

9-2013

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Jodi Nafzger, Keeping Pace with a Technology-Driven Profession, *Advocate*, Sept. 2013, at 29, 31.

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Keeping Pace With a Technology-Driven Profession

Jodi Nafzger



Ready or not, Idaho is going paperless. At the Idaho State Bar 2013 Annual Meeting in Coeur d'Alene, the Idaho Supreme Court previewed the new statewide judicial case management system which is expected to roll out in the next 36 months.¹ The Idaho Supreme Court's Technology Committee, comprised of judges, trial court administrators, attorneys, court clerks, and other specialists provided a preview of a new digital court management system that will make a reality technology tools like electronic filing, judicial workbench, public access portals, and video conferencing.

The subject of integrating technology into your practice is a broad theme. This article is by no means a how-to. The focus of this article is on the professional responsibility of lawyers to be technologically competent and to provide affordable legal services and how the two responsibilities might intersect.

Idaho Supreme Court's new judicial case management system

In mid-2012, the judiciary undertook the challenge to develop a new judicial case management system to replace the current Idaho Statewide Trial Court Automated Records (ISTARS) system. The Technology Committee's work has focused on creating a reliable statewide network with wireless connectivity, statewide forms, a court management system that allows for self-scheduling and event-driven automation, and electronic filing. While courts have been migrating to paperless systems since the late 90s, judges are often still heavily dependent on paper inside the courtroom. Previously, software solutions haven't been able to pro-

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vide a comparable experience. Using the latest technology, the new statewide system is designed to empower judges to control case information efficiently and securely right from the bench and provide attorneys with case tracking features, electronic data sharing capabilities, automated notifications and subpoenas, and the creation of an integrated and confidential record.

So while some of us can't use terms like "E-discovery," "client portals," "document assembly," and "virtual law office" in a coherent sentence, we must be prepared for the reality that technology is redefining the practice of law. The critical lawyering tasks — gathering, managing, and presenting information—are dominated by improved case management systems. Attorneys cannot simply pass the responsibility for electronically stored information to their client's information technology department. In this new E-discovery world, the failure of an attorney to be technologically competent can have serious consequences for the client.

ABA model rules expand the duty of competence

In 2009, the American Bar Association (ABA) created the Commission on Ethics 20/20 to conduct a plenary review and assessment of the

ABA Model Rules of Professional Conduct. One of the Commission's primary goals is to evaluate particular ethical issues raised by changing technology.² Technology-related issues can affect a lawyer's duties under the current rules, but the Commission is taking a closer look at the rapid pace of technological change and issues of lawyer competence.

Last August, the Commission proposed an amendment to ABA Model Rule 1.1 which expands a lawyer's responsibilities to include "keeping abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology...*"³ Additionally, discovery rules include "electronically stored information" and information contained in "data storage devices" in the list of initial and upon request disclosures which require that attorneys involved in litigation discovery keep up to date with technology and E-discovery law.⁴

As an illustration, in *Qualcomm Inc. v. Broadcom Corp.*,⁵ the United States District Court for the Southern District of California awarded over \$8M in sanctions against Qualcomm's attorneys for its failure to produce 46,000 documents of electronically stored information that would have changed the outcome of the case. The Court admonished the attorneys for a violation of the Federal Rule of Civil Procedure that

requires parties to respond to discovery in good faith. The Court pointed to the Advisory Committee's explanation: "[I]f primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."⁶ The Court's concerns were heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control. For the current "good faith" discovery system to function in the electronic age, the Court opined "that attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search."⁷

The lawyer's duty to safeguard client confidentiality

A lawyer must also act competently to protect the confidentiality of clients' information.⁸

As I work on this article using the public network at Thomas Hammer Coffee House, I am reminded of the significance of this rule. The availability of sensitive client documents through electronic means that could be accessed or intercepted by other users raises issues of confidentiality. We know that keeping up with the changes in the law is difficult enough. A New Jersey ethics opinion suggests that just "keeping up" is not all a lawyer must do: "Whether a particular system provides reasonable protective measures must be 'informed by the technology reasonably available at the time' to secure data against unintentional disclosure."⁹

At a minimum, attorneys should create a virtual private network in or-

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der to connect securely to a remote network and protect against general internet traffic.¹⁰ An insightful and user-friendly overview of other technology protocols to safeguard confidential information can be found in an article entitled *Protecting Client Data: 11 Steps to Take When Using Technology*¹¹ by Peter Roberts, the Practice Management Advisor in the Law Office Management Assistance Program of the Washington State Bar.

Professional responsibility to provide affordable legal services

In addition to the duties of competency and confidentiality, the Commission is examining how advances in technology can increase or enhance the opportunities for lawyers to improve access to justice.¹² Lawyers are challenged to utilize technology to make available affordable legal services to underserved individuals. William E. Hornsby, Jr., staff counsel at the ABA, regularly writes and speaks about the intersection of technology and legal practice. Hornsby suggests that the American legal system falls short of providing access to justice for all.

Legal needs studies show that people often do not recognize when they have a problem for which there is a legal solution and therefore do not seek out lawyers or the justice system to provide assistance with their

problems. Some assert that the costs of legal services are beyond the means of many people. While that is true for the poor in some areas of law, both the marketplace and specific programs, such as lawyer referral [programs], provide affordable legal services for many types of legal matters. For many, it is not affordability but lack of engagement that causes people to forego legal solutions. Technology has addressed efficiencies in the legal process, once again driving down costs, but has not fulfilled its potential for creating engagement.¹³

Law schools have a unique opportunity to enlist the power of modern information technology to bridge the crucial gap in affordable legal services. In January, the Center for Computer-Assisted Legal Instruction (CALI®)¹⁴ selected six law schools to develop a course as part of the Access to Justice Clinical Course Project. Participating law schools include Columbia Law School, Concordia University School of Law, CUNY School of Law, Georgetown University Law Center, University of North Carolina School of Law, and University of Miami School of Law. These hybrid clinical courses are designed to teach law students how to use and deploy technology tools to lower barriers to justice for low-income, self-represented litigants.

Students will use A2J Author® to build user-friendly web-based document assembly tools called A2J Guided Interviews® that will allow users to complete pleadings or other legal documents by answering a series of easy-to-understand questions. By building documents that perform some of the tasks that lawyers do, future lawyers gain insight into emerging technologies at the center of modern law practice and also develop core competencies across a range of new and traditional lawyering skills including empathy and client-centered professionalism.¹⁵

The A2J Clinic at Concordia Law is a collaborative project with Idaho Legal Aid Services and builds on the already comprehensive work of Idaho's Court Assistance Office (CAO). CAOs are located in the county seat in each of the judicial districts, and officers are onsite to provide access to court approved forms and to review forms before they are filed, but a growing number of pro se litigants are accessing the forms online. The CAO website was revised and launched in April 2013 to meet the high demand for services and better facilitate access to court information and forms.¹⁶ Idaho's CAOs are using document assembly programs and interactive tools for problem assessment to encourage and facilitate access to justice to meet the demand for fast, accurate, and logical navigation of the court system online. The Court Assistance Office reports the past two years have shown the highest historical number of requests with 56,763 in FY2012 and 60,614 in FY 2011.

Paving the way for paperless

With the increasing use of E-discovery and paperless judicial systems, members of the legal profession must consider new methods for managing the overwhelming volume of information and be compe-

tent with the emerging technologies at the center of modern law practice. It is also increasingly clear that law schools must teach the technology of law practice. The ABA Model Rules of Professional Conduct call for law school curriculum which familiarizes aspiring lawyers with important technology tools. With practical skills training in the use of effective technology tools, the next generation of lawyers can bring an enhanced mastery of business and technology processes into their law firms, government agencies, and public interest organizations and improve the practice of law and the provision of affordable legal services.

Endnotes

1. Chief Justice Roger Burdick and Terry Derden, Assistant Boise City Attorney, presented on the topic "Lawyering in the Digital Age," July 18, 2013.
2. ABA COMMISSION ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 1 (2009), available at <http://www.abanet.org/ethics2020/outline.pdf>.
3. MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. 8.
4. See FED. R. CIV. P. 26(b)(2)(C) and IDAHO R. CIV. P. 34(a).
5. 2008 WL 66932 (S.D.Cal. Jan. 07, 2008).
6. FED.R.CIV. P. 26(g), Advisory Committee Notes (1983 Amendment).
7. *Qualcomm*, 2008 WL 66932 at 13.
8. MODEL RULES OF PROF'L CONDUCT R. 1.6.
9. N.J. Ethics Op. 701, available at http://www.judiciary.state.nj.us/notices/ethics/ACPE_Opinion701_ElectronicStorage_12022005.pdf.
10. *How (and Why) to Set Up a Virtual Network*, Eric Geier, available at <http://www.pcworld.com/article/2030763/how-and-why-to-set-up-a-vpn-today.html>.
11. Westlaw 36 No. 2 ABALPRAC 48 (2010).
12. ABA COMMISSION ON ETHICS, p. 8.
13. William E. Hornsby, Jr. presented on the topic "Gaming the System: Approaching 100% Access to Legal Services Through Online Games," at the CALI Conference on June 15, 2013.

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14. CALI® is a nonprofit consortium of law schools whose mission includes promoting "access to justice through the use of computer technology."

15. Ronald W. Staudt & Marc Lauritsen, *Justice, Lawyering and Legal Education in the Digital Age*, May 8, 2013. A2J Clinic projects are modeled on Staudt's Justice & Technology Practicum at IIT Chicago-Kent College of Law.

16. Patricia Tobias, Administrative Director of the Courts, *Court Assistance Office Report to Governor C.L. "Butch" Otter & the 1st Regular Session of the 62d Idaho Legislature*.

About the Author

Jodi Nafzger is an Assistant Professor and Director of Experiential Learning & Career Services at Concordia University School of Law. She is a member of the governing board of the Professionalism and Ethics section of the Idaho State Bar, serves on the Idaho Pro Bono Commission and the Fourth District Pro Bono Committee, was appointed by the City Council to the Boise City Ethics Commission in 2013, and is a recent graduate of the Idaho Academy of Leadership for Lawyers.

