

CAUTIONARY TALES OF TECH INCOMPETENCE

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THE ABA'S NEW STANDARD:

Model Rule 1.1 – 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 . . .*”



To date, 37 states have adopted this heightened standard of competence, including Florida, New York, Illinois, Massachusetts, Pennsylvania, Ohio, and Virginia, Louisiana, and Texas



Texas is the most recent, by Supreme Court of Texas order dated February 26, 2019:

- Amending Rule 1.01 (Competent and Diligent Representation to include a revised Note 8 that adds “including the benefits and risks associated with relevant technology” to remaining “proficient and competent in the practice of law.”



This change had been coming for quite some time, as some court decisions demonstrated:

- Munster v. Groce, 829 N.E.2d 52 (Ind. App. 2005) – (the “duty to Google”)
- Weatherly v. Optimum Asset Management, Inc., 98 So. 2d 118 (La. App. 2005)
- DuBois v. Butler ex rel. Butler, 901 So. 2d 1029 (Fla. Dist. Ct. App. 2005) – (“horse & buggy”)



- *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013) – (duty to use social media evidence)
- *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010 – (duty to do online juror research)
- *Griffin v. Maryland*, 192 Md. App. 518 (2010) – (searching social media “a matter of professional competence”)



You don't have to be this:



But you can't afford to be this:





Digital Competence is vital in areas like:

- Law practice management (email systems, document creation/management)
- Ediscovery
- Filesharing and cloud computing
- Cybersecurity



ABA Formal Ethics Opinion 477 (May 2017)

- Lawyers need to use “reasonable efforts” (like encryption) to ensure security of client communications
- Lawyers must “act competently to safeguard information relating to the client”

CAUTIONARY TALES FROM THE TRENCHES

- *Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC*
(15-5714 (Fla. Dist. Ct. App. 2017))
 - Check your firm's spam filter and email system



- Paul Manafort's lawyers who thought they knew how to digitally redact documents...
but they were wrong.

- Wilmer Hale, the SEC, and the *Wall Street Journal* - the dangers of “reply all” (2017)
- DOJ and the Gavin Black prosecution – know what you’re redacting, or not redacting (2017)
- *State v. Ratliff*, 849 S.W.2d 183 (N.D. Sup. Ct. 2014) – know what you’re electronically producing

- May 2019 –N. J. lawyer fails to electronically file a crucial document – a demand for a trial de novo after a \$200,000 arbitration award against his client.
 - Result: the appeals court affirms the arbitration award, citing the lawyer’s tech “fail.”

- *James v. National Financial LLC*, C.A. No. 8931-VCL (Del. Ch. Dec. 5, 2014)
 - Tech incompetence in ediscovery is no excuse
- Angela Turiano/Wells Fargo
 - Lawyer's tech incompetence in ediscovery causes one of the biggest data breaches in history



It's All About the Benjamins: Tech Incompetence Can Cost You Money

- New York, 2017 – Barbara Katsos
- Canada, 2016 – John Dillon
- Sanctions because of not checking email or not having an email address

Tech Incompetence Leading to Disbarment

- Oklahoma, 2016 – James Oliver disbarment over not “getting” e-filings in bankruptcy court

Tech Incompetence Leading to Cybersecurity Exposure

- Iowa, 2013 – Robert Wright
- Virginia, 2016 – *Bile v. RREMC and Denny's Corp.*, No. 3:15-cv-00051 (E.D. Va. Aug. 24, 2016)

“Like Leaving Your File on a Park Bench”

- *Harleysville Insurance Co. v. Holding Funeral Home*, 2017 WL 4368617 (W.D. Va. 2017) – the dangers of filesharing



Don't Be This:

