speaking of ethics

By Saul Jay Singer

R U Competent?

Mick Wiggins

Reason's whole pleasure, all the joys of sense, Lie in three words—health, peace, and competence.

—Alexander Pope

Mayor Mayer has claimed executive privilege with respect to several e-mails that he withheld from a public records request, even though he is reported to have conducted government business and transmitted many of them from a personal Verizon address rather than from his secure official city e-mail address. Alice Associate, counsel for an activist seeking disclosure of the e-mails over Mayor Mayer's privilege assertion, commented "there's a reason the Mayor should be using his own official e-mail channels, because of security and encryption. He's running city business out of Verizon?" Hackers did, in fact, break into the mayor's Verizon account.

Whoops.

Peter Partner, a successful District of Columbia lawyer who has been practicing for more than 30 years, has mastered the use of computers for word processing and e-mail, but he is not at all comfortable with "all this new-fangled technology," and he has no knowledge of the inner-workings of computers. While on a lunch break during a deposition at opposing counsel's office, he requested and was granted permission to use a private office and computer to catch up on some work. Peter typed a "memo to file" in which he discussed confidential client matters and analyzed the weaknesses in his client's case; saved it onto his flash drive, which he carries on his pocket key chain; and carefully erased the memo from the computer, believing he had eliminated all traces of the file on opposing counsel's computer.

Whoops.[1]

Laura Lawyer, an expert in real estate cases, defended Builder against a claim by Purchaser that the subject home was infested with killer mold and, therefore, uninhabitable. Purchaser introduced evidence that it would cost $100,000 to remove the mold and, after prevailing at trial, was awarded judgment accordingly. However, unknown to Laura and her client, a brand new technology had been developed that could remove the mold and render the home fully habitable for only $20,000.

Whoops.

It is no mere coincidence that the first, substantive[2] District of Columbia Rule of Professional Conduct addresses a lawyer's duty of competence which, when all is said and done, is probably the most elemental duty a lawyer has to his or her client. Rule 1.1 provides that "a lawyer shall provide competent representation to a client" and makes clear that "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

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The issue presented here is, Does the requisite "legal knowledge, skill, thoroughness, and preparation" apply to *technological* competence as well as legal competence? That is, has our hypothetical Mayor Mayer violated Rule 1.1 by "running city business out of Verizon?" Has Peter Partner breached his duty of competence by failing to know that he has not eliminated all traces of a crucial confidential file from opposing counsel's computer? Should Bar Counsel discipline Laura Lawyer—a very able attorney who barely pulled Cs in her basic science courses in college and who characterizes herself as "a technological Neanderthal"—for failing to become an expert in the arcane field of mold removal?

As a preliminary matter, it is important to note that the Federal Rules of Civil Procedure do impose a duty of technological competence with respect to electronic discovery.[3] Aside from the duty of competence in federal discovery practice, however, there is no general agreement among ethics experts with respect to whether, and to what extent, the duty of competence encompasses a lawyer's obligation to become technologically proficient. While some American jurisdictions address the issue in terms of potential breaches of confidentiality and related duties of competence regarding the safekeeping of client files,[4] others have recognized or suggested that there is a duty of competence entirely distinct from the duty of confidentiality.[5] Canada, which apparently has taken a more expansive view of the duty of competence in handling technology, has joined those jurisdictions that apply the duty of technological competence beyond the context of confidential communications.[6]

Many commentators argue for an expanded role of technology under Rule 1.1 that would affect how lawyers conduct research, manage their internal software systems, and litigate their cases. However, to date, neither the District of Columbia Court of Appeals nor the D.C. Bar Legal Ethics Committee has issued any opinions or interpretive comments regarding the effect of emerging technologies on the lawyer's duty of competence. Like many other jurisdictions, however,[7] the District has addressed the issue of technology in the limited context of the duty of confidentiality, particularly in D.C. Bar Legal Ethics Opinion 341 (2007) (Review and Use of Metadata in Electronic Documents). While the primary thrust of Opinion 341 addresses the duty of a lawyer receiving metadata,[8] the Legal Ethics Committee also discussed the obligations owed by an attorney who transmits data electronically, ruling that "lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures."[9] This language,

which strongly suggests a unity of the duties of competence and confidentiality, can be read to imply that a lawyer has an independent duty of technological competence, at least insofar as necessary to protect client confidences and secrets.

Few jurisdictions discuss the general impact of technology on a lawyer's practice, and there is no consensus as how to best handle the increased role of technology in the legal profession. Because the duty of competence is treated differently across the country, there is no clear answer as to what degree of technological competence is encompassed by Rule 1.1. As such, and until the Bar or the D.C. Courts rule on this issue, I would urge practitioners to err on the side of caution and exercise the greatest possible diligence in mastering whatever technology is necessary to competently serve the client.

As to the duty of competence by Mayor Mayer, Peter Partner, and Laura Lawyer, each should seek help, as strongly suggested by Opinion 341. That is, after all, why lawyers retain consulting experts. Thus, for example, Laura may not know the ins and outs of mold removal, but she may well be ethically required to retain and consult with someone who does.

The D.C. Bar Rules of Professional Conduct Review Committee, which has commenced analysis of the duty of technological competence, is inviting informal input from members of the Bar on this very important and challenging issue. As counsel to the Rules Committee, I invite you to share your thoughts and ideas, which may be forwarded to me here at the Bar.

Notes

1 Similarly, the Supreme Court recently ordered briefs on the question of whether it should reconsider its decision in *Kennedy v. Louisiana*, 554 U.S. ____ (2008), that it is unconstitutional to impose the death penalty on child rapists. The Court had apparently based its decision on the "fact" that there was no evidence of a national consensus in favor of putting child rapists to death. Did counsel for Louisiana breach his duty of competency when he failed to advise the Court that Congress had enacted a 2006 law making child rape a capital offense under the Uniform Code of Military Justice?

2 Rule 1.0 (Terminology) is a definitions section.

3 *See* ABA Center for Continuing Legal Education, Ethical Issues in E-Discovery, 1–4 (2008). "A lawyer must understand the rules of discovery and a client's IT systems." *Id.* at 1. This includes an ability to identify electronically stored information (ESI) that must be produced for the purposes of making and responding to document requests, as well as the associated costs. *Id.* The report also mentions duties of competence extending to knowledge regarding various file formats, sources of electronic data, and basic information on how a computer operates. *Id.* at 2. This duty is not an empty obligation; a number of cases reaffirm that failure to understand electronic discovery can result in sanctions. *See generally id.*, at 3–4.

4 For example, New Jersey and the New York County Lawyers' Association (NYCLA) treat changes in technology as a modification of the standard of reasonable care to protect confidential information. *See* N.J. Eth. Op. 701, 2006 WL 1916396, at *3 (reasonable care "may be informed by the technology reasonably available at the time to secure data against unintentional disclosure"); NYCLA Eth. Op. 738 (2008) (a lawyer has a "burden to take due care in appropriately scrubbing documents prior to sending them out of the office. . . .").

5 The Florida Ethics Committee, citing the duty of competency, held that the obligations of confidentiality "may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents." Fla. Eth. Op. 06-2 (2006) (regarding metadata). Similarly, the Arizona Ethics Committee ruled that it is not unethical to store confidential information on Internet-accessible computers, but that the attorney must take "competent and reasonable steps" to protect against disclosure. *See* Ariz. Op. 05-04 (2005) (Electronic Storage; Confidentiality); *accord* Colo. Eth. Op. 119 (2008) (Disclosure, Review, and Use of Metadata). Expressly citing the duty of competence, the committee stated that proper protection of data requires that "an attorney must be competent to evaluate the nature of the potential threat to the client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end." *Id.* Alternatively, if a lawyer does not have such competence, she may fulfill her duty by retaining an expert who does. *Id.*

6 Guidelines promulgated by the Federation of Law Societies of Canada note several duties of competence relating to technology, including a requirement that an attorney either maintain a "reasonable understanding of the technology used in the lawyer's practice" or have access to someone with technological competence. Federation of Law Societies of Canada, Guidelines on Ethics and New Technology (1999), at 1. The guidelines further note that the technological standard may be elevated when handling particular types of cases; for example, a lawyer may be ethically required to use document management software to handle complex litigation and to use support calculation software for a complex child or spousal support case. *Id.*

7 *See supra*, note 4.

8 The D.C. Bar Legal Ethics Committee held that "a receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent." Opinion 341.

9 For an analysis of D.C. Bar Legal Ethics Opinion 341, *see* Saul Jay Singer, *Metadata As Metaphor: A Major or Miner Matter?*, Wash. Law., Nov. 2007, at 14.

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Correction

Due to a clerical error, the D.C. Bar Web site attributed a disciplinary action to Bar member **Robert E. Sylvester**. This error has been corrected.

We are pleased to note that Mr. Sylvester has been in good standing throughout his membership.

We thank Mr. Sylvester for graciously accepting our acknowledgement of this mistake.

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