E-Discovery Trend Alert: A Second State Has Approved a Technology CLE Requirement for Its Lawyers

Related Lawyers: **Megan E. Jones**

Related Practice Areas: **Antitrust / Competition**

Authors: Megan Jones*

Electronic discovery is no longer new, as it approaches the conclusion of its second decade since its first mention. As early as 2000, the Federal Rules Advisory Committee started to consider rules for electronic discovery, culminating in the 2006 amendments to the Federal Rules of Civil Procedure. The 2006 Rules were the first iteration of the Federal Rules to contemplate the discovery of "electronically stored information." In 2012, Model Rule 1.1 of the ABA Model Rules of Professional Conduct [1], addressing competence, was updated to include technology. Comment 8 to the rule now reads that “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.” Over 20 states have formally adopted the revised comment to Rule 1.1. Some other states, while not having formally adopted the change to their rules of professional conduct, have nonetheless acknowledged a duty of technical competence. For example, the New Hampshire Bar Association, in Advisory Opinion #2012-13/4 concerning cloud computing, said:

> Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes.

And in California, a final ethics opinion of the State Bar of California (Formal Opinion No. 2015-193) requires attorneys who represent clients in litigation either to be competent in e-discovery or associate with others who are so competent. The opinion expressly cites the ABA's Comment 8 and states:

Maintaining learning and skill consistent with an attorney's duty of competence includes keeping "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Technology and its role in discovery is now unavoidable. *See also* New York County Lawyers' Association Professional Ethics Committee Formal Op. 749 (Feb. 21, 2017) (discussing the "ethical duty of technological competence with respect to the duty to protect a client's confidential information from cybersecurity risk and handling e-discovery" in a litigation or government investigation). It's essential performing legal work today to have some basic understanding and use of standard legal technologies.

For example, it is hard to imagine either producing or reviewing documents in a case today without the use of technology, or engaging in online research to ascertain a deponent's views on an issue without turning to social media. Other technology topics include how to dispose properly of electronic data, how to protect digital assets, authenticating social media and email evidence and, as was seen in the popular podcast *Serial* (Season One), using cellphone forensics. In sum, legal technology skills are no longer optional for lawyers; they are a must-have.

Bodies that regulate the practice of law are taking note of the primacy of technology in practicing law. It makes sense, therefore, to have training for technology included in the minimum standards of practice. With the September 29, 2016 opinion in case no. SC16-574, The Florida Bar became the first bar in the nation to require a CLE tech component for its members, adding language setting forth that "in order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology." SC16-574 at 2. It began as a recommendation of the Technology Committee of the Vision 2016 commission, as a way to improve the technological competence of Florida lawyers. Recently, the North Carolina State Bar joined Florida on the cutting edge, adopting a proposal that similarly requires all lawyers to take at least one hour of CLE credit that focuses on technology.[2] This puts technology training on near equal footing with ethics, as the second course mandated on a *yearly* basis.

The impetus for such mandatory requirements may stem from lawyers' reluctance to admit that they actually need technical training. A recent Tech Report published by the ABA found that attorneys "should not rely on their own belief that they are 'good enough' at using the software deployed in their firm."[3] Such self-assessment of one's skills is "notoriously inaccurate," noting that "people don't know what they don't know, and therefore think they know more than they do."[4] And, there are no excuses when it comes to such ignorance: "[p]rofessed technological incompetence is not an excuse for discovery misconduct." *James v. Nat'l Fin. LLC,* No. CV 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014). The consequences for failing to adapt to technology in the practice of law can be costly, both ethically and competitively[5].

What is happening in the FL and NC is likely to be just the first of a wave of changes in CLE requirements. Other states will likely follow their lead. As more states adopt a CLE requirement, the technical skillset of the legal industry will improve, which will only better serve our clients. What should be clear by now in 2019 is that whether required by CLE credit or not, technical competency is already anything but optional for lawyers.

This article was published as part of Hausfeld's Winter Competition Bulletin and in Lexology in February 2019.