Thinking About Technology - Lawyers Can’t Be Luddites Anymore: Do Law Librarians Have a Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology

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Lawyers Can’t Be Luddites Anymore: Do Law Librarians Have a Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology?*

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In August 2012, the American Bar Association, recognizing the influence of technology, amended the Model Rules of Professional Conduct. These changes to the standards of professional conduct require attorneys to have some basic technological competence. Ms. Jackson focuses on specific areas in which law librarians may find opportunities to share both newly developed and well-established technological expertise with attorneys.

¶1 Technology affects almost every aspect of the practice of law.¹ In August 2012, the American Bar Association (ABA) House of Delegates, recognizing the influence of technology, voted to amend the ABA Model Rules of Professional Conduct.² While only one state, Delaware, has (as of April 2013) incorporated these changes into its state rules,³ legal professionals have begun to comment on how the rule changes may affect lawyers in every area and size of practice.⁴ Even those attorneys who have expressed the sentiment that they did not go to law school to learn about technology will “need to know enough [about technology] to be sure they’re not overlooking important issues.”⁵ One solo practitioner and technology consultant has commented that once attorneys have developed enough knowledge to identify important issues, they may “need a colleague or expert they


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5. Id.
can rely on” to provide additional assistance. In light of the sometimes expressed opinion that law libraries and librarians are increasingly unnecessary, firm, academic, and governmental law librarians can make themselves uniquely valuable by developing knowledge and skills in the area of technology that will transform them into those experts on which attorneys can rely to ensure the technological competence required by the new rules. In this column, I focus on some specific areas where law librarians can find opportunities to share their newly developed and well-established expertise, including computer-assisted legal research (CALR), e-discovery, courtroom technology, and measures to ensure the maintenance of confidentiality.

Model Rule 1.1 and the Modified Comment

¶2 While Model Rule 1.1 regarding attorney competence remains unchanged, the modification of Comment 8 to the rule makes it clear that lawyers authorized to practice in a state adopting the new language have an affirmative obligation to acquire and maintain an awareness and understanding of developments in technology. The modified comment provides:

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 continuing legal education requirements to which the lawyer is subject. 8

¶3 Christopher Popper, a Delaware attorney, suggests that, based on Delaware’s adoption of the new language in the comment:

[A] Delaware lawyer is now compelled to at least consider implementing certain types of technology, and whether the benefits of such technology outweigh the risks. One form of technology in that category would be legal research resources. . . . Research done exclusively through hard copies . . . is a[n] extinct exercise in the legal profession. The benefits of cutting edge legal research resources clearly outweigh the apparent lack of any risks associated with this type of technology. 9

Legal Research

¶4 Both experienced practitioners and librarians often lament the fact that when using keyword searches, inexperienced legal researchers frequently locate statutory provisions but fail to look at surrounding provisions. Thus, less experienced researchers run the risk of failing to understand the context of their results. They may even incorrectly interpret a provision because they do not identify

6. Id. at 28.
9. Popper, supra note 1, at 2. The draft of the rules made changes to what had been Comment 6, but due to later, unrelated, modifications to Rule 1.1, it was redesignated as Comment 8. Popper’s article refers to the changes as being to Comment 6.
important definitional sections.\textsuperscript{10} This risk exists despite efforts by legal information vendors to improve the browsing and table of contents functions, which have traditionally been available in print and make it easier for users to develop contextual understanding.

\%5 Other risks associated with various electronic legal research systems have also been written about.\textsuperscript{11} Even the benefits of using electronic citators, which are more current than their print equivalent, have some associated risks.\textsuperscript{12} While librarians might not all agree about the degree of risk associated with CALR, most law librarian scholarship discusses the risks and attempts to provide suggestions to assist researchers in minimizing them.\textsuperscript{13}

\%6 Notwithstanding that there may be some “risks” associated with “cutting edge” CALR systems, law librarians have often focused on the recognition of both technology-based and print legal research skills as required competencies, and they have recommended including research skills on the bar exam.\textsuperscript{14} While legal research is still not being formally tested, there has been some progress made,\textsuperscript{15} and a job analysis survey conducted for the National Conference of Bar Examiners indicates that research methodology knowledge and electronic research skills were highly significant for newly licensed lawyers.\textsuperscript{16} Perhaps the modification of the ethics rules concerning technology will contribute to the endeavor to recognize the use of CALR resources as a required competency. Because law librarians are increasingly seen as knowledgeable experts in the area of CALR use, we should anticipate that we will serve as the colleagues on whom attorneys rely to assist with CALR. The rules modification should thus be seen as an opportunity to increase the prestige and value of the law librarian profession.

\section*{E-discovery}

Electronic data discovery (EDD), a term often used synonymously with the term e-discovery,\textsuperscript{17} is another area often mentioned in recent discussions of technological

\begin{thebibliography}{99}

\bibitem{ss} See, e.g., Lee F. Peoples, Testing the Limits of WestlawNext, 31 LEGAL REFERENCE SERVICES Q. 125 (2012).

\bibitem{wa} See, e.g., Alan Wolf & Lynn Wishart, A Tale of Legal Research: Shepard’s and KeyCite Are Flawed (or Maybe It’s You), N.Y. ST. B.A. J., Sept. 2003, at 24, 30 (discussing how using a table of authorities can assist in overcoming the risk of relying on citatory information).

\bibitem{ka} See, e.g., id. at 28.


\bibitem{ca} Id.


\bibitem{we} One e-discovery provider suggests the following meaning of the synonymously used terms: “e-Discovery, ED, Electronic Discovery, EDD, ESI, Electronic Data Discovery—whatever you call it, it’s all the same. Whether it’s packaged as a product, service, solution or a confusing combination of the three, quite simply put, Electronic Discovery is the collection, preparation, review and distribution of electronically stored information including emails, web pages, word processing files, databases or other ephemeral data that is stored electronically.” E-nough Already, XACT DATA DISCOVERY, http://www.xactdatadiscovery.com/services/electric-discovery/ (last visited May 14, 2013).
\end{thebibliography}
changes affecting both the practice of law and the evolving ethical rules. Because evidentiary materials are increasingly born digital, e-discovery continues to be an area of growth. Predictive coding is a quickly developing subject in the e-discovery discussions. \(^1\) Predictive coding “is the use of computer algorithms and machine learning to conduct the review of electronically stored information (ESI).” \(^2\)

\(^8\) The use of predictive coding has itself been the topic of ethical debate. Howard Sklar, senior corporate counsel at Recommind, Inc., a leader in predictive coding services, anticipates that the use of predictive coding will become an ethical obligation. \(^20\) Jim Calloway, a noted authority on law practice management and technology and the director of the Oklahoma Bar Association’s Management Assistance Program, suggests that while some anticipate that predictive coding will become an ethical obligation, others predict “ethical and malpractice horrors ahead for any lawyer who dared ‘outsource’ their duties to machines or non-lawyers.” \(^21\) Yet Calloway doesn’t “really see predictive coding becoming an ethical requirement” because predictive coding will “gain ... more acceptance as a business requirement long before ethics rule-making bodies have a chance to consider it.” \(^22\)

\(^9\) The debate regarding predictive coding centers on the benefits and risks of the process. The benefits and goals of predictive coding are “accurate, cost-effective and expedited document review.” \(^23\) The cost-effective nature of predictive coding is one of the factors that must also be considered. In determining whether the use of predictive coding is consistent with the requirement of Rule 1.5 that an attorney charge a reasonable fee and not collect an unreasonable amount for expenses, its cost-effective nature would certainly weigh in favor of its use. \(^24\) However, while it

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22. Id.


24. This is similar to the factors that an attorney must consider when determining whether the outsourcing of document review is consistent with the ethical requirements of Rule 1.5. See Danielle S. Fitzpatrick & Elizabeth Jones, Outsourcing Document Review: Pros, Cons and Ethical Considerations, BUS. TORTS & RICO NEWS, Spring 2012, at 15.
may be cost-effective, even advocates acknowledge that predictive coding may not always be inexpensive or result in cost savings.\textsuperscript{25}

\textsection{10} Predictive coding is also not without risks. It retains significant potential for human error because the “process is only as good as the input criteria, and a missed keyword or key concept could lead to entire categories of relevant or privileged documents being inadvertently missed.”\textsuperscript{26} Although the potential for human error is also present in a manual review, there is the perception that a manual review permits a greater degree of understanding and control by the reviewing attorneys,\textsuperscript{27} thereby reducing the risk that complete categories of relevant documents will not be properly identified. Under the rules of civil procedure, there is also the risk of sanctions for failing to produce electronic information,\textsuperscript{28} and manual review may be less likely to result in the disclosure of privileged information. Thus, there is room to question whether the use of predictive coding meets the requirement that reasonable steps be taken to protect against the disclosure of privileged material and to rectify errors in compliance with Federal Rule of Evidence 502\textsuperscript{29} and the newly modified Rule 1.6, which is discussed in more detail below.

\textsection{11} So how can law librarians use their skills to help minimize the risk and maximize the benefit for those attorneys who, under the new rules, must undertake or at least consider the use of predictive coding? In 2007, a contributor to the Law Librarian Blog suggested e-discovery “is an area ripe for lawyer-librarian or corporation-information specialist collaboration and increasing the value of librarianship in the parent institution. Who knows how to mine data better than librarians?”\textsuperscript{30} While document review is an area of e-discovery in which law librarians initially participated, predictive coding offers new opportunities, particularly in light of the developing ethical standards regarding technology.

\textsection{12} Randy Diamond, who teaches an e-discovery class and serves as the director of the University of Missouri Law Library, suggests that work in the area of predictive coding fits well with the law librarian skill set. “As librarians we have our own knowledge base . . . with Westlaw and Lexis. We have been teaching for years about the lack of precision and recall and the difficulty in terms of identifying what the keywords are to find the most relevant documents.”\textsuperscript{31} Diamond noted that Michael Arkfeld, a leader and author in the area of e-discovery, when asked about the need to teach students the technological aspects of electronic discovery, responded: “How does a student or attorney understand a defensible search unless they understand...
stand the pros and cons of keyword, concept, and predictive coding search techniques?"\textsuperscript{32}

§13 As experienced instructors and searchers, law librarians have the opportunity to play a vital role in assisting students and attorneys with developing the knowledge necessary to construct "defensible" searches. In addition, law librarians have a role supporting e-discovery and predictive coding: they can evaluate e-discovery software, develop and organize e-discovery and predictive coding precedents, and monitor predictive coding developments and best practices.\textsuperscript{33} This monitoring of developments and best practices by law librarians is particularly important in making attorneys aware of the risks and benefits of technology use, as required by the developing ethical rules in the e-discovery arena. Because "[c]ompanies are beginning to treat eDiscovery in a proactive rather than a reactive manner" and "[i]nformation managers, law librarians, corporate knowledge managers and record management professionals have an important role to play on the eDiscovery team," many professional associations, such as the Special Libraries Association, have begun to offer training.\textsuperscript{34} Similarly, in response to the expressed desire of its members,\textsuperscript{35} the American Association of Law Libraries scheduled programming during its 2013 annual meeting that addressed EDD.\textsuperscript{36}

Courtroom Technology

§14 Even absent the new language in the rules of professional conduct about risks and benefits, some have reasoned that the requirement in Model Rule 1.1 that a lawyer maintain an awareness of changes in the law and its practice establishes a competency obligation for the use of courtroom technology, since use of this technology has become the standard.\textsuperscript{37} The comments to Rule 1.1 regarding thorough-

\textsuperscript{32} Id. Because senior attorneys, who have the experience with the subject matter of the case, are tasked with establishing the seed set on which the predictive coding process operates, it is particularly essential that they, who may not necessarily have had the experience with electronic legal research that junior associates have had, develop an understanding of the pros and cons of various search strategies. The [predictive coding] process is decidedly different from human linear review, where an army of junior attorneys, paralegals, and/or contract attorneys review documents in cases about which they know little or nothing. In predictive coding, seed sets are reviewed by a small group of counsel with detailed command of the facts and issues. Predictive coding software takes the work product from these senior reviewers and ‘trains’ itself to identify responsive documents.


\textsuperscript{34} Opportunity Opens Doors for Information Pros in eDiscovery, SLA LEGAL Div. (May 15, 2012), http://legal.sla.org/2012/05/ediscovery/.


\textsuperscript{37} Michelle L. Quigley, Courtroom Technology and Legal Ethics: Considerations for the ABA Commission on Ethics 20/20, 20 PROF. LAW., no. 3, 2010, at 18, 19.
ness and preparation can also be used as support for this position.\textsuperscript{38} Notwithstanding, there are some unresolved questions and risks associated with the use of courtroom technology that must be considered. It is certainly not unusual for users of technology to experience technical problems. In such cases, should attorneys have the ability to undertake repair or be adequately prepared with a backup to meet their ethical obligations?\textsuperscript{39} Even if using expensive courtroom technology increases the likelihood of the successful presentation of evidence, is the acquisition, maintenance, and use of such equipment consistent with the duty to keep fees reasonable under Rule 1.5?\textsuperscript{30}

\section{Law Librarians Can Help}

Law librarians have traditionally been early adopters of technology. Despite the advent of information technology departments in academic, court, and firm environments, it is likely that law librarians will continue to be asked to support technology.\textsuperscript{40} At least in the academic arena, this familiarity with technology has resulted in law librarians’ being included in the group of instructors teaching law practice management and other practical skills courses. These courses typically include some instruction on the use of courtroom technology, a topic that other law faculty often prefer not to teach.\textsuperscript{41} Thus, the law librarians teaching these classes have a unique opportunity to assist students in learning about the various courtroom technology systems.

Because each courtroom may have a different system, there is no guarantee that new lawyers who have received such training will end up practicing in a courtroom with a familiar system. Therefore it may be advisable instead to adapt already familiar technology to courtroom uses. For example, the iPad can be used with Apple TV, a projector, and several applications to create an inexpensive, adaptable, and highly functional mobile system for courtroom presentations.\textsuperscript{42} Many state bar associations have established law office management and technology sections and have also begun to offer practice management assistance programs (PMAPs), which provide instruction on technology use. PMAP staff serve the entire bar, but often focus much of their attention on solo practitioners and small firm attorneys\textsuperscript{43} to whom law librarian assistance may not be available. However, the limited staff resources and the growing number of solo and small firm attorneys may make it difficult for PMAPs to effectively provide the necessary assistance.

Firm, court, and academic law librarians may thus find opportunities to share their knowledge of courtroom technology by partnering with PMAP staff.\textsuperscript{44} In states without PMAP programs, law librarian groups can fill the void. After all,

\begin{thebibliography}{99}
\bibitem{38} Id.
\bibitem{39} Id.
\bibitem{42} Peter Summerill, \textit{iPad Wireless Presentation}, \textsc{MaCLITigator} (Oct. 16, 2011), \url{http://www.maclitigator.com/2011/10/16/ipad-wireless-presentation/}.
\bibitem{43} \textit{What Is a Practice Management Advisor?}, \textsc{Am. Bar Ass’n}, \url{http://apps.americanbar.org/dch/committee.cfm?com=EP024000} (last modified Jan. 28, 2013).
\bibitem{44} Id. There are PMAPs in more than twenty state bars and law societies in the United States and Canada.
\end{thebibliography}
law librarians are already familiar with teaching cost-effective research and have frequently offered continuing legal education programs to state bar organizations. Law librarians could similarly use their technology knowledge to teach cost-effective courtroom technology.

**Model Rules 1.6 and 4.4**

¶18 Model Rule 1.6, which deals with the confidentiality of information, has undergone some change as well. The modified Rule 1.6 now includes subsection (c), which states: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to, information relating to the representation of a client.” Comment 18 to Rule 1.6 has also been modified and sets forth the factors to consider in determining whether a lawyer has made reasonable efforts to prevent unauthorized access to or disclosure of confidential information. The ABA Commission on Ethics 20/20 report accompanying the technology-related changes to the Model Rules suggests that the change to Rule 1.6(c) was intended to clarify that lawyers have an ethical obligation not only not to reveal confidential information but to make reasonable efforts to prevent disclosure, such as might occur if the lawyer’s network was “hacked” by a third party.

45. MODEL RULES OF PROF’L CONDUCT R. 1.6(7)(c) (2012).

46. Comment 18, as modified, provides in pertinent part:

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

Id. cmt.18.

47. The report provides:

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party “hacks” into a law firm’s network or a lawyer’s email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

**AM. BAR ASS’N, COMM’N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105A, app. to Am. Bar Ass’n, supra note 2, at 4 (Aug. 2012) [hereinafter ABA REPORT].**

Many law librarians are familiar with security measures, including protective software, and have experience working with software licensing and vendor services. This experience would certainly facilitate their evaluation and procurement of security measures designed to prevent unauthorized access and the resultant disclosures that are intended to be addressed by the new language of Rule 1.6 and comment 18.

¶19 Similarly, Rule 4.4 and comment 2 to that rule have been amended to provide for further protections for confidential information maintained as ESI. As modified, Rule 4.4(b) provides: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”48 Comment 2 then emphasizes the inclusion of metadata as confidential information.49

¶20 If law librarians have the requisite skill set and are “better” at mining data, including the metadata specifically addressed in the change to comment 2 to Rule 4.4, it is logical to assume that they would also likely possess knowledge of tools to remove or “scrub” the data that the changes are designed to address. The ABA Commission on Ethics 20/20 acknowledged that the modified rules and comments do not “resolve [the] more controversial question: whether a lawyer should be permitted to look at metadata in the absence of consent or court authority to do so.”51 As ethical standards continue to develop in the face of technology changes, law librarians can provide assistance by monitoring comments and legal authority.

Conclusion

¶21 While Delaware is currently the only state that has adopted the changes to the Model Rules of Professional Conduct, lawyers, and the law librarians who support them, must act in anticipation of the changes. In the tightening business of

49. Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Id. cmt.2.
50. Popper, supra note 1, at 5.
51. ABA REPORT, supra note 47, at 6.
law, it is essential that attorneys “act now, if not to anticipate technological rules, then to match the experience and expectations of . . . technologically competent clients, associates, or staff.” Law librarians have the necessary knowledge, skills, and experience to assist legal practitioners in complying with their evolving ethical obligations and meeting the expectations of clients. Law librarians must seize this opportunity to add value within the structure of their firms, institutions, and professional organizations.