The Myth of the Digital Native: Establishing Competence and Eliminating Tech Bias in the Modern Law Firm

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Introduction

Technological illiteracy and generational bias in the legal industry is causing law firms to implement faulty strategies with respect to technical training and education of their attorneys and staff. The result is inefficient and poor work product, lower realization rates, lost profits, and even malpractice.

Young lawyers joining law firms today are considered to be "Digital Natives" because they've grown up in a digital world and are therefore assumed to have some innate technological talent. This is a myth. While a lifetime of exposure to technology may make these so-called Digital Natives more open to technology and possibly faster at learning it, most of their experience is with basic functionality of consumer-based apps. That skill does not equate to competent use of programs (and complex features) that lawyers use every day. It certainly doesn't equate to competent use of basic office technologies that have complex features, such as MS Word.

Technology is fundamental to the proper delivery of legal services. To date, at least 27 states have formally recognized an ethical duty of technology competence as stated in Model Rule 1.1 and Comment 8. However, this duty is often treated as an individual mandate, rather than a professional skill that law firms must help all lawyers to develop. This view of the duty is problematic, and it is even more so when combined with the myth of the Digital Native.

To be clear: In a law firm setting, the issue of technology competence is not purely personal and limited to each lawyer on an individual basis. Individual incompetence is a problem for the law firm as a whole. Policies and procedures that allow or encourage technological incompetence by systematically skipping training may lead to violations of Model Rule 5.1(a)-(b) for which law firm management and supervising lawyers will be responsible. If law firm management does not enable lawyers to become technologically competent, then it is not meeting its duties to ensure that all lawyers within the firm are complying with all ethical rules.

Yet, law firms that buy into the myth of the Digital Native are doing exactly this. By assuming that all young lawyers can and will use technology competently by nature rather than by training, law firms are creating a multi-layered cluster of incompetence and ethical violations. Failure to provide adequate technology training to all lawyers in the firm, including Digital Natives, means that the lawyers will be unable to meet their duty of technology competence. It also means diminished quality of work performed for clients. Systematically producing low-quality work combined with willful technology incompetence raises concerns about unearned fees and unethical billing practices under Model Rule 1.5.

Applicable Ethics Rules

Perpetuating the myth of the Digital Native, and relying upon it as an excuse to avoid providing technology training to young lawyers, conflicts with three rules of professional ethics:

- **Model Rule 1.1:** The duty of competence, including technology competence.

- **Model Rule 5.1:** The duty to supervise and facilitate ethical compliance of subordinate lawyers.
- **Model Rule 1.5:** The prohibition against collecting unreasonable fees.

Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And now Comment 8 to Model Rule 1.1 provides: "[8] 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 [CLE] requirements to which the lawyer is subject."

The duty of competence under Model Rule 1.1 encompasses substantive knowledge of law and an understanding of technology. Technology competence includes awareness, a grasp of the benefits and risks associated with relevant technology, and reasonable skill in the technology tools that we choose to use to practice law. It is a continuing duty.

According to Model Rule 5.1 (a), a partner or supervising lawyer must ensure that the firm has developed and enforces policies that direct and facilitate that all lawyers in the firm conform to the Rules of Professional Conduct. And under Model Rule 5.1(b), any lawyer who supervises a subordinate lawyer must also "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Because Model Rule 5.1 (a)-(b), obligates senior lawyers to ensure compliance with all ethical rules, senior lawyers must facilitate compliance with the duty of technology competence as it exists under Model Rule 1.1. Similarly, senior lawyers must also consider the consequences of their subordinates' lack of technology competence and systematic failure to adequately use the most basic legal technology: unearned fees under Model Rule 1.5. Basic legal technology is open to interpretation, but it usually includes case management software, document management software, billing software, email, a PDF system with redacting capabilities, and the MS Office Suite, particularly MS Word.

Under Model Rule 1.5, a lawyer may not collect an unreasonable fee. Lawyers have an ethical obligation to work in a cost-effective manner and to avoid churning hours. When a lawyer spends billable time manually performing easily-automated tasks, then that fee may not be truly earned. Therefore, the corresponding bill would not be reasonable under the circumstances.

The Myth and the Fallacy of the Digital Native

In 2001, [Marc Prensky](#) coined the term "Digital Native." It is used to describe the generation of young people who grew up surrounded by digital technology and tends to correspond with birth years for millennials (1980 to 2001). The term has been taken to mean (often mistakenly) that Digital Natives intuitively know how to use technology without the need for training.

The problem is that, in practice, there is no such thing as a Digital Native. No one is born intuitively knowing how to use technology effectively. And life-long exposure to technology does not translate into competent use and understanding of technology. People born in those years are certainly not born with "digital wisdom," which is the ability to use and critically evaluate technology, and make ethical and pragmatic decisions regarding the technology.

In reality, Digital Natives, who are presumed to have a natural wisdom and aptitude for technology, simply do not. Their casual exposure to technology means that the types of technology with which Digital Natives are familiar is mostly social or lifestyle-focused and their learning is undirected and informal. Thus, when it comes to workplace technology, Digital Natives' skills are often incomplete and their knowledge is largely superficial. Nobody grew up using case management software, document management software, billing software, encrypted email, redacted PDFs, and MS Word like lawyers do. Everyone must learn it.

To make matters worse, the notion that Digital Natives can skip technology training isn't just a misconception among older staff. Digital Natives themselves vastly overestimate their own technological skill. Though they are averaging 35 hours per week using digital media, the use typically involves text messaging, playing games, passive consumption of entertainment media, and looking up non-academic things online. Yet, when asked to judge their skills with workplace technology, Digital Natives greatly overestimate their skills and their value. In fact, a study found that "nearly six out of 10 millennials can't do basic tasks such as sorting, searching for and emailing data from a spreadsheet." In sum, confidence is high but competence in startlingly low.

By holding on to the myth that Digital Natives with in-depth knowledge of workplace technologies exist, we obscure the need for training and we waste potential that could be cultivated if evaluated honestly. We also encourage young people to remain technologically incompetent while imagining that they are competent. At the same time, we rarely offer genuine assessment of skills and fail to provide technology training that would bridge the skills gap.

The Problem with "Positive" Stereotypes

At first, it may seem to benefit young lawyers to be presumed to have technology competence. But the seemingly-positive connotation of the Digital Native stereotype hides many harmful aspects.

First, the assumption of innate technical talent ignores reality and underlies faulty policies that assume young lawyers do not need technology training. That sets them up for failure, dissatisfaction, and burnout. It is a biased and misguided view of what young lawyers bring to the workforce and what they need to succeed.

Second, it confuses learnable skills with innate traits. A belief in inherent tech wizardry affects what we expect from, and how we interact with, our colleagues. We expect young lawyers be able to do things that are not within their actual skill set, and we do not give older lawyers an opportunity to show us what is in theirs. Viewing these skills as if they are innate talents hides the need for training and discourages people (who are not presumed to have such talents) from even attempting to learn. This creates a long-term, anti-growth mindset within the firm and fuels policies that encourage law firms to skimp on training and education.

Third, by grouping together an age group as Digital Natives, other differing aspects of young lawyers are erased. Young lawyers are reduced to a homogeneous stereotype, which runs counter to diversity and inclusion efforts. Assumptions based on a single characteristic are biased and prejudicial.

It also masks the reality that policies based on the Digital Native myth are age-based policies. And since relying on the myth of innate technical abilities justifies a failure to train, such anti-training policies will

likely stymie the professional development and career advancement of young lawyers. Such policies would not stand if accurately recognized as age-based discrimination.

Recognizing the Harm of the Myth

In addition to age-related bias issues, relying on the myth of the Digital Native to make (or avoid making) policy creates a business problem and an ethics problem. Law firms should take action to combat the issue—and the simple answer is training.

The business problem for law firms is the impact on both young lawyers and clients. Young lawyers do not possess innate or magical technical skills. When law firms treat young lawyers as if they should possess these skills (without assistance from the firm), they are set up to fail. Young lawyers do not actually know how to use technology to do legal work properly or efficiently, if they know how to do legal work yet at all. The skills gap is never addressed but always penalized. This creates a fleet of disgruntled young lawyers who are unsatisfied with the type of work that they're doing and are fed up with the feedback they are receiving, which leads to attrition. Clients aren't satisfied with the quality of work they're receiving or the amount they're paying for it. The bigger problem will arise for clients in the future when attrition becomes such an issue that there are very few qualified senior lawyers to do the work.

The ethics problem is three-fold and requires considering how technology competence works in a law firm setting. Whether so-called Digital Natives fail for lack of training is a matter that should concern partners and other senior lawyers. Ignoring it could have financial consequences for the law firm and ethical consequences related to failure to supervise for the partners and senior lawyers.

It is a given that under Model Rule 1.1, all lawyers must be competent, including technologically competent. But also consider that under Model Rule 1.5, lawyers cannot charge unreasonable fees and incompetent use of technology may make fees unreasonable. If colleagues or subordinate lawyers are failing to meet the duty of competence, then it is the duty of the partners to bring them into compliance.

Under Model Rule 5.1, partners have a duty to supervise all persons in their firm, including subordinate lawyers. The duty to supervise requires partners and senior lawyers to ensure that everyone in the firm is complying with the ethics rules (including Model Rules 1.1 and 1.5). So the logical conclusion is that depriving young lawyers of training based on assumptions that they already know how to do the work is inadequate supervision. Furthermore, it is creating an additional hurdle for young lawyers to meet their own duties of technology competence if they are not supported in building the skills.

The reality is that most lawyers, regardless of their age, are not fluent with today's basic workplace technologies. Yet, the assumption is that young lawyers have innate technology talent. Technological illiteracy of firm management combined with generational bias causes law firms to implement faulty strategies with respect to technology training—if they do any training at all. By failing to recognize the role and responsibility of law firm management in setting policies and providing opportunities for training, law firms are neglecting their ethical management duties.

Nothing shows the myth of the Digital Native and the damaging impact of failing to train more clearly than the example of MS Word.

Digital Natives in Practice: The Example of MS Word

Most of the technology young people use is directed toward consumption. Comparatively, technology use in a law firm setting tends to focus on complex content generation and analysis. Rudimentary content generation skills, such as text messaging and taking selfies, will not help a young lawyer to succeed.

For writing, MS Word is overwhelmingly the most used tool of our trade because document preparation, drafting, and polishing consumes a significant amount of every lawyer's time regardless of practice area. Despite how intuitive the basic functionality of MS Word appears at first glance—open a document, start typing, text appears on screen, done—it has a much deeper functionality and far more features available that lawyers should know how to use. As legal professionals, we do intricate work and create complex documents, such as briefs, motions, contracts, exhibits, and e-filings. So even our daily word processing is more complicated than the average user. Therefore superficial and merely passable use of MS Word will not cut it.

However, young lawyers really only know how to type, and they do not understand what capabilities are even available in MS Word. In fact, when tested, only about one-third of law students could perform these basic tasks in MS Word on their first attempt:

- Track changes, accept changes, turn the feature off;
- Cut and paste, with or without formatting;
- Find and replace text;
- Format font and paragraph;
- Fix footers;
- Insert hyperlinks;
- Apply and modify styles;
- Insert and update cross-references;
- Insert page breaks;
- Insert non-breaking spaces;
- Clean document properties; and
- Create comparison document (i.e., a redline).

The big problem is that the skills listed above are necessary for using MS Word effectively in legal practice. They are essential for delivering legal services.

MS Word is feature-rich and customizable. Every button along its top ribbon is a targeted solution to a specific problem. But these powerful and useful features go ignored and unused because people do not realize that they exist, or people have not been trained to use them. If we act as though only certain people are capable of learning technology or that technology should be so easy that it doesn't require any training, we miss out. And so do our clients. When our expectations are misaligned with our reality, we underutilize the technologies intended to support us.

Workplace technology is designed to solve problems with depth and complexity. Therefore, if technology has the power to solve these problems it is neither easy nor intuitive. So policymakers must accept that technology is not easy and that to achieve proficiency, people must receive training.

Train Systematically to Build Competence

Mere exposure to technology is not enough. While exposure can increase comfort, it does not necessarily impart facility. Technology competence is a bundle of learned skills. Lawyers need to move past technology illiteracy, avoid reinforcing bad habits, and begin deep learning with deliberate practice.

MS Word is just one example. To build competence, firms and individual lawyers need to determine what they don't yet know. This critical step begins with an initial skills assessment in order to provide targeted training to lawyers. If you tell a lawyer they have to spend time taking a test they will rebuff the idea. Lawyers are busy and anything that takes away from billable time is usually rejected. If you, however, tell a lawyer that taking a short test may allow them to opt out of future mandatory training, they will welcome the testing. Few things feel more irritating or wasteful than being required to sit through training on a topic you already know. Competency-based training models award credit based on the lawyer's actual learning, not time spent in class. Once a lawyer can prove mastery of a particular set of competencies, he or she is may move on to the next set.

Recognizing the need for training is difficult. Initial skills assessment also helps the lawyer to understand and accept that he or she actually needs training. To use the example of MS Word again, many lawyers believe that typing and printing represents the entirety of all functions and skills necessary for adequately using MS Word. But there's much more. We operate under delusions of adequacy because we have never had to quantify our skills, abilities, and knowledge needed to produce legal work product. Merely making training available to lawyers is ineffective because they will not use it until it is proven that they need it.

Finally, competency-based assessments and training allow both the lawyers and the law firms to verify the lawyer's skill set. This is not only important to validate to our clients that right person is performing the work, using the right tools and technology, it is also a marketing opportunity allowing law firms to distinguish themselves from their competition.

The Evolving CLE Ecosystem

The CLE ecosystem is changing to reflect the need for technology training. In February 2017, the ABA adopted a revised Model Rule for Minimum Continuing Legal Education ("MCLE"). This revision responded to new Model Rule 1.1 and Comment 8, as well as Florida's inclusion of technology-focused courses in its MCLE requirements, which became effective January 1, 2017. The revision is designed to help lawyers comply with Model Rule 1.1. To encourage access to high quality technology programs, the Commission recommended accrediting technology CLE programs. "'Technology Programming' means programming designed for lawyers that provides education on safe and effective ways to use technology in one's law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters."

Now it's time for law firms and legal educators to pursue and incorporate competency-based learning so that lawyers become competent in technology. It should start with a skills assessment, incorporate deep learning with deliberate practice, be designed to facilitate meaningful change, and have a clear, practical link to each lawyer's practice.

Conclusion

Age is irrelevant. The myth of the Digital Native causes decision makers to believe that technology is a talent as opposed to a bundle of learned skills that attorneys develop over time and ignores the reality that most lawyers, regardless of their age, are not fluent with today's basic office technologies. The truth is that technology isn't easy and no one comes by technology competence without training and effort.

Since technology is fundamental to the modern delivery of legal services, we must embrace an approach to developing technology competence, which includes competency-based assessments, training, and validation for all lawyers in the law firm. The tools we use, and *how* we use them, will define how we deliver services to our clients, which is vital to how we serve their interests.

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