

Lawyers and Technology: A Bad Marriage Gets Worse

By Casey Flaherty

This genie will not be put back in the bottle. Technology's encroachment continues unabated. We have smart cars, smart TVs, and even [smart toasters](#). "Smart", however, is often more about potential than function. Smart suggests a proliferation of buttons, menus, and options that only make sense after hours of trial and error aided by a dense instruction manual.

The Myth of the Digital Native

The kids will save us. They grew up immersed in technology. Wrong. [The digital native is a myth](#). Acquiring a Twitter account in utero does not bestow an innate ability to commune with the machines. While 83% of Millennials sleep with their smart phone, [58% of them struggle to solve basic problems using technology](#). Most of what passes for the technological sophistication of our youth comes in the form of passive consumption or, at best, rudimentary communication (e.g., texts, Facebook). They are not trained, and therefore do not know, how to use the technology they encounter in a professional environment.

That young and old alike struggle with technology in the professional environment is unsurprising. The tools used are far from intuitive. Eventually, user interfaces and user experiences will improve. Someday, technology will work like magic. But today is not that day. In the meantime, our personal lives have gone digital (smartphones, connected cars, wearables). Our commercial lives have gone digital (shopping, taxes, banking). Our professional lives have gone digital (e-filings, e-signatures, e-discovery). And most of us, kids included, operate barely above the threshold of survival. Our technological competence is just enough to get by, for now.

In an information economy, attention is the scarcest commodity. We have finite attention to allocate to technologies that presume trained users. This challenge is not limited to individuals. [Studies](#) find that for every dollar spent on new technology, enterprises must invest an additional ten dollars in organizational capital—training and process redesign—to capture the technology's full benefits. Related [studies](#) find that it therefore typically requires five to seven years for an enterprise to properly integrate new technology. Without the complementary investment of time and resources, the technology only partially fulfills its promise, if at all.

The Digitization of the Legal Profession

E-filing, and the attendant need to be able to manipulate digital information to serve as an officer of the court, has been around since 1995. But it was not until 2013 that the [ABA added “technology” to Model Rule 1.1](#) on competence. Since then, 14 states have followed suit. But even those states that haven’t yet amended their ethics rules are recognizing the proliferating importance of technology to our professional lives. On June 30, 2015, the State Bar of California finalized a [formal opinion](#) holding that insufficient understanding of electronic discovery can violate its unamended rules of professional conduct. The import of the opinion was broadened by the observation that “Not every litigated case involves e-discovery. Yet, in today’s technological world, almost every litigation matter *potentially* does.” Indeed, even more generally, “Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent.”

Today’s ever-changing technological world. It changes so rapidly that less than a month after the California ethics opinion, the [Second Circuit revived a case](#) by a document reviewer claiming that his work did not require legal judgment (which bore on employment classification and issues like overtime pay). The court found, “an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law.” We live in strange times. Lawyers are required to understand the technology that is replacing them. Grasping the technical aspects of digital document storage is more fundamental to being a lawyer than reviewing potential evidence to determine if it is relevant to a litigation.

We’re a decade past the point where a lawyer would even try (and [fail](#)) to argue “excusable neglect” for missing a court deadline because he did not regularly check his email. Instead, our world will increasingly become one of [email goofs](#) landing lawyers on the front page of *The New York Times*, [lawyer Excel errors](#) costing clients millions, [mishandling of electronic evidence](#) getting lawyers sanctioned, and lawyers being taken to task for not thinking to use Google (see [here](#) and [here](#)).

New World, Same Response

While times change, the answer is the same as it ever was for lawyers operating in an ever-evolving world: training. Our profession has long recognized the need for continuing legal education. CLE needs to include the proper use of technology essential to the modern practice of law. What that training can and should look like will be the subject of my next article.

About the Author

Casey Flaherty is a lawyer, consultant, writer, and speaker based in Austin, TX. Casey is a former in-house counsel and the creator of the [Legal Technology Assessment](#), an integrated technology and training platform. Follow Casey on [LinkedIn](#) and on Twitter, [@DCaseyE](#).