, you should consult with other law firms that use the same machine and watch them use the equipment.

Going Paperless for the Law Office with Ethical and Practical Considerations

- You will need to make sure your current technology can support the new scanning equipment that you are buying. Hopefully you have a good IT person that can assist you.
- The gold standard in scanning software is Adobe Acrobat Professional. Most of us likely have no clue as to the capabilities of Adobe Acrobat. For example, did you know that Acrobat has a typewriter function? All you need to do is scan a form that needs to be filled out and turn it into a PDF. Then choose the typewriter function and you will be able to type on the document even though it is not a Word or WordPerfect document. It is simply a preprinted form. No more typos, no more ribbons, no more typewriters. There are dozens of tips and tricks that you need to learn.
- Adobe Acrobat has a security feature which allows you to secure a document from changes by an outside party.
- Adobe Acrobat also has an OCR or optical character recognition function that reads your documents in such a way that will make it searchable.

Going Paperless for the Law Office with Ethical and Practical Considerations

- Training your staff is important. There are multiple internet sites that offer training.
- Should you attempt to scan all of your files? That depends on your situation, but if you have been practicing for a while the general answer is no. It is not as simple as scanning everything. Scanning all of your old files can be overwhelming and not productive. You need to have the proper equipment, software, and processes in place before you get started so that you are as efficient and effective as possible.

E. Shredders.

- We have multiple shredders in our office.
- We also use the services of a company that will shred documents in bulk. The truck comes to our office with the shredder and we supervise the shredding of the documents.
- We have found that for the most part there is no need to keep and file paper.

Going Paperless for the Law Office with Ethical and Practical Considerations

F. Document management software.

- Our office uses a data management system called Worldox <http://www.worldox.com/>. Worldox allows us to organize the documents we input into the computer just like you organize your paper files, except it will all be done in your computer.
- Worldox takes control of all of your programs and as a result you can open your programs from within Worldox without having to go into each program to open your document. You search documents in Worldox the same way you search in the Internet.
- Although there is training involved, it is not that difficult to use.
- Worldox is a remarkable program that has changed the way we search for information and has substantially reduced the need to search for and pull files.

Going Paperless for the Law Office with Ethical and Practical Considerations

G. Digital files.

- Most correspondence does not have to be hand signed. There is a lot of wasted paper and ink when printing a document, signing it, scanning it and e-mailing.
- Adobe Acrobat Professional allows you to scan your signature into your system and have it inserted in a secured encrypted way into your correspondence.
- Our letterhead has been saved in the computer as a template so that we do not in most cases print our correspondence on letterhead.
- Many other programs provide for digital signature.

H. Backup, backup, backup and the cloud.

- Make sure you have a reliable way of backing up your data. If lightning or fire destroys our computer and hard drive, we can retrieve our data.
- Test your backup every day.

Going Paperless for the Law Office with Ethical and Practical Considerations

- Where are you going to store the digital files? Will they reside on a network, on a single computer, or in “the cloud?”

I. VOIP Telephone System.

- Zultys manufactures and sells a voice over Internet protocol (VOIP) phone system which operates through the Internet. This is not your parent’s telephone system. <http://www.zultys.com>
- When the phone rings in the office it also rings at my iPhone. VOIP Mixie telephone systems are an extension to the iPhone, iPad and Apple Watch.
- Faxing is almost a thing of the past. Each person in our office has his own private fax line. The faxes are received directly into the computer through the Mixie phone system. No paper. We save the fax using Worldox.
- The Mixie VOIP telephone, e-mail and Internet are connected through fiber optic line. You can buy as much speed as you need. The cost of a fiber optic line is very competitive. An experienced consultant can assist in getting the right product at the best price.

Going Paperless for the Law Office **with Ethical and Practical Considerations**

- Each person in our office has a private line. We encourage our clients to call our private line and not call our secretary or receptionist. This greatly reduces the manpower needed to answer the telephone. If a party is not available the Mixie voicemail system allows us to leave the appropriate message. Mixie can also record any telephone conversation.
- Your voice messages and recorded messages can be easily saved to your hard drive or e-mails.
- Conferencing with Mixie is simple and clearer.
- We also use Join Me to conference. There are many other conference call provides available.
- Mixie has a call detail reporting feature which keeps up with all calls and can be exported into a time billing system.
- We do not dial telephone numbers anymore. Mixie links to my Outlook Express contacts list. We retrieve the contact in Outlook and punch the icon with my mouse pointer.

Going Paperless for the Law Office with Ethical and Practical Considerations

J. Remote Connection.

- You can use remote desktop connection www.microsoft.com to connect our office with my home office. While in the home office I login through the Internet into our office network. When logged in I am viewing the same page that I would you if I were in the office.
- Using my home office computer is just like using my computer and telephone in the office.
- You can work anywhere in the world.

K. Smart Phone, iPhone, iPad and Apple watch.

- As you are aware there are many brands of smart phones available.
- Our firm uses an iPhone and iPad. Although an iPhone and iPad are fairly expensive they have greatly increased our efficiency. We are now linked to our office and personal e-mails, calendar, and contacts.
- I also use an Apple Watch.

Going Paperless for the Law Office with Ethical and Practical Considerations

- The iPhone and Apple Watch are linked to the Mixie VOIP phone and rings when my office phone rings.
- Other ways to Communicate. Too many ways to count, but a few are: Facebook, Twitter, LinkedIn, Video Conferencing, Conference Calling, Join Me, Mixie, Skype and many others.

L. E-mail.

- Outgoing email attachments are generally sent in Adobe Acrobat and should be secured.
- Make sure the recipient has an appropriate Adobe reader version. We put the following statement on the cover of our e-mails.

Opening Adobe Attachments

Most email attachments are sent as Adobe Acrobat files. If your email program does not automatically open email attachments, you may have to open Adobe Acrobat before attempting to open the documents. If you do not have Adobe Acrobat Reader you can download the Adobe Acrobat Reader, which allows you to open and print Adobe files.

Going Paperless for the Law Office with Ethical and Practical Considerations

There is no charge for Adobe Acrobat Reader and you can download it by double-clicking the following link to the Adobe website:

www.adobe.com/products/acrobat/readermain.html.

If you encounter any problems with the transmission of these documents, please do not hesitate to contact us.

M. Microsoft outlook.

- We have found that the most inexpensive program to use for our calendar and contacts is Microsoft Outlook.
- We have more than 11,000 contacts in Microsoft Outlook which as I said is linked to our Mixie VOIP telephone system.

N. Voice recognition software.

- Dragon NaturallySpeaking is voice recognition software that allows you to speak into a microphone and the words are typed in the software document I am using at the time. I use Dragon NaturallySpeaking every day. The program has greatly increased my productivity.
www.nuance.software.net

Going Paperless for the Law Office with Ethical and Practical Considerations

- This outline was dictated by me using Dragon NaturallySpeaking. A secretary did not type this outline.

O. Anticipate problems.

- You can easily deal with most problems. I can assure you that the computer will not blow up.

P. Security.

- Cyber security.
- Digital files are more secured than paper. Digital files and data can be backed up, and protected.
- Be very careful about opening incoming emails.
- Cyber Security Audit, training and Insurance.

Q. Conclusion.

- Do not attempt to go paperless or shred any paper without consulting with your IT professional and putting a first-class backup system in place.

Going Paperless for the Law Office with Ethical and Practical Considerations

- Depending on the age and open-mindedness of your staff, you may get pushed back about going paperless. Many overworked secretaries are not thrilled with learning new ways of doing things. With time and training our staff loves the concept of a paperless office. The staff is always giving us new ideas to help us achieve a truly paperless office.
- We now have the technology to be a paperless office and we all should have the desire to be there sooner than later. There is no good reason NOT to be as paperless as possible. We can learn from each other. We will be better lawyers as a result of our efforts.

Going Paperless for the Law Office with Ethical and Practical Considerations

Ethical Considerations: Pam Barker

A. ABA Model Rules of Professional Conduct

- The Rules of Professional Conduct govern lawyer's behavior in a paperless practice and generally.
- Rule 1.1: Competence. Lawyers have a duty to keep abreast of changes in the law and their practice, including the benefits and risks associated with relevant technology.
- Rule 1.6(c): Confidentiality. Lawyers have a duty to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, client information.
- A lawyer's efforts to prevent the unauthorized access to such information are judged by a reasonableness test.
- Rule 1.6(c) has not been adopted in Alabama, Arkansas, D.C., Georgia, Hawaii, Indiana, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Rhode Island, South Carolina, Texas, and Vermont.
- Rule 4.4: Respect for Rights of Third Persons. Under the Model Rules, a lawyer

Going Paperless for the Law Office with Ethical and Practical Considerations

who receives a document or electronically stored information and knows or reasonably should know that it was inadvertently sent has a duty to notify the sender.

- Rule 5.3: Responsibilities Regarding Non-Lawyer Assistance. Lawyers have a duty to make reasonable efforts to ensure the services are provided in a manner that is compatible with the lawyer's professional obligations when using non-lawyers outside the firm, such as a Cloud system to store client information or a document management company.

B. Rules → Real World

- Let's take a look at how the Model Rules of Professional Conduct work in conjunction with the contemporary practice of law and the paperless law office.

C. Artificial Intelligence

- One example of an expanding technology that can be used in a paperless law office is artificial intelligence.
- Ross Intelligence is an example of artificial intelligence. It is a tool that uses IBM's

Going Paperless for the Law Office with Ethical and Practical Considerations

supercomputer “Watson” and algorithms to quickly conduct legal research and prepare legal memos.

- This brings up ethical considerations. Such as: What will a lawyer need to do to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations, pursuant to Model Rule 5.3? How will a lawyer be sure to comply with Model Rule 1.1 and keep abreast of relevant technology? Can a lawyer using this technology effectively safeguard information and maintain its duty of confidentiality under Rule 1.6? Is there potential for an unauthorized practice of law issue?

D. Meta Data

- Another example of an expanding technology is the use of meta data. Meta data is data about data that is automatically created in certain applications, such as Microsoft Word. It provides information about other data. It can provide information such as titles, keywords, versions, creation date, file type, and other technical information.

Going Paperless for the Law Office with Ethical and Practical Considerations

- Certain types of meta data may constitute information relating to the representation of a client, thus triggering ethical obligations such as confidentiality and potential violations of protections from attorney-client privilege and the work product doctrine. For example, metadata can demonstrate when data was entered into a database and who entered it—information that could be critical in a products liability case.
- Ethical considerations arise if a lawyer sends and another lawyer receives a document that contains metadata. Such as: Has attorney-client privilege been waived? Did the attorney breach its duty to prevent the inadvertent disclosure of confidential information? Can a lawyer who receives an electronic version of a document ethically “mine” or review the metadata in the document? State and local ethics commissions are divided on the answer.
- A sender of a document has a duty of reasonable care to avoid inadvertently disclosing confidential information under Rule 1.6, but what comprises “reasonable care” varies by jurisdiction. There are various tools lawyers can use to “scrub” or remove metadata before sending a document. For example, Workshare is a program that strips metadata from word documents before transmitting them over email. Even more simply,

Going Paperless for the Law Office with Ethical and Practical Considerations

converting a document to PDF can remove some metadata.

- Whether the recipient of metadata can ethically mine or review the metadata is an unsettled issue.
 - For example: Maryland and Vermont generally allow metadata mining. Colorado and West Virginia only allow it if the recipient does not have actual knowledge that the metadata was sent inadvertently. New York and Maine prohibit metadata mining regardless of knowledge of inadvertent disclosure. Minnesota and Pennsylvania use a case-by-case approach.
- Lastly, under Rule 4.4(b), the recipient may have a duty to notify the sender if he or she discovers sensitive information and knows or should know that it was sent inadvertently.

E. Cloud Computing

- Another example of an expanding technology which intersects with the Model Rules of Professional Conduct is Cloud Computing
- The use of cloud computing has been growing in recent years. The ABA reports

Going Paperless for the Law Office with Ethical and Practical Considerations

that cloud usage is at 54.6% in 2018, with solo and small firms leading the way.

- A 2018 survey from the ABA asked cloud users to identify their biggest concerns and “confidentiality/security concerns” were number one with 63%. While it is possible for lawyers to ethically entrust client information to the cloud and lawyers can use cloud computing services in their practices without breaching their duty of competence or confidentiality, it will not happen without effort.
- Under Rule 1.6, a client may require the lawyer to implement special security measures not required by the Rule or may give informed consent to forgo security measures that otherwise required.
- Under Rule 1.15, lawyers have a duty to safeguard client property, so lawyers need to be candid with clients about how their practice utilizes technology and the risk associated with it, so that clients can make appropriate informed decisions.
- As mentioned, under Rule 5.3, there is a duty to monitor the data security practices of third-party cloud vendors to ensure that they

Going Paperless for the Law Office with Ethical and Practical Considerations

are consistent with a lawyer's ethical obligations.

F. Cyberattacks

- ABA Formal Opinion 483: In response to a data breach, state statutes breach notification statutes create obligations for businesses. In addition, under Model Rule 1.4, lawyers have an ethical obligation to notify clients of a breach that involves or has a substantial likelihood of involving material client information.
- Because of the sensitive, personal and material information collected, law firms are attractive targets for hackers. A 2018 Survey done by the American Bar Association reports that 1 in 4 law firms has experienced a data breach.
- It can help to be proactive rather than reactive, especially since under Model Rule 1.5 lawyers have an obligation to appropriately safeguard property of a client or third party that is in a lawyer's possession. One way firms are being proactive is by seeking cybersecurity insurance, knowing that in spite of their best effort to prevent

Going Paperless for the Law Office with Ethical and Practical Considerations

hacks and mitigate risk, hacks are an inevitable possibility.

- Cybersecurity insurance is growing in popularity, as breaches and cyberattacks become more frequent. It is intended to assist companies and other organizations with the financial aspects of data recovery and other activities in the unfortunate event of a cyberattack. Many companies use it to insulate themselves from claims from customers, employees or other data breach victims. Most cyber insurance policies also provide coverage for breach-related fines imposed by the state or federal government. However, most crime and cyber policies require a computer hack or active invasion of a computer system by a criminal to trigger coverage, which can create coverage gaps. It is important for policyholders, such as lawyers and law firms, to adequately gauge their requisite cybersecurity coverage.

- Examples of Cyberattacks:
 - The Dark Overlord: obtained over 18,000 documents from dozens of law firms relating to the extensive litigation stemming from 9/11. It encrypted the files and is threatening to release the

Going Paperless for the Law Office with Ethical and Practical Considerations

documents, which include confidential client information and internal communications, unless a ransom is paid.

- The Panama Papers: In 2015, Panamanian law firm, Mossack Fonseca, had more than 11.5 million documents leaked containing financial and client information for more than 214,000 entities and many politicians. The documents contained not only general client information but also information indicating that the law firm set up shell corporations used for illegal purposes.
 - In closing its firm, Mossack Fonseca said that “The reputational deterioration, the media campaign, the financial siege and the irregular actions of some Panamanian authorities have caused irreparable damage, whose obligatory consequence is the total cessation of operations to the public.”
- DLA Piper 2017 Breach: A DLA Piper employee mistakenly clicked on an “update” to an accounting software used

Going Paperless for the Law Office with Ethical and Practical Considerations

in the Ukraine office that was actually a phishing scam. It took 20 minutes to shut down the entire firm, which has offices in more than 40 countries. Although DLA Piper's cybersecurity team discovered the breach in 20 minutes, the virus was still able to disable the firm's telephone system and most of its computer network, including email. It took a week to get the firm's email servers back online.

- GozNym Malware Attack: GozNym is a cybercrime network that has malware specific to obtaining banking information.
 - GozNym malware attacked several entities, including two law firms, a Texas church, a California furniture store, a Mississippi casino, a German medical equipment distributor, a Kentucky farm, and a Pennsylvania manufacturing company. This attack emphasizes that because cyberattacks are digital, they can come from anywhere and cast a wide net of victims.

Going Paperless for the Law Office with Ethical and Practical Considerations

- A law firm in Washington D.C. fell victim to a phishing email that led to the malware. As a result, hackers gained access to the firm's bank account and the firm lost \$76,000.
- The GozNym malware also obtained bank login credentials from a law firm in Wellesley, MA and transferred \$41,000.
- Relatively low amounts taken, but the resulting costs to the firms are much higher (e.g. forensic costs, legal costs, notification costs, credit monitoring costs, and intangible costs, such as reputational and public relations costs.)

G. Working Mobile: Tablets, Smart Phones, Smart Watches, and WiFi

- In working from anywhere, especially in public places, lawyers need to be wary that they are not breaching any ethical obligations, such as confidentiality or the duty to ensure that third party service providers are operating in a way to meet a lawyer's ethical obligations.

Going Paperless for the Law Office with Ethical and Practical Considerations

- Technology can also be used to maintain confidentiality, such as anti-glare and privacy filters for laptops and tablets
- Additionally, with more technology available, there is more for attorneys to do and know to maintain their ethical duty of competence.
- When devices are interconnected, one can serve as a conduit to the other. For example, in the massive Target breach in 2013, hackers infiltrated Target through its HVAC system.
- It is ethically important for lawyers to have a holistic view of the firm's technology and bear in mind duties of competence, confidentiality, and safeguarding information while using it.
- For example, law firms should know where sensitive client data is stored, know the physical and electronic security measures in place around the data, and be deliberate and careful in adopting data storage models such as the Cloud.
- Further, lawyers should be careful when devices are used for both personal and professional use. The firm's software or firm

Going Paperless for the Law Office with Ethical and Practical Considerations

policies should provide adequate protections from vulnerabilities resulting if an attorney does not protect his or her personal technology.

H. Social Media

- Lawyers use social media to advertise their firms, share victories or case studies, or alert clients to recent developments.
- Lawyers need to be mindful of what they are sharing in posts and also what they are sharing with social media sites when they create accounts or link email accounts to social media pages.
- Examples:
 - Kentucky attorney's 2010 Facebook post: "Breeder's Cup and weekend partiers to call if you get into trouble or need out of jail before Monday."
 - The Kentucky Bar Association classified this as an advertisement and in response, the Bar Association passed a rule that requires all advertisements to be submitted to the Bar Association, even those on social media.

Going Paperless for the Law Office with Ethical and Practical Considerations

- An Illinois Assistant Public Defender's Blog: "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.' I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense."
[Post included client's jail ID number]
- For this and other posts about clients, the assistant public defender lost her job and received a 60 day suspension of her law license.

I. Online Client Recruitment and Forums

- As the digital age advances, more and more portions of the law office may become virtual to create constant lines of communication and assistance for clients and potential clients.
- There is a fine line between engaging in public discussion on general legal topics and

Going Paperless for the Law Office with Ethical and Practical Considerations

engaging in communications that create attorney-client relationships and run afoul of legal ethics.

- When does an online chat cross into client relationship territory? Is it enough to make certain disclosures?
- The more specific the question and the attorney's response, the greater the risk that an attorney may inadvertently create an attorney-client relationship and implicate ethics rules governing confidentiality of information and client conflicts.
- State Bar of Arizona Ethics Opinion: although it is acceptable for lawyers to provide articles or newsletters to individuals online, attorneys "should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific."
- Further, this is risk of the unauthorized practice of law (and breach of Model Rule 5.5(a)) because a lawyer may give advice to a person in a jurisdiction in which they are not licensed. It can be difficult online to know where someone is located.

Going Paperless for the Law Office with Ethical and Practical Considerations

J. Conclusion

- To an extent, technology has created a new standard of practice in the context of legal malpractice. There is more to know about and different duties to uphold.
-
- A 1957 sci-fi film has a famous line—“We are all interested in the future, for that is where you and I are going to spend the rest of our lives.” The future of the legal profession is looking more and more like the paperless law office and we are going to spend our lives living and working in the paperless law office.
- However, we cannot do so successfully without keeping in mind the ethical considerations of doing so.