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THE FATE OF COMMENT 8: ANALYZING A LAWYER'S *ETHICAL* OBLIGATION OF TECHNOLOGICAL COMPETENCE

Lisa Z. Rosenof

I. INTRODUCTION

Anyone who has seen the viral video of the lawyer mistakenly adopting a cat persona as a visual overlay in a virtual court hearing[1] would understand the importance of technological competence to the effective discharge of a lawyer's professional duties. Whether they know it or not, lawyers use technology in every facet of their legal practice. As technology becomes more of a fixed presence in the everyday lives of lawyers, the American Bar Association ("ABA"), as the national voice of the legal profession, has taken measures to create an ethical duty of technological competence.[2]

ABA Model Rule 1.1 ("Rule 1.1") has long required lawyers to provide competent representation to clients.[3] Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[4] In 2012, the ABA amended Comment 8 to Rule 1.1 ("Comment 8") to reflect that, "a lawyer should keep abreast of changes in the law and its practice, including the *benefits and risks associated with relevant technology*…"[5]

The vagueness of the standard, however, poses underappreciated risks to lawyers, who may find themselves subject to professional discipline based not on their lack of legal knowledge or skill, but rather on their failure to keep pace with the rapid evolution of technologies with which they may have had no special training or expertise. For example, some lawyers use artificial intelligence ("AI") during the jury selection process to correlate data on human behaviors based on patterns sourced from public data.[6] Others engage in verbal questioning with potential venire members to ascertain their viewpoints and behaviors. Is it practical to say that the latter group is behaving *unethically*?

The ABA's standard in Comment 8 provides no boundaries or roadmap to follow in determining whether a lawyer has breached this ethical duty of technological competence. The legal profession has failed to make

1. Guardian News, *'I'm Not a Cat': Lawyer Gets Stuck on Zoom Kitten Filter During Court Case*, YOUTUBE (Feb. 9, 2021), https://www.youtube.com/watch?v=lGOofzZOyl8 [https://perma.cc/SK5J-WG98].

2. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

3. *Id.*

4. *Id.*

5. *Id.* at cmt. 8 (AM. BAR ASS'N 2020) (emphasis added).

6. *See infra* Section III(A).

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strides to close the gap between its current standards and ongoing technological innovations. This Comment examines the potential for courts to construe the standard broadly, putting lawyers at risk of rule violations and malpractice in a world brimming with fast-paced technological innovations. This Comment argues that a lawyer is not supposed to ever "attain" complete technological competence but should stay informed to provide competent representation. In other words, technological competence sets a bar that keeps rising for lawyers, and it is okay that lawyers will never fully reach it. Ultimately, this Comment will suggest that the ABA delete the offending portion of Comment 8 and urge state bar organizations to mandate continuing education on technology.

In Section II, this Comment will present the historical analysis and legal jurisprudence of Rule 1.1, specifically in connection with Comment 8. Next, Section III will discuss the future viability of Comment 8 and propose a new, workable standard. This Comment will then conclude in Section IV by reasserting the need for the ABA and state bar organizations to provide guidance for lawyers regarding their ethical duty of technological competence.

II. BACKGROUND

The requirement for attorneys to keep "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology," has raised concerns regarding the meaning of technological competence and what constitutes "relevant technology" in legal practice. This Section seeks to define technological competence and describes the progression of Comment 8 to Rule 1.1. First, Part A will explain Comment 8 jurisprudence. Second, Part B will seek to define competence generally. Third, Part C will seek to define technological competence. Fourth, Part D will analyze what the courts have recognized as "relevant technology." Finally, Part E will discuss state adoption of the duty of technological competence.

A. Adoption of Comment 8

The ABA Model Rules of Professional Conduct ("ABA Model Rules") serve as a model for jurisdictional ethics rules.[7] The format of the ABA Model Rules is akin to the formats of the American Law Institute Restatements and the Uniform Commercial Code.[8] Each rule states a

7. *About the Model Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/3RTS-87AP].

8. Peter M. Moser, *The A.B.A Model Rules of Professional Conduct*, 14 U. BALT. L.F. 8, 8

principle and is followed by an official comment.[9] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule.[10] The comments are intended as guides to interpretation, but the text of each rule is authoritative.[11]

ABA Model Rule 1.1 has long required attorneys to provide competent representation to clients.[12] Competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[13] However, in recent years, the ABA has instituted a self-assessment of its Model Rules to stay updated on changes in the legal profession, particularly in technology.[14] In 2009, the ABA recognized this development and created the Commission on Ethics 20/20 ("Commission") to study the impact of technology and globalization on the legal profession.[15]

In May 2011, the Commission made its initial draft proposal of Comment 8.[16] It stated that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[17] In September 2011, the Commission revised its proposal to "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 technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[18] The Commission released the revised proposal for comment on September 19, 2011.[19] However, in 2012, the ABA adopted the

(1984).

9. *Id.*

10. *Id.*

11. *Id.*

12. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

13. *Id.*

14. Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to ABA Entities, Cts., Bar Ass'ns (state, loc., specialty, and int'l), L. Schools, and Individuals (Dec. 28, 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.pdf [https://perma.cc/F2S8-REY6] [hereinafter 20/20 Memorandum].

15. *Id.*

16. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N, Proposed Official Draft 2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_outsourcing.pdf [https://perma.cc/N3YX-5CX9].

17. *Id.*

18. MODEL RULES OF PRO. CONDUCT r. 1.0 (AM. BAR ASS'N, Proposed Official Revision 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_confidentiality_revised_resolution_and_report_posting.pdf [https://perma.cc/T73H-TRCC] (emphasis added) [hereinafter Rule 1.0 (Proposed Official Revision)].

19. *See Comments*, ABA, https://www.americanbar.org/groups/professional_responsibility/

proposed revised September amendment verbatim without regard to comments from the legal profession at large.[20]

The Commission's proposal for Comment 8 was intended to address, among others, the following developments: (1) legal advice and information about legal services are increasingly communicated through electronic media, and (2) client confidences are no longer kept just in file cabinets, but on laptops, smart phones, tablets, and in the cloud.[21] The Commission concluded that the addition of the phrase "including the benefits and risks associated with technology" would offer greater clarity regarding a lawyer's obligations in this area and emphasize the importance of technology to modern law practice.[22]

In 2017, the ABA adopted a revised Model Rule for Minimum Continuing Legal Education ("MCLE") in which lawyers must earn credit hours in an average of at least one credit hour per year in ethics and professionalism programming.[23] The ABA has accredited programs that address law practice and technology to qualify for ethics and professionalism programming requirements.[24] The ABA noted that such programming will assist lawyers in satisfying Rule 1.1's technology component.[25] The revised MCLE requirements reinforce the idea that the duty of technological competence is continuing, and training is important.[26] Comment 8, together with the revised MCLE requirements, impose an ongoing open-ended obligation to follow changes in technology.

The ABA Model Rules are not binding, however, and state supreme

committees_commissions/standingcommitteeonprofessionalism2/resources/ethics2020hompeage/comments/ [https://perma.cc/FA6K-3L69].

20. Technology Working Group, *Comments*, ABA, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111128-technology_confidentiality_revised_proposal_comments_all.pdf [https://perma.cc/C6JQ-JDU5] (demonstrating arguments that adding the requirement may be problematic and may invertedly ask more of lawyers than they can – or should have to – deliver and that the proposed amendment appears unnecessary because the Commission gives no specific guidance to practitioners on the level of knowledge required).

21. 20/20 Memorandum, *supra* note 14, at 2, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.pdf [https://perma.cc/C83R-98YW].

22. Rule 1.0 (Proposed Official Revision), *supra* note 18 at 3.

23. MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUC. (AM. BAR ASS'N 2017), https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.pdf [https://perma.cc/M6E4-E6FU] (defining ethics and professionalism programming as CLE programming that addresses standards with which a lawyer must comply to remain authorized to practice law) [hereinafter MCLE].

24. *ABA MCLE Model Rule Implementation Resources*, ABA, https://www.americanbar.org/events-cle/mcle/modelrule/ [https://perma.cc/3DMJ-MJBP].

25. MCLE, *supra* note 23, at 4.

26. Ivy Grey, *How to Meet the Duty of Technology Competence*, LAW TECH. TODAY, (June 29, 2017), https://www.lawtechnologytoday.org/2017/06/technology-competence/ [https://perma.cc/9GFD-PBQK].

courts or legislative committees are tasked with promulgating ethical standards and formulating their own rules governing the practice of law in their respective jurisdictions. As of February 2022, thirty-nine jurisdictions have adopted a statement on technological competence.[27]

B. Defining Competence Generally

Competent representation requires the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[28] Lawyers must be vigilant in protecting the public against lawyers who represent themselves to be competent and skillful but neglect matters entrusted to them.[29] While a lawyer has a duty to execute the business entrusted to him or her with a reasonable degree of care, skill, and dispatch, mere negligence, or mistake in the performance of an attorney's duty is generally insufficient to warrant disbarment.[30] It is, nevertheless, a ground for disciplinary action that an attorney be culpably or grossly careless and negligent as to the client's interests.[31]

C. Defining Technological Competence

Competence is "the mental ability to understand problems and make decisions."[32] Moreover, technology is "modern equipment, machines, and methods based on contemporary knowledge of science and computers."[33] When taken in conjunction, technological competence can be defined as "the mental ability to understand problems and make decisions in regard to modern equipment, machines, and methods based on contemporary knowledge of science and computers."

In *Disciplinary Counsel v. Valenti*, the Supreme Court of Ohio found a lawyer, Valenti, technologically incompetent in filing pleadings with the court after deadlines had passed, scheduling a deposition the same day as a court hearing, and failing to notify the court or her client of the scheduling conflict.[34] The board recommended Valenti's suspension for six months, with the suspension stayed on condition, including a

27. Robert Ambrogi, *Tech Competence*, LAWSITES, https://www.lawnext.com/tech-competence [https://perma.cc/N9K9-TTJR] (tracking the states who have adopted the duty of technological competence); *see infra* pp. 12-16.

28. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

29. 3 M.L.E. Attorney and Client § 36.

30. *Id.*

31. *Id.* (finding that a failure to appear for a trial, for example, constitutes incompetent representation).

32. *Competency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

33. *Technology*, BLACK'S LAW DICTIONARY (11th ed. 2019).

34. Disciplinary Couns. v. Valenti, 175 N.E.3d 520, 523 (Ohio 2021).

requirement that she complete six hours of continuing legal education in law-office management with a focus on calendar management and law-office technology.[35]

The Supreme Court of Ohio in *Valenti* seems to define a lack of technological competence without regard to modern equipment, machines, and methods based on contemporary knowledge of science and computers. For example, scheduling conflicts and calendar management are aspects of the legal profession that need not be dictated by modern technology. Several lawyers still resort to handwritten calendaring, in contrast to calendar management software. Some commentators even argue that handwritten calendars ensure a better decision-making process, personalization, and provide cognitive benefits.[36] Nevertheless, an apparent discrepancy exists in defining technological competence.

D. Defining Relevant Technology

In its August 2012 report to the ABA House of Delegates ("2012 Report"), the Commission recognized that, "in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology."[37] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document."[38] Since the 2012 Report, courts have been left with a great deal of uncertainty as to what constitutes "relevant technology." Listed below are a few examples of the areas where courts have imposed a duty of technological competence.

1. Electronic Filing

The Supreme Court of Kansas, in *In re Harris*, found that a lawyer failed to competently represent his client by failing to electronically file bankruptcy pleadings.[39] Pursuant to a rule change, the United States Bankruptcy Court required that all pleadings be filed electronically.[40] The lawyer attempted to file a bankruptcy case using paper pleadings rather

35. *Id.*

36. *See* Max Lukominskyi, *Why Paper Planners Still Matter in the Age of Digital Calendars*, EVOPAPER (Sept. 22, 2017), https://evopaper.com/why-paper-planners-still-matter-in-the-age-of-digital-calendars/ [https://perma.cc/C9F5-N3K6].

37. Patricia A. Sallen, *Technology Competence: New Wine in an Old Ethical Bottle*, 42 L. PRAC. 34, 36– 37 (2016) (emphasis added).

38. *Id.* at 37.

39. In re Harris, 180 P.3d 558 (Kan. 2008), *reinstatement granted*, 224 P.3d 1158 (Kan. 2010).

40. *Id.* at 560.

than electronic pleadings.[41] The court noted that the lawyer failed to competently represent his client when he failed to electronically file the bankruptcy petition under KRPC 1.1, Kansas' competency rule which mirrors the language found in ABA Model Rule 1.1.[42] In failing to competently represent his client, the court ordered the lawyer to a three-month suspension from the practice of law.[43]

2. Case Management Systems

The Supreme Court of Missouri, in *Johnson v. McCullough*, held that in light of advances in technology allowing greater access to information that can inform a court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage.[44] Further, the court held that until a Supreme Court rule can be promulgated to provide specific direction, a party must use reasonable efforts to examine the litigation history on Missouri's online case management system of those jurors selected but not empaneled and present to the trial court any relevant information prior to trial.[45] Thus, the Supreme Court of Missouri imposed a duty to search the state's online case management system.

3. Online Legal Research

The District Court of Appeal of Florida, Second Circuit, in *Hagopian v. Justice Administrative Commission*, noted that lawyers have also become expected to use computer-assisted legal research to ensure that their research is complete and up to date.[46] Further, computer-assisted legal research has become recognized as a standard research technique among judges, lawyers, and law students.[47] However, the United States Court of Appeals for the Eighth Circuit, in *Badasa v. Mukasey*, remanded a case to the Board of Immigration Appeals because the Immigration Judge based his decision on Wikipedia.[48] The Eighth Circuit reasoned that due to Wikipedia's openness in allowing anyone to edit its pages, it was "not a sufficiently reliable source on which to rest the determination that

41. *Id.*
42. *Id.*
43. *Id.* at 564.
44. Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010).
45. *Id.*
46. Hagopian v. Just. Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009).
47. *Id.*
48. Badasa v. Mukasey, 540 F.3d 909, 910 (8th Cir. 2008).

an alien alleging a risk of future persecution is not entitled to asylum."[49] There are, however, a number of websites that the courts accept as holding reliable information. The U.S. District Court for the Eastern District of Louisiana, in *U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co.*, held that "public records and government documents are generally considered not to be subject to reasonable dispute, and this includes public records and government documents available from reliable sources on the internet."[50]

4. Discovery

Making discovery disclosures in an Electronically Stored Information ("ESI") format is now common in both civil and criminal litigation.[51] In this "digital age," lawyers are expected to have basic competency in working with digital evidence and understand how ESI is created, stored, and retrieved.[52] Indeed, the State Bar of California issued an ethics opinion finding that competency for litigators includes "at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored evidence."[53]

The Court of Chancery of Delaware, in *James v. National Financial, LLC*, held that professed technological incompetence is not an excuse for discovery misconduct.[54] There, the lawyer violated two discovery orders by producing inaccurate information.[55] The lawyer knew the specific information that he was obliged to produce but in exporting the information from a software system, the lawyer chose not to select all the required fields on the spreadsheet.[56] Delaware's legislature previously adopted their own parallel to Comment 8 of ABA Model Rule 1.1, and the court found the lawyer in violation of the rule.[57] Further, the court held that if a lawyer cannot master the technology suitable for that lawyer's

49. *Id.*

50. U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co., Civ. Action No. 03-1605, 2004 WL 2347559, at *1 (E.D. La. Oct. 18, 2004).

51. United States v. Montague, No. 14-CR-6136-FPG-JWF, 2016 WL 11621620, at *1 (W.D.N.Y. May 17, 2016) (finding that where discovery is complex and voluminous - i.e. thousands of pages of documents and video tapes containing many hours of video surveillance and several hundred hours of digital recordings of telephone conversations - courts have imposed on the government the obligation to organize and disclose discovery materials in a process and format that permits defense counsel to effectively review ESI material and prepare for trial in an efficient and productive manner).

52. *Id.* at *3.

53. *Id.* (citing State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion 2015-193).

54. James v. Nat'l Fin. LLC, No. CV 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014).

55. *Id.* at *12.

56. *Id.* at *10.

57. *Id.* at *12.

practice, the lawyer should either hire tech-savvy lawyers tasked with the responsibility to keep current, or hire an outside technology consultant who understands the practice of law and associated ethical constraints.[58] Similar to hiring an expert witness to help a jury make sense of the factual evidence of a case, the Court of Chancery of Delaware suggested that lawyers hire an outside technology consultant to help a lawyer make sense of the ethical constraints imposed by modern technology.

5. Social Media

Social media sites that allow parties to share information online create numerous ethical issues for lawyers.[59] Lawyers are expected to carefully consider both the relevant ethical rules and how the anticipated posting can impact their professional reputations and careers.[60] For example, bar disciplinary authorities suspended an Illinois lawyer for five months after he used YouTube and Facebook to post a video of an undercover sting where his client had purchased drugs.[61] The lawyer believed the video showed police planting evidence, and he titled the post "Cops and Task Force Planting Drugs."[62] After the prosecutor suggested that the lawyer carefully review the video, the lawyer admitted that it showed the client had provided drugs and advised her to accept the plea.[63] The client suffered adverse consequences as a result, including damage to her reputation and loss of friends.[64] While the client's informed consent might have made the posting permissible, in this particular case, the lawyer did not adequately disclose and explain the risks and consequences of the posting.[65]

Similarly, a Florida public defender was disciplined for making an off-the-cuff comment about a client in a Facebook post.[66] Unlike the Illinois

58. *Id.* (citing Judith L. Maute, *Facing 21st Century Realities*, 32 MISS. C.L. REV. 345, 369 (2013)).

59. Nicole Iannarone, *What Every Attorney Should Know About Technology in Practice*, 26 PIABA B.J. 59, 65 (2019).

60. *Id.*

61. Debra Cassens Weiss, *Lawyer Suspended for Posting Video of Undercover Drug Buy in Mistaken Belief it Exonerated Client*, ABA J. (Mar. 19, 2014, 4:45 PM), https://www.abajournal.com/news/article/lawyer_suspended_for_posting_video_of_undercover_drug_buy_in_mistaken_belie/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email [https://perma.cc/JVH6-ARJT].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Martha Neil, *Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result*, ABA J. (Sept. 13, 2012, 9:19 PM), https://www.abajournal.com/news/article/lawyer_puts_photo_of_clients_leopard-print_undies_on_facebook_murder_mistri [https://perma.cc/VQ7A-QJXY].

case, the posting did not go to the substance of the legal matter, but it nevertheless constituted a confidentiality violation, caused a mistrial, and resulted in her firing.[67] The offending post was a photo of the leopard-printed underwear her client's family brought for him to wear during court, with a caption making fun of its appropriateness as courtroom attire.[68] The use of social media is tangential to the legal practice and yet the courts have imposed a duty of technological competence in the use of it.

6. Metadata

Metadata is "secondary data that organize, manage, and facilitate the use and understanding of primary data."[69] For example, metadata saved in a word-processing document often reports the author's name and initials, the name of the company or organization where the document was created, any revisions to the original text, any digital comments made on the document, document versions, and hidden text.[70] In addition to the possibility of waiving the attorney-client privilege and work-product protections, lawyers who inadvertently disclose client information contained in metadata may violate state ethical rules.[71] Moreover, lawyers choosing to affirmatively mine communications received from opposing parties for confidential information contained in the metadata may similarly subject themselves to sanctions for violating state ethical rules.[72]

E. State Adoption of Comment 8

Of course, the Model Rules are just that—a model.[73] They provide guidance to the states in formulating their own rules of professional conduct.[74] Each state is free to adopt, reject, ignore, or modify the Model Rules.[75] As of February 2022, thirty-nine jurisdictions have adopted a statement on technological competence.[76] However, lawyers in states that

67. *Id.*

68. *Id.*

69. *Metadata*, BLACK'S LAW DICTIONARY (11th ed. 2019).

70. Adam K. Israel, *To Scrub or Not to Scrub: The Ethical Implications of Metadata and Electronic Data Creation*, Exchange, and Discovery, 60 ALA. L. REV. 469, 469–70 (2009).

71. *Id.* at 483–84.

72. *Id.*

73. Robert Ambrogi, *Tech Competence*, LAWSITES, https://www.lawnext.com/tech-competence [https://perma.cc/N9K9-TTJR] (tracking the states who have adopted the duty of technological competence).

74. *Id.*

75. *Id.*

76. *Id.*

have not yet adopted Comment 8 concerning technological competence are not exempt from the duty.[77] The drafters of the change noted that the comment merely provides additional information explaining the parameters of a duty already part of the competence rule.[78] Thus, all lawyers should assume that technological competence is one of the duties they owe their clients as part of the broader duty of competence.[79]

State adoption of Comment 8 can be viewed in three classes. Subsection 1 will examine the states that have refused to adopt Comment 8 language. Subsection 2 will examine the states that have adopted Comment 8 verbatim. Finally, Subsection 3 will examine the states that have adopted a modified version of Comment 8.

1. State Refusal to Adopt ABA Comment 8 Language[80]

Georgia and Washington D.C. are among the minority of states that have refused to adopt Comment 8's language regarding technological competence. Georgia's Comment 8 reads: "a lawyer should engage in continuing study and education."[81] Similarly, Washington D.C.'s competency rule reads: "a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence."[82] The Washington D.C. committee tasked with reviewing the duty of technological competence explained their reasoning for refusal by stating concern about selectively listing a specific skill, such as technology.[83]

2. State Adoption of ABA Comment 8 Language Verbatim[84]

On the other hand, Ohio is among the several states who have adopted

77. Iannarone, *supra* note 58, at 62.

78. *Id.*

79. *Id.*

80. *See* Robert Ambrogi, *Tech Competence*, LAWSITES, https://www.lawnext.com/tech-competence [https://perma.cc/N9K9-TTJR] (noting the following states who have refused to adopt Comment 8 language: Alabama, Washington D.C., Georgia, Hawaii, Maine, Maryland, Mississippi, Nevada, New Jersey, Oregon, Rhode Island, and South Dakota).

81. *State Bar Handbook*, STATE BAR GA., https://www.gabar.org/Handbook/index.cfm#handbook/rule79 (last visited Dec. 3, 2021).

82. D.C. RULES OF PRO. CONDUCT r 1.1, https://www.dcbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Client-Lawyer-Relationship/Competence [https://perma.cc/YF7N-GNC4**].**

83. Bob Ambrogi, *D.C. Bar Mulls Rules Changes Governing Technology Competence, Data Storage*, LAWSITES (May 30, 2019), https://www.lawsitesblog.com/2019/05/d-c-bar-mulls-rules-changes-governing-technology-competence-data-storage.html [https://perma.cc/D8AE-C6DK].

84. *See* Ambrogi, *supra* note 80 (noting the following states who have adopted Comment 8 language verbatim: Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico,

the ABA language verbatim. Ohio's Comment 8 to Rule 1.1 reads: "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 education requirements to which the lawyer is subject."[85]

One state—Delaware—adopted Comment 8 entirely and expanded it further by forming a Commission of Law and Technology.[86] The purpose of the Commission is to provide lawyers with "sufficient guidance and education in the aspects of technology and the practice of law to facilitate compliance with the newly adopted duty of technological competence."[87] Delaware's approach recognizes the lack of specific guidance provided by the original Comment 8 and sets up a system in which the duty of technological competence can be actively promoted among lawyers.

New Hampshire adopted the ABA's Comment 8 verbatim but included the following ethics committee comment: "the broad requirement of Comment 8 may be read to assume more time and resources than will typically be available to many lawyers."[88] The committee noted that realistically, a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer and by lawyers similarly situated.[89] New Hampshire softens the requirement by recognizing practical limitations.

3. State Modification of ABA Comment 8 Language[90]

New York adopted a modified version of the ABA's Comment 8. New York's Comment 8 reads: "lawyer[s] should…keep abreast of the benefits and risks associated with technology the lawyer uses to provide services

North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming).

85. OHIO RULES OF PRO. CONDUCT (2020), https://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf [https://perma.cc/26ZH-QBNR].

86. *See Commission on Law & Technology*, DEL. CTS, https://courts.delaware.gov/declt/ [https://perma.cc/PH2Z-EE7N] ("The Commission was created by Order of the Supreme Court on July 1, 2013" to "develop and publish guidelines and best practices regarding the use of technology and the practice of law").

87. *Delaware Supreme Court Creates New Arm of Court – Commission on Law and Technology*, DEL. CTS (July 5, 2013), https://www.courts.delaware.gov/forms/download.aspx?id=69618 [https://perma.cc/JHP8-NZEA].

88. N.H. RULES OF PRO. CONDUCT r 1.1 cmt. 8, https://www.courts.nh.gov/new-hampshire-rules-professional-conduct [https://perma.cc/F7MH-GCXV].

89. *Id*.

90. *See* Ambrogi, *supra* note 80 (noting the following states who have adopted modified Comment 8 language: California, Colorado, Massachusetts, Michigan, Montana, New York, North Carolina, South Carolina, Texas, Virginia, and West Virginia).

to clients or to store or transmit confidential information…."[91] New York's approach specifies particular circumstances in which the lawyer is obligated to be technologically competent, putting the attorney on notice that they need to be competent in technologies such as cloud storage or encrypted email systems.

West Virginia imposed a stronger ethical duty than the ABA in their modified version of ABA's Comment 8. West Virginia's Comment 8 reads: "[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…."[92] This is to be read in contrast to the ABA's Comment 8 which reads: "a lawyer should keep abreast of changes."[93]

North Carolina adopted a modified version of the ABA's Comment 8 that is more aligned with a lawyer's specialized field. North Carolina's Comment 8 reads: "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice…."[94]

III. DISCUSSION

This Section will argue that, since the language of Comment 8 seems to impose an obligation on lawyers to do something that they aren't necessarily professionally trained to do, it could subject lawyers to career-ending discipline for conduct they have never had reason to encounter in practice. This is, in part, due to the fast-paced nature of technology. First, Part A of this Section will assess the future viability of Comment 8 in connection with advancements in technology. Next, Part B will discuss the plain language interpretation of Comment 8. Finally, Part C will evaluate the first option of amending Comment 8, while Part D will evaluate the second option of deleting the offending language in Comment 8. This Section will conclude by urging the ABA to delete the offending portion of Comment 8 and require accompanying technology-based CLE credits.

91. N.Y. RULES OF PRO. CONDUCT r 1.1 cmt. 8 (2020), https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf [https://perma.cc/DES7-TLNJ].

92. W. VA. RULES OF PRO. CONDUCT r 1.1 cmt. 8, http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule1.html#rule1.1 [https://perma.cc/X5MT-2V9S].

93. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020).

94. N.C. RULES OF PRO. CONDUCT r 1.1 cmt. 8, https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-11-competence/ [https://perma.cc/TY2Q-6B9V].

A. Future Viability of Comment 8

Decision tree analysis and artificial intelligence ("AI") are two emerging technologies that lawyers have begun to implement in their practice. A decision tree is a decision-making model that considers a client's options and the possible outcomes of anticipated events and attempts to predict a client's best course of action.[95] The quantitative model allows a lawyer to plug in a number of variables to arrive at this best course of action.[96] Variables can include considerations such as whether a motion to dismiss or for summary judgment is likely to be granted, whether additional damages such as consequential or punitive damages may be imposed, whether a key piece of evidence will be admissible at trial, and whether a particular witness will cooperate with your side.[97] Decision tree analysis software can be extremely costly for firms to implement. Additionally, while decision trees can be very useful, they produce educated guesses—they are not a crystal ball which will foretell the outcome of a client's case.[98] A lawyer may develop a decision tree which overwhelmingly predicts odds in their client's favor; yet, the lawyer may still lose the case.[99] This is because legal decision-making can be subjective, based on the particular judge in the case or new facts and circumstances in a case not present in existing cases. Further, a lawyer's decision tree may inform a client that their best decision is easily not to sue, but the client may insist on pressing forward.[100]

Lawyers use AI for a number of tasks, including electronic discovery, legal research, drafting, contract management, and litigation strategy.[101] Some have argued that as the quality of work product created by lawyers augmented with AI surpasses the work created without AI, lawyers will soon have a professional responsibility to employ new techniques.[102] They have also argued that where AI and data can provide empirical, objective answers to questions, it may no longer be ethical for law firms to employ conjecture (at best) or hunches (at worst) in

95. David M. Madden, *To Sue or Not to Sue: A Hypothetical Case Study in the Use of Decision Trees in Developing Litigation Strategy*, 20 DCBA BRIEF 16 (2007).

96. Robert L. Haig, 2 N.Y. PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 6:34 (5th ed. 2021).

97. *Id.*

98. Madden, *supra* note 95, at 16.

99. *Id.*

100. *Id.*

101. Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 GA. ST. U. L. REV. 1073, 1073 (2019).

102. *Id.* at 1076 (emphasis added).

delivering legal services to clients.[103] The ABA Model Rules increasingly may require the use of AI.[104] However, the use of AI in a number of areas, including discovery and jury selection, implicates various ethical issues for lawyers.[105]

The rapid advancement in technology has created beneficial tools but also generated unique problems for legal professionals.[106] Due to the ubiquitous nature of technology, more and more areas of legal practice are affected by modern tools of communication, information storage, and information dissemination.[107] In its 2012 report, the ABA Commission on Ethics 20/20 noted that technology has irrevocably changed and continues to alter the practice of law.[108] Given the open-ended standard in Comment 8, courts have the potential to expand what is considered "relevant technology" to include areas such as decision tree analysis and artificial intelligence. However, these areas, in turn, raise their own ethical issues.

B. Plain Language Interpretation of Comment 8

The customary practice in any legal analysis is to start with the plain language of the text.[109] Rule 1.1 expresses that a lawyer "shall provide competent representation."[110] The term "shall" mandates a duty to provide competent representation. Once a lawyer agrees to take on a client, they must provide competent representation. Contrast that with the term "should," which denotes a recommendation or that which is advised but not required. Further, competent representation requires the "legal knowledge, skill, thoroughness, and preparation."[111] Comment 5 to Rule 1.1 expresses that thoroughness and preparation are attained through the "use of methods and procedures meeting the standards of competent

103. *Id.* at 1092.

104. *Id.*

105. Thomas E. Spahn, *Artificial Intelligence: Litigation-Specific Ethics Issues (Part 1)*, PRAC. LAW. 43, 43–44 (April 2018) (finding ethics issue of deceit in discovery where parties don't anticipate or consent to deponent's speech patterns being calibrated and analyzed on a basis propounded for software; also finding ethics issue of proprietary information in jury selection where lawyers research into jurors' social media).

106. Katy (Yin Yee) Ho, Note, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853, 853 (2017).

107. *Id.*

108. *ABA Commission on Ethics 20/20*, ABA (Aug. 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf [https://perma.cc/53S5-JN4U].

109. Christina Gomez, *Canons of Statutory Construction*, 46 COLO. LAW. 23, 23 (2017) (noting that words should be given their ordinary, common meaning).

110. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

111. *Id.*

University of Cincinnati Law Review, Vol. 90, Iss. 4 [2022], Art. 9

practitioners."[112] Comment 8 to Rule 1.1 expresses that "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."[113] Comment 8's omittance of Rule 1.1's thoroughness and preparation requirements, together with the differing affirmative obligations, suggests that the ABA intended for any duty of technological competence suggested by Comment 8 to be precatory rather than mandatory.[114]

C. Option #1: Amendment of Comment 8

Lawyers cannot fulfill their duty of technological competence if they do not know exactly what it entails. The mere recitation of a requirement of technological competence does not provide guidance as to the scope of the duty. Thus, the ABA, both as a rulemaking and a normative matter, should define the contours of the ethical duty by providing specific guidance for lawyers to help define this duty and its scope.

The ABA could amend Comment 8 to reflect the position adopted by North Carolina to state: "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice…."[115] This standard would allow lawyers to be less apprehensive about complying with technological acumen but also necessitates a duty to run concurrent with their own practice. It follows that such a requirement to keep abreast with changes in their practice would hold a cybersecurity lawyer to a different technological standard than an immigration lawyer.

Alternatively, the ABA could amend Comment 8 to reflect the position adopted by New York to state: "lawyer[s] should…keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information…."[116] This standard would also provide more specific guidance for lawyers.

Although the modified versions adopted by both North Carolina and New York should be commended for attempting to make strides toward a more defined standard, both remain overbroad and do not consider the fast-paced nature of technology. Relevant technologies will continue to

112. *Id.* at cmt. 5.

113. *Id.* at cmt. 8.

114. *See § 1.1:3 Phrase-by-phrase analysis*, SIMON'S NY RULES OF PROF. CONDUCT (2021) (finding New York's Rule 1.1 merely symbolic because it says "should" instead of "shall").

115. N.C. RULES OF PRO. CONDUCT r. 1.1 cmt. 8, https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-11-competence/ [https://perma.cc/TY2Q-6B9V].

116. N.Y. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (2020), https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf [https://perma.cc/DES7-TLNJ].

transform, and the language adopted by North Carolina and New York has the potential for states to broadly define the term, subjecting lawyers to discipline for conduct they haven't ever encountered in practice based on the fast-paced nature of technology.

D. Option #2: Deletion of Offending Language

This Section will argue that the ABA should delete the offending portion of Comment 8 that reads "including the benefits and risks associated with relevant technology" and impose accompanying technology-based education requirements. Given that neither the ABA nor the majority of states have provided lawyers with guidance to interpret the competence requirement, states that wish to mandate extensive new burdens for lawyers could cite Comment 8's language for support. This inherently contradicts the ABA's intent but which the language it adopted seems to permit. In its revised proposal of Comment 8, the Commission concluded that the addition of the phrase "including the benefits and risks associated with technology" would offer greater clarity regarding a lawyer's obligations in this area and emphasize the importance of technology to modern law practice.[117] However, the ABA has failed to offer greater clarity to lawyers and instead has exposed lawyers to potential career-ending discipline.

The argument for deleting the offending portion of Comment 8 is illuminated when examining similar duties imposed in other professional areas. Generally, the standard of reasonable care which applies to the conduct of lawyers is the same as that which applies to engineers, accountants, and doctors.[118] Thus, this Section will analyze the duty of technological competence as it pertains to those non-legal professions.

According to the National Society of Professional Engineers, engineers have a general duty of competence in that they shall perform services only in areas of their competence.[119] Although engineers heavily rely on technology in their occupation, the National Society of Professional Engineers Code of Ethics does not impose an ethical duty of technological competence similar to the duty imposed by Comment 8.[120] The absence

117. MODEL RULES OF PRO. CONDUCT r. 1.0 (AM. BAR ASS'N, Proposed Official Revision 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_confidentiality_revised_resolution_and_report_posting.pdf [https://perma.cc/T73H-TRCC].

118. Vernon J. Rockler & Co. v. Glickman, Isenberg, Lurie & Co., 273 N.W.2d 647, 650 (Minn. 1978) (finding that accountants must exercise the average ability and skill of those engaged in their profession).

119. *NSPE Code of Ethics for Engineers*, NAT'L SOC'Y PRO. ENG'RS (July 2019), https://www.nspe.org/resources/ethics/code-ethics [https://perma.cc/8U2N-42U9].

120. *Id.*

of such a requirement is surprising given technology's importance to the field of engineering.[121] CompTIA's tech workforce analytics demonstrates that engineers are the second leading tech occupation job.[122]

According to the International Ethics Standards Board for Accountants, accountants also do not have an ethical duty of technological competence.[123] The Handbook of the Code of Ethics for Professional Accountants explains that the maintenance of professional competence requires continuing awareness and understanding of relevant technical, professional, and business developments.[124] The handbook does not define the term "technical." However, the terms technical and technological have different meanings. Technical can be defined as "of or relating to a particular subject."[125] Technical aspects of the accounting profession, for example, include analysis of financial statements and budgetary control. The Code of Ethics for Accountants makes no mention of an accountant's duty to keep abreast of the benefits and risks associated with relevant accounting technology. For example, an accountant is not ethically bound to understand or utilize AI in preparing their client's taxes.

Similarly, according to the American Medical Association ("AMA"), doctors have a general obligation to provide competent medical care to patients.[126] The AMA has published two ethics opinions regarding doctors' use of technology. The first Ethics Opinion on Professionalism in the Use of Social Media imposes a duty to weigh a number of considerations when maintaining a presence online.[127] The Ethics Opinion details specific duties regarding social media, including maintaining privacy and confidentiality, considering separate personal and professional content, and recognizing that actions online and content posted may negatively affect their reputations.[128] The second Ethics

121. There is an argument to be made that engineering is a more inherently technological profession than law, and thus a duty of technological competence would be superfluous. Of course, an engineer needs to be technologically competent, but the same doesn't necessarily apply for lawyers. Hence, it follows that the ABA would have more incentive to adopt the language of Comment 8 than the National Society for Professional Engineers.

122. *Cyberstates*, COMPTIA, https://www.cyberstates.org/ [https://perma.cc/5PER-QTRR].

123. *Revised Code of Ethics – Completed*, IESBA, https://www.ethicsboard.org/projects/revised-code-ethics-completed [https://perma.cc/DDC5-6PVY].

124. *Id.*

125. *Technical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/technical?src=search-dict-box [https://perma.cc/F8QN-MRUH].

126. *Code of Medical Ethics Overview*, AMA, https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview [https://perma.cc/L647-DFA2].

127. *Professionalism in the Use of Social Media: Code of Medical Ethics Opinion 2.3.2*, AMA, https://www.ama-assn.org/delivering-care/ethics/professionalism-use-social-media [https://perma.cc/5R3R-Q3JV].

128. *Id.*

Opinion on Ethical Practice in Telemedicine relates to telemedicine and requires that doctors who provide clinical services through telehealth/telemedicine must be proficient in the use of relevant technologies.[129] Thus, according to the AMA Ethics Opinions, a doctor's "duty of technological competence" extends only to two separate areas: (1) doctors who use social media, and (2) doctors who provide healthcare services via telecommunication technologies.

As evidenced, engineers and accountants, professionals that habitually use technology in their respective fields, are not held to an ethical duty of technological competence. On the other hand, doctors are held to a duty of technological competence; however, the duty is imposed only upon doctors who use social media or provide healthcare services via telecommunication technologies. This requirement is well-reasoned because telehealth doctors, whose sole practice is conducted virtually, should be required to have a higher level of technological competence.

An analysis of the case law pertaining to a lawyer's duty of technological competence demonstrates that, prior to the ABA's adoption of Comment 8, courts were already equipped to impose sanctions on lawyers who lacked the requisite technological competence under Rule 1.1, the general duty of competent representation.[130] Thus, courts have an existing avenue in which they can hold lawyers incompetent with respect to technology.

Nevertheless, the importance of technology in the legal profession should not be dismissed. It is not a recent phenomenon that lawyers lag behind their clients, the general population, and even other professions in adopting new technology.[131] However, technologies offer many benefits that can help increase efficiency, minimize mistakes, and decrease labor costs in legal practice.[132] By decreasing labor costs, technology can help address the significant gap in access to legal services.[133] By increasing efficiency through technology, firms can pass savings on to clients. Disadvantaged individuals have often been excluded from legal services because of their inability to pay hourly billable rates. Thus, increasing

129. *Ethical Practice in Telemedicine: Code of Medical Ethics Opinion 1.2.12*, AMA, https://www.ama-assn.org/delivering-care/ethics/ethical-practice-telemedicine [https://perma.cc/MDH7-VWJY].

130. *See, e.g.*, Att'y Grievance Comm'n of Maryland v. Fox, 417 Md. 504 (2010) (finding Rule 1.1 violation in lawyer's lack of thoroughness and preparation evidenced in ineffective case management system and that lawyer's replacing of manual calendar and case tracking system with a computerized system would be considered as mitigation).

131. Mark Britton, *Behind Stables and Saloons: The Legal Profession's Race to the Back of the Technological Pack*, FLA. B.J. 34, 35 (2016).

132. Kristin L. Yokomoto, *Ethical Duty of Technology Competence*, 61 ORANGE CNTY. LAWYER 66, 66 (2019).

133. Britton, *supra* note 131, at 34–35.

efficiency can help introduce more clients to available legal resources.

Legal education has also recognized the importance of technology. Law schools have started offering courses that specifically teach students about practice-related technologies.[134] This is a way in which legal education acknowledges that the profession is changing. The same big-data techniques that found their way into school curricula a decade ago are starting to appear in law schools as well.

From a client's perspective, legal services may feel like a black box: a client often has little visibility into, or control over, what a lawyer does.[135] Clients just know that they might pay a lot to further their desired legal outcome.[136] Clients may pay for an associate to spend days on a legal research question that might have taken hours due to a lack of technological competence. Today's clients are being conditioned to consume goods and services online in new ways, and it is incumbent on lawyers to understand how to adapt those ideas into their practices.[137] In today's ultra-competitive and fast-paced society, increased billable hours and heightened client expectations dominate the practice of law.[138] For most lawyers, that leaves little time for much else.[139] Many firms do not have the resources or appetite to stay up to date with the latest technology news, security threats, or constant changes that impact their business.[140] Arguably, without technology, lawyers are simply not going to be able to stay competitive.

The legal practice has shifted from a time where lawyers primarily utilized air mail to send correspondence to a modern practice where lawyers verbally dictate correspondence to their cell phones, which utilize an AI system to send out their message via electronic communications. According to technology adoption statistics, as of January 2021, the rate of internet use in the world stands at almost 60%.[141] Compared to the first quarter of 2020, that rate has increased by 7%.[142] Worldwide, only 37% of organizations have incorporated AI into their business.[143] However, by 2025, AI is expected to replace around 85 million jobs in the United

134. *See* John Mayer, *Syllabi Commons*, TEACHING TECH. TO L. STUDENTS SPECIAL INT. GRP., https://techforlawstudents.classcaster.net/syllabi-commons/ [https://perma.cc/2VCR-JFNU] (Sept. 14, 2021); *see also* Katrina June Lee, *A Call for Law Schools to Link the Curricular Trends of Legal Tech and Mindfulness*, 48 U. TOL. L. REV. 55, 68–73 (2016).

135. Britton, *supra* note 130, at 34.

136. *Id.*

137. Walters, *supra* note 101, at 1075.

138. Matt LaMaster, *Seven Common Technology Mistakes by Law Firms*, 93 MICH. B.J. 50 (2014).

139. *Id.*

140. *Id.*

141. Jacquelyn Bulao, *How Fast is Technology Advancing in 2021?*, TECHJURY (Nov. 1, 2021), https://techjury.net/blog/how-fast-is-technology-growing/#gref [https://perma.cc/VT3W-LZEM].

142. *Id.*

143. *Id.*

States.[144] Due to the fast-paced nature of technology, Comment 8's ethical obligation to have a basic awareness and understanding of these technologies could subject lawyers to discipline.

A lawyer's duty to be informed about technologies should not be entirely diminished. The primary method of keeping lawyers up to date in their legal knowledge and skills is continuing legal education ("CLE").[145] Courses and seminars are offered in a wide variety of specialties, which are designed to fulfill bar association requirements that lawyers take a certain number of hours of classes per year.[146] Bar associations consider CLE requirements to be crucial portions of legal training and have frequently recommended the discipline of noncomplying lawyers.[147] A number of courts have considered under what circumstances discipline is appropriate for a failure to comply with CLE requirements.[148] Some courts find that reprimand is appropriate, others determine that a fine should be paid, and still others impose a suspension of the erring lawyer.[149] Requiring lawyers to complete a certain number of technology-based CLE requirements per year would allow lawyers to remain technologically competent while not imposing an *ethical* obligation, given that technology is so fast-paced and evolving.

Critics often label CLE offerings as unnecessary, inconvenient, or possessing limited value to many lawyers.[150] Mandatory CLE is attacked as mere window dressing, designed only to give the external appearance of genuine concern for the quality of legal services.[151] Furthermore, critics argue that a lawyer's obligation to improve his or her competence is an obligation to assist others, not to benefit themselves.[152] However, mandating technology-based CLE requirements would allow for lawyers to become familiar with modern technologies, often accompanied by the implementation of practices that lead to streamlined legal services. This increased efficiency would allow firms to pass savings on to clients. Additionally, by familiarizing themselves with modern technologies, lawyers would inherently strengthen their ability to assist clients.

In addition to mandating technology-based CLE requirements, state authorities should also consider forming commissions similar to

144. *Id.*

145. *Discipline of Attorney for Failure to Comply with Continuing Legal Education Requirements*, 96 A.L.R.5th 23 (Originally published in 2002).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Randall T. Shepard, *The "L" in "CLE" Stands for "Legal"*, 40 VAL. U. L. REV. 311, 311–312 (2006).

151. *Id.*

152. *Id.* at 324.

Delaware's Commission of Law and Technology to provide lawyers with sufficient guidance and education in aspects of technology and the practice of the law.

In essence, the ABA can still successfully afford disciplinary authorities with a proper avenue for imposing sanctions related to technological competence if it chooses to delete the portion of Comment 8 that reads: "including the benefits and risks associated with relevant technology."[153] This can be accomplished by imposing accompanying CLE credit requirements that pertain to technologies frequently used in legal practice. This allows for the Rule 1.1 general duty of competence to remain while simultaneously recognizing that technology quickly evolves as should a lawyer's understanding of those technologies. Further, deleting Comment 8's offending language would alleviate lawyers' concern of violating such a broad standard.

IV. CONCLUSION

In 2012, the ABA recognized a rise in technology use and amended Comment 8 to Rule 1.1—the duty of competency—to impose an obligation for lawyers to "keep abreast of the benefits and risks associated with relevant technology." However, neither the ABA nor the majority of states have provided guidance to interpret this requirement. This lack of guidance exposes lawyers to the possibility of courts broadly construing the standard and subjecting them to discipline based on technologies that they have never had reason to encounter, or know that they would encounter, in practice. Thus, the ABA should consider deleting Comment 8's offending portion and instead require technology-based CLE credits to ensure that lawyers remain informed about technologies used in their legal practice. The ABA should balance the need to address challenges brought by technology with the necessity of maintaining flexibility to address future changes in technology.

The age of technological enhancements in the legal profession is only accelerating, and there is reason for healthy skepticism about the impact of new legal technologies on the legal profession. The legal profession must remain optimistic about its technological future and, at the same time, accept the reality that technology will continue to disrupt the profession's status quo.

Lawyers should keep doing what they do best, which is practicing law and zealously advocating for their clients. While doing so, they should continue to educate themselves about technologies in their practice. After all, the purpose of education is to turn mirrors into windows. Although it

153. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020).

is easy for lawyers to see what is happening in the mirror—their own legal practice—gaining an education helps shift lawyers' perspective to what is happening through the window—the use of new technologies in the modern world, which is becoming essential to delivering quality legal services.