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Rule 1.1 Duty of Competency and Internet Research

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8:30 **SESSION 1 – RULE 1.1 DUTY OF COMPETENCY
AND INTERNET RESEARCH**
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Rule 1.1 Duty of Competency and Internet Research

“Benefits and risks associated with relevant technology”

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Rule 1.1 Duty of Competency and Internet Research

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Disclaimer: All statements reflect my opinions and do not reflect any opinions of The University of Georgia School of Law or The Georgia Bar Association.

- Research guide with links to documents and resources: libguides.law.uga.edu/cle2019
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What Has Changed?

Basically the world has changed and technology is the primary driver. The legal industry has changed and yet many lawyers still brag about their lack of technology skills. These skills are not advanced programming and software design. I am talking about the competent use of basic office applications.

Service providers like RocketLawyer and LegalZoom prepare wills, contracts and articles of incorporation. It's estimated that these providers are now at least an \$8 billion industry. People that used to hire local attorneys are now using these services. Potential clients are also using online service to find and evaluate lawyers. The days of non-transparency are dead. Lawyers must be knowledgeable about these services and how they use technology to deliver services.

What is Technology Competency?

Technology competence is broad, it is more than data security and e-discovery. It does not mean knowing how to code. Nor does it mean knowing everything about all technology. It is knowing about the technology which is or could relate to what you do for a living. It means knowing what technology is out there that could help your clients and help you be better at performing your job. It means knowing what this technology can and cannot do.

Basically competency requires a baseline understanding of, and reasonable proficiency in, the technology at hand. Of course, specific proficiencies and competencies will vary between lawyers and practice areas. It also means we should be as inquisitive and knowledgeable about technology as we are the substantive law.

You may have help in meeting your duty of competence. But you may not delegate all technology duties to others in the firm. This would be an abdication of your responsibility to understand technology.

When discussing technology competency it is important to distinguish the various types of software that we find in most law offices.

1. Industry-specific tools like case management and predictive coding software rarely appear outside the legal field.
2. Standard business software
 - a. Microsoft Office applications,
 - b. Adobe Acrobat
 - c. Operating systems - Microsoft Windows, Apple macOS
3. Legal research systems – Bloomberg Law, Lexis Advance, Westlaw Edge

Why is This So Important?

Because the model rules themselves are changing as well as the interpretations of the rules. There is a reason the first rule is that of competency and expecting technological competency is just an update of the existing duty. Our ethical duties now require us to do more than maintain subject expertise and protect client confidences. A lawyer must be competent in all matters reasonably necessary for the representation.

I would not even attempt to count the number of articles discussing the ethical duties of a lawyer regarding technology since 2012 when the ABA amended Comment 8 to Model Rule 1.1.

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I will touch on duties found in Rule 1.1 (competence), Rule 1.5 (ethical billing), Rule 1.6 (confidentiality), and Rules 5.1 and 5.3 (supervisory responsibilities).

The interconnectedness of the ethics rules suggests we must shift our thinking about the role of technology in delivering legal services. Technology is the mechanism to improve efficiency and provide better client service. Incompetent use of technology when doing legal work is incompetence. Incompetent work means unreasonable fees.

Rule 1.1 Competence

A lawyer's fundamental duty has always been to provide competent representation to the client. Lawyers used to think of competency as their substantive knowledge of a certain area of law combined with the experience and ability to adequately represent a client in a particular matter. But times have change and so has the view of what it means to be competent.

Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment 8 to Model Rule 1.1 provides: "[8] 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 [CLE] requirements to which the lawyer is subject."

The technology update does not change the duty to maintain competence under Model Rule 1.1, it merely clarifies that maintaining technological competence is now part of meeting that duty. A practitioner can no longer proudly claim their Luddite status and still claim to ethically serve their clients' interest. The amendment to Comment 8 should be viewed as a sort of codification of changes to the practice of law. Changes that have already occurred but are now being explicitly acknowledged by the rule.

Whatever the nature of your practice or the size of your firm, everyone around you is using technology, your clients, your opponents, courts, judges, agencies, and corporations. Everyone with whom you interact in service to your client. All of those people expect a level of competency in the efficient creation of documents, the secure exchange of information, and the appropriate use of courthouse and courtroom technology.

Rule 1.6: Confidentiality of Information

Increasingly law firms are targets of hacks and data breaches. Two of the country's largest firms Cravath (2016) and DLA Piper (2017) admitted to suffering serious cyberattacks. While mid-size and large firms are most likely to be the target of an attack, every lawyer should understand the potential risks and what mechanisms they or their firm can put in place.¹ They need to adopt best practices for all attorneys and staff including periodic review of procedures and continuing training.

Clients are demanding protection of their digital information. According to the 2016 ABA Tech Survey, 31% of responding lawyers said their clients have imposed security requirements.

¹ View the ABA Technology Survey Reports linked in the research guide.

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In the larger firms that percentage increases to 63%. Clients expect us to know about how to protect their secrets including:

- Understanding firewalls and firm wide protection
- Knowing about scams and ransom ware
- Recognizing and avoiding phishing and spear phishing attacks
- Knowing how encryption, strong passwords, and password managers work

Rule 1.5: Fees

There is a connection between shunning technology or using it efficiently and unethical billing. Under Model Rule 1.5, a lawyer may not collect an unreasonable fee. In every office the right person should be performing the work, using the right tools and technology, and no person should spend an unreasonable amount of time on the task.

It is not unwarranted to conclude that a fee is unreasonable if the lawyer performing the work deliberately did not use the available technology to perform basic tasks. This is particularly true if a lawyer does not use the technology but instead manually performs the task, thus spending several times longer to perform it. The corresponding bill would not be reasonable under the circumstances. Choosing to do a task manually is no different than padding bills.

An example: Lawyer A described instances when he sent Word documents to other lawyers for review. Those lawyers would print the documents, manually annotate the printouts, scan the documents to digital format and return them, instead of using Track Changes. Someone in the Lawyer A's office had to manually retype all the changes. The client is then billed for this inefficiency.

It can be argued that failure to become technologically competent means that lawyers are knowingly wasting client's time and money. If true, the billable time spent manually performing easily-automated basic tasks or fruitlessly fiddling with MS Word may be an unearned fee to which the lawyer is not entitled. It's already clear that clients are not willing to pay for this time, but this could be more than a billing write-off—it may constitute an ethical violation.

Efficient use of technology tools can also allow smaller firms to approach a more level playing field. You may be able to do things it used to take an army of associates and paralegals to do. Being at least somewhat familiar with and aware of technology also prevents you from being at the mercy of vendors who rattle off some technical jargon you don't understand and then present you with a hefty bill.

Writers and bloggers continue to argue that technology helps us practice law, to spend more time representing our clients and solving their problems. And much less time reviewing and proofreading routine documents and reading email.

When Comment 8 was revised to explicitly state that technology is part of the duty of competence, it necessarily affected Comment 5 to Model Rule 1.1. Comment 5 should now be read to mean that technology is also part of the "methods and procedures" and "adequate preparation" necessary to competently provide legal services. Under Comment 5, lawyers must use the technology methods and procedures that meet the standards of competent practitioners. Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of "methods and procedures" used by competent lawyers.

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So using your computer and the programs as a glorified typewriter, without using the advanced features, is arguably unlikely to meet the standards.

Where Do We Start?

We start with what we have, with the software everyone uses. What technology do you use in your practice? No state has published a list of technology programs that lawyers must learn or skills that lawyers must possess. But if there were such a list, it would include:

- Case management software
- Document management software
- Billing software
- Email
- PDF system with redacting capabilities,
- Office productivity suite, particularly word-processing

The majority of law offices use MS Office Suite with MS Word. Use of the program by lawyers has been a particular target for writers and bloggers. They have been eager to describe the abysmal word processing skills of lawyers. Many lawyers lack real competence in MS Word but do not recognize it.² Document preparation, drafting, and polishing consumes a significant amount of every lawyer's time regardless of practice area so they are probably wasting the most time in this area.

Have you encountered lawyers who:

- Manually number paragraphs or add line numbers.
- Do not know how to use templates or are unaware that they exist.
- Struggle against formatting, consistently re-doing work rather than re-setting or automating formatting.
- Retype information because they do not know how to cut-and-paste with or without the original formatting.
- Ignore *Bluebook* rules and preferences for section and paragraph symbols because they do not know where to find them or how to insert them.
- Manually create the Table of Contents and Table of Authorities, and re-do it manually every time the document changes.
- Do not know how to track changes, accept changes, turn the feature off, or eliminate its metadata.
- Do not know how to make and delete comments, and instead include typing in the body of the document for comments that can be missed, lost, or forgotten.
- Fail to use headings to make a document navigable and accessible,

Are you able to honestly assess how well you know how to use the program? There are assessment services such as the Legal Technology Assessment by Procertas and diagnostics by Legal Technology Core Competencies Certification Coalition (LTC4).³ You can test your knowledge and then develop a training plan to fill any gaps.

² I will specifically refer to MS Word because it is the most popular word processing program but most of the conclusions apply to any program.

³ Links in the research guide

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Many tech tools are available to improve your efficiency and ensure that you are not overbilling your clients for your written work. Take a look at PerfectIt with American Legal Style from Intelligent Editing. The program helps with proofreading, legal-specific typos, *Bluebook* formatting, and enforcing the leading legal writing style guides. Best Authority from Levit & James helps build a table of authorities. These are the kinds of tasks that are repetitive and ripe for error and more efficiently performed by the software. There are also browser add-ins or drafting aids built into Lexis and Westlaw.

As lawyers, we do sophisticated work and create complex documents, such as briefs, motions, contracts, exhibits, and e-filings. Superficial and merely passable use of MS Word is insufficient. You must possess a baseline level of competence. Your word processor is integral to practice and must be learned.

Lawyers perform the following tasks again and again, every day. These are basic MS Word skills that every person at your law firm should possess, and, if possible, should be delegated to a lower-level employee. Yet, some level of competence at each of these tasks is necessary—even for partners—because partners are now typing and creating their own documents. Lawyers who are not delegating must develop technology competence by building their skills.

- Fix footers
- Insert hyperlinks
- Apply and modify styles
- Insert and update cross-references
- Insert page breaks
- Insert non-breaking spaces
- Clean document properties
- Create comparison document (i.e., a redline)
- Automatically number paragraphs or add line numbers
- Insert section and paragraph symbols
- Create and update a table of contents and table of authorities
- Insert and delete comments
- Use headings to make a document navigable and accessible

These skills are all necessary for using MS Word effectively in legal practice. But in addition to skills, it is important to be aware that more is possible. Even if you are not going to become an advanced user, you should know that additional functions are available in MS Word, such as macros for repetitive tasks; creation of form documents; availability of a Quick Parts Gallery for reusable content; and customizable styles and templates. The key is to know when you should start looking for a solution. Look for improvements in areas where you are wasting the most time or experiencing the most frustration.

A couple of other observations by Casey Flaherty of Procertas. He is frustrated at how few people can use Word styles. “Styles are the foundation of any complex document, which is what lawyers put together and work in.”⁴ He also noted a lack of Microsoft Excel expertise

⁴ Building NewLaw podcast

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among attorneys. It can be great for financial modelling or a budget for a client but it is not great for the text heavy things lawyers do.

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

This rule arguably imposes on any supervisor the duty to evaluate and insist upon appropriate technology skills for new lawyers or interns. Information provided by Procertas indicates that only about one-third of law students tested could perform the basic tasks listed above on their first attempt.

To get some idea how well future lawyers are being educated on technology you can review the Law School Innovation Index. A project of The Center for Legal Services Innovation at Michigan State University College of Law, the index has a goal of measuring how well law schools are preparing students to deliver legal services in the 21st Century. The project began with the premise that law schools must teach students about legal-service delivery innovation and technology. Daniel W. Linna, Jr., director of the center, believes that law schools should be teaching future lawyers about the business of law, process management, how to use data, and how to be entrepreneurial.

Every office must create policies, provide training, and ensure ethical compliance, including meeting the duty of technology competence, for everyone in the office.

Who Has to Be Competent?

What if anything can be delegated? Is it possible to gain competency for the firm as a whole through delegation and/or supervision? Under Model Rule 1.1, a lawyer who is not competent to undertake representation may delegate the duties after developing a reasonable level of technological awareness to supervise and delegate the matter.

Delegation imposes its own responsibilities and challenges. It means sharing authority and responsibility with an employee or a third party and adequately supervising them. The person delegating must have enough knowledge and ability to give direction, ask questions, ensure ethical compliance, and determine whether the work was done properly. The delegating lawyer must still have some understanding of the technology. Blindly assigning someone else to “do the technology thing” could be an abdication of the responsibility to understand technology.

How Do We Continue to Develop?

There are no easy answers to the question how do lawyers get and remain technologically competent. Florida became the first, currently the only, state to mandate technology training. Florida requires that lawyers complete three hours of CLE every three years in approved technology programs.⁵ As of the writing of this paper 35 states have adopted the change to Comment 8 of Rule 1.1 and no doubt other states will be joining Florida in requiring technology training as part of their CLE requirements.

Comment 8 requires us to “keep abreast of changes,” which implies something more active than simply learning the programs that we currently use. Is there a duty to discover new technology that will make us more efficient? Arguably there is.

⁵ SC16-574 In Re: Amendments to Rules Regulating The Florida Bar 4-1.1 and 6-10.3 (Sept. 29, 2016); requirement effective Jan. 1, 2017.

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The path to competency requires proper training for firms of all sizes. Regardless of whether you will choose to perform the work yourself or whether you will delegate it, training is key to appropriately staffing a matter and managing a project. All work performed for clients should be done by the right person with the right skills, at the right rates, for the task. Any investment in technology, hardware or software, must have a complementary investment in training, initial and continuing.

There are suggestions in the research guide, with links, for introductory training programs, task-specific learning opportunities, and in-depth training and certification programs.

Conclusion

Learning to use your technology tools, such as MS Word, is as necessary for meeting your duty of competence as is learning substantive law—they're part of the same duty of competence. And no ethics opinions have yet found that one duty of competence is greater than the other.

You don't need to be a tech wizard. Start with honest assessments of current skills. Then use that to decide whether to delegate or take matters on personally. The example of MS Word shows there is more to the software than most of us realize. However, it also shows there is more to gain from training. Reducing time wasted and time written off is good for you and your client.

View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge. There is a continuing duty to learn about technology.

Before concluding I want to mention one area of technology that you should learn more about right now. That's artificial intelligence (AI). It is the technology that will alter the legal landscape, particularly for young lawyers. As email changed the way we do business every day, AI will become ubiquitous. It will be the indispensable assistant to practically every lawyer. Learning about and embracing AI will free up lawyers to spend more time thinking, advising, and helping their clients. The research guide has a couple of suggested articles/sites for you to learn more.

The real goal of adopting any technology is to keep lawyers doing value-added work, thinking and advising, to spend as much of their time doing the work that only they can do.

Sharon Bradley

Sharon Bradley joined the University of Georgia School of Law in November 2003 and became the Special Collections Librarian in January 2006.

Bradley is responsible for the special collections which include the Rare Book Room, the school archives, the faculty publications collection and the portrait collection. She is a member of the Library Leadership Team, which sets goals and policies for the library, and is part of the Reference Team, which develops programs and services to assist patrons with legal reference resources. Bradley teaches Legal Research as part of the 1L curriculum. She oversees the library's disaster planning efforts and serves on the school's Emergency Preparedness Team.

She came to UGA after serving as the reference librarian for technology education at the Thomas M. Cooley Law School in Lansing, MI. She has both taught and practiced law, previously serving as an adjunct professor at Wayne State University, assistant public defender with Florida's Second Judicial Circuit and attorney in private practice. Bradley is still a member of the Florida Bar Association.

After receiving her bachelor's degree in criminal justice from Valdosta State College, Bradley worked as a missile maintenance officer in the U.S. Air Force. She then earned her Juris Doctor from the University of Montana, where she served as an editor of the Montana Law Review. While practicing law, she earned her Master of Library Science from Florida State University. She is active in the American Association of Law Libraries (AALL), the Southeastern Chapter of AALL and the Legal Information Preservation Alliance.

Bradley is very involved with historic preservation efforts in Athens-Clarke County. She has served on the Athens-Clarke County Historic Preservation Commission (2008-2016), is currently a member of the ACC Hearings Board and SPLOST Citizens Oversight Committee, and is chair of the Athens-Clarke Heritage Foundation Preservation Awards.