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# Professional Rule Requiring Technology Competence:

What it Means and How to Comply

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# History of Technology Competence Requirement for Lawyers

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- 2012 – ABA Model Rules includes it
- 2014 – North Carolina becomes an early adopter

# 38 States Have Adopted Duty of Tech Competence for Lawyers

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States Include:

- Florida
- South Carolina
- North Carolina
- Tennessee
- Texas
- New York



# Ethical Duties Triggered by Lawyers' Use of Technology

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- Duty of Competence Ethics Rule 1.1
- Duty to Supervise Agents Ethics Rule 5.3
- Duty to Communicate Ethics Rule 1.4
- Breach of Client Confidentiality Ethics Rule 1.6
- Safekeeping Property Ethics Rule 1.15

# Other States

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California has not passed the model rule, but State Bar Opinion No. 2015-193:

- 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 technology."

E-discovery case involving overbroad search that offending attorney allowed:

- At the least, Attorney risked breaching his duty of competence when he failed at the outset of the case to perform a timely e-discovery evaluation.
- Also, failure to supervise the e-discovery team.
- Also, negligence allowed breach of client confidentiality.

# California State Bar Opinion No. 2015-193

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- Demonstrates the interaction between tech (database searching) and zealous client representation (protecting data where disclosure was not required and was harmful to client's interests)
- Failure to supervise agents – Ethics Rule 5.3
- Client confidentiality breached – Ethics Rule 1.6

# Model Rules of Professional Conduct

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## Rule 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

# NC Rules of Professional Conduct

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## Rule 1.1 comments:

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.





# North Carolina Comments to 1.1

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A lawyer's competence is measured by

[1]

- relative complexity and specialized nature of the matter,
- the lawyer's general experience,
- the lawyer's training and experience in the field in question,
- the preparation and study the lawyer is able to give the matter,
- and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.



# North Carolina Comments to 1.1

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[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.



# North Carolina Comments to 1.1

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[10] A lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent.



# Rule 1.1 ABA Committee addressing Encryption (Formal Opinion 477)

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Lawyers undergo a “fact-based analysis” that includes evaluating factors such as:

- The sensitivity of the information.
- The likelihood of disclosure if additional safeguards are not employed.
- The cost of employing additional safeguards.
- The difficulty of implementing the safeguards.
- The extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

# Opinion 477 – Protect Client Communications

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1. Understand the Nature of the Threat.
2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.
3. Understand and Use Reasonable Electronic Security Measures.
4. Determine How Electronic Communications About Clients Matters Should Be Protected.
5. Label Client Confidential Information.
6. Train Lawyers and Non-Lawyer Assistants in Technology and Information Security.
7. Conduct Due Diligence on Vendors Providing Communication Technology.



# Rule 1.1 ABA Committee Addressing Encryption

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“cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the [above] factors to determine what effort is reasonable.”

# Not Sure I Agree with the Committee Here

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- Technology standards are always changing.
- Part of competence in technology is keeping up with those changes.
- Now we expect encryption in motion, encryption at rest within your own systems, and even encryption on open networks.



# Lawyer Also Has Duty to Communicate Technology Risks to the Client

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Lawyer has duty under Ethics Rule 1.6 to keep client information confidential.

“prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Providing electronic discovery using technology that you do not understand can put a client’s secrets and privileged communications at risk.

If you don’t know how a discovery technology works, then you have a duty to hire a consultant who does.



# Lawyer Has Duty to Bring Competent Help to the Table

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North Carolina Bar Rule 5.3 regarding nonlawyer assistants:

“a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.”

Supervise your tech help to behave within the ethical rules

Make sure your legal help understands the technology options and risks

# Lawyer Also Has Duty to Communicate Technology Risks to the Client

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- “When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.
- The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted.
- Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client.”



# Lawyer Has Duty to Install Adequate Controls

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- North Carolina State Bar Rule 1.15 mandates internal controls to prevent fraud
- House closing cases over the past 5 years – payment controls were not adequate. Purchase payment made to fraudulent account.



# In re Amendments to Rules Regulating The Fla. Bar 4-1.1

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- Competent representation may involve a lawyer's association with, or retention of, a non-lawyer advisor with established technological competence in the relevant field.
- Competent representation may also entail safeguarding confidential information related to the representation, including electronic transmissions and communications.
- Additionally, we add language to the comment providing 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
- 200 So. 3d 1225, 1226 (Fla. 2016)



# What Should I Do?

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- 1) Understand the technology being used in the trial or transaction
- 2) Understand technology that may be the subject of the trial or transaction
- 3) Bring in expert help to manage and/or teach you the technology risks and liabilities
- 4) Make sure client understands these risks and the business risks associated with the technology
- 5) Be especially alert to how tech may compromise client confidentiality and/or client property



# In-House Counsel Concerns

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- Understand your company's products and services
- Understand the technology your company uses
  - Are there legal/regulatory risks?
    - can include risks of data use/retention/transfer
    - can include risk to the community (nuclear tech)
  - How can tech be used to help your company?
  - How can tech be used to attack your company?
- Understand the technology that your company gives you
- Push your outside counsel to use better technical tools



# Not Just Risks – Benefits of Technology

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- Do you have an obligation to find and use the best tech for your client's benefit?
- Do you have an obligation to know the optimal uses of the technology available to you?

**Ted Claypoole**

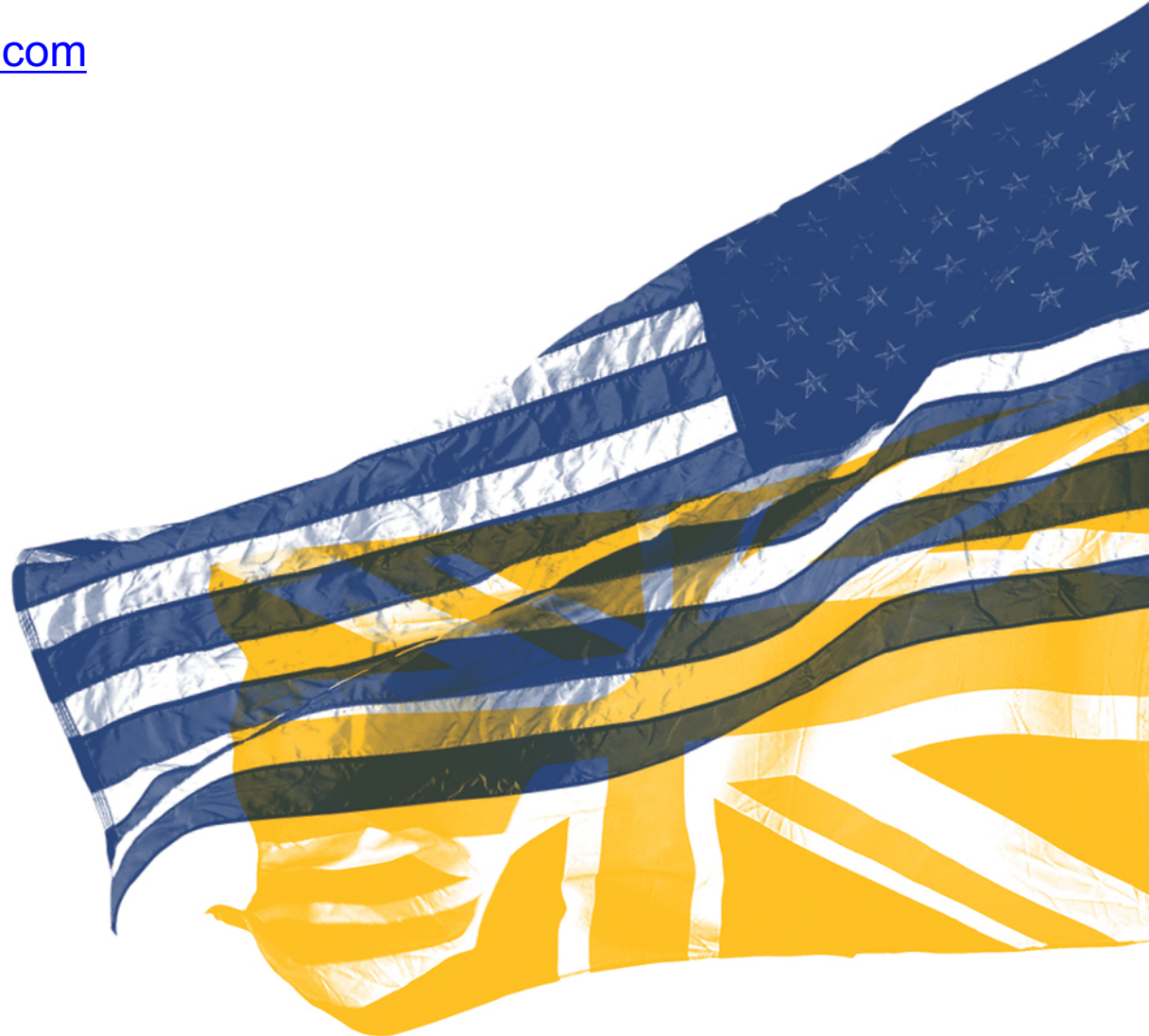
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