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Dunning-Kruger and You: Evaluating Your Technological Competence with the Legal Tech Audit

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Introduction

There's an enormous skill set you must develop as an attorney: an eye for detail and nuance, a critical mind capable of addressing a legal issue from multiple, often contradictory, perspectives, the poise and presence to stand before a court and present your case, the confidence to argue zealously on behalf of your client, the fortitude to work long, hard hours, and so on. One skill that is too often neglected, though, is the ability to utilize technology to ease the burden of all those aforementioned tasks for the benefit or your firm, your client, and most importantly, yourself. In fact, In August of 2013, the ABA approved a change to its Model Rules of Professional Conduct to address this very issue. The comments to Rule 1.1 on a lawyer's "duty of competence" were amended to include that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology..."[1]

One aspect of this comment is a reminder and a warning that new technology has some inherent risk as it is being adopted and understood. We need look no further than the notion of putting data into the "cloud." While it is certainly convenient for all of our information and services to be universally accessible from anywhere with an internet connection, that same information can be hacked or compromised just as easily. Part of your due diligence is making sure you understand the benefits and costs, both financial and practical, of any technology you choose to integrate into your practice.

Another aspect of the comment is that lawyers are encouraged to improve their familiarity with the technology already being used. But how much more does the one

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[1] *Client-Lawyer Relationship, Rule 1.1 Competence - Comment*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (Dec. 2013)

need to get out of their word processor or email client? Some would say that there's always more to learn. And they are right; there are so many functions and tools built into Microsoft Word alone that no mortal being could ever know all of them, and that is a single piece of software in a whole suite of office productivity applications.

However, some would say they know more than enough to get by. In fact, the practice of law demands a higher level of competence with those tools considering the importance of creating and transmitting documents, communicating quickly and effectively, and recording actions taken. If you've been plugging along with no issues, haven't been reprimanded or otherwise punished, and generally enjoy an uninterrupted stream of clients, your level of technological competence is probably exactly where it needs to be.

This latter mindset isn't wrong either. After all, it's your skills as a lawyer that your clients are interested in, not whether you're a Microsoft certified Excel guru. This level of tech aptitude should not be mistaken for mastery, though. The amount of expertise you have with the software is not all-encompassing, but enough to get the job done. Yet some lawyers will consider their skills to be far more advanced than they actually are. By the criteria they see before them, gainful employment and successful application of technology to daily tasks, they evaluate themselves as being competent with the technology. In other words, if you're good enough to be a successful lawyer using a word processor or spreadsheet, doesn't that mean you're a good user of that software?

If this starts to sound a bit dissonant, it's by design. Of course not all lawyers will conflate being a good lawyer with being a good technology user. And the aforementioned cognitive error (actually, a *meta*cognitive error, but I'll address that

later) of falsely attributing competence based on a deficient skill set is a condition suffered by humans in general, not just lawyers. The phenomenon was identified by Justin Kruger and David Dunning in the article "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments." While the article was published more than 15 years ago, it has been thrust back into our collective consciousness recently due to the explosive advancement of technology and the increasingly diverse ways in which we interface with it. As we struggle to assess our effectiveness in utilizing tech in a myriad of new ways, the aptly named "Dunning-Kruger effect" posits, in grossly simplified terms, that the less we know about something, the more likely we are to overestimate our competence in it.

The Dilemma(s)

Evaluating and improving the technological competence of lawyers presents a two-fold dilemma. The first is simply addressing the Dunning-Kruger effect. The article describing their studies introduces three points, the first two of which seem benign: first, that success depends on knowing the rules and strategies of the domain you're participating within, and second, that people will apply different rules and strategies in a domain with differing levels of success. The third and noteworthy point is that:

> ...when people are incompetent in the strategies they adopt to achieve success and satisfaction, they suffer a dual burden: Not only do they reach erroneous conclusions and make unfortunate choices, but their incompetence robs them of the ability to realize it.[2]

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[2] Kruger, Justin; Dunning, David (1999). "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments". *Journal of Personality and Social Psychology* 77 (6), 1121.

They refer to this ability to know how well they are performing, or to judge the performance of others, as *metacognition* or *metacomprehension*. To illustrate their point, the authors use the example of being able to write grammatical English. The skills necessary to complete a grammatical English sentence are the same ones needed to recognize one. They're also the same skills needed to recognize an error; "In short, the same knowledge that underlies the ability to produce correct judgment is also the knowledge that underlies the ability to recognize correct judgment."[3]

They found that individuals less competent in an area were more likely to overestimate their performance. Their lack of skill translated into a deficiency in the *metacognition* necessary to recognize that they had performed poorly. Interestingly enough, while the lower skilled individuals tended to overestimate their abilities, higher skilled individuals tended underestimate their performance relative to their peers. They found that they could accurately identify their absolute abilities (their score on a test), but would downplay their ability relative to the performance of their peers (average score amongst a class). The conclusion reached was that the participants assumed since they had performed well, everyone else must have done just as well.

How does this apply to lawyers and technology? This discussion about the Dunning-Kruger effect isn't to cast lawyers as a profession of luddites, blissfully unaware of all the tools at their disposal. This is simply a public service announcement, a reminder to question your preconceptions about what you do and how you do it. It's a cautionary warning, the one discussed previously about the new ABA comment regarding an attorney's duty of competence regarding technology. Just because you're doing fine with technology doesn't mean you can't be doing more, doing it better, or

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[3] Ibid.

doing it faster. Don't assume you're doing the best you can with the software or hardware at your disposal. I am sure there's some task in Word or WordPerfect that will simply ruin your day if you find yourself stuck with it. Don't live with that; make it an opportunity to improve your skills.

The second dilemma is one that flows from recognizing where there is room for improvement. Even if you can identify a piece of software that you'd like to learn better, there's a potential disincentive for lawyers to get better with technology. A technologically proficient lawyer can format reports easier, create documents automatically, compile spreadsheets with less confusion, process PDFs quicker, etc. But achieving that proficiency takes time training and learning about all the nuances and functions of the software. Improving with using technology can take a lot of time and effort. And generally speaking, this isn't time you can bill for. Getting better with technology also means you can complete tasks quicker, which means you will be billing for less hours. That's right: this second 'dilemma' comes down to the almighty dollar and ethical behavior. Will you spend more time learning something new (and potentially very challenging) in order to reduce the time you ultimately charge for? What if that same time could be instead used doing the same tasks in the longer, more inefficient way, and still be counted as billable time?

How much of a problem or perceived issue this may be depends on how cynical one is about those that practice law in the United States. Will attorneys, despite the time saving benefits presented by enhancing their prowess with the software at their disposal, continue to pad their billable hours with inefficient practices? Or will they embrace the paradox of spending more time and effort to make less money? Of course, the reality isn't nearly so nefarious, and most clients are aware. Clients are paying for their skills as

a lawyer, not for the dexterity with which they can navigate the finer functions of Microsoft Word. And even if the work is inefficient, if the end product produces a desirable result in the end, maybe the inefficiency is worth it. Regardless of whether this feeds back into the false sense of technology competency discussed earlier, many clients are interested in the outcome, not the means.

That being said, it cannot be universally claimed that no one has ever looked at the details of their bill and wondered how much could be saved if their council was a little savvier with a word processor. Enter Casey Flaherty, corporate counsel at Kia Motors America, Inc., and someone who did exactly that. And then did something about it.

The Solution (?)

Flaherty's solution to the perceived overcharging for technological incompetence was a basic technology competency audit. The nature of the audit is relatively simple: a series of mock assignments testing the skills of his outside law firms in certain pieces of software, namely Microsoft Word, Excel, and Adobe Acrobat. He chose a set of tasks that take him about 30 minutes to complete, and includes such projects as formatting a motion in Word, isolating pertinent performance data in Excel, Bates stamping a series documents reproduced as PDFs, etc. Flaherty set a satisfactory completion time at an hour and had firms bidding for Kia's business send a top associate to take the audit. For each time the outside council fails to complete the tasks within that hour, he takes 5 percent off their bill. I would argue that any firm that comes with a half hour or so of that limit should not have their billing reduced. Indeed, in much of the literature written about the audit, Flaherty freely admits that the hour limit was a completely arbitrary

threshold. However, none of the outside council came even close. Of the 10 times he administered the audit, the best any of his outside firms could achieve was two and a half hours, with the worst being eight hours, or an average of five hours across all of them.

An interesting aspect of the audit was that Flaherty gave his outside council opportunities to explain that certain aspects of the audit would not be handled by an associate. In the letter sent to the associated before the audit, he explains that:

> It is important to understand that the distribution of work is one focus of the audit. You should not hesitate to explain that a particular task would be performed by someone else—e.g., your secretary, a paralegal, word processing. For certain tasks, that is precisely what is expected (i.e., it is the right answer).[4]

 This disclaimer came with a set of caveats though. First, paralegals also bill for their time, so unless they receive substantially different training, it probably won't change the fact that the tasks are being done inefficiently. Second, the audit is also intended to test general proficiency, so even if the specific task being tested may not be appropriate for the associate's position, it will still probably reveal whether they're proficient in the way the audit is concerned. Third, sufficient staff support isn't always available, especially considering the odd hours worked or work done while traveling. The tasks will still need to be accomplished by the associate in these situations, even though they would normally be handled by staff. Finally, if the associate claims that efficiency on a particular task is immaterial because it will never show up on a bill, that is fine, but then it should never show up on a bill.[5]

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[4] Flaherty, Casey, "Could you pass this in-house counsel's tech test? If the answer is no, you may be losing business". http://www.abajournal.com/legalrebels/article/could_you_pass_this_in-house_counsels_tech_test (July 17, 2013).
[5] Ibid.

The Audit

The primary goal of the audit is to provide a more tangible incentive for attorneys to improve their tech skills. A stand-alone audit tool is now available that will allow clients to request that their attorneys take the audit and receive a score based on their performance. All other things being equal, or depending on the preferences of the client, the tech audit score will provide the client with a discrete value by which to evaluate attorneys or firms. The score will be a real representation of how much more, or less, a client can expect to pay. The audit addresses everything from find-and-replace to functions to purging metadata from a document. You can see a full list of the material covered in the audit In Appendix 1. The skills being tested aren't anything overly sophisticated; as Flaherty puts it, "the learning curve is neither steep nor long."[6] They are also tasks you can realistically expect to see requested. I must add that some tasks are hidden behind obscure or unintuitive design choices, and, in the case of some pieces of software, are downright intimidating. If not for a helpful coworker, I would still be mortally terrified of Excel.

I've had the chance to review the stand-alone version of the legal tech audit available to law students, which only touched on a couple features of Word. The lessons covered modifying and applying styles, auto-numbering headings, using the navigation panel to arrange sections of a document, viewing and using the formatting mark-up in a document to achieve the desired look, and creating templates. The system for going through the lessons and evaluations was rather restrictive, only working in Internet Explorer and one of the newer versions of Word. The integration between the lessons

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[6] Ibid.

and the practical exercises, however, responded very quickly and helped tremendously with learning.

The exact tasks included in the full audit aren't public knowledge yet, as the product is still being developed. There are a few projects tested by the audit[7] available by way of example, including one involving adding a provision to a generic lease in Microsoft Word. It involves adding a new section between Articles II and III. All the new content added is correct, but all of the subsequent sections (and cross-references to those sections) will need to be renumbered. In the document provided, the lease is 101 pages long and will require 136 headings to be changed, as well as 273 cross-references to be updates, or 409 necessary updates (or 'opportunities for error'). For the average user trying to make all of the updates manually, the process can take about two and a half hours. A user savvy in the type of techniques advocated by the audit can use Word's built-in styles, auto-numbering, and cross-references to make the same changes in about 20 seconds.

Another task involves providing PDFs for court, but making sure all of the active links have been removed from the documents. Flaherty uses the example of an associate who prints out the PDFs and then rescans the prints into a new PDF. Yes, technically the links are removed. But consider the process of printing, retrieving, and scanning. Maybe the whole process takes 4 minutes, but if you're billing at $200 an hour, those 4 minutes are $20 for a single document. Multiply that across all documents that might need to processed this way and the costs quickly begin to accumulate.

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[7] Flaherty, Casey "Legal Tech Audit" https://www.youtube.com/watch?v=KOfC5jQoH6Y

These are just some of the practices Flaherty identified as taking a disproportionate amount of time compared to the way they could otherwise be completed using the right techniques. As the list of features in Appendix 1 makes apparent, there is a rather large amount that one needs to learn to pass the audit with flying colors. What is even more impressive (and daunting) are the subjects and tasks that were discussed for the audit but were not chosen to be included in the final product, including data security, email and calendaring, legal research, time and billing, and electronic discovery. For the three subject areas the legal tech audit covers, I have compiled a collection of training resources in Appendix 2. I would invite you to peruse the feature list for something you've struggled with before, or even something new, and give it a try.

Why You Should Care

So will you be failing your due diligence if you can't add Bates Numbering in Acrobat? No. Is your livelihood in peril if you can't automatically generate a table of contents in Word? Unlikely. Will your billable hours be slashed if you can't link cells across multiple spreadsheets in Excel? Probably not. As discussed above, most people coming to an attorney are only tangentially concerned about their technology skills, if at all. Ultimately it is you skill as a lawyer that they are interested in, so any thought of improving you tech competency should come only after you are completely confident in your ability to represent your client's best interest.

That said, I believe that many of the skill advocated by the tech audit are well worth your time learning. While an incalculably small amount of lawyers will actively avoid training in an effort to inflate their billable hours, I believe most others have a

genuine interest in honing their skills. Having done a fair amount of research into what is involved in the audit, as well as preparing a series of instruction sessions on audit-related skills for current law students, I can personally attest that the talents and insight you can gain are incredibly helpful. Knowing how to finesse Word into creating a document the exact way I want it to look instead of fighting it tooth and nail was well worth the time and effort.

Furthermore, Flaherty's tech audit could be the next big thing. There are many different training tools available to lawyers, either provided in house, through vendors like Capensys, or free online (Appendix 2), but the tech audit is one of the first services to provide a genuine incentive to engaging in that training. Legal technologists, librarians, bloggers, and those interested in forecasting the future of the legal practice have been paying a lot of attention to what Flaherty has been saying since the audit was introduced in early 2013. The excitement initially surrounded the audit because it was the first discrete way of evaluating and motivating the improvement of tech training for lawyers. That hype has grown now that Flaherty has delivered on the promise to a localized idea into an external tool for the legal community to utilize. While the tool has taken about two years to materialize, the fact that actually arrived bodes well for its implementation

Even if the tech audit doesn't become an established practice, it's another indicator in series of efforts to address what is perceived to be an issue in the legal profession. There's a growing field of positions for people with JDs, but who don't want to become lawyers. And almost all of these new professions are in some way integrated with technology: legal knowledge engineers, legal technologists, legal process analysts, legal project managers, online dispute resolution (ODR) practitioners, legal

management consultants, legal risk managers, etc. In other words, there is a growing number of "legal entrepreneurs" who specifically specialize in the intersection of law and technology. And most of them aren't in Atlanta, or New York, or Los Angeles, or London, or Beijing. They're in Silicon Valley, and they see that technology can replace book stores, TV, and taxis. So why not lawyers? It's not as strange as it sounds. Just look at LegalZoom, providing largely automated legal assistance. Or the Computer Assisted Legal Instruction center's Access2Justice (A2J) platform, a cloud based software tool that lets you create web-based interfaces for document assembly. A2J is freely available to courts, clerk's offices, legal services organizations, and law schools to make these tools, all without having to involve a lawyer.

Lawyers have not innovated into these kinds of high tech fields because, until now, there was virtually no alternative to an actual attorney. However, the demands of society changed, and technology has advanced to the point that these demands can be met without an admitted member of the bar. So instead of lawyers filling these new niches, the entrepreneurs, hackers, and robots have begun to do it instead. Rather than falling further behind, why not embrace this opportunity to reclaim relevance.

Absent all of those things, if you're already competing for clients, why not compete on technological proficiency as well? It certainly can't hurt your cause to be a good technologist on top of being a good lawyer.

Conclusion

Embrace this opportunity to reexamine your presumptions about where you are professionally and technologically. This author did, and I've found that the most empowering aspect of engaging in the legal tech audit was removing a lot of the anxiety

surrounding figuring something out. Too many times do I find myself trying to learn (unsuccessfully) in the middle of a project, getting frustrated, and attacking it in a brute force way that would ultimately leave me feeling stressed out and unsatisfied with the final product. My view of the audit has thusly evolved, from some new, needlessly onerous potential reason for punishment, to a legitimate reason to want to improve my level of comfort in engaging with the software I thought I understood. I once again encourage you to give the process a shot, and to start (or continue) the journey of becoming a tech savvy lawyer.

Appendix 1: Legal Tech Audit feature list

Word Processing

Align Text: center
Align Text: justified
Align Text: left
Align Text: right
Bookmark
Breaks: Page
Breaks: Page - Column
Breaks: Section - Next Page
Bullets
Columns
Comment: delete
Comment: delete all
Comment: insert new
Comment: next
Comment: previous
Compare
Copy
Create PDF
Cross-Reference
Cross-Reference: update
Cross-Reference: update all
Cut
Endnote
Find
Find & Replace
Find & Replace All
Find & Replace: Format
Find & Replace: Special
Font
Font color
Font size
Font style
Font: all caps
Font: bold
Font: highlight
Font: italics
Font: small caps
Font: strikethrough
Font: superscript

Font: underline
Footnote
Format Painter
Header & Footer: different first page
Header & Footer: edit
Header & Footer: format page number
Header & Footer: insert page number
Header & Footer: link to previous
Hyperlink
Indent: decrease
Indent: First line
Indent: increase
Insert: Shapes
Insert: Symbol
Insert: Text Box
Margins
Multilevel List
New Window
Numbering
Orientation
Pagination: Keep lines together
Pagination: Keep with next
Paste
Paste: Keep Text Only
Paste: Merge Formatting
Permissions
Picture: crop
Picture: insert
Picture: styles
Picture: wrap text
Prepare for Sharing
Redo
Restrict Editing
Save

Save as
Show/Hide ¶
Show: Navigation Pane
Show: Ruler
Spacing: after paragraph
Spacing: before paragraph
Spacing: line spacing
Styles: apply
Styles: modify
Styles: update to match selection
Table: autofit
Table: borders
Table: delete column
Table: delete row
Table: insert column
Table: insert row
Table: insert table
Table: shading
Table: text alignment
Track Changes: accept
Track Changes: accept all
Track Changes: next
Track Changes: on/off
Track Changes: other authors
Track Changes: previous
Track Changes: reject
Track Changes: reject all
Track Changes: show final
Track Changes: show markup
Undo
Views: Draft
Views: Outline
Views: Print Layout
Styles: apply
Styles: modify
Styles: update to match selection

Spreadsheets

Align Text: center
Align Text: left
Align Text: right
Align: bottom
Align: middle
Align: top
AutoFill
AutoSum
Borders
Breaks
Cells: delete
Cells: format
Cells: insert
Charts
Clear
Columns: autofit
Columns: delete
Columns: format
Columns: hide
Columns: insert
Columns: unhide
Conditional Formatting
Copy
Copy as a Picture
Create PDF
Cut
Defined Names
Fill Color
Filter
Find & Replace
Find & Select
Find & Select: go to special
Font
Font color
Font size
Format Painter
Formula: add
Formula: cell references
Formula: divide
Formula: multiply
Formula: subtract
Freeze Panes
Function: AVERAGE
Function: COUNT
Function: COUNTA
Function: HLOOKUP
Function: IF
Function: IFERROR
Function: INDEX
Function: ISBLANK
Function: ISERROR
Function: ISNUMBER
Function: ISTEXT

Function: LEFT
Function: LOOKUP
Function: MATCH
Function: MAX
Function: MIN
Function: RANK
Function: RIGHT
Function: ROUND
Function: SUM
Function: SUMIF
Function: VLOOKUP
Hyperlink
Indent: decrease
Indent: increase
Margins
Merge & Center
Name Box
New Comment
Number Format
Orientation
Page Break Preview
Page Layout
Paste
Paste Special
Permissions
Picture
PivotTable: multiple filters per field
PivotTable: column labels
PivotTable: insert
PivotTable: report filter
PivotTable: row labels
PivotTable: show values as
PivotTable: summarize values by
PivotTable: values
Prepare for Sharing
Print Area
Print Titles
Protect Workbook
Remove Duplicates
Rows: autofit
Rows: delete
Rows: format
Rows: hide
Rows: insert
Rows: unhide
Save
Save as
Scale to Fit
Select All
Shapes
Size

Sort
Styles
Table
Worksheet: delete
Worksheet: hide
Worksheet: insert
Worksheet: move or copy
Worksheet: rename
Worksheet: select all
Worksheet: tab color
Worksheet: unhide
Wrap text

PDF

Advanced Search
Bates Numbering
Bookmark: add
Bookmark: delete
Bookmark: go to
Bookmark: rename
Callout Box
Create PDF: combine files into a single PDF
Create PDF: from clipboard
Create PDF: from file
Draw
Encrypt
Find
Full Text Index with Catalog
Header & Footer
Highlight Text
Link
Pages: delete
Pages: extract
Pages: insert
Pages: replace
Pages: rotate
Recognize Text (OCR)
Redact
Remove All Links
Remove Hidden Information
Remove Links
Snapshot
Sticky Note
Text Box
Text Edit

Appendix 2: Select Training Resources

Word Processing

Microsoft Office Training and Tips
https://office.microsoft.com/en-us/support/results.aspx?ctags=CE001017196&queryid=485752a4-82eb-47c1-96f8-0825904423cf&av=all

Word Help and How-To's
https://office.microsoft.com/en-us/word-help/word-help-and-how-to-FX101818070.aspx

Get the Most Out of Microsoft Word
http://www.americanbar.org/publications/law_practice_magazine/2012/march_april/get-the-most-out-of-microsoft-word.html

CompuSavvy's Word & WordPerfect Tips
https://compusavvy.wordpress.com/

Allen Wyatt's WirdTips
http://word.tips.net/

Spreadsheets

Excel and Numbers Templates for Attorney Billing Timesheets
http://www.esquiremac.com/blarg/2009/5/5/excel-and-numbers-templates-for-attorney-billing-timesheets.html

Excel for Litigators: Tips to Present Numbers and Calculations at Trial
http://cogentlegal.com/blog/2014/06/excel-for-litigators/

Law Firm Project Tracker
https://office.microsoft.com/en-us/templates/lawfirm-project-tracker-TC001140479.aspx

Litigation Task Based Budget Excel Spreadsheet
http://hytechlawyer.com/?p=2361

PDF

Acrobat for Legal Professionals
https://blogs.adobe.com/acrolaw/

PaperlessChace PDF Blog
http://www.paperlesschase.com/category/pdfs/

AcrobatUsers Tutorials
https://acrobatusers.com/tutorials

Digital Trends: How to Edit a PDF
http://www.digitaltrends.com/computing/how-to-edit-a-pdf/