

Technology and Virginia Attorneys: The Lure, the Core, the Law, and the Lore

by Alan S. Goldberg

The profession and business of practicing law has changed in many ways, with technology advances leading the way. For new attorneys, some words will be confusing because technology has made them obsolete. In a law office today (the concept of a fixed location physical office may be outdated because of technology advancements), no one “dials” a telephone number anymore, no one will “take a letter” using dictation and shorthand, and no one uses carbon paper or a mimeograph machine to make copies of documents. Even the word “document” now means a word processing file and not a piece of paper.

For attorneys, as for many other professionals, embracing change can be a daunting and for some a seemingly impossible achievement.

Professional competence increasingly includes familiarity with and the ability to use computer technology in providing legal services to clients, just as is the ability to read and understand a corporate annual report or an audited financial statement. So, let’s consider what might be a good start for the twenty-first century Virginia attorney who wants to understand the new technology.

First, it’s important to acknowledge that many attorneys in large law firms have technology professionals on staff who take care of much of the computer infrastructure for the firm. For smaller law firms, sometimes only a single attorney in solo practice will be expected to address the firm’s technology concerns. Nevertheless, both large-law-firm and small-law-firm attorneys should know some basic information and techniques.

Where files are created can be a confusing, but is a critical, part of using computer technology properly, because of privacy and security concerns, and because of litigation hold concerns when information must be protected because

of procedural and professional conduct rules. Where files repose and how they move and are removed depends upon the technology being used. Most of the time, a file is created on the computer hard drive with a word processing application such as Microsoft® Word for Windows or Word for Mac.

Sometimes, however, the file is created on another computer, called a “server,” that is connected by a cable or by wireless to the computer the attorney is using. Sometimes, the distant computer is located in “the cloud,” which is a term used to describe a very distant computer server, such as those provided by commercial computer technology companies including Google and Microsoft.

Regardless, the attorney must know where the file reposes in case he wants to expunge it. In general, unless special technology is used that many attorneys don’t have available or don’t know how to use, expunging a file, which some refer to as deleting a file, does not actually occur. Instead, the computer changes the identifying information for the file and someone with sophisticated knowledge of computer technology likely could locate and see the deleted file.

So one important lesson to learn is that using someone else’s computer for legal work can expose otherwise confidential information, such as the contents of a file, to whomever has access to that computer and knows how to locate and read supposedly expunged files. Another lesson is that when disposing of a computer, the best solution for expunging files from the hard drive is to remove it and destroy it.

It’s also important to know that sending a file to someone via electronic mail, without first removing what is called metadata (that is, hidden information within the file that can be seen by

someone knowing where and how to look), can expose preliminary drafts and client information to the recipient. Surprisingly, some attorneys have no idea what metadata or file naming features are and a recipient either inadvertently or intentionally can see prior versions of the file including what was changed or deleted before, and also for whom the file originally was created, such as another client, unless that metadata information is removed. To add to the confusion that surrounds metadata, some jurisdictions have rules of professional conduct that could be construed to prohibit looking for metadata while others permit looking for it and some are ambiguous. In Virginia, the likely conclusion is that peeking at metadata is not appropriate, but no published legal ethics opinion directly addressing the issue has been found.

Another basic feature of computer technology that every attorney should understand is how each commonly used computer program works. In one unfortunate instance, an associate of a Wall Street law firm, during the preparation of a Microsoft® Excel spreadsheet computer file and conversion of that file to an Adobe® portable document format file, inadvertently caused certain hidden rows of financial information contained in the Excel spreadsheet file to reappear without the designation that would have indicated omission from the transaction. This resulted in the filing of a motion to correct the attorney’s computer technology mistake, which created embarrassment and risk for the law firm and the client. Had the attorney been skilled in using the computer applications or sought advice from someone with the necessary expertise, the error likely would not have occurred.

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Finally, it is important to understand that some areas of law, including health law and technology law, require more computer technology prowess than others. Health information privacy and security and data breach issues implicated by the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and of the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009, require far more than a rudimentary knowledge of computer technology, including encryption technology. In addition, the Food and Drug Administration has published materials indicating that some computer software that involves health care is a medical device, and so any attorney involved in life sciences law must understand the nature of software and related computer technology concepts.

It's no longer possible for attorneys to believe that it is appropriate to continue to avoid learning and understanding computer technology including social media and social networking. Welcome to the twenty-first century where the practice of law and computer technology go together, and nothing can keep them apart.



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