

Professional Competence and Information Technology

by Alan S. Goldberg

WHETHER PROFESSIONAL COMPETENCE for attorneys clearly requires the ability to use information technology safely recently has been the subject of articles published by the District of Columbia Bar¹ and the Florida Bar.² Concerns for members of the Virginia State Bar include compliance with the Virginia Rules of Professional Conduct and other judicial rules and policies. They also include federal and state privacy laws that protect health records and other information. Those include the Health Insurance Portability and Accountability Act of 1996 and the Internal Revenue Service Section 7216, Disclosure or Use of Tax Information by Preparers of Returns, and Virginia privacy laws.

A Microsoft Office Excel reformatting mistake caused 179 contracts erroneously to appear in a spreadsheet forming a part of an agreement for the purchase of Lehman Brothers assets, and soon thereafter was the subject of litigation in the U.S. Bankruptcy Court for the Southern District of New York.³

The amendments to the Federal Rules of Civil Procedure effective December 1, 2006, address e-discovery and other federal and state discovery rules and impose stringent technology-related requirements on attorneys anticipating and involved in litigation.⁴ Metadata concerns are discussed in continuing legal education programs. The rules may differ in each jurisdiction.⁵

Some attorneys do not understand basic techniques for practicing safe computing. The following are simple technology tips that can enhance professional competence, regardless of your expertise level:

Whoops—where did my e-mail go?

Don't begin a new e-mail by inserting addresses in the "to" and "copy to" fields. Instead, use the body of that e-mail for temporary addressee information and

fill in the addresses when the e-mail is ready to send. That way, an inadvertent click will not send a flawed e-mail beyond any hope of retrieval.

Stop thief! According to the Insurance Information Institute's 2007 Theft Statistics, based on the Federal Bureau of Investigation's Uniform Crime Reports, a motor vehicle is stolen in the United States every 28.8 seconds.⁶ Why would any attorney ever leave a laptop that contains confidential information in an unattended automobile?

Behold the litigation hold. Every attorney, regardless of practice area or position in any firm or organization, should know what a litigation hold is; when a litigation hold likely arises; and how to protect electronically stored information. Review *Zubulake v. UBS Warburg* and decisions of Judge Shira A. Scheindlin.⁷ Also see the resources available at the Sedona Conference website.⁸

Before you use it, learn it. Today's computer programs are more complex, even though some software developers say that their programs are easy to use. Instruction manuals often are computer files that have to be opened and printed or read online, which discourages study. No attorney should use a computer program of any complexity without studying the developer's manual and instructions provided by third-party vendors. And beware of hidden files that sophisticated users can open and read.

Neither a borrower nor a lender be. Sometimes an attorney will use another's computer. Unfortunately, every action on a computer creates a hidden history. Clients, legal strategies, and confidential information—even information created on so-called Web-based e-mail that uses a commercial online service provider—can be found by a technology sleuth. In

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HIPAA Alert

The American Recovery and Reinvestment Act of 2009—the economic stimulus legislation currently before Congress—at press time included provisions that would expand privacy and security rules under the Health Insurance Portability and Accountability Act.

The changes could impose new requirements on attorneys and others who are deemed to be "business associates" under HIPAA. The legislation would impose civil and criminal penalties on business associates for privacy violations.

If the legislation passes as currently written, substantial amendments would have to be made to business associate agreements. The process will be confusing at first, as federal and state governments will have to resolve ambiguities with state laws. Attorneys who have business associate relationships with entities covered by HIPAA should watch the progress of this legislation. Drafts of the legislation are available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.+1>.

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general, the only reliable way to erase digital information is to destroy the media. Think before you create digital words that may survive forever on someone else's computer.⁹

Specific competence in information technology may not yet be included explicitly in ethical and professional responsibility rules. But the profound nature of how the practice of law has changed because of computers surely implicates proactive efforts by attorneys to understand computer technology.

Endnotes:

- 1 "Speaking of Ethics, R U Competent?," by Saul Jay Singer, *Washington Lawyer*, November 2008, accessed at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/november_2008/ethics.cfm on January 8, 2009.
- 2 "What Every Attorney Needs to Know About Electronic Technology," by D. Patricia Wallace, *The Florida Bar Journal*, October, 2008 Volume 82, No. 9, accessed at <https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/0f70a83688e3cd0d852574ce0055401c?> on January 8, 2009.
- 3 *Motion of Barclays Capital Inc. for Relief Concerning Certain Contracts Erroneously Posted with the "Closing Date Contracts,"* accessed at <http://abovethelaw.com/Barclays%20Relief%20Motion.pdf> on January 9, 2009.
- 4 *See* Amendments Approved by the Supreme Court — Submitted to Congress (April 2006) — (Effective December 1, 2006), accessed at <http://www.uscourts.gov/rules/congress0406.html> on January 9, 2009.
- 5 District of Columbia Bar Opinion 341, Review and Use of Metadata in Electronic Documents, accessed at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm on January 9, 2009.

- 6 Insurance Information Institute, Issues Updates, Auto Theft, December 2008, accessed at <http://www.iii.org/media/hottopics/insurance/test4/> on January 9, 2009.
- 7 Opinion and Order, U.S. District Court for the Southern District of New York, *Zubulake v. UBS Warburg LLC, et al.*, accessed at http://www.nysd.uscourts.gov/rulings/02cv01243_order_072004.pdf on January 9, 2009.
- 8 The Sedona Conference, accessed at <http://www.thesedonaconference.org> on January 9, 2009.
- 9 "Hard drive destruction 'crucial,'" BBC News, accessed <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/technology/7816446.stm?ad=1> on January 9, 2009.