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The Legal Technology Guidebook

Springer

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Preface

Lawyers' resistance to technology is legendary. Lawyers were reluctant to use phones to communicate with their clients when the phone was invented. It is a good bet that if you carefully check a storage closet in a law firm that has been around for a while you will find carbon paper, a Rolodex with phone numbers of many deceased people, and an ancient, yellowed pad used to make handwritten diary entries to bill the client. In a lawyer's house, the VCR is always flashing "12:00."

This book is an attempt to do something about that by communicating to lawyers the urgency of their understanding the technology around them and using it in their practice in a knowledgeable and efficient manner to serve their clients' interest. If we could ban one sentence in the English language, it would be: "you really do not have to understand the technology to get this." You most certainly do. Absolving lawyers from understanding the technology pertaining to the creation, maintenance, and storage of their clients' information is as dumb as telling medical interns that they do not have to understand "that X-ray stuff."

We have therefore written this book to communicate how to manage the technology that lawyers now have to use to collect, search, and analyze the information that their clients or their opponents have created. Whether involved in litigation or in a business transaction, the client's most precious asset may be the information it has created or collected. The days of telling the client to send to the lawyer a banker's box that has the information pertinent to a case or transaction are over. Now, the client may have a staggering amount of unorganized information that the lawyer may need but, unless the client has a superb information governance system, that information will be scattered all over a computer network without rhyme or reason. Learning how to find it, preserve it, collect it, and search for what is truly useful without bankrupting the client has become the lawyer's art and her necessary skill.

We begin with the lawyers' ethical rules that pertain to the required competence they must have and a discussion of other ethical rules that pertain to how a lawyer now must practice law because technology has so deeply affected the rules of the game. We could say that we do not intend to scare you but we do. You will see how

lawyers can be seen punished severely if they persist in refusing to understanding the technology.

We then speak of the evidentiary rules and how these ancient rules are being used (or tortured) to deal with the revolution in how people communicate and create information that will be used at trial.

We then turn to the main course: How do you do it? We provide the most practical information we have as to how the available technology works, how to use it, and how to manage it so that the result is the best that can be achieved with the resources that are available. We explain how management techniques and processes can be used to check the results from the use of any available tool and how the lawyer should manage the process using the skills that come from an understanding of how information is managed in a digital world.

We hasten to point out that none of us can pretend to have had scientific training in data management. We learned everything you are reading in a very good school—the one of hard knocks. We hope that encourages you to learn what we have. It is as if we had been asked to write a book about roller-skating. We suppose that we could, but we prefer that you get up on the skates and we hope you enjoy the ride.

Washington, DC, USA Judge John M. Facciola

Contents

Part I Introduction to Technology Competence

1 Introduction to Ethics and Technology 3

2 Technological Competence 5

3 Outsourcing 9

4 Receipt of Privileged Information 15

Part II The History of Technology Competence

5 What Is Technology? 21
5.1 What IS Technology? 22
5.2 Identifying Technology Risks 22
5.3 Identifying Technology Benefits 24
5.4 Conclusion 25

6 How Did We Get Here? 27

7 Technology: Then and Now 29
7.1 The Network 30
7.2 Backdoor Access 31
7.3 Historical Context 31
7.4 Moore's Law 34
7.5 Where Are We Now 34

8 Benchmarking Technology Competence 37
8.1 Looking Beyond Legal 37
8.1.1 ISO Certifications 37
8.1.2 PMP 38
8.1.3 Six Sigma 38

Part III Technology in Litigation

9 Introduction to eDiscovery 43

10 Authenticity 47
10.1 The Problems and Their Solutions 48
10.1.1 Tender of Electronic Information to Establish That the Information was on a Website 48
10.1.2 The Internet Archive—“The Way Back Machine” 49
10.1.3 Communications Using the Internet 50
10.1.4 Text Messages and Instantaneous Communications 52
10.1.5 Social Media Postings and Tweets 53
10.1.6 Computer Generated Data 55
10.1.7 Business Records 57
10.1.8 Self-authentication 59

11 The “Ethics” or Lack of Them During Negotiations 61

12 Technology Assisted Review 65

Part IV Strategies for Achieving Competence

13 Transparency 71
13.1 Defining Transparency 71
13.2 The Growing Need for Transparency in eDiscovery 72
13.3 Beyond eDiscovery: Transparency in Transactional Matters 74

14 Effective Communication 75
14.1 Establishing Roles and Responsibilities 75
14.2 Sharing Knowledge Among Team Members and Stakeholders 76
14.3 Efficiently Responding to Emergent Circumstances 77

15 Achieving Consistency 79
15.1 DMAIC 80

16 Managing Variable Needs 87
16.1 What Is Scalability? 87
16.2 Capability 88
16.3 Availability 89
16.4 Repeatability 89
16.5 The Challenges 90
16.6 Solutions 91

17 Effective Supervision 93
17.1 Six Criteria for Effective Supervision 98

18 Using Technology for Improved Billing and Business 103
18.1 A Brief History of the Billable Hour 103
18.2 Using Technology to Develop Alternative Fee Arrangements 104
18.3 Buying and Selling Legal Technology 105
18.4 Understanding Business Impact of Competence Failures in Technology. 105

Appendix A: Case Study: Network Security 107

Appendix B: Case Study: Backdoor Access 109

Appendix C: Scalability Tools 111

Appendix D: Case Study—Contract Management Meets M&A (Role Play). 113

Appendix E: Sample RFP Questions 123

Appendix F: Legal Technology Product Index 125

Glossary. 135

Index 139

Legal Citations 141

Part I
Introduction to Technology Competence

Chapter 1
Introduction to Ethics and Technology

That there should be a distinct set of ethical rules pertaining to lawyers' use of technology seems odd at first glance. Ethics rules are written broadly by design and would seem to be able to apply across all practices; there are not, after all, distinct rules pertaining to the representing banks or trying malpractice cases. Yet, here, as elsewhere, the extraordinary changes that technological developments have made in the creation, processing, collection and preservation of electronically stored information have required that broad rules be refined and then applied to problems that no generation of lawyers have ever faced.

Imagine a law firm in 1975 and a visit from a client who has a legal problem or represents a corporation. The client discusses the problem with the lawyer who may take notes and, after the meeting, use those notes to dictate a memorandum to her file. The lawyer may then direct the client to collect whatever papers pertain to the controversy and deliver them to the lawyer who will probably makes copies of them for the lawyer's use, with the client possibly directed to maintain the originals. From that point on, lawyer and client will communicate by phone or letter and if by letter, a copy will be placed in the lawyer's and client's files. At the conclusion of the representation, the lawyer and client will make arrangements for the disposition of the copies of the client's files.

Now, imagine that same scenario in 2015. The client may well visit the lawyer but there the similarity ends. The lawyer has a computer and will record her notes or type a memorandum to her file on that computer. While the lawyer may not know it, the computer itself has created information about the lawyer's use of the computer and the work done and this information, the metadata, are accessible during any well-designed examination of the computer's workings. Similarly, every piece of electronically stored information that the client and its employees have ever created will have that same characteristic of metadata.

The client's files that the lawyer's needs are now entirely electronic and are not stored in a cold old banker's box but on a complicated computer network. The client's employees may be using that network for all communications, whether in writing, by voice or text or instant message. There may be no systematic direction,

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whether mechanical or human, as to what is to be kept and what disposed of, and, as is likely, there is no such system the client and lawyer are confronted with a gigantic data set, the vast majority of which has nothing to do with the matter. Somehow, someway someone is going to have to separate the few grams of wheat from all that chaff.

Once the information is gathered for the lawyer, the lawyer has to decide where and how to keep it. Its size may warrant a solution other than the transmittal of electronically stored information by email Or, the client may have already kept the information in cyberspace ("the Cloud") and the lawyer may wish to have the information accessible to her from that receptacle. Or, irrespective of how the client kept the information, the lawyer may find it cheaper and more efficient to maintain all of its clients' files in a cyberspace or cloud environment.

The lawyer's search within the client's files may produce problems of efficiency and cost if the lawyer, like the lawyer in 1975, intends to go through them item by item. Such a prospect may trouble a client who has to weigh cost against value. Technology may suggest to client and lawyer delegation to a third party to collect from the client's file what the lawyer truly needs and a particular vendor and its technology may provide an attractive means of doing what must be done.

The radical difference between the environment of the 1975 lawyer and of her 2015 colleague explains why more refined rules have had to be created to deal with the differences in those environments. Anything else would be to either pour new wine into old bottles, or mouthing a bromide ("A lawyer should be competent") that provides no actual guidance to the concerned lawyer.

Thus, there are new rules, or more accurately, new interpretations of traditional rules that impose such different obligations that they truly become, in themselves, new rules. This chapter is devoted to an explanation of those rules and their application.

A crucial word of warning: every ethics presentation begins with the warning that the Model Rules of Professional Conduct of the American Bar Association ("ABA") Formal Opinion are just that: models which state bars are free to accept, reject or modify. Therefore, a lawyer must consult her local bar rules of ethics before deciding on a course of action. That advice commands a lawyer's obedience particularly in this area. Lawyers will find that there are not minor differences between a given Model Rule of Professional Conduct and a local rule but that one directly contradicts the other. Lawyers fail to appreciate that at their peril. Indeed, if time permits, counsel is well advised to seek prospectively an opinion from a local bar before undertaking a particular course of action. Such rulings can provide certainty where, while the Model Rule of Professional Conduct provides guidance, the local rule does not and reasonable people could differ on the outcome. Given an area so full of dramatic technological change and where there already dramatically divergent approaches between the Model Rules of Professional Conduct and local bar opinions, counsel simply must use all necessary means to get certainty before embarking on a course of action. To fail to do so may be to walk through a minefield without a map armed instead with the hope that counsel is doing "the right thing."

Chapter 2
Technological Competence

The technological change lawyers have witnessed brings in its wake an obligation to know enough about that change and its consequences, if they can be reasonably anticipated, to have an impact upon the client's business and the representation to be provided.

Model Rule of Professional Conduct 1.1 requires that a lawyer provide competent representation to a client. "Competent representation" is said by the Rule to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id.

The Comment to the Rule indicates that whether the lawyer has that skill is a function of a comparison between the nature of the matter with the lawyer's training and experience in handling such matters and the feasibility of associating with a lawyer who has "established competence" in the area. Model Rule of Professional Responsibility 1.1, Comment 1: the clear inference of the Rule is that if the lawyer cannot provide "competent representation" she should decline the representation.

For present purposes, the most significant modification of the accompanying comments is the one generated by the American Bar Association Formal Opinion in 2012. Its president had urged the committee responsible for the Rules to bring them kicking and screaming into the technological world in which lawyers live. The product was a modification of Comment 8, "Maintaining Competence," which required a lawyer to "keep abreast of changes in the law and its practice" by adding the words "*including the benefits and risks associated with relevant technology*."

A moment's thought indicates obvious instances where lawyers' behavior can and will be tested by this standard. Take a discovery dispute where lawyer A demands a certain production of electronically stored information and lawyer B tells the judge, considering a motion to compel, that the production would be difficult and cost hundreds of thousands of dollars. If it turns out that that lawyer B's assertion is false and uttered by him without any effort to understand how available technology could have lessened those costs substantially and that knowledge was easily accessible and well known by other lawyers who litigate eDiscovery cases, lawyer B may well have violated this rule.

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