



## Technology Talk

by Richard K. Herrmann

# Ethics and Technology: Delaware Finds Itself First Again

**Delaware earned its nickname “The First State”** when it led the Thirteen Colonies in ratifying the Constitution. But Delaware also enjoys a number of firsts in the area of law and technology. Its courts were the first in the world to conceive of and implement electronic filing in 1991. It was the first to have a state court rule relating to interactive briefs. Its district court was the first to create an electronic discovery default standard in 1995, before the amendments to the Federal Rules of Civil Procedure were adopted. And now it is the first state to have a Supreme Court Commission on Law and Technology.

The July 1, 2013, order creating the new arm of the court recognized the need to provide “lawyers with sufficient guidance and education in the aspects of technology in the practice of law so as to facilitate compliance with the ... Rules of Professional Responsibility.” This follows the amendments to the American Bar Association’s (ABA) Model Rules of Professional Conduct in August 2012, adopting the work of the Ethics 20/20 Commission. The Delaware rules were amended in January 2013, adopting much of the model’s rules. These amendments specifically focus on the need for lawyers to be competent in the technology they are using and to understand the impact it may have on client confidentiality.

There was a time, not many years ago, when the subject of practice management topics did not qualify for CLE credit in many states. The times have changed, however, even prior to the amendments. Lawyers and courts have realized the practice of law has evolved dynamically, in no small measure, as a result of the increased importance technology has played in the daily practice and in litigation itself. The Supreme Court of Delaware was the first to realize this in the language of Rule 1 of the new commission, “[i]t is of utmost importance to the public and to members of the Bar that attorneys maintain their professional competence in technology.” The court understands this “competency in technology is important not only in rendering legal services, but also in providing them in a manner which will not compromise privilege or confidentiality.”

Over the past decade, ethics issues relating to technology have been anecdotal, with many in the form of informal or advisory opinions. Others have related to specific breaches of ethical conduct. Organizations such as the ABA are fairly good at tracking certain ethical topics, such as metadata and cloud computing. But they all lack two

important elements: education and guidance, such as best practices. That leaves it up to commissions, such as the one just created in Delaware, to develop and publish guidelines and best practices and to educate the members of the bar in their use.

But isn’t there a danger here? Won’t these new best practices create a minefield for those attorneys who have not followed them? Suppose in some malpractice action, some plaintiff attempts to establish liability on the grounds the attorney failed to follow the guidelines and best practices established in the legal community by the Supreme Court’s commission. The court anticipated this issue and has made it clear in the rules that it “is not the purpose of the Commission, its guidelines or best practices to mandate a standard that must be followed or to create any additional exposure to the Delaware Bar. If the creation of guidelines or best practices could be used as evidence or support of a legal standard, there would be a tendency to create very limited or superficial guidelines or best practices. The work of the Commission needs to be useful and without fear that its work product will be used for an unintended purpose.” To this end, the rule provides that the failure of an attorney to comply with a published guideline or best practice is not admissible for any purpose in a civil action in any court.

The new commission takes effect September 2013, giving the court sufficient time to select the 15-member board, which will include representative judges from the courts, lawyers and chief information officers from Delaware law firms of many sizes, and corporate counsel. It is anticipated the business of the commission will immediately take two tracts: (1) developing best practices; and (2) providing quality educational programming on technology for the bar. Since the mission of the commission is centered on ethics, and since Delaware has an ethics CLE requirement, it should not be difficult to obtain a ready and enthusiastic audience of attorneys interested in making their practices more safe, efficient, and compliant with the Code of Professional Conduct while at the same time receiving free ethics credit.

There are a number of important current technology issues ripe for consideration. We can call them the low-hanging fruit.

1. Metadata has been an issue for at least a decade. Varied opinions exist from a number of jurisdictions. Authority remains split on

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whether or not a lawyer receiving a document can intentionally look into tracked changes to see if the sending lawyer inadvertently sent the old draft language with it. More importantly, however, are the steps a sending lawyer should take to avoid the issue in the first place. The commission will publish these steps.

2. The hot topic of cloud computing surfaces two questions: (1) is it safe to use the cloud; and (2) what steps should be taken to protect client confidentiality? The ABA created a beautiful map showing the jurisdictions having issued opinions on the subject.<sup>1</sup> Of course, the domain name alone may cause a lawyer's eyes to glaze over. However, the opinions are interesting, and many reach the same point, but not clearly to those who are technologically challenged. For example, the list of simple do's and don'ts is a great tool to follow, but only if we are to reach those who need to most understand the dangers.
3. Security is an issue that is clearly understood and then ignored for the sake of convenience. When was the last time you heard of a lawyer, particularly in a small firm without technology support, who had a password-protected thumb drive? In fact, how many of you use your smart phone or tablet without a required password? The need for good network password security is rarely enforced. The West Virginia Supreme Court ethics opinion<sup>2</sup> tells the story of a law firm encountering a password nightmare. It is a good read; I am still waiting for the movie.
4. E-discovery is a bit more complicated but obviously requires attention. I don't consider it the low-hanging fruit, as the issues are not simple or straightforward. A basic best practices approach for the novice is sorely needed. Many lawyers have been burned by either not knowing the consequences of their actions or believing

they could simply avoid the consequences by delegating. Neither approach will work. And even to those well educated in the field, dangers abound. Simply ask Glaxo SmithKline.<sup>3</sup>

We should anticipate that technology and the law will be among the hottest of topics during the next several years. Commissions, such as the one created in Delaware, will mark the official start, but other avenues of best practices and education are on the horizon. The American Inns of Court recently launched a virtual presence known as AIC Technology University.<sup>4</sup> It has two purposes: (1) to confront and discuss solutions for ethical issues that arise when lawyers and judges use the latest technology in their practice; and (2) to distribute information on the latest technology available for lawyers and judges. The university has a number of colleges, including the College of Social Media, the College of Mobile Technology, the College of Courtroom Technology, and, of course, the College of Ethics and Technology. Any of the 29,000 members of the American Inns may register to gain access to a growing body of information being developed by the deans of each college and those supporting the effort. I have little doubt that the Federal Bar Association and its chapters will be joining the collaboration. ☺

#### Endnotes

<sup>1</sup>Cloud Ethics Opinions Around the U.S. [www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/cloud-ethics-chart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html) (last visited Aug. 4, 2013).

<sup>2</sup>*Lawyers Disciplinary Board v. Markins*, No. 33256 (May 23, 2008).

<sup>3</sup>Andrew Strickler, *Law360* (Jan. 22, 2013), [www.law360.com/articles/409104/gsk-says-e-discovery-co-ceo-is-holding-data-hostage](http://www.law360.com/articles/409104/gsk-says-e-discovery-co-ceo-is-holding-data-hostage).

<sup>4</sup>AIC TECH UNIVERSITY [www.aictechu.org](http://www.aictechu.org) (last visited Aug. 4, 2013).

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