

Chasing the Duty of Competency in Legal Technology

In some way or another, technology has impacted or even altered virtually every aspect of the practice of law.¹ Especially during the pandemic, lawyers can practice anywhere in the world with available internet or Wi-Fi connection.² Email and text messages have largely replaced letter writing and phone calls and computer research via laptop or smart phones has mostly replaced law library research and textbooks.³ Courtrooms have moved to using projectors and video monitors over whiteboards, and courts are utilizing electronic exhibits.⁴ Even fitness tracker watches and smart phone applications can provide information for injury claims.⁵ A few of the main realms for which it is almost necessary to have competency include safeguarding client information, eDiscovery, and communication and file sharing technologies.⁶

Lawyers practicing in the United States are held to high standards. The [Model Rules of Professional Conduct](#) [MRPC or “Model Rules”] provide both mandates and guidance in discretionary situations on topics including attorney conduct, conflicts of interest, fees, confidentiality, and more.⁷ The rules are not inherently binding, instead they go into effect when states choose to adopt the rules, or each state may adopt their own modified version of the rules.⁸ Whichever the case, states around the US have a set of rules that very closely mirror the model rules, and attorneys within that state are expected to follow them or be reprimanded by the state bar association.

The MRPC’s very first Rule 1.1 concerns lawyer competency, stating that “a lawyer shall provide competent representation to a client.”⁹ This requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁰ This rule is quite vague, but there are eight comments that follow the rule to provide a bit more guidance. Most of them clarify what kinds and how much preparation must go into a client’s matter for them to be adequately represented.

¹ Steve M. Puiszis, *Perspective: Technology Brings a New Definition of Competency*, BLOOMBERG LAW, Nov. 26, 2022, at 2:00, <https://news.bloomberglaw.com/business-and-practice/perspective-technology-brings-a-new-definition-of-competency>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Model Rules of Professional Conduct*, LEGAL INFORMATION INSTITUTE, Nov. 26, 2022, at 2:15, https://www.law.cornell.edu/wex/model_rules_of_professional_conduct#:~:text=The%20MRPC%20is%20comprised%20of,the%20Integrity%20of%20the%20Profession.

⁸ *Id.*

⁹ *Model Rules of Professional Conduct, Rule 1.1: Competence*, AMERICAN BAR ASSOCIATION, Nov. 26, 2022, at 2:17, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/.

¹⁰ *Id.*

In 2012, the American Bar Association voted to amend Comment 8 to Rule 1.1 dealing with maintaining competency.¹¹ The former comment explained that to maintain requisite knowledge and skill a lawyer must “keep abreast of changes in the law and its practice” but the 2012 amended added “... including the benefits and risks associated with relevant technology...”¹² This was a huge step in urging lawyers, especially those who entered the practice when computers were rarely if ever used, to seek education on technological advancements that are prevalent in the practice. Since the amendment, 40 of the 50 states have adopted the duty of technology competence to their version of the rules.¹³

Despite the vague language in the Model Rules and state rules, or even lack of technology competency in some states, there are many steps that lawyers can take to stay ahead of the curve and maintain the requisite level of competency. Mary Grace Guzman, a distinguished legal ethics and professional responsibility attorney practicing in California at ArentFox Schiff, recently visited Vanderbilt Law School’s Professional Responsibility course to explain how lawyers can be mindful of their professional responsibilities while in practice.¹⁴ Guzman provides guidance on how California attorneys and law firms can incorporate technology to stay in compliance with the Model Rules.¹⁵ This guidance, however, is a useful tool for attorneys across the country to follow regardless of their state’s rules.

1. Have established protocols regarding the use of firm-owned technology.
2. Have and keep antivirus, spyware, and malware software up to date.
3. For cloud-based services, avoid using free services and pay for additional security such as encryptions and retrieval of lost data. Most cloud-based services offer HIPPA compliant confidentiality services, which can also be used by lawyers.
4. Generally, avoid using free technology services. Free video conferencing, email services, cloud storage, or phone services are cost-effective but provide minimal — if any — level of privacy or data protection to you or your clients.
5. Use password protected Wi-Fi at home and at all other private and public spaces.

¹¹ Michael Barrons, *Legal Technological Competence: The Coming Requirement for Legal Professional Development Has Arrived*, INFOWARE, Nov. 26, 2022, at 2:20, <https://infowaregroup.com/blog/legal-technological-competence-the-coming-requirement-for-legal>.

¹² *August 2012 Amendments to ABA Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION, Nov. 26, 2022, at 2:21, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf.

¹³ Robert J. Ambrogi, *Tech Competence*, LAWSITES, Nov. 26, 2022, at 2:25, <https://www.lawnext.com/tech-competence>.

¹⁴ Mary Grace Guzman, *New Tech Competence Requirements for California Attorneys*, GOLDEN STATE LAWYER, Nov. 26, 2022, at 2:20, <https://www.goldenstatelawyer.com/2021/05/new-tech-competence-requirements-for-california-attorneys/>.

¹⁵ ArentFox Schiff, Mary Grace Guzman, Nov. 26, 2022, at 2:45, <https://www.afslaw.com/attorneys/mary-guzman>.

6. Consider the use of a VPN (Virtual Private Network).
7. Take advantage of free trainings offered by practice management services and require employees to do the same.
8. Before incorporating a new form of technology into your practice, consider how the technology will impact client confidences. Consider the different price points for the same technology. For example, the base price of a service may offer less privacy protection than the more expensive version.
9. Upgrade your technology regularly to avoid the loss of data — meaning, if possible, don't wait until your computer crashes to buy a new one.
10. Back up your data regularly.
11. If you must hire IT support, better practices encourage you to find a company that specializes in supporting lawyers and law firms, or that has significant experience and understands attorneys' privacy and confidentiality duties.

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