Technological Competence

By Martin Felsky, Senior Counsel, Heuristica Discovery Counsel LLP

All of us who work in litigation support have experienced frustration when dealing with those lawyers who do not understand technology. Whether it's your own colleagues, your client's in-house counsel or opposing advocates, this deficiency, which is often discounted by the guilty parties, can be the cause of unnecessary delays, expensive rework, and wasted motions.

We know that lawyers are often constitutionally resistant to change. Many are also uncomfortable in the arenas of science and numbers. So the three questions that most often arise in our e-discovery circles are:

1. What kind of technological knowledge do lawyers need?
2. What is the legal profession doing about it?
3. What can I do as a lawyer to improve my technology competence?

To answer the first question, I would point readers to an excellent 2020 Slaw post by Professor Amy Salyzyn, *A Taxonomy for Lawyer Technological Competence*. She outlines six different kinds of technology competencies:[1]

1. Automated lawyer (uses technology)
2. Alert lawyer (aware of the benefits and risks)
3. Avatar lawyer (manages their online presence)
4. Augmented lawyer (artificial intelligence)
5. Acquainted lawyer (emerging technologies)
6. Attentive lawyer (impact of technology on courts and society)

For electronic discovery in particular, I present my own list of desirable competencies below.

What kind of technological knowledge do lawyers need?

Legal professionals who wish to gain technological competence must first understand what it means, beyond the limited definitions in ethical rules.

Litigation support and electronic discovery have been among the practice areas most transformed by technology. What do litigation lawyers (whether civil, criminal, family, or any other practice area) need to know to be technologically competent?

[1] A Taxonomy for Lawyer Technological Competence - Slaw.

1. **Understanding ESI**. Lawyers need to understand electronically stored information, including emails, documents, databases, social media, and cloud storage. They must understand the characteristics of digital information in its many forms, including such basic concepts as how data is stored, preserved, retrieved, collected and used in litigation.
2. **Familiarity with Data Management**. Knowledge of how data is managed and archived within different systems is crucial. This includes understanding data formats, metadata, and the potential pitfalls of data conversion or migration.
3. **Proficiency with Electronic Discovery Tool.** There are many tools and software applications designed to facilitate electronic discovery. Lawyers should be familiar with these tools to effectively search, collect, review and produce ESI. This also includes understanding how to use data analytics, predictive coding, and other forms of technology-assisted review.
4. **Legal Holds and Data Preservation**. Understanding the mechanisms for implementing legal holds to preserve relevant data is crucial. Lawyers must ensure that once litigation is anticipated, all data preservation steps are compliant with legal requirements to avoid accusations of spoliation.
5. **Cybersecurity Measures**. With the increasing risk of data breaches, lawyers must understand the basics of cybersecurity to protect sensitive information from unauthorized access and data leaks.
6. **Distinguishing hype from reality**. When dealing with any new technology, lawyers must be conversant enough to recognize what claims are realistic and which are exaggerated. As William Gibson said, "The future is already here – it's just not evenly distributed."

What is the legal profession doing about technological competence?

Very recently, most law societies across the country have adopted a commentary to their rules of conduct that define lawyer competence as including technological competence.[2] Unfortunately, this regulatory approach has come to Canada quite late and has a limited scope.[3] It took seven years after publication of the American Bar Association technology amendment for the Federation of Law Societies of Canada to add technological competence to its own model rules of conduct in 2019:[4]

[2] See Stephen Burns, Sebastien Gittens, Scott Bower and Ahmed Elmallah of Bennett Jones (2024-05-23) here: Unchartered Territories: Canadian Courts and Law Societies Grapple with the Use of Generative Artificial Intelligence Tools | Bennett Jones.

[3] Besides the Rules of Conduct, there may be non-binding "guidelines" and practice notes or directions available in some jurisdictions. For example the Law Society of Ontario's Technology Guideline.

[4] FLSC Model Code of Professional Conduct.

The full text is presented below, but I would summarize it as follows: *Lawyers have a duty to understand and use technology only if it is relevant to their practice and reasonably available, given client requirements.*

> 3.1-2 [4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.
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> [4B] The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:
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> a. The lawyer's or law firm's practice areas;
> b. The geographic locations of the lawyer's or firm's practice; and
> c. The requirements of clients.

Lawyers have a legal duty of care to clients, and are officers of the court, which means they are obligated by law to be competent irrespective of Law Society regulations. In *H2 Canmore Apartments LP v. Cormode & Dickson Construction Edmonton Ltd*., 2024 ABKB 424 (CanLII), the parties were ordered to improve the way in which productions were requested and provided. As the court summarized:

> *Long-gone should be the days when parties in disputes involving a significant number of electronic records quietly retreat to their respective corners without joint planning or consultation and then serve their affidavit of records. As this case illustrates, that is a recipe for disproportionate delay and expense, inefficiencies, missteps, missed expectations, and missed opportunities.*

This decision provides powerful incentives to improve the state of lawyer technological competence. In *Zhang v. Chen*, 2024 BCSC 285 (CanLII), counsel for Mr. Chen included non-existent case citations in a notice of application. These citations were discovered to be so-called “hallucinations" generated by ChatGPT and were withdrawn before the hearing.

While the court did not find an intent to deceive, it did order the lawyer to bear the additional costs incurred by opposing counsel due to the inclusion of the fake cases. Technology competency includes an understanding of the strengths and limitations of current generative models.

For a more detailed analysis of *Zhang v. Chen*, see Chan-Glasgow, The Price of Technological Incompetence.

What can I do as a lawyer to improve my technology competence?

Dedicated efforts are required if legal professionals are to achieve and maintain technological competence. Here we offer a checklist.

1. **Assess your own current technological proficiency**
    a. Audit personal and team skills in using current legal technologies.
    b. Identify gaps in knowledge, particularly in areas crucial to effective litigation, such as eDiscovery, case management software, and secure communication tools.
2. **Engage in continuous learning**
    a. Enroll in workshops, webinars, and courses focusing on legal technologies.
    b. Stay updated with the latest trends and tools in legal tech through journals, podcasts, and professional groups.
3. **Adopt and master eDiscovery tools**
    a. Learn to use electronic discovery platforms that assist in data storage, retrieval, and analysis.
    b. Understand best practices for managing digital evidence to ensure integrity and compliance with legal standards.
4. **Enhance data security measures**
    a. Implement robust cybersecurity measures to protect client data.
    b. Regularly update security protocols and participate in security training to defend against cyber threats.
5. **Utilize case management or project management software**
    a. Integrate comprehensive case management software to streamline workflow, enhance document management, and improve client communication.
    b. Train all team members on the effective use of these tools to ensure uniformity and efficiency.
6. **Develop proficiency in remote collaboration tools**
    a. Become proficient with online collaboration and communication tools to facilitate remote work and virtual court appearances.
    b. Ensure compliance with confidentiality and privacy regulations when using these tools.
7. **Participate in legal tech networks**
    a. Join legal technology forums, networks, and discussion groups to exchange knowledge and stay informed about new tools and methodologies.
    b. Consider attending major legal tech conferences either as a participant or a speaker to broaden your network and knowledge base.

8. **Implement regular technology audits**
    a. Schedule regular reviews of technology use within your practice to ensure effective use and compliance with ethical standards.
    b. Adapt and upgrade technology tools and practices as needed based on audit feedback and evolving legal requirements.
9. **Develop a technology update plan**
    a. Create a roadmap for future technology adoption and training to keep pace with advancements in the field.
    b. Allocate budget and resources for ongoing technology updates and professional development.
10. **Take action**.
    a. Lobby your providers of continuing legal education to integrate technological competence topics into their courses.

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In Martin's 40-year legal career he has been sought out as a technology transformation advisor to law firms, governments, courts and corporations around the world. Martin was involved in drafting the Ontario eDiscovery Guidelines, the Sedona Canada Principles, and was active on the Ontario Digital Evidence and eDiscovery Working Group for many years. He served on the Uniform Law Conference of Canada Electronic Document Rules Working Group, which developed nationally consistent rules of practice. He was appointed to the Canadian General Standards Board Committee on the admissibility of digital evidence in 2014.

Martin is also the author of several Canadian Judicial Council publications including the Blueprint for the Security of Court Information, now in its 7th edition. The Blueprint has been implemented in every Canadian superior court. He provides legal, policy and technical advice to courts across Canada on the issues of information governance including cybersecurity and privacy, and he is considered an expert on judicial independence and information governance.

Martin has been recognized annually in Who's Who Legal (Litigation) as a global thought leader since 2015. He was Chair of the Board of the Canadian Legal Information Institute (CanLII), which provides free access to legal decisions.

At Heuristica Discovery Counsel LLP Martin is Senior Counsel. His practice is finely tuned to the most complex electronic discovery challenges. He empowers clients to navigate and resolve intricate discovery disputes with a blend of legal insight, business acumen and technological expertise.