

Technology Competence and the Practice of Law: Now, a Necessity

by Alan S. Goldberg

Imagine practicing law today without using a computer: For most of us, unimaginable. For today's law students, learning the law without a computer also would be unimaginable. Are computer technology and legal education and the practice of law now permanently symbiotic?

Many law students first learned about computer technology systems when using proprietary Westlaw and Lexis legal research services before the Internet became ubiquitous. Now those services and many competitors are accessible on the Internet using laptops, tablets, and cellular telephones. The use of laptops in the classroom is an ongoing item of controversy among law professors. Some say that students spend too much time in class surfing social media web sites instead of paying attention to the professor's remarks, and others say that it's the professor's responsibility to capture and hold the interest of the students during class. But students want to use laptops and hand held devices, and they will use them whether or not teachers like it.

Debates regarding legal education often focus on Dean Langdell's case method and what some view as positive changes including adding clinical training and skills development. But perhaps the most consequential change both in legal education and in law practice was initiated without specific relevance to substantive and procedural law, and instead occurred because of instant computer access to a plethora of information about the law.

Some disagree about whether the end result of a legal education primarily is preparing law students for law practice by teaching students the law, or preparing law students' minds for legal analysis.

In either case, a critical component of the legal education process is teaching competence in the use of computer technology that will enhance the work product of practicing attorneys.

Among the first experiences a practicing lawyer has after joining or opening a law firm is exposure to the firm's technology. Knowing how to use a firm's computer system productively and reliably is a necessity. Because so much of law school education depends on computer technology for research, writing, and information sharing, new graduates already know many aspects of technology used in the practice of law.

Unfortunately, although most professional rules of attorney ethical conduct require basic competence, experience and competence in using computer technology in the practice of law is not specifically referenced either in professional responsibility rules or in commentaries accompanying the rules. Some bar legal ethics opinions support a requirement of competence in technology.

This situation may well change because the ABA adopted the following language at its 2012 annual meeting:

"Rule 1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. ... [6] 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 technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (emphasis added)

Ponder a typical day in the professional life of an increasing number of members of the Virginia State Bar:

First, early in the morning, reading and replying to e-mails and reading about current events and legal developments on the Internet, either using a laptop computer or a hand-held computer device;

Second, arriving at the office and logging on to the office network using a computer providing access to document files, e-mail, the Internet, word processing, spreadsheets, data bases, and more.

Each of these applications requires knowledge, experience, and judgment for effective use, with periodic new versions requiring continuing education about changes. Improper use of any of these applications could result in inappropriate loss of confidentiality of information, inaccurate documentation, incorrect computations, flawed research, or loss of vital and relevant information. Some might say that if an attorney really needs to know how these or other applications function, surely a staff member or colleague can assist. But would an attorney not be expected to have a basic understanding of laws and judicial decisions relating to statutes of limitation and repose, contracts, proximate cause, mens rea, fraud, gross income, and perjury regardless of the attorney's day-to-day practice and without the immediate assistance of anyone else?

In other words, while a heightened level of technology expertise would be appropriate in situations requiring advanced knowledge and expertise (such as for an attorney concentrating in communications, intellectual property, or health law), a primary part of every attorney's competence is to be able to recognize basic issues and implica-

tions and thereby to know when to learn more and when to ask for the assistance of colleagues. Knowing basic computer technology is a part of that competence.

In 2012, an attorney must know and understand how to properly configure search inquiries, delete “cookies” or cached information, use proper formulas in spreadsheets, and protect confidentiality and security with passwords and encryption. The attorney should also know how to avoid prematurely sending an e-mail by inserting addressees *only after* the e-mail has been proofread, inadvertent and inappropriate disclosure of information when using Internet search engines, mixing up versions of documents when using word processing, and inadvertently releasing metadata or prior versions of documents in a file shared with others when that information could prejudice a client’s best interests.

Sadly, a lesson was learned from an error during the extraordinarily complex and massive bankruptcy case involving Barclays Capital Inc. A formatting error in an Excel spreadsheet inadvertently resulted in 179 Lehman contracts mistakenly being included in an asset purchase agreement. That led to the filing of a motion in the U.S. Bankruptcy Court

for the Southern District of New York stating that a first-year law associate had unknowingly included the contracts as a part of an executed agreement.

The critical need for all attorneys to have and maintain the requisite knowledge and skill required to practice law, including learning the benefits and risks associated with technology, has never been greater. Even while the debate continues about what and how law schools should be teaching and what attorneys should be learning, one thing is certain: every attorney must know how to practice safe computing. Today, those attorneys who ignore the need for basic competence in the use of computer technology do so at their peril.

As well stated by Sharon D. Nelson, the president-elect of the Virginia State Bar: “It’s about time the ABA competence comments under the Model Rules now include keeping current regarding ‘the benefits and risks associated with relevant technology.’ For those lawyers who are still in the Jurassic age of technology, remember what happened to the dinosaurs: many more of your colleagues, and likely many of your clients, now believe that you are ethically required to know and to keep up with changes in law office technology.”



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