

LEGAL TECH

Navigating the Changing Seas of E-Discovery Ethics: Key Considerations for Counsel

By Rose Jones, Sarah Tona and Colleen Casey Voshell

Competency is a cornerstone of ethical duty in the legal profession. Lawyers today have a duty of competence to understand technology and stay apprised of continual changes in new tools, systems and applications. As technology continues to pervade every facet of life and business, the scope of the lawyer's ethical duty of competency has swelled to encompass technology's burgeoning role in litigation.

ABA Model Rule 1.1 was updated seven years ago with a comment formally declaring a lawyer's duty of technological competency. Since this 2012 update, a sea of change has ensued as state bar associations

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have adopted or amended their respective rules to capture the ethical duty of technological competency. Model Rule 1.1, Comment 8 states:

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.

With the rapid advancement of tools and workflows, what was considered technical competence 20 years ago is only the tip of the iceberg of what is in play today. Despite these ever-turning tides, much of the legal

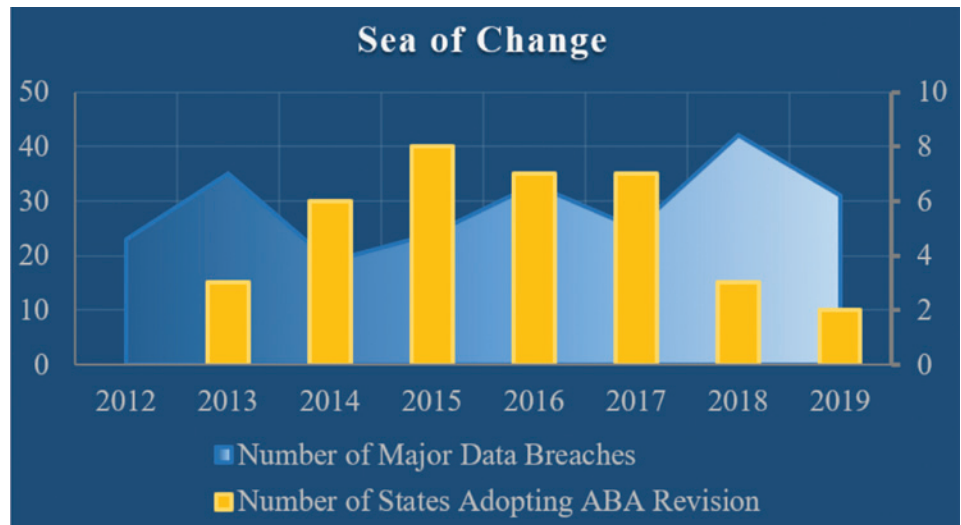
profession has struggled to get on board with understanding technology at a level that truly establishes technological competence.

A prime example can be observed with the developments in data privacy and information security. The global data protection landscape has shifted significantly in the last two years alone, with the introduction of GDPR, Brazil's General Data Protection Law, the California Consumer Privacy Act and other similar legislation around the world. The prevalence and significance of data breaches coincided with the emergence of these new data protection laws. Law and technology could no longer remain ships that pass in the night.

State-by-State Guidance

Thirty-six states have adopted the ABA Model Rule 1.1 revision, formalizing the obligation for counsel to provide technical capability for any technology they or their clients use. Close examination of state opinions on the duty of technological competency sheds further light on how drastically expectations are shifting.

Several states that have not formally adopted the rule change have instead acknowledged the duty through the publication of formal opinions, asserting that



attorneys who fail to develop basic technological aptitude are putting the integrity of their clients' cases at risk. For example, the Standing Committee on Professional Responsibility and Conduct of the California State Bar stated in Formal Opinion No. 2015-193, that an attorney may violate ethical duties of competence by failing to understand and perform specific e-discovery tasks or associating with others who are so competent. California also asserted that billing a client by the hour when the level of efficiency was lower due to an attorney's technical incompetence may be a violation of ethics.

New York County Lawyers' Association Professional Ethics Committee Formal Op. 749 from 2017 emphasizes the, "Ethical duty of technological competence with respect to the duty to protect a client's confidential information from cybersecurity

risk and handling e-discovery," in a litigation or government investigation. Similarly, New Hampshire's bar association issued Advisory Opinion No. 2012-13/4 regarding cloud computing that, "Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework and privacy laws keep changing, lawyers should keep abreast of these changes."

In the wake of formal opinions on competence, a push for state-required technology CLEs has also risen. In 2016, Florida became the first bar in the nation to require a CLE tech component for its members. It amended Rules 4-1.1 (Competence) and 6-10.3 (Minimum Continuing Legal Education Standards) adding, "That competent representation may involve a lawyer's association with, or retention

of, a nonlawyer advisor with established technological competence in the relevant field. Competent representation may also entail safeguarding confidential information related to the representation, including electronic transmissions and communications.” It also stated in Opinion No. SC16-574, “In order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology.” This year, North Carolina’s bar announced, “All licensed attorneys will be required to complete one hour of CLE devoted to technology training (part of the annual 12-hour requirements).”

Technology Is Inevitable in Discovery

It is possible that continued development of mandatory

requirements may help wash away the reticence lawyers often harbor toward technological innovation. The 2017 ABA Tech Report remained heavily critical of the outlook on attorney technological competency, concluding attorneys, “should not rely on their own belief that they are ‘good enough’ at using the software deployed in their firm People don’t know what they don’t know, and therefore think they know more than they do.” The 2018 ABA Tech Report noted that while the general population overall continues to overestimate their abilities in self-reporting assessments, solo and small law firm attorneys appear to inflate their “comfort” using technology at a higher rate than the respondents from large law firms.

Performing legal work today and maintaining an ethical legal practice, definitely requires a

basic understanding and use of standard legal technologies. While all attorneys don’t need to be experts in technology, they must understand the forces at play that may impact their clients. Competent lawyers have a basic understanding of the technologies they use. They evaluate how time is billed for each case and uncover instances of blatant inefficiencies that could be solved with technology at no additional cost to the client. They understand the changing regulatory framework and commit to frequent and consistent education on privacy laws, information security considerations and other drivers that impact client matters. As more states adopt a CLE requirement, the legal field’s technical skill set and fulfillment of ethical competency will steadily improve, ultimately providing better service and outcomes for clients. ■