Oregon Business Lawyer

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Using Technology in Your Law Practice Today and Tomorrow

By Gwyn McAlpine, Perkins Coie LLP

Responsible incorporation of technology into your legal practice is increasingly expected by clients, judges, and ethical rules. And —as has become apparent in recent weeks— technology is necessary to continue serving your clients in the event of office closures and business disruption. This article highlights concepts to consider in applying technology to your practice.

Why You Should Care

In 2012, the American Bar Association (ABA) amended comment 8 to Rule 1.1 to make it clear that the duty to provide competent representation includes understanding "the benefits and risks associated with relevant technology." While this does not require becoming deeply technical yourself, it does require awareness, an ability to spot issues, and knowing when to call in help (and adequately supervising that help).

Most state bar associations have adopted comment 8, some have added CLE requirements, and others have incorporated the concept into ethical opinions. While Oregon has not yet adopted the comment, other duties, such as confidentiality, ethical billing and privacy protection nevertheless impose an obligation to use technology responsibly.

In this Issue

Rule 1.6(c), for instance, requires reasonable efforts to prevent disclosure of client information. Isn't it reasonable to expect that a lawyer who is electronically storing or transmitting client information knows how to do so without inadvertently disclosing it? A reasonable level of technological savvy is so mainstream that media and judges are not sympathetic to misuses (think of the PDF redaction error in the Paul Manafort case), and clients have higher expectations for practice efficiency because of it. What do you need to consider when using technology in your practice?

Priority No.1: Security

A technology-enabled practice can provide enormous benefits in flexibility and cost. But you must think through security and information-governance concerns to ensure you maintain confidentiality and preserve the client's records. There are some clear starting places.

Complex Passwords: Use complex passwords, and do not reuse your work-related passwords for consumer accounts. Heed this anonymous advice: "Passwords are like underwear: make them personal, make them exotic, and change them on a regular basis."

Access Controls: When sharing documents, consider to whom you are giving access and your process to revoke that access when no longer needed. For instance, some file sharing services allow you to send "anonymous links" to documents, meaning anyone with the link can click on it to access them. The convenience of not needing a login may be outweighed by the risk of the email being misdirected or forwarded to someone outside your privilege circle. A better practice is to require a specific person to log in. Similarly, remove content at the end of a matter or set expiration dates, so it does not live on the internet forever.

Continued on page 2

Technology

Continued from page 1

Gwyn McAlpine is the Director of Knowledge Management Services at Perkins Coie, an international law firm with 1,100 lawyers in 20 offices.Gwyn's focus is on creating value for clients by enabling attorneys to practice law more efficiently and collaboratively.

Knowledge management at Perkins Coie includes internal and external collaboration, and artificial intelligence and expert systems, in addition to more traditional knowledge management initiatives.

Gwyn practiced corporate law for 10 years before fully transitioning to knowledge management.

Recordkeeping: As you move from a paper-based practice to a more digital practice, rethink your recordkeeping strategy. Be sure you know where the client records are housed and consider that they might be scattered across various systems. Ensure you track record locations to comply with retention and handling requirements or a request to turn them over.

Encryption: A 2017 ABA ethics opinion establishes that lawyers must make a case-by-case determination of whether an email requires encryption, depending on the level of sensitivity. Find out whether your email application automatically encrypts and, if not, how to do it. Think through this analysis each time, and it will become routine. If you use a cloud-based service to share and store client information, you should be asking the same questions about encryption of data as it is transferred and stored.

Public WiFi: A public WiFi network could expose confidential information being transmitted by or to you. Public WiFi networks are found in coffee shops, hotels, airports, and other places where you frequently see lawyers conducting business. You can avoid public WiFi networks altogether, use a virtual private network (VPN), consider a mobile phone hotspot, or limit your activity to nonconfidential communications.

Vendor Reliability: As you acquire software or use online services to facilitate your matters, you should conduct due diligence on the vendor—its reputation and history, data handling policies and practices, and license terms. Basically, you want to be sure it will treat your information with at least the level of care that you would.

Smart Speakers: While smart speakers, such as Alexa and Google Home, may be convenient for daily chores, they are always listening. Engaging in a client call with one of these in the room means a third party is listening and recording at least one side of the conversation. Consider making your office a smart-speaker-free zone.

Keep the considerations above in mind whenever you are storing or transmitting client data in an electronic format and ask for help from people with more expertise if you need it.

Collaboration With Your Team and Clients

With security concerns addressed, you can focus on using technology to bring efficiency to your practice. Collaboration tools enable teamwork and information sharing, often in real time, instead of a laborious sequence of back-and-forth work.

Any law office must share information and documents among the team to facilitate getting work done. A document management system (DMS) serves several purposes, including collaboration. Multiple people can access the same document on a network, and a DMS includes features such as document numbers, an audit trail, and version control to help manage that process. Document permissions can limit access to only those working on a matter or exclude anyone walled off from a matter. A DMS is often organized by client-matter numbers, making it easy to keep the electronic matter file together, regardless of who authored a document. This makes it a system of record, as well as a collaboration tool.

Co-authoring tools allow multiple authors to work on the same document at the same time. Think of that long brief that has a team working on different parts of it. Instead of funneling all your changes through one person, each person can be in a portion of the document, which is then locked to other editors, streamlining the overall process.

Teams can also take notes collaboratively, using applications for electronic notebooks. These have sections and pages, just like a binder, with team members adding to it as needed. Instead of multiple yellow pads of notes, some with undecipherable handwriting, all of the team's notes are together in a central place for easy reference.

Collaboration with your client and third parties is also straightforward with technology. Clients like that it allows them to stay on top of their matters without a meeting or phone call, and technology promotes efficiency and transparency. Common-use cases include key document repositories or other file sharing, co-authoring, project and task management, and access to financial information. Many of these solutions are cloud-based, so be sure to think through that security checklist.

Automation of Routine Tasks

Automation technologies require thoughtful investment, but are potentially very powerful. With document automation, similar to Legal Zoom documents or car loan paperwork, you can create any type of document, customized for your practice. Templates are coded with software so you can quickly and easily generate a set of draft documents (and rinse and repeat). Because of the time it takes to develop and code the standard template, this is only

Continued on page 3

 Continued from page 2

practical for high-volume documents with limited variability. You can purchase sophisticated software, but don't overlook automation opportunities in broadly available tools. DocuSign, for example, has template capabilities for documents that you frequently send out for electronic signature, along with workflows that sequence and track signature collection. Even using Word's native "mail merge" function can give you the benefits of document automation without investing in new software.

Workflow automation is growing in popularity. You might see processes such as the e-signature workflow mentioned above, notifications to relevant people upon certain events, or intake forms that populate a data repository or an automated document. With automated workflows, you are only limited by your imagination and the time you put in to design them, so focus on your biggest "pain points." You will find workflow functionality embedded in many common tools, such as task and project management tools, or you can customize your own through SharePoint and O365 apps.

Artificial Intelligence: Robots Are Your Friends

Artificial Intelligence (AI) is the ability of computers to mimic human intelligence. It covers a broad spectrum of computer science. In the context of the legal practice, it typically refers to machine learning, natural language processing (NLP), and expert systems. AI excels at pattern matching and scaling but is not good at tasks that require human perception. Because legal tasks require precision and contextual analysis, AI should be seen as a supplement to human work, not a replacement for it. So far, AI has shown the most success in the following legal applications:

- Legal Research: Legal research has leveraged NLP for many years. If you use Westlaw, you've been using AI. More recently, legal research tools have incorporated data analytics to provide greater insights.
- E-Discovery: E-Discovery is another early adopter of AI. Technology-assisted review uses machine learning to dedupe, thread emails, spot anomalies, and surface unknown issues.
- Contract Analysis: Contract analysis is the transactional variant of document review. AI technologies extract salient provisions for more detailed review from thousands of pages of contracts. This also facilitates analysis of common provisions across contracts, which can be difficult to do efficiently without the aid of technology.
- Expertise Automation: Expertise automation uses rules-based logic to navigate through a decision tree. Turbo Tax is the most famous example of this.
- Outcome Prediction: To predict outcomes (or at least trends and tendencies), AI is applied to data sets to identify patterns. PACER provides an enormous set of structured data that can be sliced and diced in various ways to look at historical outcomes and timeframes for different types of cases across jurisdictions and timeframes. Judicial analytics are so powerful, they have been outlawed in France![1]

What's Next?

AI has already made its mark on legal technology, but we expect more to come. Data analytics will continue to grow, particularly as law firms combine their internal data with external sources, such as PACER, to derive insights specific to their firm and experience. AI will also expand the use of automated workflows. By turning unstructured data (documents) into structured data (databases), it will support development of more sophisticated workflows. Machine learning will mature as well, with more creative use of cases and models, and portability of that learning. But we will also need to address issues, such as privacy and bias, that become magnified as we use AI to process larger volumes of data.

Help!?!

> *"To maintain a responsible awareness of the "benefits and risks" of relevant technologies, a lawyer today must be an informational omnivore with a sustained interest in technology as a fundamental building block of the contemporary world.*
>
> *"…Technological competence isn't a skill attorneys can simply add to their CLE checklist — it's something that needs to be woven into their DNA."*
>
> (Legal Executive Institute)

To develop your own technological savvy, become an informational omnivore. Pay attention to your use of technology as a consumer and think through how you might apply that to your practice. Follow websites like Above the Law (Legal Tech Section) or LawSites by Robert Ambrogi to learn about developments. Attend the ABA Tech Show to see technology in action and hear from your peers on how they apply it to their practice. Take technology-related classes through, e.g., LinkedIn Learning.

But above all, be curious. Technology is not a fad or something to be delegated; it's here to stay and it is integral to your practice. ◆

Endnote

1 Article 33 of France's Judicial Reform Act prohibits using personally identifiable information about judges to analyze or predict their practice. Violation could carry a five-year prison sentence. The concern seems to be protecting judges, so that it is not as easy to detect patterns in decision making, to compare judges, or to detect variances from expected civil law norms. See this article from *The Artificial Lawyer.*

Drafting Contracts: Back to Basics

By Elizabeth Ruiz Frost, University of Oregon School of Law

Elizabeth Frost teaches Legal Research and Writing and other courses at the University of Oregon School of Law.

Before joining the Oregon Law faculty, she was in private practice, specializing in real estate finance at Sidley Austin LLP.

Contract drafting requires terrific precision. Transactional lawyers spend countless hours perfecting deal terms so the documents meet their clients' expectations. Then, right under the lawyer's nose, a grammatical slip can undo all that hard work.

Learning to write and honing our communication skills are lifelong pursuits that require trial and error, feedback, and revision. The tough thing about advancing drafting skills and honing precision in a transactional context is that contracts do not get road-tested like other legal writing. Legal writers who write to a court may think more about audience and perhaps put more thought into the rhetorical effect of the content. Those writers then learn whether the language works, explains, and persuades—and can adjust the next time around.

But contracts are less frequently tested. Most transactions do not end in litigation. Fortunately, a transactional lawyer typically does not have her language evaluated by a court to learn whether the provision worked the way she intended. Moreover, transactional drafting typically starts from a form, updated for deal terms but not grammatical expression. So bad habits persist.

Because they do, writers ought to return periodically to basics. After all, basic grammar can make all the difference in contract enforcement. Passive voice and nominalizations are two grammatical constructions that arise frequently in contract drafting and can erode clarity and precision.

Passive Versus Active Voice

Passive voice is a grammatical construction in which the object of the action becomes the subject. The sentence's logical subject is obfuscated or removed altogether. Here is an example of a sentence in the passive voice: "The repairs will be completed by the landlord by March 15." The logical subject of that sentence is the landlord, but the landlord has been converted to the object. Meanwhile, the sentence's true object—the repairs—has become the sentence's grammatical subject. No one is straightforwardly doing anything in sentences like this. Rather, due to passive voice, the action is done to someone.

Passive voice is not inherently ungrammatical, but when the logical subject is obfuscated, several issues can arise.

First, and of most concern in contracts, the passive voice can create ambiguity. The passive voice makes the logical subject less clear, particularly when writers omit that subject altogether. Imagine a provision that says, "Repairs will be completed by March 15." By whom? The landlord or the tenant? Unless that sentence is accompanied by clear context, the duty to make those repairs falls on no one. In transactional drafting, where assigning duties, rights, and obligations is the document's core purpose, the subject of a sentence matters very much.

Consider this example from a hypothetical non-compete agreement, based on a case that ended up at the Texas Court of Appeals. *East Texas Copy Systems, Inc. v. Player,* No. 06-16-00035-CV, 2016 WL 6638865, at *1 (Tex. App. Nov. 10, 2016).

> *"If the employee's employment with employer is terminated prior to two years from the date of this Agreement for any reason other than a for-cause termination, this Non-Compete Agreement will no longer be binding."*

The drafters' intent was to limit the provision so that the agreement would terminate only if the employer fired the employee. But the passive voice here does not create that limit because it simply says, "is terminated." By whom? Who knows? If both parties have termination rights in the contract, can't the employee nullify the non-compete agreement simply by quitting within two years of its execution?

In the Texas case, that's exactly how the court interpreted this type of language. The passive voice omitted the logical subject, so the court could not identify which party this referred to. Thus, either party could nullify the non-compete and render it useless.

Second, the passive voice produces wordiness. Using the passive voice, which includes the by-subject phrase, typically adds an unnecessary couple of words.

Continued on page 5

Contract Drafting

Continued from page 4

Passive voice yields dull, indirect, and impersonal writing.

"The landlord will complete the repairs by March 15" is two words shorter than the original sentence above. Two words may seem like no big deal, but they add up over the course of a long document.

Third, passive voice yields dull, indirect, and impersonal writing. Sentences in the passive voice contain some form of the "to be" verb as the main operative verb. Apologies to the existentialists out there, but what a boring verb "to be" is. The sentence's more interesting verb converts to a past participle. The reader is left with having to discern the meaning of all the "is" "was" and "will be" sentences.

Finally, the passive construction is a little more difficult for readers to process. It disrupts the normal subject-verb-object order of a sentence, which is the easiest to process. To make sense of other constructions, our brains have to work just a little harder—maybe only by milliseconds, but still. This is not to say that every sentence ought to be written as subject-verb-object. That could be monotonous. Readers appreciate variation, but if the choice is between variation and accessibility, choose accessibility.

How does one find the passive voice? First, look for the "to be" verb in any of its forms, followed by a past participle (normally the "_____ed" from of a verb). That's not a foolproof measure, however. For example "the door is closed" is not written in passive voice, even though it contains the "to be" verb and a past participle. It simply describes the condition of the door; "closed" here is an adjective. If the sentence said, "the door is closed by Jim," it would contain passive voice.

To root out passive voice, writers need to understand what's happening in each sentence. First, look for all the verbs. Second, ask who is supposed to be doing the action in the sentence (i.e., who is the logical subject?). Then, with that subject identified, is that subject at the fore or is it relegated or missing altogether?

Of course, the passive voice may occasionally be preferable. So the final editing step is to think about what is most important in the sentence. Sometimes the object is more important than the subject.

Consider the following example: "After the Closing, Buyer will remain bound by the Agreement." The most important part of that sentence is that the buyer remains bound. Converting it to active voice would unnecessarily emphasize the binder.

Sometimes, the subject is unknown or diffuse, so the passive voice makes sense. Conceiving of or naming all the possible subjects of a verb could be absurd. Consider the following sentence: "If any license is not granted..." Many agencies may be involved in granting licenses. Listing them would be unnecessary and would improperly focus the sentence on the agencies rather than the consequence. Further, the active voice in this example could create precision problems. Misnaming an agency here could provide one party an excuse for non-performance.

Nominalizations

A second problematic grammatical construction in contract drafting is nominalization. In technical terms, when a writer converts a verb or an adjective to a noun, the writer has nominalized that word. In non-technical terms, it occurs when an action or description gets turned into a thing.

Legal writing is rife with nominalizations. They appear in statutes, opinions, and contracts. They are so common in legal writing that new lawyers start using them just to fit in. A person who had never in her life seen the phrase "had knowledge" will write it exclusively in place of "knows" after only a few months in law school. Nominalizations sound lawyerly, but it's not a good sound, and lawyers can do better. Here are some examples that arise frequently:

- Violation (violate)
- Establishment (establish)
- Determination (determine)
- Knowledge (know)
- Applicability (apply)
- Compliance (comply)
- Representation (represent)

I pulled each of the following examples of nominalized verbs from contracts. Each is clunky, wordy, and somewhat more obscure than the original verb.

Continued on page 6

Contract Drafting *Continued from page 5*

"*Debt Obligation* has the meaning..." This one nominalizes the verb "to mean." De-nominalizing it simply requires deleting two unnecessary words. "*Debt Obligation* means..." is more concise and straightforward.

Consider the following common contractual phrase: "*The intention of the parties is to..*" "Intention" is a nominalized version of the verb "to intend." "Intention" is an abstract noun, as opposed to a concrete one. An abstract noun is an idea or a concept; readers struggle just a bit more when the subject of a sentence is abstract. They comprehend sentences that start with a concrete noun (i.e., "The parties intend to...."). The denominalized version is shorter, less clunky, and contains a stronger subject and verb pairing, again eliminating the boring "to be" verb.

Sometimes a nominalization can create ambiguity, just as the passive voice does. In this next example, the affected parties are not clear. "The use of the property is limited to agricultural or light industrial uses." Use by whom? Maybe context makes it clear, but why not make a right or limitation explicit? For example, "Tenant and its assigns may use the property only for agricultural or light industrial uses." The sentence is slightly longer with these subjects, but the meaning is clearer, and the concrete nouns improve the sentence.

Adjectives too are often nominalized in legal writing. "Has the ability to" is perhaps one of the more annoying frequently used nominalizations. If someone "has the ability" to do something, could the writer say, "is able to" instead? Or better yet, that she "can" or "may" do it?

The following three examples show that progression, with each revision yielding a tighter, less cluttered sentence.

1. The director has the ability to terminate the program.
2. Revision: The director is able to terminate the program.
3. Better revision: The director can terminate the program.

Because nominalizations present some of the same issues as passive voice, writers should look especially for them when editing. As a quick editing step, a writer can look for words that end in "ment" or "ion," a common ending for nominalized words. But due to irregular verbs, a writer has to think a little harder about each noun in a sentence to find them all. Has a noun in a sentence been converted from a verb, and would converting it back yield a more straightforward, clearer sentence? Not always, but it's worth considering.

So much of contract drafting is built on tradition and habit. We include "to wits" and "whereofs" because lawyers always have or because they're already on the form. Those forms are also filled with unnecessarily challenging grammar. We can improve them. Or should I say, improvement can be made by us?

We can form new good habits for the profession and work to pass them along to those we train. Because words still matter, and because lawyers' facility with matters of grammar and style vary greatly, I encourage readers to incorporate matters of grammar into their new-lawyer training. ◆

OSB COVID-19 Response

CLE Programs: Participation at live events sponsored by the OSB CLE Seminars Department will be limited to webcasting (if available) through the end of April. If you have already registered to attend an OSB CLE Seminars-sponsored event, you will receive an email from the OSB CLE Seminars Department regarding any changes in delivery or scheduling.

Section CLE events scheduled for March that are not cosponsored with the CLE Seminars Department have been canceled. Registrants will receive notice by email of individual program cancellations and any plans to reschedule.

You can also check our events calendar to see the status of bar events. If you have questions, please contact the OSB CLE Service Center at (503) 431-6413 or (800) 452-8260, ext. 413 for webcasting, on-demand, or CD/DVD options that may be available.

OSB Meetings: In addition, all bar sections, committees, task forces and other groups will meet by conference call or videoconference only in March and April. Members and guests can participate in meetings via the conference call numbers included in the meeting notices sent by the bar. If you have questions about an upcoming meeting, please contact the OSB at (503) 620-0222 or (800) 452-8260.

Professional Liability Fund: The PLF and OAAP have cancelled all seminars, events and in-person counseling sessions. Staff will attempt to reschedule counseling sessions to occur by phone or videoconference.

OAAP Recovery Groups: All in-person recovery meetings at the OAAP are suspended through April. In the meantime, each week OAAP will host two online recovery-focused video meetings for lawyers, judges. and law students. ◆

2020 Subcommittee Chairpersons

At its February meeting, the Executive Commitee confirmed 2020 subcommittee chairs.

CLE
Genny Kiley
Emerge Law Group

New Business Lawyers
Will Goodling
Stoel Rives

Outreach
Brian Jolly
Farleigh Wada Witt

Communications
Jeffrey Tarr
Sussman Shank

Legislative
Valerie Sasaki
Samuels Yoelin Kantor

Can you get CLE credit for writing an article?

According to Jade Priest-Maoz, Oregon State Bar MCLE Program Manager, attorneys can claim credit for legal research and writing if the activity meets certain accreditation standards. This is Category II credit, and there is a cap of 20 Category II credits per three-year reporting cycle.

MCLE Rules and Regulations

Rule 5.7 and Regulation 5.200(e) set forth the requirements for claiming credit for legal research and writing. ◆

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

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