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Essential Technology Competence for Attorneys

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THE NEW DUTY OF TECH COMPETENCE IN TEXAS: STAYING ETHICAL AND COMPETENT IN THE DIGITAL AGE

BY JOHN BROWNING

I. Introduction – It's a Brave New World Out There

In 2012, a sea change occurred in the legal profession, particularly for those who came of age in the "good old days" when being competent in representing one's clients meant staying abreast of recent caselaw and statutory or code changes in one's area of concentration. In August 2012, the American Bar Association (ABA)—following the recommendations of its Ethics 20/20 Commission—formally approved a change to the Model Rules of Professional Conduct to make it clear that lawyers have a duty to be competent not only in the law and its practice, but in technology as well. Specifically, the ABA's House of Delegates voted to amend Comment 8 to Model Rule 1.1, which deals with competence, to read as follows:

> **Lawyers have a duty to be competent not only in the law and its practice, but in technology as well.**

> **Maintaining Competence**
> 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.[1]

Now, of course, the ABA Model Rules are precisely that—a model. They provide guidance to states in formulating their own rules of professional conduct, and each state is free to adopt, ignore, or modify the Model Rules. For a duty of technology competence to apply to lawyers in a given state, that state's particular rule-making body (usually the state's highest court) would have to adopt it.

And since late 2012, more than half of the country has adopted the duty of technology competence by formally adopting the revised comment to Rule 1.1. Thirty-six states in all have done this. Texas became the 36th state in late February 2019, with the Supreme Court of Texas' Miscellaneous Order No. 19-9016, amending Paragraph 8 of the Comment to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct. Under this amendment, maintaining proficiency and competence in the practice of law now includes knowing "the benefits and risks associated with relevant technology"—mirroring the ABA's change. The Supreme Court's action followed closely on the heels of resolutions supporting the change passed by the State Bar's Computer and Technology Section as well as the Professional Development/Continuing Legal Education Committee. The Computer and Technology Section's resolution noted that "the practice of law is now inextricably intertwined with technology for the delivery of services, the docketing of legal processes, communications, and the storage and transfer of client information, including sensitive and confidential private information and other protected data."

For a number of the states that had preceded Texas, even before the formal adoption of a technology competence requirement, there were clear indications that lawyers would be held to a higher standard when it came to technology impacting the practice of law. For example, in a 2012 New Hampshire Bar Association ethics opinion on cloud computing, the Bar noted that "competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes."[2]

Even the one state that has not adopted the ABA Model Rules—California—nevertheless acknowledges the importance of technology competence. In a 2015 formal ethics opinion on e-discovery (which will be discussed later), the California Bar made it clear that it requires attorneys who represent clients in litigation to either be competent in e-discovery or to get help from those who are competent. Its opinion even expressly cited ABA's Comment 8 to Rule 1.1, stating that "Mandatory learning and skill consistent with an attorney's duty of competence includes 'keeping abreast of changes in the law and its practice, including the benefits and risks associated with technology.'"[3]

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