

Vetting Technology: A Herculean Task

By Sharon D. Nelson and John W. Simek

An illustrative story of getting it wrong (and then right)

There are thousands of stories of lawyers who ill-advisedly purchased technology or technology services. Let's start with one such story, starring a successful and highly respected lawyer we will dub "Joe."

Joe noted correctly that his website traffic was falling off a bit and determined that he would find a new website designer who could redo his site and take care of his search engine optimization (SEO). Off he went to a legal conference in Florida, where he ran into a personable salesman who worked for a website design/SEO company.

The salesman promised him the sun, the moon, and the stars. Joe knew nothing about website design or SEO, but he really liked this fellow and believed his promises. He signed an expensive contract and waited. It wasn't long before his website, which had declined in Google search rankings under the previous vendor, hit rock bottom. Joe was losing the steady stream of clients his website had previously generated. Though we never investigated the reason, we suspect that prohibited (or "black hat") SEO may have been used and that Google, which scans for prohibited SEO

tactics, punished Joe's firm by dropping him in its rankings.

That's when we got a call. Joe knew we didn't do website design/SEO, but he knew we had a lot of knowledge about it. And by this time, his law firm was really suffering. So he contracted for a few hours of consulting work to locate a local firm (outsourcing to India for these services is usually a really bad idea).

We knew of a good local web design firm known for high-quality SEO that had done work for several law firms. We accompanied Joe when he met with the web design company. Why? We were there to ask the difficult questions, understand the technology being used, nail down the pricing and services offered, and generally act as a BS filter.

The meeting went well. The firm made good on its promises, and Joe's website began soaring in the Google rankings. The stream of clients from the website increased steadily and Joe was soon looking for new lawyers.

Lessons from Joe

Many vendors sell snake oil. They may be charming, but you're not buying charm. Salespeople who attend conferences don't necessarily understand the technology they're selling; they can demo it, but they didn't do the coding. Ask them difficult questions about the cybersecurity built into their products and you're likely to get a deer-in-the-headlights look as they summon two canned sentences from their training. What salespeople *do* understand is that their employment depends on making sales.

Joe should have been humble about his knowledge (or lack thereof). It was a smart move to hire someone who knew the field—*but* did not have a dog in the hunt because

they weren't selling the services Joe was seeking. The cost to Joe was about six hours of time. The results paid that bill many times over. No matter where you are located, there are people qualified to help you find the right technologies and the right vendors.

Tips for getting it right

In the situation above, expert advice from an outside firm without any interest in the outcome was the solution. But there are many other things you can do to vet technology.

Colleagues are a great source. They, too, have no dog in the hunt; they just want to help by explaining how a product they used was godawful or the best thing since sliced bread. They can also tell you how much it has really cost over time.

If you're lucky enough to be in a state with practice management advisors in your state bar, they're a tremendous source of good advice. It's their job to keep updated on technology for law offices, and most are excellent at matching lawyers with the right technology at the right price. You may even have the fringe benefit of being in a state where the bar has worked with a vendor to provide discounts for its members.

Every year, the American Bar Association conducts a legal technology survey. The *2018 ABA Legal Technology Survey Report* is available for purchase at <https://www.americanbar.org/products/inv/book/353335439/>. Proceed with caution, however: lawyers tend to be laggards when it comes to adopting new technology, so the survey results are not necessarily helpful in deciding what technology you should invest in today. But they will give you an overall sense of mainstream legal products and services. Also, the survey is expensive. We tell lawyers to look for online summaries;

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the price of those is just right—they're free. And to the ABA's credit, it has published free summaries, available at https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/ [<https://perma.cc/8B6R-9Z8W>].

We would be remiss if we didn't mention our own book, which we believe is the only annual guide to legal tech. The *2019 Solo and Small Firm Legal Technology Guide* (Nelson, Simek & Maschke, Chicago: ABA, 2019) is available for purchase at <https://www.americanbar.org/products>. Enter the title in the search area.

Additional helpful resources include other Law Practice Division books and CLEs, as well as webinars put on by the Legal Technology Resource Center. We routinely read *LP's Law Practice Today* online magazine and *Law Practice* magazine for quality information relating to technology for law firms.

For TECHSHOW 2018, Darla Jackson, Natalie Kelly, and Jim Calloway submitted an excellent set of materials entitled "How Do I Chose? Selecting and Implementing Law Practice Technology," which is available at https://www.americanbar.org/content/dam/aba/events/law_practice_management/techshow/2018/How%20Do%20I%20Choose%20Selecting%20and%20Implementing%20Law%20Practice%20Technology.authcheckdam.pdf [<https://perma.cc/ZSU5-J3KE>]. It's crammed full of useful information, and at 17 pages, is much more than we could fit in a column!

Do you need a Mercedes or will a Hyundai do just fine?

Lawyers often overbuy—or are oversold. Take case management, for instance. Clio has one of the best case-management systems around. We recommend it frequently. But it does so much and ties into so many other programs that it's naturally a more expensive solution. There's a cost to being feature-rich.

If you can't afford that option, you might do some comparison shopping and discover that you're just fine with good case-management systems like Rocket Matter, MyCase, or others at a much lower price point. That's especially true if you are a solo or small-firm lawyer or just starting out.

Bare bones may be all you can afford—and it may be enough.

Do you have trouble with anything marked "some assembly required"?

You'd be surprised at how new technology completely befuddles some lawyers. If you answered "yes" to the question above, you may want to look for something easy to implement and use. Not all technology needs to be complex.

Still, you're going to find that installing and configuring technology may require assistance from an IT consultant. That's fine, even though there are initial costs, *but* only if you can take it from there without a lot of difficulty. This is where demos can be enlightening. You can watch how easy or complex it is to perform certain common functions. That's the part that is critical to you. Someone else can do the setup.

What does ethics have to do with vetting technology?

Ethics has a lot to do with vetting technology. As we write, 36 states have adopted the duty of technology competence. You can't just blindly and randomly select technology, nor can you use technology that is no longer supported. We write the prior sentence knowing full well that we see lawyers still using Windows XP. Because it's no longer supported, it's no longer receiving security updates.

Then there's the pesky change to Rule 1.6 of the ABA Model Rules of Professional Conduct (also now adopted by most states). That rule now states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Have you made "reasonable efforts" to abide by this duty if you're using unsupported software not receiving security updates? Absolutely not. If you're using Windows XP or any other unsupported software, it's time to upgrade.

When acquiring new technology, you must consider how it will protect (or not) the security of confidential data you hold. This is critically important in a world where many lawyers are turning to cloud-based

products. You need to do some due diligence, meaning you should have a nondisclosure agreement in place (especially if the vendor wants information from you). It also means asking questions like:

- Is the vendor accustomed to working with law firms and aware of lawyers' ethical duties?
- If the vendor will hold your confidential data, is it encrypted in transit and in storage? How is it backed up? Multiple locations within the U.S. are preferred.
- Has the vendor had an independent, third-party audit and, if so, can you access it?
- Does the vendor perform background checks on its employees?
- If the relationship doesn't work out, how do you terminate the contract? Are you committed for a given period?
- How is the data returned to you? In what format? Is there a cost?
- Does the vendor offer a service-level agreement if there are problems?
- Will the vendor provide references, preferably from law firms?
- How long has the vendor been in business?
- Is the vendor financially sound?
- Is the vendor's online reputation good? You can check this yourself.
- Are the vendor's terms of service reasonable? Yes, we know you never read the terms of service, but it's time to start.
- What are the costs? Be sure to look for hidden costs or escalation clauses.
- Does the vendor have an incident response plan in case of a cyberattack or data breach?
- Does the vendor use multifactor authentication?
- Does the vendor follow industry standard best security practices? It should say that in the contract.
- Does the vendor carry third-party cyber liability insurance?

- Is it stated clearly that your data belongs to you?
- In the event of a dispute, what happens (arbitration or litigation) and where does it happen?
- If you need to comply with particular laws or regulations, does the vendor also comply? This is important! One of our favorite quotes is from former deputy U.S. Attorney John Paul McNulty: “If you think compliance is expensive, try non-compliance.”

If you need extra help with cybersecurity questions, ask. The ABA offers a cybersecurity checklist at https://www.americanbar.org/content/dam/aba/images/law_national_security/Cybersecurity%20Task%20Force%20Vendor%20Contracting%20Checklist%20v%201%2010-17-2016%20cmb%20edits%20clean.pdf [<https://perma.cc/N77X-LFD2>].

Final thoughts

Vetting legal technology is a pain when you are trying to run a law practice. Vendors have become less and less transparent about their pricing; they often want you to watch a demo or a webinar before they talk costs. Because of that, searching the web for solutions tends not to work well since you can't filter by price. But there's a true return on the investment of your time: a more efficient and profitable law practice, while also providing better client service. That's a win-win! ■

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