

The Competent 21st Century Legal Professional

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A long time ago, at a
law school not very far away...

Legal Education in the Past



Christopher Columbus Langdell
developed the case method for legal education at
Harvard Law School

Legal Education in the Present



NEW:

Doctrinal courses reflecting new legal developments (e.g., International Law).

NEW:

More emphasis on practical skills, such as legal writing courses and clinics

The New Reality

- Electronic discovery
- Automated document assembly
- Virtual law offices
- Cloud computing
- Project management
- Legal process outsourcing and unbundling
- Social media for marketing and investigation



How can law schools respond?

An Example:



Institute on Law Practice Technology & Innovation

New Course Offerings

- Project Management for Lawyers
- Lawyering in an Age of Smart Machines
- The 21st Century Legal Profession
- Electronic Discovery
- Externships with a New Generation of Potential Employers
- And others...

A Sampling of Other Projects

- Using technology in new ways
 - Massachusetts Litigation App (www.masslitapp.com)
 - Google “Glass in Class”
- New Concentration in Legal Technology and Innovation
- The Suffolk-Flaherty legal tech audit

Overall Goal

- Prepare students to be competent legal professionals in the 21st century.

The Concept of Competence (Model Rule 1.1)

[6] 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.

Two Examples of the Changing Nature of Competence

- The Competent Use of Basic Law Practice Technology
- The Duty of Confidentiality

Examples of Recent Developments

- Iowa – lawyer disciplined for subjecting his clients to a financial scam that could have been uncovered with a simple Internet search.

Examples of Recent Developments

- Massachusetts – lawyer disciplined for failing to take appropriate steps to comply with a court order regarding the preservation of digital evidence.

Examples of Recent Developments

- New York – Court rule mandating that lawyers handling cases involving electronic discovery “must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery.”



ARE YOU A LOW-TECH LAWYER?

- *Tech Skills Lawyers Need to Know* -

D. CASEY FLAHERTY

corporate counsel for Kia Motors America

HAS DEVELOPED AN INTRIGUING AUDIT.

Flaherty's hypothesis is that lawyers, as a group, are deficient in their use of technology. Their knowledge gap directly leads to companies left with bills for...

"OUTRAGEOUS SUMS FOR UNNECESSARY BUSYWORK."



“ *The audit is driven by fear—fear of wasting company money on low value-added work.* **”**

FLAHERTY'S AUDIT FINDINGS:

FLAHERTY'S COMPLETION TIME:

30 MINUTES

EXPECTED COMPLETION TIME:

1 HOUR

ACTUAL (MEAN) COMPLETION TIME:

5 HOURS

An Example of Inefficiency with Word

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I. → OVERVIEW OF RIGHTS GRANTED TO DEALER ¶

¶

Subject to the terms of this Agreement, COMPANY hereby appoints DEALER and grants DEALER the non-exclusive right (i) to buy and resell the Kia Products identified in the Kia Product Addendum, attached hereto as Exhibit A, as such addendum may be revised by COMPANY from time to time; (ii) to identify itself as an authorized Kia Dealer at the location(s) specified in Part 1 and in the manner specified in Part 2; and (iii) to use the Kia Marks (as defined herein) in the advertising, promotion, sale and servicing of Kia Products in accordance with Part 2, Paragraph IX.A.3. As provided herein, COMPANY expressly reserves the unrestricted right to sell Kia Products itself and to grant others the right to sell Kia Products, whether or not in competition with DEALER. ¶

¶

II. → OVERVIEW OF RESPONSIBILITIES ACCEPTED BY DEALER ¶

¶

DEALER accepts its appointment as an authorized Kia Dealer and agrees to (i) vigorously and aggressively sell and promote Kia Products; (ii) satisfactorily service Kia Products, regardless of where sold and by whom and whether or not under warranty; and (iii) establish and maintain satisfactory Kia dealership facilities at, and only at, the location(s) specified in Part 1, all in strict accordance with the terms and conditions of this Agreement. ¶

¶

III. → TERM OF THIS AGREEMENT ¶

¶

Unless otherwise agreed by the parties hereto in a written addendum to this Agreement, the term of this Agreement shall commence as of the date COMPANY signs it (at the end of

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The Better Way

Dealer Agreement (Properly Formatted) - Microsoft Word non-commercial use

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STANDARD PROVISIONS¶

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Suffolk's Role

- Automating the audit
- Enhancing the audit with additional tasks
- Administering the audit for the profession and law schools

What's the Goal?

- Incentivizing lawyers to use technology as effectively as possible to bring down the cost of legal services
 - Why hasn't this happened already?
- Training the next generation of lawyers to be more technologically competent.

The Objection

- Shouldn't lawyers just delegate this stuff to staff?



Image courtesy of freedigitalphotos.net & Stuart Miles

The Responses

- Leaner firms = smaller staff
- Easier/quicker to do it than delegate it
- Staff might not do it the right way
 - Rule 5.3 (duty to supervise non-lawyer assistance)
- Version control; need to keep working
- The need arises after hours
- If staff really do it, audit the staff

Other Questions

- Who will be able to participate?
- What will it cost?
- Won't lawyers cheat?

Two Examples of the Changing Nature of Competence

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- The Duty of Confidentiality

Technology and Confidentiality



Protecting Client Information in the Past

Client Information in a Digital Age



Hypo on Technology and Confidentiality

A lawyer keeps confidential client information on a laptop, smartphone, or flash drive. What steps must the lawyer take to satisfy her ethical obligations to protect the confidential information?

Under the old (pre-August 2012) Model Rules? Under the new version of the Model Rules?

Newly Adopted Changes to Model Rules

- Clarify that lawyers should take reasonable precautions to protect client confidences from inadvertent or unauthorized access or disclosure (Model Rule 1.6)
- Identify factors that lawyers should consider when determining whether they have taken reasonable precautions (Model Rule 1.6)

Factors for Determining the Reasonableness of a Lawyer's Efforts

- Sensitivity of information
- Likelihood of disclosure without safeguards
- Cost of additional safeguards
- Difficulty of implementing safeguards
- Extent to which the safeguards adversely affect the lawyer's ability to represent clients

Reasonableness ≠ Paranoia



Image courtesy of freedigitalphotos.net & Stuart Miles

Mere disclosure, by itself, does not trigger discipline.

The Ethics of Cloud Computing



Image courtesy of freedigitalphotos.net & cooldesign

Key Ethics Takeaways About Cloud Computing

- Ethics opinions generally conclude that it is *ethically permissible to use the cloud*, but lawyers must take *reasonable precautions* to protect the information.
- A Massachusetts opinion (12-03) is a bit more restrictive, concluding that lawyers need to get **client consent** before storing **sensitive client information** in the cloud.



What's reasonable in the cloud?

A few important considerations

- Encryption
- Understanding who has access to your information
- Understanding who *owns* your information
- Using a strong password
- Employing two factor authentication

Coming soon...

- A website at the ABA that answers commonly asked questions about data security in ways that ordinary lawyers can understand.
- For example:
 - What is a strong password?
 - Why is encryption important? And how do you do it?

The Bottom Line: It's a Brave New World for Lawyers



Thank you.