Professional and Ethical Traps for Technophobes and Technoweenies

Over the last couple of years, I have had a lot of fun writing articles about technology, and have delighted in the opportunity to point out the trials and tribulations of the use of technology in our profession. I have poked fun at partners and colleagues who have struggled to catch up with their teenage children, and I have also watched in dismay as some of my friends fall further and further behind in their ability to keep up with the changes that technology has caused. And while some of the horror stories make for humorous articles, there is also a dark side to the tales of crashed hard drives and wrongly addressed e-mails.

For many, the learning curve that we have chosen (forced, for some of us) to adopt has been worthwhile, as we now have the ability to communicate instantly, transfer documents across the world, and to manage and organize personal and professional information. Our ability to serve our clients quickly and efficiently has improved, and most of us have experienced an increase in productivity in our offices. In spite of the gains that many have made, however, there are some in our profession who have shunned technology, content that the traditional practice methodology is sufficient. And while that attitude is admirable, it may also carry some risk. What if the use of commonly employed technology might have brought about a difference in the outcome of a case? Would that be grounds for malpractice? Or an ethical violation?

And what about the risks of using technology? The fact of the matter is that the use of e-mail, servers, palm devices, cell phones and other gadgets carry professional risks that were unknown a few short years ago. It's one thing to lose a paper file, but the loss of thousands of pages of data in an instant because of failure to back up properly is a nightmare that none of us needs. And I can assure you the client is not going to be happy either.

So how do we resolve this inherent conflict in determining the level of technology that we will employ? I suggest that the best place to start is the Rules of Professional Responsibility. The new rules address the use of technology in several areas, including client communications, and provide a framework for making intelligent decisions that are consistent with the rules and standards of care that govern our practice.

Rule 1.1 of the Rules of Professional Responsibility reads as follows:

COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
. . . .

5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and the <u>use of methods and procedures meeting the standards of competent practitioners</u>. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence. (Emphasis supplied).

Now I don't pretend to know to what extent lawyers have adopted gee whiz technology in their practice, but I do know that there are basic technologies that most of us are familiar with, and it is the failure to properly use the well known technologies that may create liability issues when things go south for our clients. For years, warnings have been published in both mainstream and legal publications about a variety of issues that can result in harmful or embarrassing loss or inadvertent disclosure of data or confidential information. Many of us have ignored these warnings, but more and more of us have recognized problems and taken steps to avoid them, and in the process, established a standard of competent practitioners. Sound familiar? See Rule 1, infra.

Here is a partial list of technology traps that may give rise to professional exposure. Naturally, the list will grow as technology matures within a given area of law, and as more and more lawyers within a practice specialty begin to use various programs to assist in their practice. However, nearly all lawyers have the following technologies, regardless of their practice areas, and need to take a hard look at their office procedures to see if they are operating competently.

E-mail

Failing to consult with the client as to whether sensitive e-mail communication should be encrypted; failing to put a disclaimer as to confidentiality in the event that an e-mail is inadvertently sent to the wrong recipient; waiving a client's privilege by an inadvertent disclosure of a confidential attachment to an email, or by copying an individual who has no right of privilege.

Research

Failing to use the internet to research elements of a case, including party or witness information that a simple "search engine" such as Google would turn up; failing to use computerized legal research such as Westlaw, Lois or Lexis-Nexis when such a search would have turned up an important case that a lawyer missed while researching using books and a digest; or, using such research tool improperly and missing an important case.

Metadata

Failing to strip metadata from a word processing document so that editing, revisions and other confidential information are transmitted to the other side; failing to use PDF or similar programs to create sensitive documents that contain no metadata.

Backup

Failing to back up daily, weekly, monthly and to store tapes offsite; failing to check backup system routinely to see if it works; failing to rotate and replace tapes according to schedule so that data integrity maintained; using a cheap, poorly capitalized web based backup site that goes bankrupt or loses client data.

Case Management

Failing to check for conflicts; loss or misplacement of file data from lack of organization.

Breach of Confidentiality

Failing to permanently erase a hard drive before disposing of a computer with client data; allowing vendors and third parties to access a system with client data exposed; sending bills to third party billing auditor for insurance defense files without getting permission of client; failing to use firewalls, or standard virus software to prevent loss of data or intrusion by third parties; failing to password a laptop, phone or palm device with confidential client information and then losing it or having it stolen.

Practice Software

Failing to use accepted software in the preparation of forms or documents, that provides math checking, or rules checking, so that simple mistakes are avoided;

Case law is somewhat meager on the issues I have pointed out, perhaps because there is a wide gap between the technological "haves" and "have nots, " such that there is no firm standard of care. I believe, however, that this gap is narrowing in the areas that I have mentioned, and with some technology, the standard of care (backups, eg.) is well established. From a professional standpoint, it shouldn't matter. Each of us should strive to incorporate the best methods into our practice, and to follow those procedures that will ultimately inure to the benefit of our clients.

Seriously.