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**THE 2011
HONORABLE JAMES R. BROWNING
DISTINGUISHED LECTURE IN LAW**

**ETHICS FOR AMERICAN LAWYERS IN THE AGE OF
TWITTER AND THE CLOUD**

Roberta Cooper Ramo*

Editors' Note: The Montana Law Review was honored to have Roberta Cooper Ramo deliver the 2011 Honorable James R. Browning Distinguished Lecture in Law on April 28, 2011. Each year since 2002, the Browning Lecture has brought distinguished lawyers, scholars, and judges from across the country to the University of Montana School of Law. Ms. Ramo's lecture and visit to the School of Law certainly furthered that tradition. As its namesake indicates, the Browning Lecture honors the Honorable James R. Browning of the United States Court of Appeals for the Ninth Circuit. Judge Browning was a member of the first editorial board of the Montana Law Review and ultimately served as Editor-in-Chief. He served with distinction for many years as Chief Judge for the Ninth Circuit and continues to serve on that court today.

When I spoke to the distinguished editors of the *Montana Law Review* about what topic might be interesting to the lawyers and law students and scholars of this elegant place, I had just put down a California legal ethics opinion about what duty a lawyer owes to clients when using wireless net-

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works to work on client matters or to transmit client information, and was musing at the same time about what happens when lawyers post totally inappropriate information on Facebook. (See: to Judge, “My grandmother died and I need a continuance,” but to Facebook, “I was at a party late last night and couldn’t possibly appear at trial,” for a random example, when sadly the judge was Facebook savvy.)

I am someone whose academic life was saved in the second year of law school when the University of Chicago Law School let us choose to type exams instead of write them in a blue book (this did require lugging a correcting IBM typewriter back and forth for every exam). I took the New Mexico Bar in the stacks of the New Mexico Supreme Court where they gave you a different question every hour for two and a half days and came every hour to collect your answer. At noon on the third day of the exam, everyone retired to the bar of the La Fonda hotel and waited until word came, usually about 7:00, when the list of those who passed was posted on the actual door of the New Mexico Supreme Court. Thus, for me, this is, in equal measure, a miraculous new world with vast advantages for lawyers, judges, and clients and a terrifying state of affairs that concerns me as a lawyer and a professional worrier about the state of the American democratic experiment.

We lawyers are facing complicated ethical issues in an age of instantaneous communication. We are at a time when the information of the law libraries of your dreams is open to you not just on your computer, but on your phone no matter where you are. Answers to countless questions (except perhaps what is right or just or ethical) are just a Google search away. What needs discussion is what will be the heart of lawyering in this new digital age.

This is a matter of moment because of the role of lawyers in American history. What is it that has made American lawyers so key to our democracy? Are any of those values or behaviors put at risk by the present technology and the changes that are now measured in nanoseconds and no longer in eons or even in court terms?

Let me start with a personal story about one client many years ago, and then outline the areas in which new technology requires each of us to think about our most basic responsibilities as members of the Bar, officers of the Court.

In the early 1970’s, I was asked by the American Civil Liberties Union to represent a New Mexico high school golfer who wanted to play on the high school golf team. The golfer was a 15-year-old girl. The problem was that the New Mexico Activities Association, which governed all high school sports and extra-curricular activities, suddenly realized that there were no girls’ golf teams and that my client, shockingly enough, intended to

play on the boys' team (warmly welcomed by the coach). Hard to believe as this is, at that time there were no competitive athletics open to high school girls in New Mexico and throughout most of the nation.

My soon-to-be-famous client was Nancy Lopez, then the national junior golf champion who had won truckloads of national tournaments. Over the course of the dispute, the Association made an offer to change the rule so that if a girl was a "national champion" in a sport, and no play for girls was offered in that sport, it would allow the girl to play on a boys' team. By then, we had been joined by other attorneys representing a number of high school girls who played tennis and wanted to at least have the chance of playing inter-school matches on the boys' teams of their schools.

Since this was a serious settlement proposal, I flew down to Roswell, New Mexico, where the Lopez family lived, to present the offer to them. They met me at the Roswell Airport, and I explained that under the settlement offer, Nancy would be allowed to play on the high school boys' team until there was competitive high school golf for girls. Mrs. Lopez asked me a single question: Would the girls who wanted to play tennis also be allowed to play if Nancy accepted the settlement? When I explained that none of them had even won a state tournament and would therefore not be allowed to play, Mrs. Lopez without hesitation gave me my orders: "Get right back on that plane and don't come back until all of the girls get to play."

What I wonder now is how the outcome of the case might be different, if instead of flying down to see the Lopez family in person, I had simply sent an email. Would the decision have been the same? Would Mrs. Lopez's clear direction to me have made the same enormous impact on me? I do not know about the first question, but I am quite sure about the second. Seeing those particular faces sitting in the Roswell airport, with no hesitation from Mrs. Lopez about what the right thing to do might be, galvanized their inexperienced lawyer to do whatever it took to help win the right for this one girl, and others, to do what she did best as a part of the public school program.

I raise these particular points because my concern is that the technological emphasis on how we practice law these days may put those values and results at risk. It is possible to sit in your living room, in your pajamas, and practice law all over the world. It is possible to walk down the streets of Missoula and communicate from your phone to a client or colleague in Paris or Beijing or Bangalore or Santa Fe. Whether that is ethical, whether you are licensed to do that, is another matter. But it is not only possible, it is the current practice life of many lawyers.

It is possible to decide, or have a client decide, that it is too expensive at your rates to go through countless documents as part of the preparation

for an answer to discovery requests. The client can direct, or you can decide, to delegate that responsibility to a firm in Bangalore which will for \$25 or \$50 an hour have Indian lawyers handle that task. One can transfer tens of thousands of pages through the magic of the internet or upload them to a cloud server accessible both in India and Bozeman. But that outsourced firm might maintain that its lawyers are not actually practicing law and are thus not subject to any ethical rules, like worrying about conflicts or perhaps even confidentiality. You can contract with the outsourcing firm about those issues, but they are not simply in place as a matter of any professional obligation.

A number of major U.S. firms have discovered the lower overhead of places like Montana or Cleveland and have moved their back office operations away from New York or Washington or London. The innermost secrets of their operations and the work of their clients travel every minute from the firm's front office to Cleveland or someplace else over the internet. What are the responsibilities, obligations, and liabilities as to this very swift-moving change in the way we do business? The Bankers Boxes, the litigation and closing cases that we have lugged around, are now found on a thumb drive which may or may not be safely in your pocket.

How do we resolve our ethical duties to our clients and the system, our need to be economically efficient, and our duty to be competent in this swiftly changing world?

Today I will try to bring these issues into some focus. Let me start with only a few of the direct ethical issues that are being hotly debated among scholars and those directly concerned with making the ethical rules by which lawyers are bound—the Ethics Committee of the American Bar Association (“ABA”), state supreme courts, and lawyer disciplinary boards. Lawyers like me, in practice, are trying to figure out what is the right course of action on a field of play that changes as much as a Quidditch match in a storm, with the dementors on the way.

I want to address four broad ethical responsibilities of lawyers and of firms that are directly impacted by the available technology and the rapid change in technologic standards and options.

First, Model Rule 1.1 states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.¹

Ethics 20/20, the ABA Commission on which I sit, is now debating whether we should ask the Ethics committee of the ABA and then the ABA's deliberative body, the House of Delegates, to add the following phrase to Rule

1. Model R. Prof. Conduct 1.1 (ABA 2010).

1.1: “including the benefits from technology and the risks associated with that technology.”

Second, there is Rule 1.6,² the duty of confidentiality—a duty not to reveal a client’s confidential information. But currently the rule does not have a specific direction to safeguard a client’s confidential information when using the web and cloud computing, which may be particularly important given our knowledge of hacking as a blood sport and a possible crime.

Third, there is Rule 4.4³ that relates to inadvertent disclosure of information and, for example, the question of whether and how that applies to metadata in documents transmitted to those outside the lawyer’s office or firm.

Fourth, how does the responsibility to guard client confidences apply to the utilization of outside sources for client-related tasks? These tasks range from ministerial things like scanning documents to those that involve judgment like reviewing material related to discovery requests.

Finally, and to me most importantly, I want to return to my first question. To be an accomplished American lawyer has always meant more than simply following the legal dots (which can now be done by anyone for some issues on the web, for little to no charge without us). It has meant to be an advocate and a counselor, a definer of the dreams or hopes of clients into legal reality. Among the very best lawyers are the imaginative partners and the moral conscience in complicated situations. Most basically, being an American lawyer is to be a defender of the Constitution and the Bill of Rights. What if anything about these obligations has changed because of technology?

Let us return to parse out the most focused question for lawyers in this age: what are the ethical issues that we are all facing, known or not, as communication and access changes rapidly?

Model Rule 1.1 requires that if you hold yourself out as an attorney, you must be competent to do that which you have undertaken as a professional matter. Does that now mean that you must have access for your clients to the basic technology that is required to complete your representation of them? In litigation this may mean the ability to file electronically where that is required, from the courts to the IRS or the SEC or the Secretary of State, or even the AAA in arbitration. If you are a litigator, you must have the ability to access cases to make sure that your citations are updated not just to the day anymore, but probably to the minute. In the transaction world, you must be sure that you can get the most recent IRS

2. *Id.* at R. 1.6.

3. *Id.* at R. 4.4

rules in the areas in which you work if there is a tax aspect to whatever you are doing.

Increasingly these days, because it is not only an ethical requirement but one clients are demanding, you must also have the technology that allows you to do the work in the most economically efficient way for the matter at hand. And we must deal with the desire for rapid response and perhaps the need to avoid the Pavlovian impulse to respond immediately to electronic inquiry.

The addition to Rule 1.1 being debated would require that you keep abreast of the “risks associated with technology.” What does this mean if you are the biggest firm in Montana or a solo practitioner as I was for a number of years? This issue, the risk part, appears in every part of the Model Rules that we are now discussing, protecting client confidentiality first among them.

When you buy technology, what responsibility do you have as a lawyer to make sure it is secure, that you have backup if all crashes and burns? Is it ethical to practice law and not have backups outside your physical office? Is it ethical to practice law and not have proper firewalls and passwords? Is it enough for you to hire computer and technology expertise or do you or some lawyer in your office also have the obligation to understand at some reasonably sophisticated level exactly what the technology does? Must the skill and knowledge about technology required by proposed Model Rule 1.1 be possessed by the individual attorney or by the firm?

That leads us to the second direct rule up for discussion—Rule 1.6’s requirement of confidentiality. We are all officers of the court. In our system, among other things, this gives us a unique privilege not enjoyed by accountants or other professionals. Lawyers have the ability, with rare exception, to maintain the confidentiality of all that our clients tell us or give us, or to which we have access because of the client relationship. If you put this information on the web by any means, what if anything is required by Rule 1.6?

A recent Formal Opinion of the California Bar Standing committee on Professional Responsibility and Conduct⁴ debates this very issue. The stated facts are that a firm gives its associates laptops to use for client and firm matters. The firm can and does monitor the information on the laptop and expressly prohibits access by anyone not authorized by the firm. The associate takes the computer to a coffee shop with wireless internet to work on client matters and emails the client directly. The associate also takes the computer home and uses her personal wireless network. Is that an ethical problem? The opinion is excellent and has an in-depth discussion to which

4. St. B. of Cal. Standing Comm. on Prof. Resp. & Conduct, Formal Ethics Op. 2010–179.

I commend you, but the bottom line to me is the conclusion that the attorney herself must make a conscious decision, every time, about whether the use of the technology in a particular setting meets her responsibility to maintain client confidentiality.

I want to raise an additional issue much in the news with the recent Amazon Cloud crash (I assume that Zeus was directly responsible, you know how jealous he is). It is less expensive to use so-called cloud servers to save massive amounts of material and at the same time have it accessible from virtually any place on the planet. The question is, of course, if it is accessible to you, to whom else might the material be available on an unauthorized basis? If you use Apple through Mobile Me or use Google, someone in that Cloud knows where you are every minute of the day. Are you putting your clients' confidential information at risk?

Another hot debate is about what you are required to tell your clients before you use cloud computing. My personal view is that the best practice is to tell them in some meaningful way (that is, not with the kind of waiver that Microsoft, iTunes, or anyone else gives you) and get their permission to use that technology. I would note here that not only does being a lawyer not mean never having to say you are sorry; it also does not mean that we are exempt from various federal and state laws about data protection, notification of data compromise or loss, and other issues too complicated for a luncheon address.

Third, what about guarding against inadvertent disclosures of information? And what are you required to do if you are the recipient of such information? This is the territory of Model Rule 4.4. Who even knew what metadata was two years ago? Now I think there is a clear ethical responsibility to try to ensure that nothing you send electronically has any metadata. ABA Opinion 06-442⁵ on this point is also worth reading. I see it as an affirmative obligation to scrub anything you send and equally an obligation not to look when you realize you have inadvertently been sent metadata in a document from opposing counsel. It also means that YOU AND YOUR STAFF (I want that in all capital letters) must guard against the terrifying ability of most email programs to fill in addresses that may or may not be the ones you intend to receive the communication. I am seriously questioning whether I should have this feature disabled on all of the many devices I use every day.

There is also the issue, now magnified by email and the internet, of what your obligation is when you receive unsolicited information that may be fascinating and even devastatingly useful, but that is clearly unlawfully or improperly obtained. The ethical requirement is that you must take rea-

5. ABA Formal Ethics Op. 06-442.

sonable steps to notify the lawful owner and not to use the information. This is really no different than the obligation in a real estate transaction to tell the lawyer on the other side that you know the right number is \$1,000,000 instead of \$100,000 in a certain part of an agreement when tired fingers have gone astray.

Fourth, do the ethical rules that apply to each and all of us change when we, at a client's request or demand, use outside sources? The "Bangalore option" using offshore, low-cost resources to handle discovery is increasingly used. Using offshore entities to do all manner of things has become an expected part of commerce. Even sophisticated lawyers have been surprised at the speed and depth of various services that offer all manner of legal tasks done abroad for very low prices. Discovery has been a major source of expense in complex litigation; due diligence of varying kinds requiring review of long and complex documents can also be a big ticket item for companies. Thus many services are offered that, because of the ease of internet transfer of massive amounts of information, allow trained lawyers or paralegals from other countries to take over many legal tasks.

There are many possible problems that arise from this delegation of responsibility. Are the lawyers doing the work responsible for the same conflicts of interest rules and the maintenance of confidentiality as the firm or lawyer that employs them? Are they practicing law without a license when they do this work for American law firms on matters that are solely related to the United States? The companies maintain that they are not practicing law, but rendering clerical services of a high order at a very reasonable price. Clients are often either delighted to save the money or instruct the lawyer or law firm to use offshore services in particular matters. It is possible to contract with the companies about conflicts or confidentiality, but these are boundaries of a contract, not of ethical rules. Who faces the court when the other side notes that key documents were not produced? Who faces the regulators or the client in due diligence or other transactional matters? What are the ethical requirements for lawyers or law firms when using these offshore options at either their own or the client's request? This is highly unsettled territory that Ethics 20/20 of the ABA is working hard to understand and interpret. For now, at the very least, I think the lawyer or the law firm using these resources must make sure they are disclosed and approved by the client, the firm's malpractice insurance company, and in some instances perhaps by the particular court.

None of these issues even touch on the use of Twitter or Facebook for quasi-professional uses or on firm or individual webpages—whether you might inadvertently establish a client relationship because something posted on the internet indicated you are interested in representing particular kinds of clients. For example, the President of Zimbabwe and the Widow of the

Brother of the Emperor of Japan wrote to retain me today, but I am a really good lawyer so that was no surprise to me. We must each figure out whether it is unethical on the one hand, or a breach of your advocacy of the client on the other, to search the web for all manner of information about your opposing counsel, expert witnesses, or the client on your or the other side.

But to me, the ethical part of this complicated, rapidly changing, technological world may not be the most challenging issue that we lawyers face in this age of electronic communication. I go back to Mrs. Lopez and also to Mr. Moses Burt, the lawyer with whom I traveled through North Carolina, going to tiny towns and villages to see why poor black people were not getting the food assistance from the federal government that was given to poor white people in the late 1960's. I would not have understood nor found either the truth or the solutions if I did not talk to these people in person, face to face, as opposed to Facebook to Facebook. Is it an urban legend or truth that too much electronic communication blunts our senses to the reality of pain and injustice? Am I right to worry that query-based legal research leads to rote answers that are often wrong and are never creative solutions to clients' problems?

It turns out that if we are to refute Richard Suskind's notion that lawyering is dead, we must use technology in ethical ways to its fullest and at the same time never abandon John Adams's view that he was ethically required to represent a British soldier or Judge Browning's highest values. We must continue to hone our brains, stimulate our imaginations, and remember that we are officers of the court, whether we ever go to court or not. That means that we, American lawyers, are the people who must solve the problems of our clients and the challenges of our country.

There are no excuses for failing our obligations. This democratic experiment is not a video game and we are not avatars. We are American lawyers. Our oath and our license require that we maintain our culture of fearless, learned advocacy and provide legal solutions to our clients while using up-to-date technology in an ethical manner. To meet these old and new challenges requires thoughtful inquiry, ethical sensitivity, and the will to do the right thing. We shall.

