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Week of **March 2, 2010**

Are You Committing Technology Malpractice?

My friend and colleague Carolyn Elefant, whose myshingle.com blog is a major resource and voice for solo practitioners, recently made an observation that I found striking. Carolyn stated that in working with solos, she has seen first-hand that too many are behind the technology curve, even to the point of not using email or not keeping electronic files of client records. "If these lawyers want to sell their practices, the value is going to be diminished if a new lawyer has to invest in the IT to get the practice up to speed," Carolyn observed.

There is an even deeper dimension to the way such lawyers diminish the value of their practice - by putting them in danger of a malpractice accusation. One of the Rules of Professional Conduct requires that a lawyer be competent to handle a given matter, measured as the standard of care in the local community. When you face lawyers who are significantly more sophisticated in the use of technology, it defines the standard of care against which you are measured. If you don't use technology effectively for trial support, case management and the like, you may be perceived as willfully less competent than your competitors. And that's malpractice.

It the past I have surveyed law firms regarding their technology practices, and found that while the majority of large law firms upgrade their computers and software every two to three years, many small firms and sole practitioners go as long as six years between upgrades. They cite cost, time to learn and implement the new technologies, and lack of certainty that new technology will increase efficiency and work quality. And this is before the Great Recession has led to more widespread deferral of purchases. None of these reasons will likely protect a firm against a client who alleges that outdated technology contributed to incompetent representation.

The ABA's Model Rule of Professional Conduct 1.1, which deals with lawyer competency, does not include technology as an element in the required standard of care either in the rule itself or in the commentary on it. (Though it used to in years past.) Neither do many state rules. However, I regularly write for the Canadian Bar Association, and the commentary on Chapter 11 of the CBA's Code of Professional Conduct (also dealing with competency) states: "The lawyer should also develop and maintain a facility with advances in technology in areas in which the lawyer practises [sic], to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances." Lawyers in any jurisdiction of the United States would do well to keep that injunction in mind - for the sake of their clients and of their own practices.

Personal Commentary

The Olympic competition has been remarkable. One of the great stories of any such competition is the athletes failure and strife, yet the athletes pick themselves up to continue the competition...and in many cases, go on to reach the highest of medals and rewards for their efforts.

So, too, despite serious economic travails faced by many in our profession during the last three years, it's time to pick ourselves up, brush ourselves off, and move to accept the many opportunities right in front of us. When there is change, there are opportunities. Call me if you have difficulty seeing them and need another perspective.

Best wishes,

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