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The 'Ethic' of Getting Up to Speed 'Technologically'

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When things end up poorly in a case, whether the client deserved to win or not, the client may decide to come after his criminal lawyer claiming malpractice, either in a civil action or in a post-conviction proceeding claiming "ineffectiveness." He may argue that the lawyer 1) didn't explain all of the litigating options to me; or 2) was "ineffective" in investigating the case, or in cross-examining key witnesses; or 3) did not let me, or mistakenly encouraged me to, take the witness stand in my own defense.

It is uncommon for the judge who presides (or presided) over a case to telegraph to the client during the case or afterwards that the lawyer is doing (or did) a lousy job in a way that the client himself didn't have the skill or knowledge to recognize. In fact, some judges go out of their way, especially if they recognize the defendant as being a particularly difficult client, to say aloud, in words or substance, that "your lawyer has done an admirable job." (We all like to hear that-even if the judge's comment is strategic!)

There are circumstances today, however, particularly given the rapid and ever-emerging use of new technologies to litigate cases, where indeed the judge, without necessarily meaning to do so, may effectively be stimulating a post-conviction lawsuit by a disgruntled client against the lawyer. Just imagine a judge faced with a lawyer who is basically a Luddite and actually did screw up in not exploring avenues of defense (or in cross-examining prosecution witnesses effectively through enhanced technology capacities) precisely because of her technophobic character trait. That judge may accomplish undermining the lawyer's relationship with his client for his technological shortcomings either on the record or in a decision.

Examples may range from a lawyer's failure to obtain text messages (we all know about emails), to a failure to obtain posts on a Facebook page, to a more common failure to adequately preserve electronic materials. Which disgruntled client, particularly one sitting in a jail cell, wouldn't use the judge's remarks to try to nail to the wall his now or soon-to-be-terminated lawyer for malpractice or-maybe, worse for his reputation at

the bar-by claiming "ineffective assistance of counsel" in a post-conviction appeal or collateral attack on his conviction? For in such a lawsuit, appeal or collateral attack he will "name [his lawyer's] name" as ineffectually having tried the case by tying his own arm behind his back against-perhaps a younger-prosecutor more in tune with modern Internet technology.

The Disciplinary Authorities

In the wake of potential circumstances such as those presented above, the American Bar Association in the Model Rules of Professional Conduct, has recently added Comment 8 to Rule 1.1 ("Competence") which requires a lawyer to provide "competent representation to a client"-requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8, not added-or not yet added-to the parallel rule applicable in New York, provides 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).

So, what exactly does that mean? And what are the consequences to the lawyer if her skillset is such that she simply doesn't know things or techniques about the Internet or computer systems that other lawyers do, particularly her adversary? Might she be held by a court to have rendered ineffective counsel? Does it mean that she might be subject to disciplinary or other sanctions? Could she suffer professional obloquy when word gets around in the legal, business or even broader community that clients and even courts are displeased with her work product based on what amount to a refusal to "get contemporary" with the way of the world?

Case Law

The origins of the modern technological revolution in the art of lawyering can probably trace itself back to a number of milestones: the first Westlaw/Lexis terminals, the advent of the Internet and, on the judicial front, Judge Shira A. Scheindlin's decisions in the seminal Zubulake case. Whether you believe that the decisions opened up a Pandora's box of litigation costs and burdens for defendants, or whether you believe they gave plaintiffs access to critical evidence which would have otherwise been destroyed, there is no question that Zubulake changed the way litigators think about and prepare cases. It also required us to learn more about technology issues. As Scheindlin wrote in Zubulake V: "[C]ounsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel and the actual (as opposed to theoretical) implementation of the firm's recycling policy."[1] In other words, counsel had to get tech savvy.

And it is worth asking, if a lawyer fails to "get smart," what are the consequences? Of course, there are the potential sanctions that might be available to the aggrieved party. But can, after this new Comment 8, a lawyer face an ethics charge for this sort of lapse in knowledge? It is quite possible that it could be the basis for a malpractice claim if the failure to discuss these issues with a client resulted in a serious enough sanction, such as dismissal of a claim or defense.

Given all of the resources which have been devoted to educating the bar about the need to preserve electronic information, emails, documents, etc., it is not too hard to imagine a client claiming that the failure to do so in this day

and age amounts to malpractice, even though that would not have been the case however many years ago. In the criminal context, could it rise to the level of ineffective assistance of counsel resulting in a possible conviction reversal? Not too many years ago, the U.S. Supreme Court held that a lawyer provided ineffective assistance of counsel when the lawyer failed to tell a client about the likelihood of deportation if a client pleaded guilty to drug distribution charges.[2]

There are obvious differences between working with a client on e-discovery issues and informing a client of the legal consequences of pleading guilty to a felony, but it is not impossible to imagine a scenario in which the failure to learn about a client's technological infrastructure is egregious enough and results in a serious enough sanction so as to bring the attorney's behavior within the realm of a constitutional claim of ineffectiveness. After all, constitutional ineffectiveness under Strickland is triggered when counsel's conduct falls "below an objective standard of reasonableness."[3] What is "reasonable" in terms of what counsel is expected to know about e-discovery is rapidly changing, and only in the direction of requiring greater knowledge.

Changing Legal Landscape

The tech landscape changes, and changes quickly. Zubulake V was issued in 2004, which is eons ago in tech terms. In 2010 the New York State Bar Association addressed the question of whether an attorney may ethically use an online data storage system (read, "the cloud") to store confidential client information.[4] Because an attorney must take reasonable steps to affirmatively protect a client's confidential information, an attorney cannot just put client confidential data in any old "cloud." The "cloud" the lawyer chooses must have reasonable procedures in place to ensure the confidentiality of the data stored to it, including (1) an enforceable obligation to preserve confidentiality; (2) security procedures and recoverability methods; (3) mechanisms for preventing infiltration of the data by unauthorized users; and (4) procedures to permanently delete data upon request. In other words, and on this point, putting aside the recent amendment to the Model Rules, the state bar was explicit, a lawyer must learn these things to comply with the lawyer's ethical obligations.

Lest you think that these issues are only for really tech savvy lawyers who store information using the latest technology, legal ethical issues abound in such common technology as email. Take three ethics opinions for example. In one early opinion (1998), the state bar concluded that lawyers could ethically use emails to send confidential information (that's a relief!), but at the same time noted that where the confidential information is of an "extraordinarily sensitive nature," such that the lawyer would conclude that "it is reasonable to use only a means of communication that is completely under the lawyer's control," then in such a case the lawyer cannot use simple, unencrypted emails.[5]

More recently, the California State Bar addressed the question of whether an attorney who uses a laptop at a coffee shop, and uses that shop's WiFi, violated any ethical rules.[6] The Ethics Committee observed that data transmitted over public WiFi is accessible by third persons with the right technology rather easily, but was concerned that issuing an opinion on technology-specific matters might become quickly obsolete. But the committee issued this summary of its cautionary conclusions:

> [D]ue to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he

> takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify client of possible risks attendant to his use of the public wireless connection...

And last and most recently, as if to drive these points home, a retired lawyer in South Carolina was disciplined for not having an active email account.[7] According to an article about the decision, the disciplinary board found that not having an email account "poses a substantial threat of serious harm to the public and to the administration of justice." Whether the harm is "serious" or not could be debated, but the point here is that keeping pace with technology is no longer just a necessary nuisance, it is an ethical requirement.

Conclusion

For many lawyers, the old ways die hard, and learning new tricks is not easy. This may be especially true for the solo practitioner, who does not have the small army of tech-savvy "litigation support specialists" to help navigate the waters that many law firms, particularly Big Law, now have. *Nota bene*: Solos, or law firms with insufficient equipment and tech-savvy personnel, may have to partner with co-counsel or qualified vendors who adhere to the rules of confidentiality in the individual case, that requires it to effectively defend a client.

Technology, with its unfamiliar terminology and concepts, can seem foreign and impenetrable. But it really is not so. A benefit of that technology is that you are just one Google click away from at least preliminarily understanding back-up tapes, encryption technology and cloud computing.[8] Understanding technology is not any more difficult than understanding the legal issues in a complex dispute. And like it or not, it is ethically required and here to stay, so the sooner we all get comfortable with it, the better. Doing the basic research as to what technology is available out there may actually persuade the practitioner that he needs to do more than what he has "gotten by with" in the past. Not to be preachy, but: Keeping abreast is what continues to make us "effective counsel."

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1. *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
2. *Padilla v. Kentucky*, 559 U.S. 356 (2010). The New York Court of Appeals, overturning a prior decision, recently reached the same conclusion. *See* http://www.nytimes.com/2013/11/20/nyregion/judges-must-warn-about-deportation-new-york-appeals-court-rules.html?_r=0; *see also People v. Peque*, 2013 WL 6062172 (N.Y.), 2013 N.Y Slip Op. 0765.
3. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
4. New York State Bar Assoc. Formal Ethics Op. 842 (2010).
5. New York State Bar Assoc. Formal Ethics Op. 709 (1998).
6. The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Op. No. 2010-179 (2010).
7. http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1384434896553.
8. Good sources are online CLE programs, including a program, "Am I Competent? The Ethical Use of Evolving

Technologies," with Justice Daniel J. Crothers of the Supreme Court of North Dakota and Professor Andrew M. Perlman, Director, Institute on Law Practice Technology and Innovation, Suffolk Law School. *See* http://apps.americanbar.org/cle/programs/t13cat1.html.

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