Developing Technological Competency as a Lawyer

By Casey Flaherty

When it comes to integrating technology into the practice of law, there's no shortage of advice and information for lawyers. Determining what constitutes good advice when it comes to legal technology can be challenging. There are truths, half-truths, hype, myths, and FUD (fear, uncertainty, and doubt). Lies are easy to spot, but partial truths and exaggerations are more difficult to detect. What follows are some misconceptions that interfere with the proper integration of technology into the delivery of legal services.

Myth 1: Technology is the answer—half-true hype

The acquisition of technology is usually treated as an end point. Project complete. Box checked. Achievement unlocked.

This is a mistake. The partial truth is that technology can play a major role in productivity. Technology can be the difference-maker. This will only become truer as time passes and technology becomes increasingly intertwined with operating in a modern economy. Technology is essential for all but a few enterprises. Lawyers already spend considerable time in the digital realm—communication (e-mail), document generation (Word), research (Google, FastCase), court filings (PDF), and case management (Clio) are all augmented by the proper use of appropriate technology.

But buying technology is the beginning, not the end. The best studies we have at the enterprise level suggest that for every dollar invested in technology, the organization may need to invest as much as $10 in personnel, process redesign, and training to maximize the effectiveness of the new technology. Because we fail to make these complementary investments, many technology purchases don't deliver the desired result. Because we don't recognize that we need to dedicate time to training and process redesign, we blame the technology for not meeting our expectations. We, therefore, conclude that we need newer, better, or different technology. Sometimes we do. But often the failure is on us, not the technology.

My own empirical studies at the individual lawyer, law student, and staff levels have shown that most legal professionals drastically underuse common desktop software (Word, PDF, Excel) already at their disposal. Major gains can be made simply by getting better at the technology we already use, and that starts with recognizing we may not be using it all that well.

Myth 2: Technology should be easy—half-true hype

A user interface is like a joke. If you have to explain it, it isn't very good.

That's a pithy little turn of phrase that speaks to a critical concern for technology deployment. The user experience is of paramount importance. People are not patient. If an action takes more than a fraction of a second, users get distracted. If users have to search for the right button to click, they get frustrated. Technology that is frustrating won't be used. Technology that won't be used isn't worth the investment.

Design isn't about how something looks, but how it works. Design thinking has rightly become central to the tech world. A premium is placed on user interfaces that are clean and intuitive. Clutter is the enemy of clarity. If users aren't able to navigate a product successfully, the first question should be about product design rather than user error.

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> ## [T]echnology is now so fundamental to the delivery of legal services that it's bound up with a lawyer's nondelegable duty of competence.

Yet the idea that technology should be intuitive can go too far. Returning to that clever comparison between a user interface and a joke, think how few jokes are universal. Some straightforward physical comedy is accessible to everyone, but most jokes require context and end up being audience specific. Jokes don't translate well because of the norms and nuance that make a good joke funny. Good jokes have depth.

It's entirely possible to create an intuitive single-purpose technology. Many smartphone apps are examples of software that is intended to do one thing well. But as soon as we start wanting depth, we encounter tradeoffs. Buttons, menus, and settings proliferate as we develop a more customizable, feature-rich offering.

Exhibit A for a clean but powerful user interface is Google—a simple box, type some words, click a button. In less than one second, Google has ranked 60 trillion web pages in terms of responsiveness to our queries (something it does 3.5 billion times a day). More often than not, the web page most relevant to our search terms will be among the first options presented; only five percent of people click a link on the second page of results.

We click on the best match. Then what? How do you find the location on the web page that contains the text relevant to your search? According to Google's search anthropologists, 90 percent of us skim down until we find the applicable section of text. Only 10 percent of us know how to use the Find function in our web browser to locate text within a page.

Find is a great feature, and an obvious one once you know it exists. But not until then. If 90 percent of the population can't figure it out, it doesn't qualify as intuitive. The fact that it's not intuitive isn't necessarily evidence of deficiency. Find-in-page could absolutely be made a prominent part of the browser interface. But so could many other features. A streamlined user experience means making difficult choices.

Most people are surprised to learn that Google offers two six-week courses on how to use Google. There are many ways to perform better searches using operators, punctuation, symbols, and filters. To understand what that depth looks like when translated into a user interface, Google "Advanced Search." You'll discover that considerable depth is added at the cost of simplicity.

None of this is to impugn Google, which delivers a streamlined user experience sufficient for 99 percent of the population. But Google also retains functionality and depth that rewards power users. Offering both is the way to cut the Gordian knot of tradeoffs between usability and depth. This triumph, however, doesn't change the fact that those of us who need the deep functionality must learn how to use it.

Thinking about Google this way should also give us pause in considering other technologies we use regularly. Isn't the basic functionality of Word about as intuitive as it gets? Open a document. Start typing. Text appears on the screen. Don't most of our frustrations with Word emerge when we start to produce more complex documents?

Word isn't a single-purpose app. It's a word-processing ecosystem. All those buttons along the top ribbon are apps—targeted solutions to specific problems. But, as on our smartphones, how many Word apps do most of us really use?

Not many, because we've never been trained. And because of our pervasive belief that training should be unnecessary; technology is supposed to be easy.

Today's technology is easy, as long as we don't need it to do too much. Most people are fine with a standard Google search or using Word for simple typing. Legal professionals are not most people. The searches we run—think legal research, due diligence, e-discovery—are complicated. The documents we produce—motions, contracts, exhibits, e-filings—are complex. We actually need to work at becoming proficient with the basic technology tools of our trade.

Because our expectations are misaligned with our reality, we underuse the technologies intended to support us—matter management, e-mail, document generation, spreadsheets, and such. The tools we have are powerful; they are also deep. Using them as intended means actually taking the time to learn how to use them as intended.

Myth 3: Technology is easy for other people—busted

The flip side of thinking that technology should be easy is believing that it's too difficult for those lacking natural talent. The most common iteration of this belief is the myth of the digital native. Because they grew up surrounded by technology, members of the next generation are supposed to have acquired all sorts of technological superpowers through osmosis.

But getting a Twitter account in utero does not translate into being able to use business technology well. It's akin to expecting the teenager who can microwave a Hot Pocket to be capable of cooking a gourmet meal. He's capable—if he's trained.

Survival is the threshold most people achieve with technology. Statistics suggest that very few features on smartphones, smart cars, smart TVs, or smart toasters are used by most consumers. People, including young people, learn what they need to learn in order to do the bare minimum to survive.

Most of the technology young people use is directed toward consumption, not content generation. When they do generate content, it tends to be rudimentary—text messages, social media, pictures, etc. They learn to use the basic functionality of popular, single-purpose apps important for their survival in their social milieu. If you are unfamiliar with these apps, this can seem like wizardry. But the bulk of the genius is manifest in the app design rather than the person using it.

Rarely do young people encounter the tradeoffs between usability and depth. Their

standard interactions with technology don't require depth. They have, therefore, come to expect technology to be self-driving. But it isn't. Like our vehicles, most technology requires precise user input to get from point A to point B.

Young people tend not to realize that the apps they use are like having training wheels. The training wheels come off when they encounter programs in a professional environment. This causes frustration. Ego defense mechanisms activate. They place the blame on the tech rather than themselves (i.e., tech is supposed to be easy).

Technology is a bundle of learned skills, not an innate talent. Exposure can increase comfort, but doesn't necessarily impart facility. The partial truth here is that young people in general are more comfortable with new technology than their elders. But comfort does not mean that they're automatically able to use technology well, even if they spend ample time with the tools. We all settle into patterns and keep returning to the basic features with which we are familiar. Increasing our facility with non-obvious but labor-saving features requires deliberate practice outside our comfort zones.

Perception of inherent wizardry is not limited to young people. When someone already knows more than us about technology, it's difficult to discern the limits of their knowledge or determine where their superior knowledge has useful applications. This has implications both for our own learning and what we expect from our colleagues.

Like the view that all technology should be easy, an essentialist view of proficiency with technology suggests there's no point in training. Either you get it or you don't. People are either good with technology or they aren't. If we aren't, we see no point in trying to get better. We also apply these labels to coworkers: for some, we don't give them the opportunity to improve; for others, we assign critical tasks that aren't within their skillsets.

Myth 4: Technology is for other people—100 percent false

Delegation is an important aspect of delivering legal services for many lawyers. It's absolutely true that lawyers benefit by sur-rounding themselves with people who possess complementary skills, including skills related to technology.

But technology is now so fundamental to the delivery of legal services that it's bound up with a lawyer's nondelegable duty of competence. Twenty-seven states have already incorporated a model rule change adopted by the American Bar Association in 2012. Model Rule 1.1 now references technology when explaining how to maintain competence:

> **Maintaining Competence**
> 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.[1]

Even states that haven't incorporated the change recognize that the affirmative duty of competence includes technology. Though California's Rules of Professional Conduct remain unchanged, the State Bar of California released formal ethics opinion No. 2015-193 on e-discovery that expressly stated, "Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent."[2]

While part of behaving competently can include delegation to a relevant expert, the general duty of competence itself is non-delegable. It was only a few months after the release of the California ethics opinion that a California federal court cited it in granting motions for issue sanctions and adverse inference in a case (*HM Electronics, Inc v R F Technologies, Inc*[3]) plagued by the poor handling of e-discovery. The court also held that the lead counsel could not avoid individual sanctions by claiming a hands-off approach in which he had relied on other attorneys and the expertise of a vendor to handle the e-discovery portion of the case.

Rule 1.1 on competence needs to be read in conjunction with rules 5.1 and 5.3 that govern delegation to subordinate attorneys and nonlawyers. It remains the supervising attorney's responsibility to ensure that the work meets the ongoing duty of competence. How is the supervising attorney supposed to do that without reaching a certain threshold of knowledge?

In an e-discovery context, attorneys aren't required to know everything about electronically stored information. But they need to know the basics. They need to understand both the requirements and mechanics of issuing a legal hold. They need to be able to explain how documents on their matters are being collected, stored, queried, reviewed, and produced. This is a moving target. The technology keeps changing. Lawyers need to keep learning.

From my own empirical studies, more than 85 percent of lawyers and staff know how to convert directly to PDF. But that figure drops below 5 percent when they're asked to create the PDF in such a way that it maintains active external hyperlinks and translates internal headings into bookmarks. Similarly, only approximately 25 percent of lawyers and staff are able to get the agreement numbering right within a reasonable amount of time. And the figure again drops to approximately 5 percent when it comes to updating cross-references.

Almost all the attorneys participating in my studies have been associates. Anecdotes from conversations with senior attorneys, however, suggest not only a lower level of familiarity, but also an abiding belief that those lower in seniority know exactly what they're doing (i.e., tech is easy for other people).

Myth 5: Technology training is a matter of availability or demonstration—busted

The previous discussion stated the case for why technology training is necessary. The remaining question is, how?

The most common remedy is access to training resources. This can be anything from a list of websites to online video courses to an on-site expert ready to answer any questions.

The problem, of course, is that we don't know what we don't know. People aren't

deliberately using technology poorly. They're using technology the way they believe it's supposed to be used. We are all prone to suffering from delusions of adequacy. Not only do we often not know enough to know what questions to ask, we also don't know that we should be asking questions.

Availability of training resources is not a constraint. The Internet is replete with free training on common software. Yet we still struggle with common software. We don't know we need training. And even if we suspect we could benefit from training, we don't take the time for it because we're genuinely busy.

Time is a constraint. Time is scarce. But so is attention. Just because we attend a workshop or turn on a video doesn't mean we pay attention. Technology, in particular, makes it difficult to pay attention to training on technology. Smartphones buzz. E-mails arrive. The unending urgency of our connected world impinges on whatever time we've tried to set aside.

Time is, therefore, a poor proxy for learning. We should start measuring learning directly. We should move to a regimen that incorporates competence-based learning. That means tests. We hate tests. But tests can be extremely attractive on the front end when they permit us to test out of training we don't need. Likewise, tests can be very useful on the back end to validate skill acquisition.

We must reserve time for training. We need to pay attention during training. We should try to verify training effectiveness. Yet we can only train and test so much and so often.

The biggest shift is also the subtlest and the hardest to mandate. We all need to develop "there's an app for that" mentality. Instead of following our instincts and our professional ethos by bearing down whenever a task demands a substantial amount of labor, we should take the time to explore whether someone has already developed a technological solution to our labor-intensive problem. A simple keyword search will frequently present an affirmative answer and impart a new skill.

Increases in general familiarity will slowly transform into fluency and fluidity. We are unlikely to have precise recall of everything technology can do. But we'll know enough that when we encounter a labor-intensive problem, we'll see it as soluble. We'll also have the vocabulary and baseline competence to find and execute a solution. Using technology well isn't easy. But it also isn't that difficult if we dedicate the time and attention to learning how to use it properly.

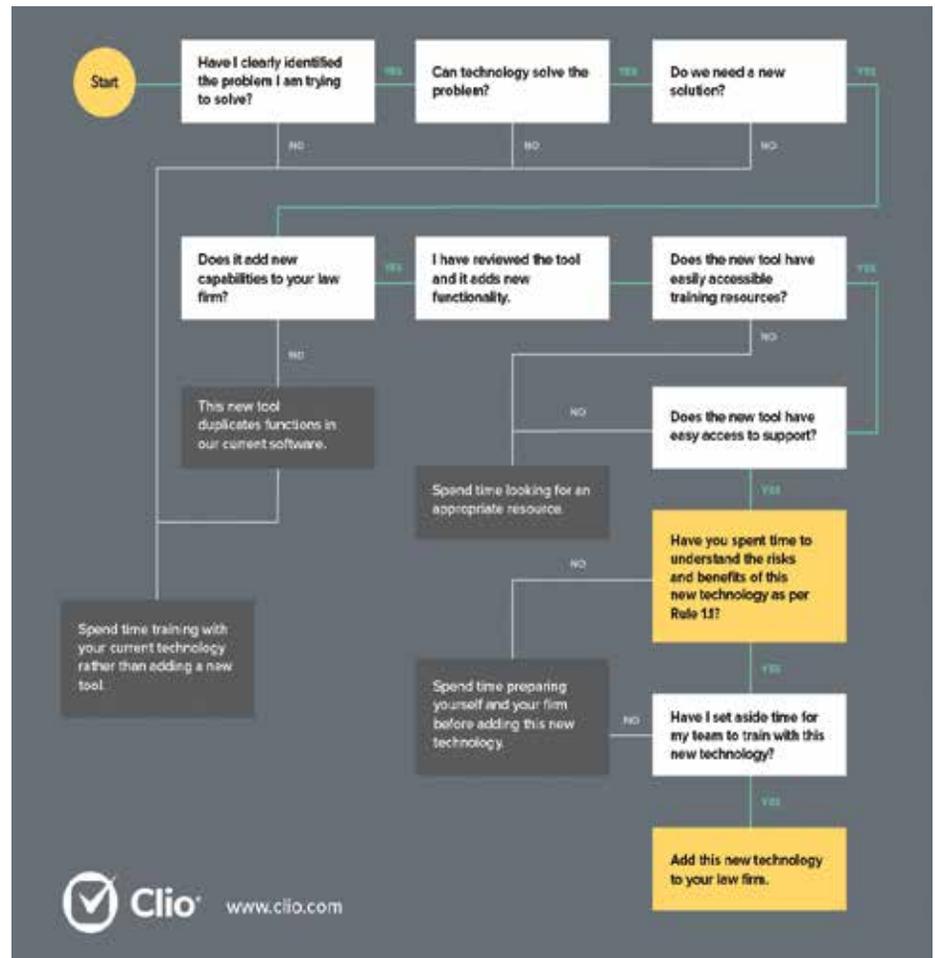## Legal technology adoption flowchart

Use the flowchart below when considering adding new technology to your law firm. This checklist will help you determine if you need to add new technology and if the technology you are considering helps meet your competency and training requirements. ∎

Casey Flaherty, a former inside and outside counsel, is the founder of Procertas. He created the Legal Tech Assessment and consults with law departments on legal operations, process improvement, technology, and external resource management. He also serves as the director of client value at Haight Brown & Bonesteel and on the Board of Advisors of Nextlaw Labs.

ENDNOTES

1. Model Rules of Prof Conduct, R 1.1, comment 8.
2. Cal Comm on Prof Responsibility and Conduct, Formal Op 2015-193.
3. *HM Electronics, Inc v R F Technologies, Inc,* 171 F Supp 3d 1020 (SD Cal, 2016).

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