Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity

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For the first time since the invention of the typewriter and the telephone, technology has again begun to exert a significant influence upon the practice of law. New communication technologies

1. The author's summary of the seven technology revolutions may be accessed at Richard Zorza, New Technologies with Implications (visited Feb. 19, 1999) <http://www.equaljustice.org/visions/TechConf/01newte.htm>. The seven revolutions and their implications for poverty practice are described in summary as follows:


Three: The Information Retrieval Revolution—Web Editors and Search Engines For Multi-Media, Push Technology and Intelligent Search Agents—Will Make It Far Easier to Find Information and Change the Way We Think About Information.


Six: The Identity Revolution—Security and User Authentication Innovations—Will Remove Many of the Barriers to Transactions at a Distance.

Seven: The Mobility Revolution—Mobile Computing With Radio Connection to the Net and PDAs—Will Enable Us to Be Connected Wherever We Are, Increasing Our Effectiveness, and Our Clients Ability to Be in Touch When They Need Us.
hold the promise of increased access to legal services for the public at large, and particularly for the poor. The tide of innovation has, however, triggered disquiet among experts in legal ethics, particularly in response to the practice innovations that incorporate these technologies.

Skeptics fear that lawyers, paralegals, and legal services organizations, in the rush to serve individual clients who are ever more desperately in need, will do so in violation of long-standing and carefully crafted ethical rules, which were designed to protect values such as loyalty, zealousness, confidentiality, competence, and commitment in the administration of justice. At its most intense, this fear fuels declarations that new means of assistance constitute the unauthorized practice of law. Conversely, advocates of innovation fear that outmo-

_id._ A more general and theoretical analysis of the effect on lawyers appears in M. Ethan Katsh, Law in a Digital World (1995). Katsh emphasizes changes in communication, see id. at 21-49, and the structure of legal information, see id. at 65-91. Neither the word “ethics” nor the phrase “professional responsibility” appears in the index to this work. See _id._ at 291-94.

2. The urgency of the lack of legal assistance for those of limited means is overwhelmingly documented. See, e.g., Russel Engler, _And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks_, 67 Fordham L. Rev. 1987, passim (1999) (discussing barriers faced by unrepresented litigants inside and outside the courthouse).

3. As a general matter, references throughout this Response to “the rules” denote the general body of disciplinary enactments that have grown up over the years. Where there are conflicts between those enactments, the word refers to the Model Rules of Professional Conduct (1998).

4. For a careful discussion of these issues in one context, see Mary Helen McNeal, _Redefining Attorney-Client Roles: Unbundling and Moderate Income Elderly Clients_, 32 Wake Forest L. Rev. 295 (1997). Professor McNeal’s paper is broadly sympathetic to the goals of those seeking to provide broad assistance, but rightly insists that these ethical issues can not be avoided. See _id._ at 303-05. She explicitly articulates questions at which others have only hinted in more informal forums. See _id._ at 308-11.

For a proposal intended to alleviate some such concerns, see John S. Jenkins, _Speakers Propose Model Rules Amendments to Ethics Commission_, Prof. Law., Spring 1998, at 10, 12 (recommending to the Commission on Evaluation of the Rules of Professional Conduct that Model Rule of Professional Conduct Rule 1.2 [C] be modified by adding language that “[l]imited objectives may be particularly appropriate in the case of moderate income clients” and that the comment thereto be similarly enhanced).

For an example of a rules change that illustrates how intense are the fears around these issues, see _In re Amendments to the Florida Family Law Rules of Procedure (Self Help)_ , No. 93-319, 1998 WL 892680 (Sup. Ct. Fla. Dec. 3, 1998) (adopting rules permitting the establishment of court-approved family self-help programs). The Court engaged in a detailed discussion of the problem of staff directing litigants to applicable statutes and emphasized the need for staff of such programs not to “advise a litigant as to which rule or statute applies because that would constitute the [unauthorized] practice of law,” _id._ For ethical opinions in the non-court “brief service and advice” context, which reflect this disquiet, see _infra_ note 22.

ded rules or interpretations will delay necessary experimentation and resulting advancements in the delivery of legal services.6

Similar concerns can arise as technology makes possible closer client-serving relationships between legal service providers and community organizations. Through these partnerships, community organizations are becoming the gateway for access to justice for the poor, blurring the lines between lay and professional organizations and their respective responsibilities.7

Likewise, tensions emerge as communication technologies and the desire to ease access to courts prompt courts to employ computers and the Internet to reach out to assist unrepresented litigants.8 The extent court's decision is likely to have limited direct legal effect beyond the boundaries of Texas. In reaching its result, the court rejected the argument that application of the statute prohibiting unauthorized practice of law required there be "a personal relationship between the party charged with the unauthorized practice of law and the party who benefits from the 'advice,'" even though defendant urged that "this is the logic of almost every court to consider the issue." Id. at *6. The district court explicitly relied on the prior Texas case law which articulates the extreme position that the statute prohibits the sale of "a manual entitled 'You and Your Will: A Do-It-Yourself Manual.'" Id. at 5 (citing Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162 (Tex. App. 1992); Palmer v. Unauthorized Practice of Law Comm., 438 S.W.2d 374 (Tex. App. 1969)). Moreover, the district court's holding that the prohibition is conclusively valid because it is content neutral, see id. at *8 (citing United States v. O'Brien, 391 U.S. 367 (1968)), seems rather untenable insofar as the prohibition is targeted at self-representation—a constitutionally recognized value. See Bates v. State Bar, 433 U.S. 350, 351-52 (1977) (noting "that most legal services may be performed legally by the citizen for himself"); Faretta v. California, 422 U.S. 806, 807 (1975) (recognizing the Sixth Amendment right to represent oneself at criminal trial).

6. See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons, 67 Fordham L. Rev. 1751, Recommendation 48, at 1774 (1999) [hereinafter Recommendations] ("Recent experiments in the delivery of legal services—some but not all driven by technology—suggest the possibility of significant increases in access to services, provided the rules governing the practice of law are not interpreted to inappropriately narrow the delivery and evolution of services.").


8. Specifically, courts are moving towards a technology-assisted court access agenda. See Jona Goldschmidt et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers 76-78 (1998) (discussing the Quick Court System in Utah and Arizona); Engler, supra note 2, at 2001 & n.66.

As to the belief that these initiatives should create natural partnerships with legal service providers whose institutional commitment to court access parallels that of the courts, see Richard Zorza & Joyce Klemperer, The Internet-Based Domestic Violence Court Preparation Project: Using the Internet to Overcome Barriers to Justice, 4 Domestic Violence Rep. (forthcoming 1999) (manuscript at 1, on file with the Fordham Law Review) (describing an Internet project developed in partnership among courts, domestic violence programs, and legal services programs). The evaluation of that
and complexity of these tensions will develop as courts and legal service providers enter into closer cooperative relationships and undertake joint projects to address these growing problems.9

This Response does not attempt to provide answers to specific questions under the current ethical rules.10 Rather, it suggests alternative ways to think about the broader issues we face as legal providers in a modern era. This Response argues that the skeptics' fear of ethical ruin is misplaced. Rather than threatening the practice of law, technological innovation can dramatically advance the values that the ethical rules seek to protect.11 Such advancement, however, can be achieved only if technological innovation is carefully deployed, with an understanding of the underlying values that the ethical rules seek to protect, and if the ethical rules that govern practice are interpreted and modified to reflect the enormous potential of these innovations.12

9. Among the problems that arise are the danger that court staff be perceived as practicing law, and the fear that courts will compromise their neutrality if they become associated with such projects.

10. Cf. Recommendations, supra note 6, Recommendations 47-64, at 1774-78 (setting forth specific proposals for dealing with issues of such limited legal assistance).

11. Many of the tactics being proposed and implemented assume the rapid spread of broad access to the Internet among even the poor. Some advocates have questioned the validity of the proposition.

The author believes that in the relatively near future Internet access will be as widely available as cable television, and that any other assumption defeat our duty to protect the poor in, and take advantage of the opportunities offered by, a far more technologically integrated world. See generally Pew Research Ctr. for the People & the Press, Technology 1998: Summary (visited Feb. 19, 1999) <http://www.people-press.org/tech98sum.htm> (noting that the Internet audience is widening among demographic groups).

Even if this assumption is overly optimistic with respect to home usage of the Internet, it is crystal clear that access to the Internet through libraries, work, and schools is accelerating exponentially. It is suggestive, although not determinative, that in a small unpublished survey of litigants in the Manhattan Housing Court conducted in the first half of 1998 by law students at Fordham Law School, 60% reported having some form of access to the Internet—although not necessarily that they were using it. See Memorandum from Walter Luers & Alejandro Forte, Fordham Law School, to the Fund for the City of New York (Apr. 2, 1998) (on file with the Fordham Law Review) (reporting survey results).

In any event, the fact that access is increasing for all income and educational levels is beyond challenge. Advocates must prepare for that world when it comes. Moreover, the more we build systems that provide concrete help to those who have that access, the greater the incentive to provide such access and to develop the technologies that will support it for all regardless of technological and non-technological literacy.

If this analysis is correct, then the implications for the guardians of the ethical behavior of our profession are profound. Rather than positioning themselves as a bulwark against technologically-driven erosion of our professional values, they should be engaging in a cooperative endeavor with technology and service delivery innovators, to shape both emerging technologies, the ways in which they are used, as well as the technical language of the rules and the interpretations thereof to advance our shared values.  

I. **Ethical Concerns and Practice Innovation: The Example of “Brief Service and Advice”**

The fear of technologically-driven innovation is perhaps best understood by the standard example of “brief service and advice.” The same or related concerns, however, can be raised for some of the other novel forms of delivery of legal services. As alternatives to traditional “full service” representation, these innovations include web-sites designed by legal service providers that assist litigants with legal information; court preparation, and the completion of forms required for court; systems by which attorneys provide brief e-mail advice for free or for a small fee; other forms of formal or informal

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13. For a proposal intended to alleviate such concerns, see Jenkins, *supra* note 4, at 12, which describes attempts to modify Rule 1.2 (c) to ensure that the Rules do not inhibit access to justice for the poor.


16. For example, an on-line service run by Richard S. Granat states: We offer legal advice primarily by EMAIL and telephone. The advantage of using EMAIL, as compared to a telephone call, is that you can compose your thoughts and write out a more complete history of your case. You can
unbundling, such as the "ghostwriting" of forms,\textsuperscript{17} and pro se clinics,\textsuperscript{18} in which groups of individuals are given sometimes focused, but short-term, collective advice.\textsuperscript{19}

The "brief service or advice" methodology of legal representation has grown out of the dwindling availability of traditional representation. Though it can take on many forms, this practice consists essentially of a brief interaction with the lawyer (or supervised paralegal) that results in the delivery of a discrete, unbundled service to the client. The interaction significantly advances the client's legal interests at minimal marginal and average cost to the legal services entity.

Though such services have long been offered, recent technological innovations have made their administration much more practical. In some cases, extensive legal content is electronically organized to help the provider answer questions quickly, efficiently, and accurately. In others, a summary of the actual interaction is maintained electronically, allowing routine or spot supervisory review. Some systems provide legal services in the form of electronically-generated and standard printed outputs. In most such systems, the telephone is the access medium, radically reducing administrative overhead and allowing the technology to take care of queuing and appointment scheduling problems.\textsuperscript{20}

\begin{itemize}
\item also attach documents to an EMAIL message and send it to us for review.
\item The cost of our EMAIL service is $35.00 per incident or question.
\item 17. See, e.g., Colorado Supreme Court Rules Comm., Proposed Amendments Concerning Limited Representation of Pro Se Parties, Colo. Law., Aug. 1998, at 101 (presenting proposed rules, apparently not adopted, that would have permitted attorneys to prepare pleadings which would have been required to disclose on their face the assistance and identity of the attorney, without that preparation or statement constituting an entry of an appearance for other purposes).
\item 19. Strictly speaking, this list includes at least three kinds of projects, (1) those that provide "pure" information, in the sense that they do not purport to customize or focus that information into a specific context; (2) those that produce a product that is customized to the particular facts, but do not provide individualized advice; and (3) those that offer completely individual service, but not in the traditional context. The "pure" information sites offer the advantage of assisting the client to take on a more empowered role in his or her dealings with the professional, but do not necessarily raise all of the ethical concerns surrounding (2) and (3).
\end{itemize}
That such systems allow legal service providers to reach a significantly larger number of people is undisputed.\textsuperscript{21} Whether the recipients receive services that are fully consistent with the ethical rules, however, is a contested issue. In the context of "brief service and advice," critics question the existence and adequacy of client autonomy, confidentiality, zealousness, competence, and continuity of representation.\textsuperscript{22}

A. Client Autonomy and Informed Consent

As a practical matter, most clients who make use of "brief service and advice" services—or indeed any alternative to traditional full service representation—do so as a last resort. They can not afford traditional representation in the market and they have been, or are likely to be, rejected from free services, either because of income limitations or because the free legal services providers are hopelessly overloaded. Concerns arise that these circumstances force clients to accept far from ideal service either without knowing the significant downside to the service, or while knowing it, having no choice but to accept it.

For example, brief service may consist of the preparation of a pleading, but the client may have no idea how to use that pleading effectively in court. Or the lawyer may advise the client to follow a course of action without a full analysis of the costs and benefits of alternative remedies. At a minimum, a short-term client who lacks ongoing representation and support may encounter far more complex situations with neither the tools to deal with them, nor the ability to recognize that such tools are needed.\textsuperscript{23}

\textsuperscript{21.} See Increasing Delivery Capacity, \textit{supra} note 20, at 19.

\textsuperscript{22.} See McNeal, \textit{supra} note 4, at 311-18.

In the related fee-for-service context, the following ethics opinions address related ethical issues: Committee on Att’y Adver., New Jersey Supreme Court, Opinion 17 (concluding that establishment of a "900" service is not per se unethical, but that proposed disclaimer language that "[y]ou should consult with an attorney of your choice prior to taking any action based on the answer or advice provided" would be "in contravention of established law and public policy"); Ethics-Advisory Comm., Kansas Bar Ass’n, Ethics Op. 92-06 (1992) (concluding a "900" telephone service called "Dial-a-Lawyer" is not per se unethical, but that "the practice does lend itself to ethical abuse, especially fee-splitting between non-lawyers and lawyers, and attorneys must take great care to insure that such practices are well within the boundaries of [governing rules]"); Ethics Advisory Opinion Comm., Utah State Bar, Opinion 96-12, (concluding that such a system is not "per se unethical. However . . . all the ethical rules apply to that relationship" and distinguishing pro bono legal referral programs where legal topics, legal access, and legal service providers are discussed, but where no legal advice is rendered, no fee is charged, and any attorney-client relationship is disclaimed), available in 1997 WL 45137.

\textsuperscript{23.} This dilemma is generally explored in McNeal, \textit{supra} note 4, at 322-23. The applicable rule, Model Rules of Professional Conduct Rule 1.2 (1998), permits the client to agree to a restriction on the mode of representation. However, any limitation must be consistent with Rule 1.1. See \textit{id.} cmt. 5. Rule 1.1 requires generally effective representation—thus a lawyer cannot ask a client to agree to limited representation if that will be ineffective.
The skeptics worry that, at best, lawyers or legal service organizations are controlling the choices that clients are making about representation, and, at worst, that they are imposing the decisions upon clients.\textsuperscript{24} The concern is particularly acute with respect to elderly clients or those with a diminished capacity to understand or make legal choices.\textsuperscript{25}

B. Confidentiality

Concerns about confidentiality stem from the fears either that "brief service and advice" providers will not feel bound by an ongoing obligation of confidentiality, or, perhaps more likely, that the huge volumes of cases will undercut organizations' practical ability to enforce the rules of confidentiality. Confidentiality concerns are compounded further by the argument that brief service relationships are not attorney-client relationships at all, and therefore not governed by the rules.\textsuperscript{26}

C. Conflict of Interest

Skeptics fear that limited service providers will be sloppy about preventing conflicts of interest. In particular, there is concern that practitioners who view the attorney-client relationship as limited to the brief period of service or advice will become insensitive to their obligations to forebear from acting against the interests of those to whom they have ongoing obligations. A high volume of clients might be viewed as increasing this risk.\textsuperscript{27}

D. Zealousness and Loyalty

There is also concern that practitioners who engage in only brief encounters with their clients will not develop the intense loyalty to those clients that the profession demands. Rather, they will mentally compartmentalize and archive their cases without any interest in the ultimate outcome. This detachment would thwart the lawyer's duty to

\textsuperscript{24} For purposes of this discussion, one should acknowledge that this imposition is indeed undesirable. Of course, in one sense this ignores the fact that the market is already using its invisible hand to enforce such choices without any recourse for the vast majority of litigants and potential litigants. A client who cannot pay for anything that is available because only full representation is available has even less choice than one who can afford only brief service.

\textsuperscript{25} See McNeal, supra note 4, at 335.

\textsuperscript{26} See Model Rules of Professional Conduct Rule 1.6.

\textsuperscript{27} The governing Model Rules of Professional Conduct are 1.7, 1.8, and 1.9. This concern is not be confused with the related issue of imputed conflicts. There is debate among those who serve the poor as to whether application of imputed conflict rules in this context does more harm than good. Cf. Center for Prof'l Responsibility, American Bar Ass'n, Ethics 2000 Proposes Work Plan Issues to Be Considered, (visited Feb. 19, 1999) <http://www.abanet.org/cpr/wkpliss.html> (proposing Rule 1.9(a) and (b) to deal with former client conflicts).
optimize her contribution to achieve an outcome in the client’s best interest.

E. Competence

The competence concern is closely related to the zealousness concern. At an extreme, critics doubt that anything other than traditional “complete” representation can constitute fully competent representation, as it is traditionally defined. They doubt that a lawyer can handle only a small part of a client’s need in other than an incompetent way—that giving advice, rather than doing the work oneself, is inherently inadequate. A case can be seen only as a whole, and therefore a partial focus will lead to less competent work, even on a small task.

F. Continuity of Representation

Perhaps the most troubling issue, derived in part from the concerns already enumerated, is that of continuity of representation. Traditional ethical rules place—or at least appear to place—a high value on continuity of representation. They put limitations on an attorney’s freedom to withdraw from representation, particularly in the litigation context. Critics claim that partial service models implicitly or explicitly violate those rules.

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28. This concern is governed by Model Rules of Professional Conduct Rule 1.1. It is also impacted by Rule 1.2, dealing with limitations on the means of representation. See id. Rule 1.2.

29. See id. Rule 1.16.

30. Model Rule of Professional Conduct 1.16 puts strong limitations on withdrawal from representation, by creating an assumption of continuing representation unless it is possible to withdraw “without material adverse effect on the interests of the client.” Id. Rule 1.16(b). Withdrawal may also be appropriate under specified circumstances, including “other good cause for withdrawal.” Id. Rule 1.16(b)(6). These values also find strong resonance in the legal services culture, in which craft pride and an intense desire to minimize the “ghettoization” of clients combine to cause legal services professionals to emphasize that there should not be one set of rules for the rich and another for the poor.

It is the strong personal view of the author that the rules themselves should be stated neutrally with respect to the income level of the client, and even the market status of the legal service provider. However, the rules should be explicit in deciding whether to find a non-de minimis violation, taking into account both the alleged violator’s purpose in adopting a challenged practice, and the context in which it occurs, as well as all efforts made to advance the values behind the rules.

Thus, a legal services program that had adopted a challenged and ultimately disapproved method of assisting clients, but had done so to increase access to justice, without commercial benefit, and in an attempt, albeit unsuccessful, to meet the values of the rules, should be treated very differently from a commercial provider that cut ethical corners to maximize profits. See generally infra note 93 (discussing “state of mind” and “intent” defenses to violations of the Rules).
II. THE POTENTIAL POWER OF TECHNOLOGY TO TRANSCEND ETHICAL CONCERNS

Regardless of the specific service methodology to which it is applied, technology can be deployed not merely to mitigate these ethical concerns, but to transcend them. The remainder of this Response will discuss possible transcending technologies, first without regard to the specifics of the "brief service and advice" context, and then, by way of brief example, in that context.

In any area of innovation, proponents and critics should identify how transforming capacities can be used to enhance the ethical values of the profession, rather than focusing on the dangers. To assist this process, this Response will conclude by proposing general ways in which the deployment of new technologies can be enhanced, rather than hindered, by the ethical enforcement and rule-making environment.

A. Client Autonomy and Informed Consent

As a general matter, emerging technologies offer enormous opportunities for expansion of client autonomy and informed consent in the attorney-client relationship.31

1. Knowledge

First, emerging Internet-based technologies enable the client to know far more about the law of his or her case than ever before. On their own or at libraries or community centers, clients can inform themselves in detail about the governing law, long before they deal with the advocacy professional.32 They can communicate with others...
in similar situations and share common experiences. Indeed, lawyers are already reporting informally that their clients are using these tools to demand more from the attorney-client relationship.\textsuperscript{33}

2. Communication

Secondly, electronic mail, voicemail, and other technologies allow clients to keep in closer contact with their attorney than before.\textsuperscript{34} This trend is not limited to the higher income client.

3. A Wider Range of Representation Tools

Thirdly, technology is making possible a much wider range of representation and self-representation tools. Fully interactive web sites that diagnose situations and prepare court pleadings and on-line forms,\textsuperscript{35} to name just two already in extensive use, are technology-based innovations that give both the attorney and the client a far wider range of problem solving tools from which to choose.

4. Shaping the Interaction

Perhaps most importantly, technology can be used to shape the interaction between the professional and client to maximize client autonomy. Specifically, emerging technologies will enable the professional and client to quickly and efficiently obtain and share enough information about the problem the client is facing, in order to make a jointly informed diagnostic decision. On-line, Internet-based question-and-answer software can be programmed to walk users through the key questions to elucidate the underlying circumstances of a client’s problems.

The client, or the client and attorney together, can walk through a series of questions about the case. In a domestic violence case, for


\textsuperscript{34} For focus on the dubious effectiveness of lawyer-client communication in the current non-tech context, see Clark D. Cunningham, \textit{Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform}, 61 Fordham L. Rev. 1959, 1959-61 (1999) (discussing inadequacy of current research, using models from the medical field and progress in development of an international standard survey form).

\textsuperscript{35} See \textit{Maryland Law Online}, supra note 14.
example, the victim can be asked about out-of-state orders, custody disputes, and other possible complexities. The output can be used jointly to determine, in a far more informed way, the best and safest way to proceed—the ultimate test of client autonomy and informed consent.

These new tools bring together a better-informed client with a better-equipped professional, and give the two additional diagnostic and communicative means to facilitate a detailed, multi-faceted diagnostic process that optimizes client choice. In addition to the ways that technology can be used by the lawyer to provide higher quality representation, it can provide opportunities to improve client autonomy and informed choice.

B. Confidentiality

As a general matter, technological innovation surely has advanced—and will continue to advance—the protection of confidentiality.

1. Control Over Data

Put most simply, the key to technological enhancement of confidentiality is control over data. When most information is stored electronically, it is—or rather can be—far more strictly controlled. Electronic storage of client interviews, diagnoses, and other documents related to representation restricts access to those authorized to review those materials—they are not left “lying around” like their paper counterparts for anyone to see. Obviously, the foregoing depends on implementation of well-designed security systems, as well as the management systems to support those systems.

2. Tracking of Access

The capacity to track and keep detailed records of all access to confidential files, long standard in sophisticated systems, is particularly important. It should be noted, however, that systems protecting large databases, such as criminal records or domestic violence orders, are far more effective in this respect than attorney case file systems, many of which are cobbled together with simple databases and word

36. There is little dispute that automated document assembly, computerized research, and communications technologies have enhanced the quality of underlying representation. See, e.g., Marc Lauritsen, Delivering Legal Services with Computer-Based Practice Systems, 23 Clearinghouse Rev. 1532, 1532 (1990) (seeking to familiarize legal services personnel with practice system concepts); Marc Lauritsen & Ronald W. Staudt, Legal Technology in the Private Sector—Why Should We Care? (last updated Sept. 1998) <http://www.equaljustice.org/visions/TechConf/02privpr.htm> (discussing how private sector lawyers are utilizing information technology).
The technology of small law office conflict checking continues to advance, and large law firm software is a major industry.

3. Encryption and Security

Continual advances in encryption make it easier to protect routine electronic communications from eavesdropping. These advances allow for enhanced privacy in the routine context. As a practical matter, obtaining data from a well-protected site is more difficult than generally realized—at least where what is sought is one particular piece of data, such as my plea bargain, rather than a general set of data, such as any valid credit card number.

In any innovation context, the overall conclusion remains, however, that technology can be used to enhance confidentiality by securing and tracking all access to information, the release of which would violate the shared value of confidentiality.

C. Conflict of Interest

In the innovation context, conflict of interest concerns can also be assuaged, rather than intensified, by appropriate deployment and enhancement of technology.

1. Indexing

The critical issue for conflict of interest is indexing. If a legal provider cannot identify its conflicts, it can hardly avoid them. For this reason, burdensome prophylactic rules of imputed conflicts have been created, in an attempt to avoid even the possibility of an actual con-


41. In a sense, the sheer volume of information on the Internet and the sheer number of people accessing that information often provide the best protection. More specifically, the Internet Domestic Violence sites have been built with careful attention to security maximization. *See* Zorza & Klemperer, *supra* note 8 (manuscript at 3-5) (discussing use of data deletion and encryption to prevent access to potential life-threatening address and identification information).
conflict arising. The inconvenience of these rules, and the attempts to get around them by relaxing or ignoring them in particular contexts, have put perhaps the greatest pressure on current ethical structures and created the greatest tension about whether the rules are “out of date” or disregarded. Computer indexing technologies are advancing all the time, however, increasing the lawyer’s ability to identify actual conflicts with each advance.

2. Use of Additional Information

Moreover, increases in public access databases are facilitating the exchange of additional information about clients, potential clients, and their relationships with one another, that should make it easier to identify these conflicts much earlier in the intake process. For example, legal providers might use fully automated processes not merely to index names, but also to prophylactically identify likely conflicts, through access to electronic court records, family records, and the like. Similarly, offices that have conflict avoidance and priority policies, such as “prime custodial parent,” might use this software to begin to identify the potential client’s status with respect to the policy, before any substantive interaction with the client takes place. Of course, once any substantive interaction has occurred with the undesired client, the desired client has been conflicted out.

42. The intensive discussion in Ethics 2000 about relaxation of these rules in the poverty context is the best example. See, e.g., Center for Prof’l Responsibility, American Bar Ass’n Ethics 2000—July 31-August 1, 1998. Minutes of Meeting (visited Feb. 19, 1999) <http://www.abanet.org/cpr/073198mtg.html> (discussing Model Rule 1.10, Imputation of Personal Interest Conflicts); cf. Recommendations, supra note 6, Recommendation 52, at 1775 (“There should not be two systems of justice, one for the poor and one for those with resources. Ethics provisions applied to limited legal assistance must not be based on the ability or inability to pay for that assistance.”).

43. For example, even the word processor on which this paper is being written offers “sounds like” as one of the options in the “find” menu. Not so long ago this was a high-end database feature.


45. Many legal services programs attempt both to avoid conflicts and to advance their substantive family-centered agenda by providing representation in family law matters only to the “prime custodial parent.” The ability to identify whether potential clients fit into this category is critical to the effectiveness of the strategy.

46. The limits to this approach should be obvious in this particular context, which is merely offered for illustrative purposes. It may not, for example, always be easy or safe to rely on data systems to provide an appropriate definition of prime custodial parent, particularly since that status may change frequently, and since programs often prefer to rely on more family-centered measures, such as time spent with the child. More generally, potential clients about which there is doubt could be routed to an external intake process such as a pro bono attorney, to limit any potential conflicts. If there is no conflict, the case could be reintegrated into the main flow of the provider.
3. Identity Improvements

Similar transformative potential exists in technologies that improve and enhance client identification ability. As more and more large governmental systems move beyond birth date identifiers to biometric identifiers—such as electronic voiceprints, retina scans and on-line fingerprints—it will become more and more difficult for undesired clients to slip through intake screening systems. Similarly, it will become easier to identify those relationships that create conflicts.

5. Walls Between Information

Technological innovation also provides far more flexibility in conflict-avoiding information “walling.” Electronic tagging of information and tracking of access instill confidence that such walling-off rules are actually being followed, and that compliance can be documented, for use by potentially aggrieved clients or disciplinary bodies.

Taken together, these areas of innovation suggest the possibility that service delivery changes can resolve, rather than aggravate, problems with actual and imputed conflicts of interest.

D. Zealousness and Loyalty

The core value of zealousness is best served by connection between client and professional—a connection that leads to the professional to act only to further, and never to hinder, the client’s interest. This value is served by both communication and visibility.

In all contexts, it must be remembered that much critical cultural information may not be well coded in databases.

47. See generally National Inst. of Standards and Tech., U.S. Dep’t of Commerce, FIPS 190 Guideline for the Use of Advanced Authentication Technology Alternatives (Sept. 28, 1994) <http://www.itl.nist.gov/div897/pubslfip190.htm#FORESEC> (describing the primary alternative methods for verifying the identities of computer system users).


49. See id.

50. See id.

51. The more critical general questions concerning the desirability and dangers of these biometric identifiers are beyond the scope of this Response.

52. See generally Model Rules of Professional Conduct Rule 1.10 (1998) (stating the general rule of imputed disqualification applied to all members of a private firm); id. Rule 1.11 (stating more relaxed rules governing successive government and private employment, and permitting “screening” of confidential information to reduce conflicts); Annotated Model Rules, supra note 31, at 173-75 (discussing the elements of the “screening” of information to avoid imputed conflicts under Rule 1.10, and noting substantial legal acceptance of such techniques in private firms, even though they are not explicitly authorized by the rules).

53. See Model Rules of Professional Conduct Rule 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). As the ABA Center for Professional Responsibility tactfully put it, “[t]he Comment is less neutrally worded, requiring ‘commitment and dedication to the interests of the client’ and ‘zeal
1. Communication and Feedback

As described above, new communication technologies such as e-mail and voicemail enhance the ability of lawyer and client to communicate on a routine basis. Perhaps less well-recognized is the extent to which these communications may be changing the routine content of attorney-client communication. The inherent informality and spontaneity of the communication can result in a broader dialogue, better informing the professional about the underlying circumstances of the client's life, and thus instilling greater empathy and zealousness in the attorney. 54

Additionally, these informal and instant communications are likely to facilitate feedback from client to attorney about the results of the representation—"guess what happened when I went back to welfare," or "that boyfriend came back last night," etc. Of course, these informal links cannot be formed if affirmatively discouraged by the professional, 55 though they certainly run the risk of overwhelming any legal services provider. If practitioners take full advantage of their benefits, however, these technologies can offer the promise of significantly enhancing connection and thus zealousness. As technology links together a much wider net of professionals and community support services on a routine and ongoing basis, we can expect even more feedback and creativity in representation. 56

2. Visibility

Equally important is the increased visibility that technology brings. The derelictions of less than zealous professionals will be more apparent to the clients and the profession in the future. The new technologies will better inform the client of the consequences of the lawyer's actions, and more broadly disseminate models of zealousness against which individual lawyers will be judged. The Internet has already brought such an increase in the visibility and transparency of government actions. 57

E. Competence

Likewise, technology can enhance competency of representation in a variety of service delivery contexts.

54. For the argument that the lawyer-client relationship is "deeply troubled" and that this is, at least in part, a result of communication failures, see Cunningham, supra note 34, at +4.
55. See id. (manuscript at 7).
56. See supra note 12.
1. Knowledge and Skills

At an absolute minimum, the deployment of technology educates the practitioner by making available and accessible legal information and a wider range of skills. Technology can disseminate examples of successful actions and communicate them in a focused way to those who are most likely to make use of them. It also can bring the professional into contact with others who are similarly situated.\(^{58}\)

2. Training Technologies

The rapidly evolving training technologies that deliver easy to understand, absorb, and search on-line materials are also promising. Such materials include video,\(^ {59} \) "knowledgebases,"\(^ {60} \) and traditional web pages.\(^ {61} \)

3. Electronic Peer Review

Thought is also being given to enhancing peer review through electronic connection. The pro bono community has recently adopted an Internet protocol which facilitates review of the work of new pro bono lawyers by more experienced volunteer practitioners, either pro bono or in legal services offices.\(^ {62} \)

4. Statistical Tracking and Analysis

Competence is also enhanced by the use of newly developed statistical and tracking systems. Such systems could take the volume of data that case monitoring systems now routinely collect and analyze it for indicia of competence and lack of competence.\(^ {63} \) Particularly when linked to court and governmental computers, such systems will make it possible to raise the level of competence in any methodology of representation. They will also make it possible to track relative outcomes by service methodology, and thus reassure skeptics and the profession that clients are not adversely affected by electing alternative representation.

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58. For example, <http://www.probono.net> brings together pro bono attorneys in skill sharing environment. See probono.net, probono.net (visited Feb. 19, 1999) <http://www.probono.net> [hereinafter Probono Homepage]. The site offers New York member practitioners in each of several focused practice areas, skill sharing, news, a calendar, helpful legal resources, and links. \textit{Id.}

59. The cost of video is not insubstantial.

60. "Knowledgebase" is a new "buzzword" describing an accessible database of knowledge.


62. See Probono Homepage, supra note 58.

Taken together, these initiatives confirm that technology is a tool for enhancement of skill regardless of the context. Given that concerns about competence tend to be raised more usually in nontraditional representation contexts, however, this capacity is important in evaluating the overall impact of service methodology innovation.

F. Continuity of Representation

Concerns over continuity of representation are closely linked to matters of client autonomy. The techniques discussed above that enhance client autonomy also suggest that lack of continuity of representation does not necessarily undercut the fundamental values of the profession. More important to this discussion, however, are uses of technology that accomplish in a nontraditional way the benefits traditionally associated with continuity of representation.

1. Feedback Systems

Computer-based technology makes possible feedback mechanisms for tracking the progress of cases that are far more effective than those that exist in the "paper" world. One of the greatest fears associated with nontraditional service methodologies is that the attorney will lose touch with—or rather never feel any obligation to be in touch with—the progress of the case. A case that seems simple and safe for the client to handle nontraditionally may become complicated and dangerous, while the client is ignorant of the risks and how to resolve them.

However, technology can provide ways in which the advocate, or perhaps the advocate's organization, can keep in touch with the progress of the case and intervene when appropriate. For example, a legal services program and a family court might cooperate to apprise one another when case circumstances change. Whenever a case that had not involved a custody dispute changed to involve a custody matter, or whenever a case in which the opposing client had not been represented changed to one in which that person is represented, the court computer system could automatically inform the original advocate and trigger, at minimum, a reevaluation of the case.

On a less formal level, electronic linkages make it easier for advocates to keep in touch with governmental and court processes and with the results of the cases. This keeps advocates better connected and more responsible.

2. Higher Skill

As discussed above, technology increases overall skill levels. As a result, the advocate can take early steps to teach the client to recog-
nize the circumstances under which she or he may need—and should ask for—more help. Moreover, providing this information earlier in the case can reduce the likelihood that intervention will be needed in the future.

3. Precision in Goals

The real need for continuity in representation is often the absence of clear goals or of a strategy to reach those goals, particularly in non-litigation situations. Higher competency, technology-assisted representation can provide for more focused goals earlier in the representation, minimizing the need for lengthy representation.

III. RETURNING TO THE EXAMPLE—TRANSFORMATIVE TECHNOLOGY AND BRIEF SERVICE

Building on these ideas, ways emerge in which brief service technologies can advance the values that the ethical rules seek to protect. Since brief service methodologies implicate so small a part of the menu of work involved in lawyering, and so small a percentage of service innovations, they necessarily only touch on the broader range of possible ways that technology could assist in advancing these values in other methodological contexts.65

A. Client Autonomy

With respect to client autonomy, part I showed that technology can make high quality brief service much easier to administer. It can also help both attorney and client to better understand the transaction and its limitations. Innovators might include the following technology-enabled features to maximize these goals in the context of “brief service and advice.”

1. Client Diagnosis Software

As suggested above, an interactive web page could be programmed to assist the client and practitioner in determining whether brief service—or any other nontraditional assistance—is appropriate.66 Such software could be extended into more general legal need diagnostic

65. Neither the changed relationships between courts and legal providers, new relationships between legal providers and community organizations, nor direct access by the poor to legal assistance technology, are significantly reached by the foregoing discussion. An example of the latter is web-based assistance in which lawyers do not take part directly.

66. The prototypes are those web pages that list situations in which full assistance from a lawyer is effectively required, and the use of the Internet site is not recommended. See, e.g., Legal Services Online—Purpose (visited Feb. 22, 1999) <http://www.fcny.org/gadvdemo/page03.htm> (making clear that those with out of state custody orders, those under 18, and those in uncertain immigration status should not make use of the site).
software, increasing the clients overall access to, and control over, legal support.

2. Computer Customized Advice on Access to Knowledge

At the end of every interaction, the provider of brief service could mail to the client a printed document listing electronic resources with additional information relevant to the client's problem. Appropriate software could select these resources according to the issues identified during the intake advice process. For clients with Internet access, the software could generate a customized web page of links to appropriate information. This page could be password protected, with a password chosen by the client during the interaction.67

3. Customized Updating of Legal Information

Similarly, those with e-mail could receive updates on changes in the law relevant to their situation. Imagine the impact of such a distribution system during periods of rapid change in the substance or administration of the law, such as those now taking place in the welfare context.68 Of course, the e-mail would be computer generated, dependent on the profile of the client established during the brief service—perhaps enhanced by information obtained from other on-line sources.69

4. Customized Internet Access Advice

With access to client addresses, the appropriate software could easily identify local public access Internet resources and provide those by paper mail to the client. Once the client had obtained Internet access, the client could receive additional information electronically.

B. Confidentiality

With respect to confidentiality, there is every reason to believe that technology can guarantee as least the same level of security for “brief service and advice” as for any other system.

67. This is analogous to the customer-individualized airline pricing pages, generated by services such as The SABRE Group, Inc., Travelocity.com (visited Feb. 17, 1999) <http://www.travelocity.com>.

68. This technology is already widely used in marketing. See id. The Institute for Interactive Technology of Cornell Law School considers that such systems would also benefit attorneys and the quality of their work, particularly when the persuasive authority of a particular judge’s rulings derives from the judge’s reputation, rather than formal appellate position. See Bruce Comments, supra note 32, at 23-24.

69. Such access might not require the consent of the client as a matter of law, but obtaining consent would surely be advisable as a matter of improving the attorney-client relationship.
1. Standardized Reminders for Advice Staff

The software that supports the brief service system could be programmed to offer standardized reminders about obligations of confidentiality. This may be more necessary than might at first appear, since some brief service organizations employ part time staff.70

2. Focused Attention to Areas of Risk

Similarly, the software—which will include summaries of relevant law that is likely to implicated by callers questions—can highlight specific areas of risk for violation of confidentiality. This might include prompts that remind the software user to emphasize to the client the importance of maintaining secrecy when talking to others involved in the disputes, as well as warn of those individuals who have mandated reporting duties.71 This could be highly customized, based on the case history and the identity of those involved in the situation.

C. Conflicts of Interest

With respect to conflicts, the enhanced capacity of technology to locate and prevent actual conflicts may make it possible to reduce burdensome prophylactic imputed conflict rules, but only with care and attention to possible unintended consequences.

1. Conflict Identification

Notwithstanding the brevity of service, issues of conflict of interest may emerge most particularly with respect to the possibility of the appearance of conflict. Even if legal service providers lack the institutional memory to recall that opposing parties have been helped by their organization, all would agree that it does not help the image of the profession if two parties to a custody dispute discover that they have both talked to the same organization, or, even worse, the same person.72

The harshest problems are removed if the advice-giver, immediately upon recognizing such a rare conflict, ceases the interaction and makes a substitute referral.74 Software that manages the interaction

70. See Moore & Kolasa, supra note 20, at 526.
71. Cf. id. at 527 (materials include “a compilation of commonly asked legal questions, with answers; a desk reference manual with outlines of the law on a wide range of legal subjects; and a monthly bulletin of recent developments”).
72. For example, those facing problems with their children and likely to talk to various social service organizations might not be fully aware of the obligations of mandated reporters.
73. There should be no real problem with creating appropriate confidentiality practices, since no advice-giver should ever communicate any such information about one person to another in any circumstances.
74. Programs would need to find ways to decline assistance that would not disclose to a caller that a competing party has obtained assistance. While in general such
through guided questions could help guarantee that such conflicts are quickly identified.\textsuperscript{75} In the family law context, appropriate software could immediately direct the advice giver to screen his or her organization's records for the relative likely to be the adverse party. In other contexts, such as housing, conflicts are far less likely and the program could be tailored to minimize this aspect of the conversation.\textsuperscript{76}

D. Zealousness

With respect to zealousness there is every reason to believe that brief service, when technologically provided, can meet appropriate client goals. Ways to advance this agenda, beyond those already listed, include:

1. Giving the Professional Focused Risk Management Information

Here again, focused brief advice software can inform the advice giver of the risks that the client faces, and make sure that the advice giver has done all that is possible to minimize these risks. The software could deliver a customized output, based on the information already provided. For example, particular information on the caller's age and home ownership status could trigger the software to highlight the additional risks that the elderly face with respect to consumer credit and the home, even if the caller had not identified that issue.\textsuperscript{77}

2. Pattern-Based Risk Assessment

Building on this, the software could also perform a risk assessment based not on experts' predictions, but rather on ongoing statistical analysis of issues identified by other similar users. For example, if the software found that women who identified a domestic violence and a school problem also frequently had a welfare problem, the software could suggest the possibility of that additional area of need. Such systems could be designed to be self-improving and self-monitoring.

\textsuperscript{75} There is a view that where advice given is truly brief, and provided the above safeguards are followed, there is no need for comprehensive conflict checking. This is not so where the same program operates both a brief service program and a traditional service program. It is necessary to check that provision of brief service would not conflict with the duty of loyalty to an existing full service client. \textit{See Recommendations, supra} note 6, Recommendation 60(a), at 1776.

\textsuperscript{76} This would help advocates of these programs to avoid becoming bogged down in demanding and costly technicalities that have no practical relationship to the underlying values of the ethical rules.

\textsuperscript{77} In a sense this is analogous to software that suggests books based on the user's interest, \textit{see Yahoo!} (visited Feb. 19, 1999) <http://www.yahoo.com>, and its links to Amazon.com, Inc., \textit{Amazon.com} (visited Feb. 19, 1999) <http://www.amazon.com>. 
Thus, changes in law would lead to changes in recommendation, without lawyer or programmer interference.\textsuperscript{78}

3. Statistics on Effectiveness of Approaches and Players

During the interaction, the practitioner could use computer-generated, customized statistics on the likely outcomes of various strategies.\textsuperscript{79} For example, in an eviction situation, the advice giver might have statistics on the success rate of various claims in particular courts or even in front of particular judges.\textsuperscript{80} Such information ensures that the advice giver will be as zealous as possible in the particular context of the situation.

E. Competence

The technology implementations enumerated above would enhance the competence of limited service by providing information and skill to the advice giver and focusing the interaction on client needs. In addition, brief service systems can employ technology-assisted monitoring and quality assurance tools.

1. Follow-Up with the Client

Software can make it easier for service providers to follow up with the client and measure satisfaction. Software can produce satisfaction surveys.\textsuperscript{81} Technology can generate phone, mail, or e-mail questionnaires, contextualized to the actual help the client received, and can make data analysis automatic.

2. Institutional Follow-Up

Systems could also be built that followed up, and measured results, with the institutions with which the client dealt, such as welfare agencies, the schools, or the courts. Indeed, such follow-up is ultimately

\textsuperscript{78} This is similar to software that automatically suggests that book or music buyers might enjoy additional titles based on the buying patterns of the entire customer database. See Amazon.com, Inc., \textit{supra} note 77.

\textsuperscript{79} An analogy is the outcome prediction software at the Midtown Community Court in Manhattan, which takes statistically validated factors and gives judge and counsel in minor cases a prediction as to the likelihood of compliance with various forms of alternative sanctions. See Richard Zorza, \textit{Beyond Technology: How Hardware and Humans Will Merge in the Courtroom of the Future}, Crim. Just., Spring 1997, at 5-6.

\textsuperscript{80} One of the advantages that legal services providers have over smaller organizations is the ability to generate such systematic and integrated information. Cf. Richard Zorza, \textit{Bringing Criminal Justice Agencies On-Line: The Neighborhood Defender Service Experience}, Crim. Just., Fall 1993, at 2 (describing these issues in the public defender context).

\textsuperscript{81} See Fund for the City of New York, \textit{Housing Court Online: Helping You Prepare for Court} (visited Feb. 17, 1999) <www.fcny.org/housing/> [hereinafter \textit{Housing Court Online}] (site at date of visit in draft form, including on-line user survey).
critical to effective evaluation of innovation and comparison of service methodologies.

3. Quality Assurance Review

Tapes of conversations or on-line notes can be reviewed—and the results analyzed statistically in combination with the above information—to identify when the wrong service methodology is being used.\(^2\)

F. Continuity

Technology can also minimize the risks of brief service related to continuity.

1. Highlighting Areas of Potential Future Need

To minimize the costs of discontinuity in the “brief service and advice” context, appropriate software could be programmed to help the client identify those situations that are most likely require fuller representation. In the welfare context, software could identify future critical dates, such as expiration of welfare eligibility.\(^3\) The client could use a “checklist” on a regular basis as her case proceeded. A web based version could be updated by the brief advice provider through e-mail, even if it were not in ongoing direct contact with the client—or viewed her or him as a client.

2. Case Monitoring by System Linking

As described above, linking court and brief service provider computer systems might enable the brief service provider to continue to monitor cases and intervene when a crisis erupted or when events in court indicated the need for intervention. Upon such a triggering event, the brief service client would be contacted automatically—perhaps electronically—and the attorney-client interaction resume for full, continuous representation. Electronic systems would also make it easier to keep track of changing client addresses.

G. The Central Caution: Consumer Capacity and Consumer Protection

Though the potential benefits enumerated above are real, integration of technology into nontraditional representation scenarios is not

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\(^2\) See Moore & Kolasa, supra note 20, at 528 (reporting that a review of computerized case files in one hotline program “revealed quality problems”). The reason for the problem was diagnosed as a lack of desktop resources.

failsafe. These measures require a relatively informed and intelligent consumer of legal assistance. Technologies must be deployed to ensure that consumers who are, in fact, not capable of playing an affirmative role in the representation relationship are not made worse-off than they would have been without such help.

Regardless of the conclusion one reaches about the risks associated with any particular innovation, this analysis strongly suggests that the ethical rules that govern our profession should not be construed to prohibit all nontraditional service delivery. Rather, the rules and their interpretation place two responsibilities upon innovators and nontraditional service providers: (1) ensuring that the alternative service methodology incorporates technology and includes other helpful supports to protect the values that guide the rules and; (2) ensuring such service alternatives are employed only when appropriate and with the right safeguards to protect against inappropriate use with inappropriate clients.

IV. Towards a General Analysis: How the Ethical Rules and Their Administration Should Relate to Changes in Technology

Drawing on the foregoing discussion of the general opportunities that technology offers and its possible applications in one context, this Response concludes with a number of recommendations as to how the evolution and administration of the ethical rules might be structured to assist in the use of technology to advance an access to justice agenda while ensuring the protection of ethical values.

1. The ethical implications of an innovation or a technology should be based on the underlying values, rather than on the prior technical rules that have developed in response to an earlier technological environment.

The above "brief service and advice" example suggests the limits of analyzing an innovation merely terms of traditional service scenarios rule applications. Rather, we should focus on the impact an innova-

84. See McNeal, supra note 4, at 323 (discussing client competency).
85. Cf. Recommendations, supra note 6, at Recommendation 60(b), at 1777 (recommending that a diagnostic mechanism of some form should be required for any assistance beyond "brief specific advice"). In an ideal world, with services fully available as a matter of right, the question would be whether this form of assistance was optimum for the client. Given the huge and recognized absence of such help, the above-stated far less stringent question has to be enough.
86. Such values include avoiding second-rate service.
87. At the limit, there might be some innovations that would be inappropriate in all situations. The point is to reach that point at the end, not the beginning, of the inquiry. For a general discussion of evaluation methodologies, see Gregg G. Van Ryzin & Marianne Engleman Lado, Evaluating Systems for Delivering Legal Services to the Poor: Conceptual and Methodological Considerations, 67 Fordham L. Rev. 2553 (1999).
tion may have on the more general values underlying the rules.88 A rigid textual approach might have led to the conclusion that “brief service and advice” fails to provide for informed consent concerning the limitations upon the representation. However, broader analysis shows that the technology can be deployed to realize such consent to a far greater degree than might first have appeared possible. The task of the rules then becomes ensuring that the technologies are deployed in an appropriate manner so that consent will be sought and obtained.

2. The rules governing technological or service innovation should be as general as possible.

As a corollary, new rules should encourage flexibility by stating their principles as generally as possible to accommodate the rapidly developing state of the art. For example, a specific set of rules requiring that brief service be provided only to clients with appropriate cases and in appropriate circumstances should be stated generally. A rule that mandates a particular screening procedure with a particular technology, threshold questions, or diagnostic system is doomed to be inadequate—even if such measures are considered state of the art when the rule is drafted. The only thing that can be predicted with any certainty is that the state of the art will change rapidly.

3. Ethical rules should be structured to encourage experimentation and innovation, provided such innovation and experimentation seeks to meet the goals embodied by the rules.

Similarly, ethical rules should be written with a flexibility that stimulates, rather than penalizes, experimentation. Particularly in the non-market context, rules and penalties should emphasize actual effect, state of mind, and intent, rather than technical compliance with prior rules. Perhaps a safe harbor is appropriate for certain kinds of experimentation, provided that certain standards are met. Such a safe harbor would not determine whether a technical violation were committed, but rather would temper the sanctions for well-intentioned innovators.89

88. For example, in Unauthorized Practice of Law Commission v. Parsons Technology, Inc., No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), the district court discussed, in the context of its constitutional analysis, the importance of the states interest in protecting its citizens from “being lulled into a false sense of security that if they use [the challenged software] they will have a ‘legally valid’ document that’s ‘tailored to [their] situation’ and ‘best meets their needs.’” Id. at *9. It failed, however, to seriously evaluate the interest of the state in providing broad access to justice for those same citizens.

4. The rules should be structured to ensure that innovations are used appropriately, by focusing on the development of circumstance-sensitive and self-monitoring technologies.

If the legal community is to encourage innovation, it must also provide protections to ensure that any innovation is only used appropriately. Rules can be used to impose on researchers and innovators a responsibility to make a good faith effort to limit the use of new technologies and alternative methodologies in appropriate environments and with appropriate clients. For example, developers of court preparation domestic violence web sites have always been careful to limit access to those sites, creating an environment that is safe and supportive for domestic violence victims.

The legal community can build upon evaluation and feedback technologies to ensure that this rule is followed. For example, on-line usage timing technologies, which monitor whether a user gets blocked or abandons an attempt to get help, might be used to determine whether a particular technology is inaccessible and inappropriate for a particular user or class of users.90

5. The rules should be structured to encourage additional development in the technology itself, not just its applications.

Perhaps most importantly, the rules must find ways of affirmatively encouraging technological innovation. An important example is in the interface area. A major concern regarding technology-assisted legal service is that the poor lack the training and experience to use computers. Innovations such as touch screens91 and voice recognition92 and their application to broadly distributed access systems such as the Internet, will be crucial to expanding alternative means of assistance to the poor.

Similar innovations can be accomplished by safe harbor provisions for good faith experimentation,93 and by emphasizing the obligation

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91. See, e.g., Housing Court OnLine, supra note 81 (providing touch screen enabled court preparation system in the eviction prevention context).

92. This is a technology that is advancing with particular speed. It is also a particularly intuitive technology. The author once heard the true story of a Spanish speaker who came to the United States, believing it to be the land of hi-tech. He approached a Coca Cola machine, read the instruction that then—many years ago—said “Dime,” and responded appropriately by talking directly to the machine “One Coca-Cola.” He was way ahead of his time in understanding the instruction as “Di me”—“speak to me.”

93. The Model Rules of Professional Conduct recognize that intent and state of mind are critical when it comes to behavior under the rules. See Model Rules of Professional Conduct Rule 8.4 cmt. 2 (1998) (noting with respect to Rule governing misconduct, that “[a] lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists,” and incorporating by refer-
of innovators to keep pushing. The ethical rules might also emphasize
the obligation of the legal profession to collaborate, rather than com-
pete, in the low cost deployment of these technologies.  

6. The rule-making process should be restructured to incorporate the
technological perspective.

Finally, the rule-making process must fully incorporate the technol-
ological perspective. Just as the court in Reno v. American Civil Liber-
ties Union required technological insight to fully understand the
Internet and render an appropriate judgement, so too must the ethical
rule making process continuously take stock of technological innova-
tions to reflect the true potential of these rapid changes. This goal
may be achieved by altering the selection process for ethical rule-mak-
ning and disciplinary bodies to incorporate the technological perspec-
tive, by appointing knowledgeable special masters in appropriate
ethics cases, and by focusing attention to these matters by the national
leadership groups.

CONCLUSION

In summary, this Response urges re-conceptualization of the rela-
tionship between the ethical rules and technology-assisted innovation.
We must come to see technology not as the enemy of ethical practice,
but as its ally. If, as lawyers and policy makers, we learn to take full
advantage of the potential technology offers, we will truly enhance
and advance the ethical practice of law.

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94. This might be analogized to, and seen as growing from, the recommended “as-
pir[ation]” of “at least (50) fifty hours of pro bono publico legal services per year.” Id.
Rule 6.1 (recognizing the need for legal assistance for low-income people).
95. 117 S. Ct. 2329 (1997). According to the Supreme Court, the District Court
made 410 findings of fact, including 356 paragraphs of stipulations of the parties, and
54 “findings based on evidence received in open court.” Id. at 2334.