

Ethics, Technology, and Attorney Competence

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The culture of every law firm must emphasize—and indeed relies upon—the competence of its practitioners. Competence in the digital age requires something new: an understanding by lawyers of developments in technology that affect both lawyers' cases and the manner in which lawyers practice. The requirement for competence begins early and is highlighted in the very first rule of legal ethics, according to the American Bar Association ("ABA"). Rule 1.1 of the ABA Model Rules of Professional Conduct (the "Model Rules") specifically recognized the need for technological competence through a significant change in August 2012 that formally notified all lawyers (and specifically those in jurisdictions following the Model Rules) that competency includes current knowledge of the impact of eDiscovery and technology on litigation. Gone are the days when "Luddite"¹ or "caveman"² lawyers could practice with impunity. Technological competence is now acknowledged as a requisite of

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¹ Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits*, *New Model Ethics Comment Says*, ABA Journal Law News (August 6, 2012) (http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits/).

² Unfrozen Caveman Lawyer, Saturday Night Live transcripts (<http://snltranscripts.jt.org/91/91gcaveman.phtml>) ("Sometimes when I get a message on my fax machine, I wonder: 'Did little demons get inside and type it?' I don't know! My primitive mind can't grasp these concepts.").

modern practice.³ Incompetence in this regard is not merely a disadvantage that may lose a present-day case, but it is a violation of the law in several states, remedied by a series of increasingly harsh penalties ranging from temporary to permanent disbarment.

The Commentary to Rule 1.1 Acknowledges the Digital Age

Model Rule 1.1 states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Through amendments to Comment 8 of the rule, the ABA explained what it means to provide “competent” representation: “[t]o 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” (emphasis added).

While at first blush Comment 8 seemingly creates a new duty running from lawyer to client, the ABA’s position is that Rule 1.1 does not actually impose any new obligations on lawyers. In fact, “the amendment is [only] intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.” In other words, Rule 1.1 simply reiterates the obvious, particularly for seasoned eDiscovery lawyers, that in order for lawyers to adequately practice, they need to understand the means by which they zealously advocate for their clients.

Indeed, there is effectively nothing new about Rule 1.1—only its manifestation in the face of changing technology and an acknowledgement that “the changes are primarily a matter

³ Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, Hofstra Law Review, Vol. 42:175, 176 (2013) (http://www.hofstralawreview.org/wp-content/uploads/2014/02/BB.6.Rotunda.final2_.pdf).

of degree rather than overhauls of the actual substance of the rules.”⁴ This manifestation may include new challenges associated with the practice of law, including the loss of “privilege when sending emails, transferring documents, or responding to discovery”;⁵ awareness of “social media sites,” the “growing use of the cloud,” the “risks associated with using mobile devices,” and “basic issues of data security”;^{6,7} the use of technology to “help enforce document retention policies”;⁸ basic use of modern “legal research services”;⁹ and “recurrent issues like metadata within documents.”¹⁰ And lawyers may not recognize those instances—in which “mere association or consultation” with other lawyers may not be sufficient,¹¹ as “simply making another, seemingly more ‘tech-savvy’ lawyer or staff member the point person for all things technological” presents its own set of ethical and practical challenges.¹²

Despite what they do or do not recognize, lawyers are still required to maintain the same level of core competence. Some note that this level of competence is not perfection, but rather presents a “bottom line [of] reasonableness.”¹³ However, changing technologies and their burgeoning complexity also present a challenge acknowledged in a number of judicial decisions from various district courts. These decisions demonstrate that, far too often, lawyers have failed

⁴ James Podgers, *You Don’t Need Perfect Tech Knowhow for Ethics’ Sake—But a Reasonable Grasp Is Essential*, ABA Journal – Annual Meeting (August 9, 2014) (http://www.abajournal.com/news/article/you_dont_need_perfect_tech_knowhow_for_ethics_sake--but_a_reasonable_grasp/).

⁵ Rotunda, *supra*. note 3.

⁶ John Browning, *Legal Ethics and Social Media: It’s Complicated*, Dallas Bar Association (December 2013) (<http://www.dallasbar.org/content/legal-ethics-and-social-media-it%E2%80%99s-complicated>).

⁷ Judd Kessler, *Are You in Compliance with ABA Rule 1.1?* AbacusLaw (April 30, 2014) (<http://www.abacuslaw.com/are-you-in-compliance-with-aba-rule-1-1/>).

⁸ Matthew Nelson, *New Changes to Model Rules a Wake-up Call for Technologically Challenged Lawyers*, InsideCounsel Magazine (March 28, 2013) (<http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech>).

⁹ Darla Jackson, *Can Lawyers Be Luddites? Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology*, Oklahoma Bar Journal Vol. 84 (December 2013) (<http://www.okbar.org/members/BarJournal/archive2013/DecArchive13/OBJ8433Jackson.aspx>).

¹⁰ Rotunda, *supra*. note 3.

¹¹ Nelson, *supra*. note 8.

¹² Andrew M. Vogel, *Should California Lawyers Have a Duty of “Compu-tence”?* Los Angeles County Bar Association – County Bar Update (October 2013) (<http://www.lacba.org/showpage.cfm?pageid=15158>).

¹³ Podgers, *supra*. note 4.

to acknowledge that Rule 1.1 is elastic and has expanded, as appropriate and as demanded, to keep pace with the digital age—and that lawyers’ related competence must expand as well.

The Amendment Is Gradually Being Implemented in Several States

Whenever the ABA makes amendments to the Model Rules, such amendments are almost always significant because of their eventual geographic cross-country expansion, whether by express adoption or as persuasive authority. The amendments to Comment 8 reverberated and continue to do so through several states, as state bars began adopting the new commentary through ethical rules in various local jurisdictions. For example, on January 1, 2013, the Delaware Supreme Court amended the Delaware Lawyers’ Rules of Professional Conduct as they relate to technology.¹⁴ In July of the same year, the Delaware Supreme Court also created a new arm of the court, the Commission on Law and Technology, to educate both the bench and bar on matters related to technology and the amended rules, which adopted the commentary to ABA Rule 1.1. Another example is North Carolina, which in January 2014 provided proposed amendments to its ethical rules to “insure that the NC Rules are responsive to advances in technology.”¹⁵ The proposed amendments with respect to competence mirror the changes made to the ABA’s Rule 1.1 commentary.¹⁶

And even if a state bar has not adopted the amendments to Rule 1.1’s commentary, the amendment certainly still serves as persuasive authority. For example, in California, Rule of Professional Conduct 3-110 prohibits a lawyer from “intentionally, recklessly, or repeatedly fail[ing] to perform legal services with competence.”¹⁷ The rule states that “‘competence’ in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental,

¹⁴ Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Delaware Lawyers’ Rules of Professional Conduct (<http://courts.state.de.us/rules/dlrpc2013rulechange.pdf>).

¹⁵ See *Proposed Amendments to the Rules of Professional Conduct* (https://www.ncbar.com/PDFs/Ethics_20-20.pdf).

¹⁶ Pennsylvania has also amended its Rules of Professional Conduct to comport with Rule 1.1, requiring an understanding of the “benefits and risks associated with technology” and a concomitant responsibility for competent legal representation to clients. 204 PA Code Ch. 81 (<http://www.pabulletin.com/secure/data/vol43/43-15/652.html>).

¹⁷ Cal. R. of Prof’l Conduct R. 3-110(A).

emotional, and physical ability *reasonably necessary for the performance of such service*.”¹⁸

And like the ABA, California courts have drawn a direct parallel between legal and technological competence, as evidenced by the State Bar of California’s Proposed Ethics Opinion No. 11-0004, which states that “rules and procedures, when placed in conjunction with ever-changing technology, produce professional challenges that attorneys must meet in order to remain competent”¹⁹ and “suggests that such a duty exists in connection with e-discovery.”²⁰

Although California has not adopted Rule 1.1 or the ABA Model Rules, the rules nonetheless “may serve as guidelines absent on-point California authority or a conflicting state public policy.”²¹ Research indicates that there is no on-point California case law concerning whether a lawyer must maintain technological competence, nor is there a California public policy that conflicts with Rule 1.1. And the codification of both state and federal rules of procedure governing eDiscovery suggests that California has a policy entirely consistent with Rule 1.1; the same has been acknowledged by at least one California practitioner.²² The analysis is likely applicable to other states like California that have yet to adopt the changes to Rule 1.1, particularly where the state has already amended its own rules of civil procedure to acknowledge the lasting presence of eDiscovery.

Advancements in Technology Have Changed the Way Lawyers Practice Law

Since August 2012, the only judicial decision that has directly mentioned the amendment to Rule 1.1 is *State v. Ratcliff*, 849 N.W.2d 183 (N.D. 2014), albeit in a concurring opinion. In *Ratcliff*, Justice Daniel Crothers of the North Dakota Supreme Court warned that judges must know whether submitted evidence includes only the information visible on the face of the

¹⁸ Cal. R. of Prof’l Conduct R. 3-110(B) (emphasis added).

¹⁹ State Bar of California, *Formal Opinion Interim No. 11-0004* (March 21, 2014) (http://www.calbar.ca.gov/Portals/0/documents/publicComment/2014/2014_11-0004ESI03-21-14.pdf).

²⁰ J. Gary Hastings, *Jury Selection and Use of Social Media*, Alternative Resolution Centers: The Blog (July 26, 2014) (<http://arc4adr.com/blog/2014/07/26/jury-selecton-and-use-of-social-media-by-hon-j-gary-hastings-ret/>).

²¹ *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 852 (2006).

²² Hastings, *supra* note 20.

document or metadata in addition to such information.²³ He observed that the distinction “is critical, both on an ethical and adjudicative basis,” and noted the “uncertainty, and hence concern, about where [the] holding will take [North Dakota jurisprudence] when electronically stored information becomes a greater source of evidence.”²⁴ This is precisely the type of observation and concern that falls squarely within the realm of Rule 1.1’s commentary. A Luddite lawyer would profess ignorance and simply ask “What is metadata?”—failing to realize that understanding its significance to electronic evidence might very well carry, or destroy, his theory of the case. Advancements in technology have allowed the legal profession to understand how and when to use metadata;²⁵ likewise, the technological implications associated with such basic terms in competent legal research as “keyword searches,” “courtroom technology,” and even “digital digging”²⁶ are under scrutiny by some commentators, who note that in addition to court scrutiny, malpractice insurers are taking note of modern practitioners’ practices.²⁷

With respect to the state of eDiscovery in the digital age, keeping “abreast of changes in the law” undoubtedly includes becoming familiar with the benefits and risks associated with predictive coding. That technology is beginning to gain broader acceptance in the legal community as an alternative approach to the drudgery of a page-by-page manual document review, and while some practitioners are anticipating an associated ethical obligation in the near future,²⁸ others doubt an ethical standard would predate a stronger commercial pressure exerted by clients’ cost sensitivities.²⁹ But perhaps part of the reason more attorneys have

²³ 849 N.W.2d at 193.

²⁴ *Id.*

²⁵ Rotunda, *supra* note 3.

²⁶ Browning, *supra* note 6.

²⁷ Jackson, *supra* note 9.

²⁸ Debra Cassens Weiss, *Lawyer for E-Discovery Company Predicts Predictive Coding Will Become an Ethical Obligation*, ABA Journal Law News Now (Dec. 6, 2012) (http://www.abajournal.com/news/article/lawyer_for_e-discovery_company_predicts_predictive_coding/).

²⁹ Jim Calloway, *Will Predictive Coding in E-Discovery Become an Ethical Requirement?* Jim Calloway’s Law Practice Tips Blog (Dec. 19, 2012) (http://jimcalloway.typepad.com/lawpracticetips/electronic_discovery/).

eschewed predictive coding technology is that, although the underlying technology behind predictive coding has existed for decades, the technology is relatively new to the legal profession—a profession notoriously slow to change.³⁰ This is best exemplified by the relatively few number of judicial opinions that directly address the use of predictive coding.³¹

Aside from predictive coding, keyword searching to identify and collect electronic evidence is also part of what Rule 1.1 contemplates as a form of technology of which lawyers should keep abreast. Keyword searching, though simpler in form than predictive coding, is not done competently by simply generating a blind list. This is best exemplified by cases such as *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009), which frown on the use of the technology in the absence of a true understanding or strategy behind the method. The *Gross* court found that:

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.³²

In some situations, a matter may mandate the use of technology that is beyond the ordinary lawyer's expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved, thus requiring, or at least indicating the need for, the use of a knowledgeable vendor. Keeping "abreast of changes in the law" includes knowledge as to what factors a state bar would find to constitute the unauthorized practice of law by a vendor. This was the question presented in Opinion 362, issued by the

³⁰ Dave DeWitte, *Tech of Law: Fast-Changing Technology Meets Slow-Changing Profession*, The Iowa Gazette (May 15, 2011) (<http://thegazette.com/2011/05/15/tech-of-law-fast-changing-technology-meets-slow-changing-profession>).

³¹ Research indicates that, as of the date of this writing, only nineteen (19) decisions (published and unpublished) have mentioned or discussed predictive coding, in reaching the ultimate ruling of the court, and sixteen (16) of these decisions were issued subsequent to the ABA's amendments to Rule 1.1.

³² 256 F.R.D. at 136.

District of Columbia Bar. The crux of that opinion was that an eDiscovery vendor provided contract attorneys who supervised the review and production of electronic documents. Both attorneys and non-attorneys owned the vendor. Opinion 362 made clear that retaining an eDiscovery vendor that offered “soup to nuts” services would be considered the unauthorized practice of law in the District of Columbia and that, in any event, a lawyer must properly supervise eDiscovery vendors. Although Opinion 362 did not expressly state as much, it is axiomatic that a lawyer cannot properly supervise a vendor engaged in technology that the lawyer does not understand.

Whether the technology involves predictive coding, keyword searching, retaining service providers, or even enlisting contract attorney assistance (among other things), the commentary to the amendments to Rule 1.1 demonstrates that attorneys must understand the benefits and risks of new technologies that have so rapidly usurped the old way of practicing law. Rule 1.1 is elastic for good reason: because technology is too. Competent representation can be given only by those lawyers who keep in step with advancements that will benefit their clients.