Rule 1.1 in the 21st Century: Competence in the New Technical World of Law
(New Technologies & Lawyer Competence)
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Virtually every lawyer takes for granted that one of the most basic duties inherent in the lawyer-client relationship is that the lawyer be competent to undertake the representation. Competence is the first ethical requirement listed in the Model Rule of Professional Conduct and, consequently, in the Kansas Rules of professional Conduct:\(^1\):

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

\(^1\) Rule 1.1
The first comment to Rule 1.1 expands upon this requirement:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, the relevant factors include the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate with a lawyer of established competence in the field in question.2

While competence is a fundamental requirement for practicing law, as evidenced by Rule 1.1 and by the fact that the competence requirement comes first in the Rules I would suggest that the duty of competence is often taken for granted. Even, more significantly, I want to suggest today that the meaning of lawyer competence is undergoing and must continue to undergo a transformation.

If one reads Rule 1.1 and the associated comments closely, it becomes clear that the focus of the Rule is upon a lawyer’s knowledge of and experience in the law. Comment 1 to Rule 1.1 is, in fact, titled “Legal Knowledge and Skill.” Other comments speak of the need for an “analysis of the factual and legal elements of the

2 Rule 1.1, Comment 1.
Today, however, I want to focus not on a lawyer’s required competence in substantive and procedural law, but, rather, upon what level of competence in the use of technology is required or should be required, implicitly, if not explicitly, by Rule 1.1.

It is not particularly strange that Rule 1.1 focuses upon competence in substantive and procedural law and not upon the technologies that make modern law practice more efficient at times, and far more difficult at other times. Rule 1.1 was first adopted into formal ethics rules with the adoption by states of ABA Model Code DR 6-101(A) after 1970. Prior to this, the requirement of competence was more limited and generally thought to be subsumed under DR 6-101(A) (3) [prohibition against client neglect] and DR 6-101(A)(2) [lawyers must make adequate preparation]. Rule 1.1 has not changed significantly from its first adoption. Thus, the Rule is now forty-five years old.

The age of the competency required by Rule 1.1 is quite significant. In 1970 the practice of law had not changed in most respects from practice fifty years earlier. The digital age was not yet begun. Personal computing,

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3 Rule 1.1, Comment 5
4 Rule 1.1, Comment 6.
6 Annotated Rules, 20.
7 For a study of traditional law practice technology, see, M. Hoeflich, “From Scriveners to Typewriters,” Green Bag, 2d. ser., vol. 16, 395 (2013)
the Internet, cell phones, even fax machines were not yet in general use.\textsuperscript{8} Electronic database search engines also were not in general use.\textsuperscript{9} When I began working for a large Wall Street law firm in 1978 lawyers did not have computers not cell phones and the firm did not use fax machines for everyday tasks. Legal research was done primarily in the library using books, although the firm did have a Lexis terminal used by librarians when approved by the partner in charge. Today, a newly graduated lawyer will have access to all of these technologies and many, many more. Indeed, I would argue that a lawyer today cannot practice law competently without the use of modern technologies. Nevertheless, neither the \textit{Rules of Professional Conduct} do not explicitly state this and, for the most part, law schools do not teach legal technology to law students. Nevertheless, a number of both court cases and opinions issued by advisory committees around the United States have made technical knowledge an issue of competency for lawyers and it is my firm belief that this trend will continue. The real question, to my mind, is how much technical knowledge is and will be required of lawyers sufficient to satisfy the ethical requirement of competency. Further, as a law professor, I must ask whether law schools have an obligation to revise their curricula to teach legal technology to law students just as we now teach substantive and procedural law.

\textsuperscript{8} Personal computers and fax machines, while first developed in the 1960s were not widely adopted until the 1970s. the internet and cell phones did not become widely used until the 1980s.

\textsuperscript{9} Lexis was made generally available in 1973.
The Scope of Legal Technology

There is hardly any area of law practice today that has not been affected by the introduction of new technologies during the past several decades. Anyone who reads legal periodicals such as the ABA Journal or the Journal of the Kansas Bar Association can testify that an issue rarely goes to press without at least one article concerning legal technology. An increasing number of continuing legal education programs also now focus on the impact of various new technological advances. Today I want to explore several areas of legal practice in which new technologies have had a major impact and which, I suggest, impact the requirements of Rule 1.1 on competency.

Lawyer Communications

Today lawyers face a multitude of communications media unknown to previous generations. At the simplest, lawyers now can communicate with clients using cell phones, fax machines, and the Internet. On the Internet lawyers can have numerous choices including email, Facebook, twitter, and a host of social media
increasing almost daily. But while these various new methods of electronic communication make lawyer-client communications much easier and untether lawyers from their offices to an unparalleled extent, they also pose immense difficulties for lawyers trying to maintain the confidentiality required by Rule 1.6. The first words of Rule 1.6 make the absolute duty of confidentiality quite clear:

A lawyer shall not reveal information relating to a client unless...\textsuperscript{10}

The Rule then goes on to enumerate the exceptions to the general requirement of confidentiality. Nowhere among these exceptions is there one for a lawyer's lack of knowledge about electronic and digital security. The annotation to Rule 1.6 in the ABA Annotated Rules makes this explicit:

Electronic communications—such as those made by phone...by fax, or over the Internet—pose unique problems related to maintaining client confidences because of the ease with which they may be intercepted by unauthorized and unknown

\textsuperscript{10} Rule 1.6(a).
The lawyer’s duty of confidentiality requires that when communicating through electronic means...the lawyer should be cognizant of the risks, and, if necessary, take protective measures.¹¹ [emphasis added]

This is clearly a requirement that a lawyer have, at the very least, enough knowledge about the communications device he is using so as to be able to assess the risk of interception and not only warn his client of this risk, but, if necessary, take measures to lessen this risk. A number of states now require that all lawyer-client email communications carry a warning to this effect. Both the ABA committee on Ethics and Professionalism and various state advisory committees have issued opinions on the confidentiality risks of lawyer-client electronic communications.¹²

I would suggest that even these opinions may now be insufficient and out-of-date. In the past few years a number of massive breaches in the security of emails have become known, such as the North Korean unauthorized seizure and public disclosure of Sony Corporation internal emails and Edward Snowden’s disclosures.

¹¹ Annotated Rules, 110.
¹² See, for example, ABA Formal Op. 99-413; ABA Formal Op. 11-459.
through Wikileaks of the extent to which the National Security Agency has been intercepting emails of United States citizens. Increasingly, the full extent of email insecurity is becoming a major issue for businesses and individuals, including law firms. Recently, the *New York Times* ran a lead story on the concerns voiced by major money center banks that their law firms were not taking email security seriously enough and exposing them to potential security breaches.\(^\text{13}\) The full extent of lawyer disciplinary liability—as well as malpractice liability—in the event of a major security breach and disclosure of client confidences is becoming frightening. No lawyer today can take email security for granted. Notably, Sony Corporation, after its breach by North Korea, took many of its internal communications off email and the Internet completely. It has even been reported that Russia’s security services now limit senior government official’s email communications to protect top secret information from hacking.

Another “wrinkle” in email security came to the general attention of the Bar with the publication of ABA Formal Opinion 06-442. In this opinion, the ABA Committee on Ethics and Professionalism considered a lawyer’s duty to control “metadata” contained in emails. Metadata is the data that is contained in documents digital files but does not show up on screen normally. Such metadata may include changes to text, dates when changes are made, and the identities of those making changes. Such metadata is included in all word processing and email programs that permit text editing [i.e. basically all modern text writing programs]. Metadata may

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well contain information of a sensitive nature protected by Rule 1.6. Many lawyers were unaware of the existence of metadata in emails and other electronic texts prior to the ABA opinion [and, I suspect, a fair number of lawyers continue to be either unaware or not fully aware of metadata today. Formal Opinion 06-442 makes it clear that lawyers must be sensitive to releasing metadata to third parties and should consider “scrubbing” metadata from a wide range of documents including emails on a regular basis [metadata also poses significant discovery issues].14

One area in which the ABA has taken a weaker position on the intersection of electronic communications and Rules 1.1 and 1.6 is that of inadvertent disclosure of confidential information.15 The problem first arose with the widespread adoption of the use of fax machines to transmit legal materials and a common feature of many fax machines: speed dialing. Speed dialing [i.e. single digit short cuts dialing for commonly used fax numbers] made the possibilities of inadvertently sending documents to the wrong recipient greater. A similar danger was presented by email programs that had both a “reply” and “reply all” placed next to each other. A slip of the finger could mean that confidential documents were sent to third parties or, worse, to adversaries. Initially, the ABA Committee on Ethics and Professionalism opined that lawyers receiving such documents could not read them, but withdrew this opinion and held only that lawyers receiving such documents should inform the sender of their receipt. The rule today in Kansas is that lawyers:

14 ABA Formal Op. 06-422;
15 ABA Formal Op. 92-368, withdrawn by ABA Formal Op. 05-437; and, see, KRPC 1.6(3)(c).
...shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

This, of course, is not an absolute rule but, rather, leaves it to the Disciplinary Administrator and the courts to determine what “reasonable efforts” are. Still, one must ask what, specifically, what would be reasonable in such a situation. Should lawyers, for instance, be held to have a duty to scrub metadata from documents being transmitted by a method in which inadvertent disclosure is a serious risk? Should law firms disable speed dialing in their fax machines? Should lawyers not use email programs in which the “reply all” function is located next to the “reply” function? At the very least I would think that lawyers must be alerted to these risks and trained to minimize them to the extent possible.

Legal Research

One explicit requirement of Rule 1.1 is that a lawyer be adequately prepared and do necessary research in representing a client.16 The Rule does

16 Rule 1.1, Comment 1.
not, however, specify what constitutes legal research. Most lawyers, I believe, would say that simply doing research using hard copy texts, as opposed to online databases such as lexis, Westlaw, or Bloomberg Law would not be adequate in researching complex legal issues. Further, few lawyers have access to libraries sufficiently large to permit them to do complex research using only hard copy texts rather than online databases. Indeed, many bar associations, including Kansas, make online research services available to their members at little or no cost. But, once again, the online research landscape has changed radically in the past decade. Not very long ago the only serious online legal research providers were Westlaw and Lexis. Then a number of smaller competitive services became available, including Casemaker. Bloomberg, a massive news and information company, then entered the market. Several years ago Google expanded its Google Scholar search service to include legal materials and patents. Most recently, a start-up out of Stanford, Ravel, also entered the legal research market.

The various legal search services are not all the same. When there were only two major online search providers, Lexis and Westlaw, most law firms chose one or the other. In terms of search algorithms both were very much the same. In terms of presenting results, Westlaw provided West’s trademarked headnotes, but both search services presented search results chronologically and by jurisdiction. Both also had fairly comparable datasets available for search.

17 Kansas Bar Association members have access to Casemaker.
Several years ago I did a series of test searches to see whether searches on Westlaw and Lexis returned the same results and found that, within a small margin of error, they did. With the introduction of plain language searching as an alternative to Boolean searching, both Lexis and Westlaw became relatively easy to use. Every law school in the United States trained law students to use both search services.

Today lawyers have significantly more choices for online search. They can still use Westlaw or lexis, but these services are not inexpensive. They can use other services which charge for services, including those, like Casemaker, sponsored by bar association. They can also go directly to court websites and do searches in individual court records. These searches are free. Finally, they can also go to Google Scholar which is free. The difficulty is that not all search services function the same as does Lexis or Westlaw and it is not at all clear that a lawyer doing a search in one out of a range of possible searches will necessarily retrieve all relevant cases either because of differences in search algorithms, difficulty in using particular search engines, or because of searching limited datasets.

Let me give one example of some of the risks associated with online legal research. Google is probably the dominant web-based search service in the world. Several years ago it quietly entered the legal research market by extending Google Scholar to include cases, law review articles, and other legal
materials. It is also absolutely free to users. The fact that this service is provided by Google and is free makes it a very attractive site for lawyers who cannot use commercial search services because of cost considerations. On its face, Google Scholar seems to function quite like Westlaw or Lexis because it uses plain language search. However, Google scholar does not search a proprietary dataset of cases or other materials as do Westlaw or Lexis. Instead, Google Scholar searches websites on the Internet. It is what is technically called a “meta-search” engine. Further, Google Scholar uses a secret algorithm to conduct its searches. It is well known that the fundamental basis for this algorithm is what is known as a “page rank” search algorithm. This means that the first result produced from a Google Scholar search is the website found containing the search terms that is the most “popular,” i.e. has the most links or hits. The page rank algorithm, therefore, produces very different results, in terms of order and presentation, than do the more traditional search algorithms used by other legal search services. An important case in a particular jurisdiction that would be easily found in another legal search engine may be far harder to find in Google Scholar. Further, Google uses other criteria in determining how to present results. Recently, for instance, Google announced that it would give higher priority [and therefore an earlier presentation location] to websites that are “mobile friendly.”18 This is certainly not a consideration that lawyers will find useful in searching for useful court decisions.

A major question, of course, is what constitutes research competency, particularly in online research. The context in which this question will arise is one where a lawyer has failed to discover relevant authority. If a court or Disciplinary Administrator were to adopt the same standard as used in legal malpractice cases, i.e. the standard of care [i.e. competency] in the jurisdiction, this may present serious problems for lawyers who have not kept up their research skills. I would be particularly concerned about more senior attorneys who have neither the time nor the inclination to keep themselves up-to-date in online research techniques and do not have more competent assistants to do the research for them.

Another possible standard of competency in research that might well be applies is the Principles and Standards for Legal Research published by the American Association of Law Libraries. Principle !(b)(3) states:

Knows how to appropriately use available resources to research and understands the relative advantages of different methods of finding information.

a. Differentiates among various available online search platforms to employ those that are best suited to the task at hand, and

19 In litigation contexts, this may well come in the form of an embarrassing disclosure of such authority by opposing counsel as required by Rule 3.3(a)(2).
21 Available online at http://www.aallnet.org/mm/Advocacy/recommendedguidelines/policy-legalrescompetency.html.
b. Understands the operation of both free and subscription search platforms to skillfully craft appropriate search queries.

that a Lawyers who do not meet this standard may well find themselves at risk of both disciplinary and malpractice actions.

There is a second, relatively unrecognized risk in doing online legal research. This risk is lawyer doing online research on an insecure computer, i.e. a computer that has been hacked and had malware installed that permits unauthorized third parties to track the sites to which the lawyer goes, may permit such third parties to acquire confidential client information by analyzing the lawyer’s search patterns. The software to do such analysis is readily available commercially and the use of such tracking by companies on the web seeking to determine individual buying patterns is common on the web today. Were such tracking and analysis to be used against law firms by unauthorized third parties, the resulting breach of confidentiality could be devastating.22

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Any lawyer who has been involved in complex litigation during the past decade knows that the discovery portion of a trial has undergone a massive transformation. A process that once involved massive numbers of hours involving tedious sifting through reams of documents has now been changed by the introduction of computer programs that are able to rapidly examine electronically stored documents ["ESI"] documents and retrieve relevant information in minutes rather than weeks or months. But where manual discovery could be undertaken by relatively untrained personnel [when I was an junior associate at a large law firm this was often the task assigned to the most junior lawyers supervised by more experienced paralegals], computerized e-discovery requires that those who do the discovery have “at a minimum, a basic understanding of, and facility with, issues relating to e-discovery...”23 Several years ago, the Standing Committee on Professional Responsibility and Conduct of California issued an advisory opinion outlining a lawyer’s ethical obligations in handling e-discovery.24 In the digest of this opinion the committee stated:

On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability depending on the e-discovery issues

24 Ib., n. 23, above.
involved and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI.25

[emphasis added]

The message is, once again, quite clear. Technical knowledge, quite different from that a lawyer ordinarily considers his or her stock in trade, may be required in the modern practice of law in order to comply with the requirements of Rule 1.1. Once, again, we must also ask what level of knowledge will be required. The California opinion leaves no doubt whatsoever that the required standard may, in some case, be extremely high. One presumes the test would be whether the lawyer was able to use current e-discovery software in a reasonable manner. Since virtually every month sees the introduction of new e-discovery software, lawyers who find themselves in discovery and in need of using such software will have a significant burden placed upon them to acquire technical knowledge for which they may be ill-equipped.

These three examples that I have discussed by no means exhaust all of the areas in law practice today that place significant technical knowledge on lawyers or create risks for lawyers using new technologies. The rise of social media and a

25 Ib., n. 23, above, at 1.
culture of disclosure quite antithetical to traditional lawyer notions of confidentiality is just one other example I might mention.  

Solutions

Now that I have pointed out some of the more serious issues involving Rule 1.1 and new technologies I think that it is only fair to suggest some possible solutions. First, Rule 1.1, Comment 1 permits a lawyer to satisfy its requirements when he or she does not have the requisite competence to undertake a representation “to associate with or consult with a lawyer of established competence in the field.” Thus, if a lawyer finds himself involved in a case that requires a sophisticated knowledge of e-discovery he may bring on co-counsel with such knowledge. In many cases, however, such as the use of email or website security, a lawyer will not need to bring in co-counsel. Rather the lawyer will need to hire a technical specialist to come in and audit his office technology, make what changes in that technology may be required, and to establish procedures designed to implement the new technology. If I may use an everyday analogy, many homeowners will hire a heating and cooling specialist to come in twice a year to examine, clean, and maintain their HVAC systems simply because they lack the

26 The use of social media not only potentially poses ethical problems for lawyers but also for judges; see, ABA Formal Op. 462 (2013) [judges’ use of social media]
27 Rule 1.1, Comment 1.
requisite knowledge to do the work themselves and because it is economically more efficient to outsource the work than to become competent in the field themselves. The same principles, I would suggest, apply to legal technologies. If a lawyer does not wish to acquire the requisite competence in a technology himself, he can hire a consultant with the knowledge to do whatever is necessary. What he cannot do is simply ignore the issues.