

Q&A

LAWYER LIABILITY AND ETHICS



The (Possible? Future?) Intersection of Attorney Diligence Requirements of ER 1.1 and Blockchain Technology

By Jessica L. Beckwith



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Arguably (one of the paramount (and first) Ethical Rules is that duty of competence. ER 1.1 simply 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.” Comment 6 to ER 1.1 states (emphasis added), “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Enter blockchain technology. What is blockchain? Maybe you have only heard of blockchain in the context of bitcoin (which makes sense because, according to Wikipedia, blockchain was invented in 2008 to serve as the public transaction ledger for bitcoin.) Merriam Webster defines blockchain as, “a digital database containing information (such as records of financial transactions) that can be simultaneously used and shared within a large decentralized, publicly accessible network.” Fortune.com defines blockchain as, “a way to structure data.... This coding breakthrough—which consists of concatenated blocks of transactions—allows competitors to share a digital ledger across a network of computers without need for a central authority. No single party has the power to tamper with the records: the math keeps everyone honest.”

You may be thinking how exactly does blockchain technology intersect with my duties under ER 1.1? Even hearing this may cause some of us a bit of anxiety (as maybe you are thinking, I am a legal professional and certainly not an IT professional). I am not suggesting that blockchain is conclusively a “relevant technology” under Comment 6 to ER 1.1. However, blockchain technology is emerging in many sectors and attor-

neys who practice in those sectors may have a current or future duty to understand and explain to their clients the benefits and risks associated with blockchain technology.

Smart contracting is an area that is emerging as a new business model of which attorneys, particularly transactional attorneys, should be aware. Wikipedia defines a smart contract as, “computer protocol intended to digitally facilitate, verify, or enforce the negotiation or performance of a contract. Smart contracts allow the performance of credible transactions without third parties.” Wikipedia continues, “proponents of smart contracts claim that many kinds of contractual clauses may be made partially or fully self-executing, self-enforcing, or both. The aim of smart contracts is to provide security that is superior to traditional contract law and to reduce other transaction costs associated with contracting.” Smart contracts require individuals with coding expertise to code the “terms” of the contract. This leads to a multitude of questions: Do attorneys need to learn how to code? (Probably not, but they may eventually need to hire someone who knows how). Will firms need an interdisciplinary team of software/computer and legal professionals in order to assist their clients in entering smart contracts? If so, how would this interdisciplinary team be compensated? Will attorneys no longer be needed for smart contracting? Or how can an attorney bring value to smart contracting?

There are a plethora of other industries where blockchain technology has already been introduced, such as finance, energy, music, healthcare (for management of patient medical data among other uses), and real estate transactions. This technology has the potential to disrupt the legal industry as well.

My advice is to follow Comment 6 to ER 1.1 and keep abreast of changes in technology that may change the practice of law. Not only is this an ethical duty, but it may allow you to change your business model and better serve your clients. ■

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