# Technology and Legal Ethics: Defining Competence in an Increasingly Online World

By BRENDON LEVESQUE and MICHAEL TAYLOR

## INTRODUCTION

In the past, lawyers were deemed to be competent based on their experience and knowledge of a substantive area of the law. Today, competence means that lawyers are expected to take reasonable steps to understand how technology may affect their legal representation. As technology has evolved, so has the concept of competence.

More and more, the Rules of Professional Conduct require lawyers to have a reasonable proficiency in a number of online and technology-based skills. Where lawyers only a generation ago might have considered these things arcane and outside the scope of a lawyer's skill set, the point of this article is to serve as a reminder—or a warning for those who need it—that these once arcane skills are now part of a lawyer's daily routine, and are becoming more so by the day. While the rules still do not directly reference technological aptitude to any great extent, the reality and the way we all interact with clients and with the online world brings technological awareness, if not aptitude, clearly within the scope of several rules. We here offer the most common ways that the Rules intersect with the online/technological world. We hope this is a useful refresher and compilation for those who know, and it's a great place to start for those who don't.

## COMPETENCY

At the core of legal professional conduct is a lawyer's duty to provide competent representation to his or her clients. Under Rule 1.1 of the Rules of Professional Conduct, a lawyer has a duty to provide competent representation to clients. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to provide representation to the client. The comments to the Rule make clear that this obligation extends to technological competence as the role of technology grows within the legal field (though the authors believe the obligation would exist even if the comments were silent on the matter). In order to provide competent legal representation, therefore, a lawyer must stay apprised of changes in the law and legal practice, including the use of technology in practice.

We have identified six areas in which practitioners need to demonstrate and maintain technological competency. First, attorneys need to understand and maintain cyber security to ensure information relating to client representation is safeguarded. Second, attorneys should be proficient with electronic discovery, including the preservation, review, and production of electronic information. Third, technology can be used to deliver legal services more efficiently, through things like automated document assembly, electronic court scheduling, and file sharing technology. All of which are widely used. Fourth, attorneys should understand how technology is used by clients to offer services or man-

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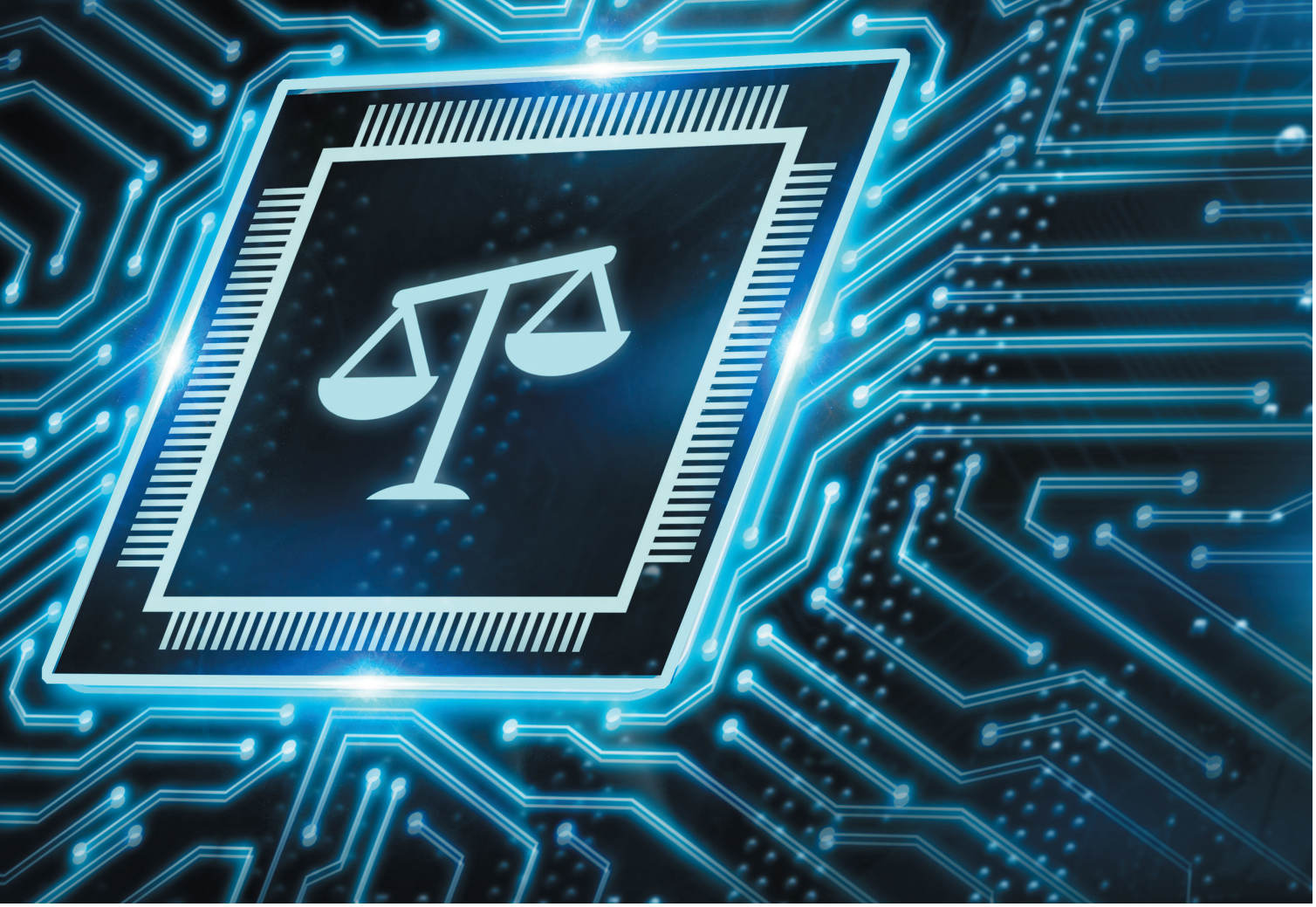

ufacture products. Fifth, using technology can be an efficient and effective way to present information in the courtroom, and even necessary to present certain evidence. Sixth, attorneys can and often must conduct internet-based investigations through simple internet searches and other research tools available online.

Not only is staying appraised of new uses of technology an ethical obligation, but there are also benefits to being technologically competent. Technology can level the playing field by making information more accessible. Over time, increased use of technology can help save money which can allow you to pass savings along to low-income clients (if you're altruistic). Technology can also increase efficiency and help manage time.

Today, more than ever, effective use of technology is important to providing competent legal services. From the outset of the coronavirus pandemic, legal services have increasingly shifted to an online platform. To continue providing competent legal services, attorneys in Connecticut need to become proficient with working in an online world and to do so far more quickly than anyone anticipated. Attorneys should conduct a review of their skill set, today. The best thing to do is to determine how comfortable you are using case management software, document management software, online billing software, email, working with PDF documents, using Microsoft Office Suite, and social media. Critical questions to ask are: Do you understand how your data security works? Do you understand how e-discovery works? Do you understand how the tech lawyers in your practice are using works? Do you understand how the technology your clients are using works? Do you know how to use technology in the courtroom? If the answers leave you uncertain, there are a number of helpful online resources that are readily available.

## ONLINE ARGUMENTS

A critical area of change to legal practice in Connecticut since the onset of the coronavirus pandemic has been the shift to online oral arguments and hearings. The decorum expected in court is still expected while you're broadcasting from your dining room table, but the elements required to achieve it have changed. Ensuring you have a quiet, distraction-free environment and an appropriate background are critical for participation in an online oral argument or video conference. Even though you are not physically in the courtroom, it is still important to wear proper courtroom attire. Appropriate demeanor, such as sitting upright in your chair, also is still important online.

Another important step is maintaining high-speed internet service, which means 4G or LTE cellular with a sufficient data plan or cable internet service. Ensuring that your computer is the only device using the internet (no family members streaming movies or gaming online), and closing all other unnecessary internet applications (email, additional open windows in your browser, etc.) will help maintain the best connection possible throughout

the argument. A computer or tablet with web cam is necessary for most conferences or arguments. Consider your camera placement *x* an oral argument. The camera should be at eye level or slightly above eye level. Looking directly into the camera will create the illusion of eye contact during an argument. Placing a lamp next to the side of your computer and not having a window behind you will create the best light for others to see you on screen.

Before the argument, you should determine on which platform the argument is being held, install the necessary application, and grant any permissions necessary through your computer software (permission for the application to use your computer's microphone, camera, etc.). Platforms for arguments or conferences may include Google Chrome (which can be downloaded online), Microsoft Teams, or Cisco Meeting app (which can be downloaded for free through the Apple app store).

To prepare, it is important to test everything at least 48 hours before the oral argument or conference call. For the test, use the same equipment and location as you plan to use for the oral argument. Moots can also be conducted via video conference, WebEx, Zoom, or Microsoft Teams. During the test, make any necessary adjustments and test them as well. Testing out the platform will also give you the opportunity to learn how to use the software effectively during the oral argument, such as knowing how to mute and unmute your microphone and what volume to speak at. You can also practice sharing your screen to show a document during an argument if you wish. As trial courts become more comfortable with digital exhibits, this skill becomes increasingly important.

Do not use the meeting chat feature unless you need to advise the court of some technical difficulty (e.g., the court cannot hear you), because everyone will see the comments and they may be recorded. Use Teams, Slack, or text messaging to "chat" with co-counsel (provided co-counsel has been approved).

As a reminder: participants in court hearings are prohibited from recording the proceedings. A transcript of the hearing or argument can be ordered after the argument. Any recording will subject you to sanctions.

## ONLINE FILES

As of November 16, 2020, Connecticut has required the mandatory submission of exhibits in electronic format. E-services procedures and technical standards are available online at the Connecticut Judicial Branch website (jud.ct.gov/external/super/e-services/e-standards.pdf). The Judicial Branch website also has a guide to remote hearings to help preparations for oral arguments (jud.ct.gov/homePDFs/connecticutguideremotehearings.pdf). Staying up-to-date on changes in the legal field, such as open courts, is critical and can be found online (jud.ct.gov/COVID19.htm).

## CONFIDENTIALITY

A critical consideration when using technology is confidentiality. Under Rule 1.6: (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d). Further, under subsection (e), a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The confidentiality required by this Rule goes far beyond the scope and communications protected by the attorney-client privilege. Under Rule 1.6, a lawyer may not make disclosures unless the client gives informed consent, or the disclosure is impliedly authorized to carry out representation. The only exceptions to this are: to prevent death, serious bodily harm or fraud, to secure legal advice regarding compliance with the rules, to defend the lawyer in controversy with client, to respond to allegations in any proceeding, to comply with a court order, and to do conflict checks.

Law firms should consider implementing online safeguards for client information, because they are often targeted for hacking. Law firms house a lot of valuable information and frequently have sub-standard security. Not only does the Rule require reasonable steps by the lawyer to protect client confidences, but the cyber security regulation of law firms is rapidly increasing and clients increasingly are making data security a key criterion for their vendor relationships. Cyber security can easily be increased by encrypting, using caution with cloud devices, vetting vendors, properly training staff, having a password policy, and having cyber liability insurance. Cloud services promote mobility, flexibility, organization, and efficiency. However, the Rules require that lawyers make reasonable efforts to meet their obligations to preserve the confidentiality of client information and to confirm that any third-party service provider is likewise obligated.

Password protection is key for maintaining confidentiality. When using iOS devices, best practices are to use a 6-digit passcode (better than 4), enable Touch ID, enable Face ID, and turn on remote data erase. In general, do not use easily guessed passwords, such as "password" or "user." When creating a password do not use confidential details, such as birthdays, Social Security numbers, phone numbers, names of family members, or adjacent keyboard combinations, such as "qwerty" and "asdzxc" and "123456." Do not use your email account password at an online retailer. Whenever possible, turn on two-factor authentication (2FA) on your mobile device, which adds an additional authentication step to your basic login procedure. Apple, Google, Microsoft, Slack, Twitter, LinkedIn, and Amazon are among some of the platforms where 2FA is available.

Other good online practices include not downloading files from a commercial web email or entertainment sharing sites. Do not open emails from unknown users or other suspicious emails. Do

not assume security is enabled on public WIFI access points. Do not click on pop-up messages or unknown links. If any information in threatened, lawyers are obligated to take reasonable steps to protect the information.

## SOCIAL MEDIA

A last consideration for attorneys in an increasingly online world is the role of social media in a case and how to ethically use social media in the legal profession. Communication through social media is governed by the Rules of Professional Conduct. Your communications over social media are subject to the Rules in the same manner as all other communications. Furthermore, a general understanding of how to review public information can be beneficial in collecting evidence for a case. The duty of competence may, in some cases, include the duty to investigate and collect evidence directly or through an agent from social media. However, attorneys should be cautious when collecting evidence from the internet.

When beginning to compose an online discovery plan, ensure that social media is included at an early stage. Make sure that you include social media in your document preservation letters. Additionally, consider including social media in discovery requests and subpoenas.

Collecting evidence from social media may not currently be a standard of care in all jurisdictions, but this will likely change in the near future. The duty to conduct internet searches has been the subject of several cases since the introduction of Google. For example, in *Munster v. Groce*, 829 N.E.2d 52 (Ind. Ct. App. 2005), the appellate court scolded an attorney for failing to locate a litigant after the court conducted its own Google search and quickly found information on how to track down the missing litigant.

Social media can also play an important evidentiary role in a case, though the results may either help or hurt your case. In personal injury cases, social media posts may reveal the extent of injury or emotional distress after an accident. In family law or bankruptcy courts, they can serve as proof of assets or employment. They can be revelatory of workplace environment/culture, provide substantive facts, and help identify witnesses on employment law cases. Social media posts also can be used to show motive, provide substantive facts, and identify witnesses in criminal cases.

The rules of admissibility concerning social media evidence follow the same rules of admissibility for traditional documents. Specifically, like traditional documents, social media evidence must be authenticated pursuant to § 9-1 of the Connecticut Code of Evidence. Authentication requires a showing that the author of the statement is who the proponent of the evidence claims it was. As with any evidence, authentication can be established through direct testimony or by circumstantial evidence of "distinctive characteristics" in the content that identify the author. Note that proving only that the content came from a particular social media account is not enough proof of authorship.

Attorneys can collect information from social media by viewing any public areas of social media accounts or groups on social media. In general, lawyers may view any public content, but *should not* attempt to access private information. Similarly, when it comes to jurors, attorneys can view social media pages, but should not connect with jurors in any way. New York State Bar Association Opinion 843 (2010) provided that "a lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not 'friend' the other party or direct a third person to do so, accessing the social network pages of the party will not violate [professional rules of conduct]."

Collecting information from social media has ethical limitations. Whether collecting information is appropriate depends on the context, such as the platform being used and whether it is available to the public. A lawyer may not hire an investigator or friend to obtain evidence from a private social media account. "Friending" a represented party on social media has serious ethical pitfalls. Rule 4.2 prohibits communication with a party that the lawyer knows is represented about the subject of the litigation. This would include friending. Rule 4.3 prohibits attorneys from stating or implying that they are disinterested. Further, where the lawyer knows or reasonably should know that a party misunderstands the lawyers' role, the lawyer is required to make "reasonable efforts" to correct the misunderstanding. Under Rule 5.3, attorneys cannot instruct a nonlawyer assistant to violate the rules by friending a represented party. On the other hand, some states distinguish between friending someone and passively viewing their public page. In some states, "friending" a party is acceptable as long as the lawyer uses their real name and no deception.

When it comes to clients using social media, attorneys should not instruct their clients to delete or alter their social media page. Failing to instruct your client to preserve properly their social media accounts could lead to a sanction. Another possibility is an adverse inference instruction. In this scenario, the court would allow the jury to infer that social media evidence the plaintiff destroyed would have been harmful to his case. Attorneys can advise their clients to increase their privacy settings on all of their social media accounts. While your client's private social media data could be discoverable, most opinions granting full access to a party's social media account required an initial showing of relevant information on the public portions. One big caveat, there can be no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence. ■

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## President's Message

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6. Justice Gorsuch is the first to have served as a member of the Supreme Court alongside a justice for whom he clerked.
7. www.archives.gov/founding-docs/constitution-transcript
8. William H. Rehnquist, 2004 Year-End Report on the Federal Judiciary, January 1, 2005, available at www.supremecourtus.gov/publicinfo/ year-end/2004year-endreport.pdf.
9. www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf
10. www.ctbar.org/about/diversity-equity-inclusion/pathways-to-legal-careers

## Technology and Ethics

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## DE&I

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womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf; "First Phase Findings From a National Study of Lawyers With Disabilities and Lawyers Who Identify as LGBTQ+" (2020), www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf; International Bar Association,"Us Too? Bullying and Sexual Harassment in the Legal Profession" (May 2019) www.ibanet.org/bullying-and-sexual-harassment.aspx

10. Lauren A. Rivera, András Tilcsik, "Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market," *American Sociological Review*, Vol. 81, No. 6 (2016)
11. Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014) nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf
12. *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (ABA, MCCA 2018) (Executive Summary) www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf
13. *See e.g.*, Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color* (2020), www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf; Chung, et al. *A Portrait of Asian Americans in the Law*, Yale Law School/National Asian Pacific American Bar Association (2017) A Portrait of Asian Americans in the Law (apaportraitproject.org)


## Lincoln

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"My best friend is the man who will get me a book I have not read."

2. *See* Michael Burlingame, *Abraham Lincoln: A Life*, Volume 1, p. 36 (2008).
3. "The judgments of the Lord are true and righteous altogether."
4. *See* Robert Bray's comprehensive study, "What Abraham Lincoln Read," Journal of the Abraham Lincoln Association, Volume 28, No. 2 (2007), and Bray's *Reading with Lincoln* (2010).
5. Harkness, supra note 1.
6. Harold Holzer, *Lincoln at Cooper Union: The Speech that Made Abraham Lincoln President* (2006).
7. Professor Masur points out that Lincoln had little military experience, but, as president, he read several treatises on warfare to improve his knowledge of tactics.
8. Bray, p. 56.
9. Poe had published "The Murders in the Rue Morgue" in 1841, and this story and subsequent Poe works appealed to Lincoln.
10. He would recite "A Man's a Man for A'That" and "Auld Lang Syne."
11. *See* Burlingame, Vol. 2, p. 47, who assumes that Lincoln relied on Dickens for the phrase.
12. Bray is not sure of how much Lincoln read of *The Pickwick Papers*, but Harkness states that Lincoln read the book.
13. This was a "heart balm" suit that Connecticut abolished in 1967. *See* General Statutes Sec. 52-572b. England followed the American trend by ending such suits in 1970. Gilbert and Sullivan's *Trial By Jury* also satirized a breach of promise action.
14. See Mark E. Steiner, *An Honest Calling* (2006).
15. Mr. Pickwick became the central figure in the Broadway play *Pickwick*, with its hit song, "If I Ruled the World."

## Supreme Deliberations

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solved because of Mr. Foisie's death and by operation of Conn. Gen. Stat. § 46b-40 (a marriage is dissolved by "the death of one of the parties"); and 3) if the marriage was automatically dissolved based on the death of Mr. Foisie, the court could not then re-dissolve it based on the motion to open. "That's some catch.…"

The flaw in the trial court's analysis was, according to the Court, in step number one, because a motion to open a dissolution judgment only for the limited purpose of reconsidering the financial orders does not reinstate the parties' marriage. The motion to substitute was controlled by Conn. Gen. Stat. § 52-599, which states, with three exceptions, that a civil action will not abate upon the death of one of the parties. The exception at issue in *Foisie* applied to any proceeding, "the purpose or object of which is defeated or rendered useless by the death of any party.…" Getting to the meat of the matter, the Court noted that it has permitted substitution where the death of a party would have "no effect on the continuing vitality of the proceeding because the estate could fill the shoes of the decedent, such as when the pending civil case sought monetary damages.…" Contrast this to cases where the action "sought specific relief that was unique to the parties, such as seeking an injunction for specific performance" and, in which case, substitution would not be appropriate.

Within these contours, the Court had little trouble concluding that Ms. Foisie's motion to open sought only reconsideration of the financial orders and not reinstitution of the marriage. And because the end result would involve only money, the action would not be "defeated" or "rendered useless" by the death of Mr. Foisie. Thus, once the map became clear, the end result became obvious. ■