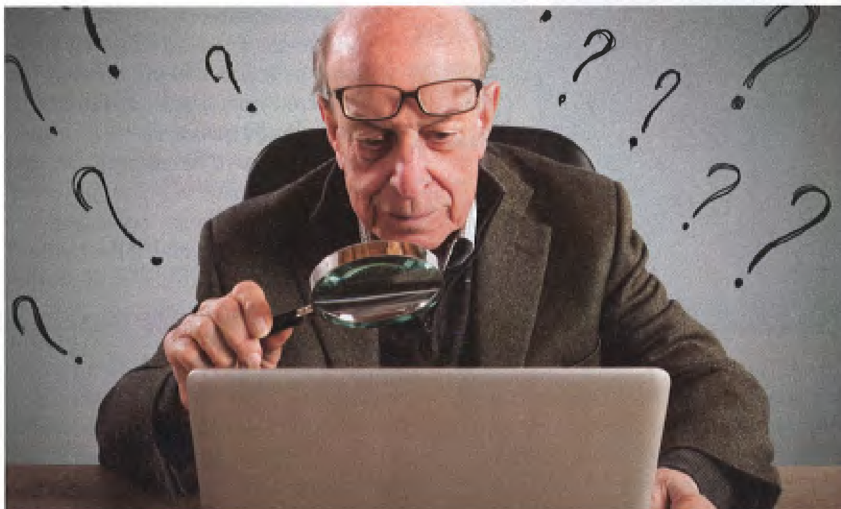
TECHNOLOGY

Legal Tech Skills Are No Longer Optional

If you are relying on your teenager to help you, the time is now to learn.

BY STEVE THOMAS



A 30-YEAR VETERAN BANKRUPTCY PRACtitioner in Oklahoma with a spotless disciplinary history recently lost his right to practice before a bankruptcy court—permanently—and received a public censure because of his acknowledged "lack of expertise in computer skills." For those lawyers still relying on teenage family members to configure device settings or set up online accounts, this sends a chilling reminder that the requirement for competence in legal technology is getting real.

Licensed in the Sooner State since 1967, James Edward Oliver's career has included practice before the Eastern, Western and Northern federal districts in Oklahoma, and the U.S. Tax Court. The Oklahoma Supreme Court's March 29, 2016, opinion stated, "no testimony nor any documents showed an insufficiency in Oliver's knowledge of substantive bankruptcy law," and said that the "trial tribunal reported that his problem was technological proficiency."

More specifically, e-filing. After Oliver failed repeatedly at proper electronic submission, even with assistance from court staff, Judge Sarah Hall of the U.S. Bankruptcy Court for the Western District of Oklahoma suspended him for 30 days. He didn't improve, so she suspended him for another 60 days and gave him nine "homework" documents that he was required to submit error-free and without third-party assistance. After finding that Oliver paid another lawyer to "ghost write" his homework assignments, Hall permanently suspended Oliver on June 15, 2015, from practice before the Western District bankruptcy court.

Oliver failed to report the suspensions to the Oklahoma General Counsel—a violation of that state's disciplinary rules, which he claimed occurred because he was ignorant of the rule. In its opinion, the Oklahoma Supreme Court "encourage[d] Mr. Oliver to continue to improve his computer skills, or better, to hire an adept administrative assistant to do his pleadings," and ordered public censure. The dissent took a harsher view, hammering Oliver for his "demonstrated incompetency to practice law before the bankruptcy court" and his failure "to make honest attempts to improve despite personalized help from court staff, directing insults instead," and concluding: "I would suspend [Oliver] for two years and one day."

Ethical rules governing lawyers' conduct usually begin with a rule requiring competence, such as Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct titled "Competent and Diligent Representation," or the American Bar Association's Model Rule 1.1 titled "Competence." Historically, the concept of "competence" brought to mind the attorney's substantive legal skills. One would be hard pressed to locate ethics opinions sanctioning lawyers for snarling the correction tape on an IBM Selectric, repeated failures at securing modem handshake in a facsimile transmission, or head-scratching confusion at a jam in a plain-paper copy machine.

But in 2009, the ABA appointed the Commission on Ethics 20/20 to study the impact of technology and globalization on the legal profession. Three years later, that commission proposed amendments to address the importance of technology to the practice

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of law, and on Aug. 6, 2012, the ABA House of Delegates passed a resolution incorporating technology-related changes into the Model Rules. Probably the best-known amendment was to the comments under Model Rule 1.1, which were modified to state that lawyers "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Other revisions, less widely publicized, included the requirement of proper technological barriers when personally disqualified lawyers are "screened" from access to matters where their involvement would create a conflict (historically referred to by the now-inappropriate term "Chinese wall"), the obligation to use "reasonable efforts" to safeguard electronically stored client information against unauthorized access by third parties (i.e., cybersecurity), and the clarification that the requirement to notify the sender upon receipt of inadvertently sent information extends to electronic information and even to metadata (e.g., the "properties" of a Microsoft Word document).

For those hoping technology might abate its pace to give them time to catch up, the future looks bleak. Technology-assisted review, or TAR, is quickly becoming a mainstay of the discovery process, forcing attorneys and judges to evaluate, challenge, or defend the reliability of mathematical algorithms. Right on its heels is AI—artificial intelligence—which, according to an Oct. 25, 2016, article in the online ABA Journal, predicted the outcomes of almost 600 human rights cases with 79 percent accuracy. And the most frightening acronym of the moment is IoT, because the internet of things is an unstoppable tsunami that makes everything previously called "Big Data" look microscopic.

The most reassuring aspect of this trend is that no one can keep up. "Reasonable" still is, and must continue to be, the standard for evaluating efforts by attorneys to maintain technological competence. The problem, of course, as Oliver can attest, is that "reasonable" ain't easy. ■

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