Introduction

From Scriveners to Streaming: Technology, Legal Ethics, and the Practice of Law

A book focused on legal ethics in the digital age must inevitably begin with a look at the technological advancements that have changed the way we live and ultimately the way we practice law. Since the industrial revolution, technology has created dramatically different business models and produced products that have made our lives more efficient and, some would say, more hectic and complicated. As society moved from the industrial age to the information age, technology progressed at a dizzying pace.

How does technological innovation directly impact the legal profession? Just as technology alters the way we all live, so too does it change the practice of law. A look back at the legal profession of the nineteenth century reveals that the technology of the time caused law firms to shift from the use of male scriveners, who hand copied and proofread documents, to the implementation of early copy machines, vertical filing systems, and the typewriter.¹ The typewriter brought women into law firms, thereby changing law firm culture. Although typists were originally the male scriveners who were willing to adapt to the “new technology,” over time female typists became the norm.

As the twentieth century began, another late nineteenth-century innovation would impact the legal profession—the telephone. Perhaps not surprisingly, the generally conservative legal profession resisted the new technology.

In fact, Clarence Seward, who would later become managing partner at Cravath, Swaine & Moore, opposed the use of both the typewriter and the telephone. He saw these innovations as destructive forces in American society. Similarly, when John Foster Dulles joined Sullivan & Cromwell in 1911, he noted that many lawyers held fast to the belief that proper communication with clients required a hand-delivered letter. Sullivan & Cromwell did not install a phone in the office until about ten years after it became available. The phone was initially installed in a separate office; employees were instructed not to use the phone, but rather only to answer the phone when it rang.

Of course, the typewriter and the telephone were eventually embraced and allowed for tremendous growth in the legal profession. As this early technology was transforming the practice of law, another significant development occurred early in the twentieth century—the first Canons of Professional Ethics was adopted by the American Bar Association (ABA) on August 27, 1908. The first Canons appeared the same year that Henry Ford produced his first Model T, Frenchman Henri Farman piloted the first passenger flight, and Robert Perry set sail for the North Pole—technology taking root to enhance mobility.

Viewed in this perspective, the ABA professional ethics rules emerged shortly after the invention of the typewriter and the telephone in an era of innovation and “firsts.” The telephone and the communication technology to follow brought a cultural change in communication with clients and gave rise to legal ethics questions of communication and confidentiality. The cordless phone, the telefax machine, the cellular phone, and email each caused the legal profession to pause and consider whether the technology was appropriate for client communication and confidentiality. In each

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3 *Id.* at 164.
4 *Id.*
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of these situations, it was necessary for a small group of lawyers to understand the technology so that the ABA and other bar associations could opine on its appropriate use.

Today, the Internet and related technology have led to the creation of cloud computing, e-filing, outsourcing, metadata, e-discovery, wearable technology, and social networking. Some of these innovations have impacted the process of practicing law, while others have infiltrated the substantive nature of legal practice. For example, a litigator does not necessarily need to understand the inner workings of cloud computing, but needs to know how to appropriately use it. On the other hand, a litigator does need to understand more about social media networks because critical evidence in his case may be lying in wait.

Consequently, in August 2012, the ABA enacted an amendment to the comment to Model Rule 1.1 (Competence) to further define a competent lawyer as *one who understands the benefits and disadvantages of technology*.\(^7\) As of the writing of this book, approximately twenty-eight states have adopted this language, and other states are still considering the addition of this language to their state bar’s rule of competence.\(^8\) The Florida Bar not only added this language, but also increased its state bar continuing legal education (CLE) requirements from thirty (every three years) to thirty-three to include a three-credit technology requirement.\(^9\)

The early reluctance of the legal profession to adopt the telephone rings true today as many lawyers have shunned technology

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\(^7\) *Model Rules of Prof’l Conduct R. 1.1 cmt. (2016)* (emphasis added).


\(^9\) Florida Supreme Court, No. SC16-574 In Re: Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3 (Sept. 29, 2016).

Florida also added the following language to its comments: “Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.” Available at http://www.abajournal.com/files/OP-SC16-574_AMDS_FL_BAR_SEPT29_(1)_copy.pdf.
and resisted adopting new methods of practice. However, the adoption of the ABA language, along with the use of new technology by both clients and a millennial generation of lawyers, has catapulted the profession forward as evidenced by the increasing number of ethics advisory opinions, disciplinary cases, court opinions, CLE seminars, articles, and books focused on various aspects of technology and social media. The use of technology, including social media, is no longer an option; it is a matter of professional competence.