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## Navigating Technology Competence In Transactional Practice

Lori D. Johnson

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2020]

NAVIGATING TECHNOLOGY COMPETENCE IN  
TRANSACTIONAL PRACTICE

LORI D. JOHNSON\*

ABSTRACT

In 2012, the American Bar Association House of Delegates, based on the work of the ABA Commission on Ethics 20/20, amended the Model Rules of Professional Conduct (Model Rules) to include a new requirement concerning lawyer competence. The obligation, enacted as Comment 8 to existing Model Rule 1.1 (outlining a lawyer's requisite competence) (Rule 1.1), requires lawyers "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." To date, Comment 8 to Rule 1.1 (Comment 8 or the Comment) has been adopted in thirty-eight states, and has begun generating scholarship and debate as to its enforcement, efficacy, and extent. However, very little has been written regarding the requirements of Comment 8 on transactional lawyers. Nor have scholars considered how the increased efficiencies that might be fostered by Comment 8 could increase the marketability and reach of transactional lawyers to traditionally under-represented groups, including entrepreneurs and small businesses. This Article will examine the potential benefits and risks of technology competence in transactional lawyering, provide workable guidelines for compliance in the quickly changing landscapes of legal technology and deal-making, and propose that the ABA provide additional guidance.

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\* Associate Professor of Law, University of Nevada, Las Vegas—William S. Boyd School of Law. The author is indebted to Bob Ambrogi, Ross Guberman, Kevin O'Keefe, Professor Cynthia M. Adams, Professor Youngwoo Ban, the attendees of the 2019 Association of Legal Writing Directors Scholarship Workshop, the attendees of 2019 Sirico Scholars' Workshop, research assistants Elise Conlin and Daniel Brady, and the transactional lawyers who provided helpful insight.

CONTENTS

INTRODUCTION .....	161
I. THE DEVELOPMENT AND ENFORCEMENT OF COMMENT 8 TO RULE 1.1 OF THE MODEL RULES .....	165
A. <i>The ABA Ethics 20/20 Commission and the History of             Comment 8</i> .....	165
B. <i>Adopting Jurisdictions' Approaches to the Enforcement and             Applicability of Rule Comments</i> .....	171
C. <i>Ethical Guidance and Specific Decisions Concerning             Technology Competence</i> .....	174
II. CURRENT LEGAL TECHNOLOGY: PRACTICES, GUIDANCE, AND CHALLENGES .....	178
A. <i>Technology in Litigation Practice</i> .....	179
B. <i>The Unique Position of Transactional Law</i> .....	180
C. <i>Technology in Transactional Practice</i> .....	182
III. RECOMMENDATIONS .....	185
A. <i>Additional CLE Requirements</i> .....	186
B. <i>Potential Revisions to Comment 8</i> .....	186
C. <i>Guidance for Transactional Lawyers</i> .....	187
CONCLUSION .....	188

## INTRODUCTION

IN the 1980s, the aviation industry faced a panic over concerns that increases in airline technology would make the human pilot irrelevant.<sup>1</sup> Pilots worried about job losses<sup>2</sup> as the monitoring capabilities of the Boeing 747-400 eradicated the requirement for an in-flight engineer by 1989, reducing flight crews by one third.<sup>3</sup> Nonetheless, by 1995 employment projections showed airline pilots and flight engineers as the fastest growing sector of the U.S. transportation economy.<sup>4</sup> Fast-forward to today, and airlines are bemoaning pilot shortages the world over.<sup>5</sup> Certainly, today's pilot shortage can be attributed in part to reductions in pay and benefits, but this vignette demonstrates how the often-false specter of "technological unemployment"<sup>6</sup> impacts every industry. The legal industry is not immune.

How has the legal industry responded to growing fears concerning lawyer job loss, automation, and outsourcing? According to scholars studying technology use in the legal profession, certain lawyers have clung to an "old ways are best" mentality,<sup>7</sup> due to their propensity to "seek equilibrium in the status quo and resist change."<sup>8</sup> However, a growing body of scholarship suggests that remaining rooted in their old ways poses dangers for lawyers.<sup>9</sup> This is especially true in a legal landscape where clients and courts expect, and in some cases require, tech-adept practitioners. These concerns have been echoed outside the legal academy by legal technology experts like Bob Ambrogi. Ambrogi has aptly noted that lawyers who

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1. See Len Morgan, *The Job Market: Airline Hiring on the Comeback Trail*, AIRLINE MAGAZINE, July 1984, at 18 (discussing press coverage of pilot job losses and the perceived "bleak outlook" for pilot jobs).

2. *Id.*

3. Nigel Moll, *A Century in Review: The 1980s*, AINONLINE (Aug. 6, 2008, 6:53 AM), <https://www.ainonline.com/aviation-news/aviation-international-news/2008-08-06/century-review-1980s> [https://perma.cc/7YJB-SNN9].

4. See George T. Silvestri & John M. Lukasiewicz, *Occupational Employment Projections: The 1984-95 Outlook*, in BUREAU OF LABOR STATISTICS, EMPLOYMENT PROJECTIONS FOR 1995: DATA AND METHODS 41, 55 (1986).

5. Marisa Garcia, *A 'Perfect Storm' Pilot Shortage Threatens Global Aviation*, FORBES (July 27, 2018, 6:09 AM), <https://www.forbes.com/sites/marisagarcia/2018/07/27/a-perfect-storm-pilot-shortage-threatens-global-aviation-even-private-jets/#34169ecf1549> [https://perma.cc/VS8K-ZFR6].

6. John Maynard Keynes popularized this term in the 1930's, defining it as "unemployment due to our discovery of means of economising the use of labour outrunning the pace at which we can find new uses for labour." John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, in ESSAYS IN PERSUASION 358, 364 (1963).

7. Antigone Peyton, *Kill the Dinosaurs, and Other Tips for Achieving Technical Competence in Your Law Practice*, 21 RICH. J.L. & TECH. 7, \*1 (2015).

8. Michael Simon, Alvin F. Lindsay, Loly Sosa & Paige Comparato, *Lola v. Skadden and the Automation of the Legal Profession*, 20 YALE J.L. & TECH 234, 238 (2018).

9. See, e.g., Peyton, *supra* note 7, at 3.

maintain a Luddite mentality are burying their heads in the sand, rather than drawing lines in it.<sup>10</sup>

For its part, the American Bar Association (ABA) has responded to the rapid advances in legal technology by amending the Model Rules of Professional Conduct (Model Rules)<sup>11</sup> to add a technology competence requirement as Comment 8 (Comment 8 or the Comment) to Model Rule 1.1 (Rule 1.1).<sup>12</sup> The widespread adoption of Comment 8 has been identified by Ambrogi as one of the most important recent developments in the field of legal technology.<sup>13</sup> The question of Comment 8's efficacy in encouraging lawyers to become skilled in relevant technologies<sup>14</sup> remains unanswered, along with related questions concerning adoption and enforcement of Comment 8 nationwide and across various legal practice areas.

Despite the adoption of Comment 8 by a majority of states and an increase in state ethics opinions interpreting it, nowhere does less clarity exist concerning the applicability of Comment 8 than in the realm of transactional lawyering.<sup>15</sup> By analyzing existing enforcement of technol-

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10. Bob Ambrogi, *New ABA Ethics Rule Underscores What EDD Lawyers Should Already Know: There's No Hiding from Technology*, CATALYST REPOSITORY SYS.: E-DISCOVERY SEARCH BLOG (Aug. 16, 2012), <https://catalystsecure.com/blog/2012/08/new-aba-ethics-rule-underscores-what-edd-lawyers-should-already-know-theres-no-hiding-from-technology/> [https://perma.cc/68ZB-RW6B] .

11. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2018) ("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 legal education requirements to which the lawyer is subject." (emphasis added)).

12. Please note that across the thirty-eight jurisdictions that have adopted the Comment, it is occasionally numbered differently. For clarity and ease, the Comment will be referred to as either "Comment 8" where appropriate or "the Comment" when discussed more broadly.

13. Bob Ambrogi, *The 20 Most Important Legal Technology Developments of 2018*, LAW SITES (Dec. 26, 2018), <https://www.lawsitesblog.com/2018/12/20-important-legal-technology-developments-2018.html> [https://perma.cc/UT7X-K2HB] .

14. Please note that this Article, when discussing relevant technologies, intends to focus on technology used in the practice of law (or within the law office setting), to produce, create, enhance, submit, file, transmit, and store lawyer work product. As such, this Article does not intend to focus on the impact of social media on the legal profession, the use (or misuse) of social media by lawyers, nor on issues regarding the unethical misuse of technology (such as unauthorized use of metadata, social media snooping, and the like). To the extent discussion of these issues is relevant to point out the current focus of ABA and state regulators in their discussions of technology use by lawyers, these issues may be mentioned.

15. Scholars of transactional drafting and skills have noted that "with limited exceptions" there are no Model Rules directly on point concerning professional behavior by transactional lawyers. TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 455 (2d ed. 2014). Rather, the Model Rules are typically enforced against transactional lawyers through analogy to litigation-oriented rules. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 7 (AM. BAR ASS'N 2018) (comparing the buy-sell relationship in transactional practice to directly adverse parties in litigation, for purpose of determining conflicts of interest).

ogy competence requirements and associated commentary, this Article endeavors to assist transactional lawyers in adapting to a rapidly changing technological landscape. However, the research shows that a lack of appropriate guidance from the ABA has frustrated the broad purpose of Comment 8, thereby potentially discouraging lawyers from adopting helpful technology, and limiting lawyers' ability to innovate and improve efficiency.

This Article undertakes a deep look at the technology competence requirement through the lens of transactional lawyering, and encourages the ABA to provide more flexible and adaptable guidance to transactional lawyers when navigating the technology competence standard. Particularly, this Article suggests that the technology needs of clients should drive the definition of what constitutes "relevant technology" under Comment 8, and requests that the ABA provide such guidance explicitly in a formal ethics opinion. As Rule 1.1 clearly focuses on the "client" and "representation," guidance surrounding Comment 8 must do the same, and lawyers should be required to become and remain competent in any technology used by, or beneficial to, their clients.

The vignette of the airline pilots demonstrates that technological advances that reduce costs and increase efficiency typically open up services to a broader and more diverse group of consumers. In fact, airlines expect the volume of commercial passengers to double over the next twenty years.<sup>16</sup> Only with the use of the improved airline technologies discussed above would such increases be remotely possible. An increase in the technological efficiency of lawyers, particularly transactional lawyers, could similarly improve access to representation for additional clients, including clients like non-profits,<sup>17</sup> small businesses, and entrepreneurs. These clients tend to exhibit higher cost sensitivity and are therefore less likely to engage counsel as vigorously as more developed businesses.<sup>18</sup>

Further, plenty of room exists for the legal industry to absorb the increases in efficiency that an enhanced, appropriately-enforced technology competence rule would foster. Specifically, a 2017 study on lawyer efficiency by the legal technology company Clio found that the average lawyer working eight hours a day produces only 2.3 hours of billable legal work.<sup>19</sup> The remaining six hours, the study found, were spent on administrative tasks such as "[o]ffice administration, generating and sending bills, configuring technology, and collections."<sup>20</sup> The task of "configuring technol-

16. Garcia, *supra* note 5.

17. See Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 176–77 (2018) (detailing how legal AI services like DoNotPay and Upsolve can provide low or no cost legal services to clients facing relatively simple legal problems).

18. See, e.g., Joan MacLeod Heminway, *Why Can't We Be Friends? A Business Finance Lawyer's Plaintive Plea to Entrepreneurs*, 95 N.C. L. REV. 1459, 1464–66 (2017).

19. CLIO, LEGAL TRENDS REPORT 10–11 (2017).

20. *Id.* at 11–13.

ogy” accounted for 11% of that time.<sup>21</sup> This equates to roughly 40 minutes per day, or 10,000 minutes per year, for the lawyer who works 50 weeks at 8 hours per day. Using even a portion of the 10,000 minutes a lawyer spends struggling with technology could greatly increase the lawyer’s ability to generate additional billable work. This increase in productivity could help drive down billable costs, without sacrificing the lawyer’s bottom line.<sup>22</sup> This enhanced efficiency carries with it the possibility of opening up legal services to traditionally under-represented groups.<sup>23</sup>

While lawyers (and the legal industry more broadly) harbor significant concern that increased technology, particularly the use of artificial intelligence and automation, could instead strip them of the billable hours required to run a successful practice,<sup>24</sup> the vignette of the airline pilots remains instructive. The pilots feared that fewer engineers meant fewer jobs, but on the contrary, increases in efficiency led to the expansion of the industry through an increased number of flights and passengers. Despite the fact that computers are used track those additional flight paths, human pilots and air traffic controllers are still required for the higher-level decision making related to weather and other unforeseen obstacles.

Similarly, transactional lawyers who can embrace technology, while wielding their human intelligence and depth of experience in deal-making, can potentially expand and enhance their practice. In fact, the skill of complex contract preparation has been noted as a “uniquely human” undertaking.<sup>25</sup> Fears concerning the ability of automated tools to overtake the role of the lawyer in contract preparation are therefore somewhat unfounded. Client needs and client demands are at the forefront of any industry. This is particularly true in an industry such as transactional lawyering, where lawyers strive to effectuate clients’ proposed transactions through complex written documents. Advances in transactional legal technology have the ability to reduce time spent on mechanical, repetitive

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21. *Id.* at 13.

22. Note that in order to maintain similar income while billing fewer hours, lawyers will need to consider adopting alternate billing strategies, such as flat rate, fixed fee, or per transaction billing. The ABA has recognized that such arrangements make legal “services more affordable, accessible, and transparent,” particularly to low and moderate income clients. See ABA STANDING COMMITTEE ON DELIVERY OF LEGAL SERVICES, ALTERNATIVE FEE ARRANGEMENTS, [https://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/alternative\\_fees/](https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees/) [<https://perma.cc/V3Z7-G2EG>] (last visited Mar. 6, 2020).

23. See Heminway, *supra* note 18, at 1466; Agnieszka McPeak, *Disruptive Technology and the Ethical Lawyer*, 50 U. TOL. L. REV. 457, 459 (2019) (noting that “[o]verall, disruptive technology can be a good thing. Companies innovate and find new and better products and services to offer, and consumers benefit from lower costs, more choice, and access in under-served areas of the market.”).

24. See Simshaw, *supra* note 17, at 192–94.

25. Kathryn D. Betts & Kyle R. Jaep, *The Dawn of Fully Automated Contract Drafting: Machine Learning Breathes New Life into a Decades-Old Promise*, 15 DUKE L. & TECH. REV. 216, 217 (2017).

tasks,<sup>26</sup> freeing up lawyer time for more nuanced work. As such, regulating technology competence by focusing on encouraging efficiency and innovation carries the potential to help lawyers provide enhanced client service.

This Article will proceed in three parts. Part I will examine the impetus behind the adoption of Comment 8 and consider the ABA's attitude toward technology. Part I will conclude by discussing the steps taken by the ABA and state regulators in early adopting states to enforce Comment 8. Part II of the Article will then examine which types of technologies scholars have considered mandatory for lawyers seeking to attain technology competence, and discuss the dearth of such guidance in the transactional context. Part III will provide recommendations for ways in which the ABA and state regulators could better align enforcement of Comment 8 with a structural, adaptable, and client-focused view of its applicability. Part III will continue by discussing ways in which such a client-centric revision to Comment 8 would enhance transactional lawyers' ability to both abide by the Comment, and provide efficient, effective representation to a broader group of clientele, followed by a conclusion.

#### I. THE DEVELOPMENT AND ENFORCEMENT OF COMMENT 8 TO RULE 1.1 OF THE MODEL RULES

In order to better understand why a client-focused interpretation of Comment 8 would benefit transactional lawyers, it is important to understand its development, the regulatory structure of the legal industry in the various adopting jurisdictions, as well as the current state of technology competence enforcement (both in jurisdictions that have adopted Comment 8, and some that have not). Understanding these various approaches can provide insight into potential revisions and/or enforcement schemes that could bring client interests to bear on Comment 8, providing additional guidance for transactional lawyers.

##### A. *The ABA Ethics 20/20 Commission and the History of Comment 8*

The Model Rules, promulgated by the ABA provide the requirement that lawyers maintain competence in Rule 1.1—the very first published rule—indicating the duty's fundamental importance in legal practice.<sup>27</sup> The competence duty set forth in Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client,” which entails using “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>28</sup> Existing comments to Rule 1.1 indicate that competence is considered on a case-by-case basis, in a somewhat subjective manner. Specifically, Comment 1 to Rule 1.1 indicates that competence is

26. Simshaw, *supra* note 17, at 192 (discussing time savings associated with document review technology).

27. See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

28. *Id.*



keyed to the “nature of the matter” and “the lawyer’s training and experience in the field.”<sup>29</sup>

Nonetheless, remaining comments to Rule 1.1 swing to more objective considerations, detailing important legal skills such as issue identification, which transcend the lawyer’s background and level of experience.<sup>30</sup> Measurements of competence are generally focused on lawyers’ substantive knowledge of the law, as well as their skills in representing clients for particular matters.<sup>31</sup> Commentary concerning the competence duty in regard to transactional practice echoes this objective sentiment. Specifically, it has been noted that transactional lawyers, like all other lawyers, “should be careful in performing legal work.”<sup>32</sup>

In a move away from this general guidance concerning the competence duty, Comment 8 was added to Rule 1.1 by the ABA in 2012, specifically addressing technology use.<sup>33</sup> This comment evolved, in part, from state-level regulators’ recognition of the pitfalls associated with lawyers’ technology use. These regulators are tasked with enforcement of the Model Rules in the jurisdictions where they have been adopted, and many began issuing ethics opinions dealing with technology in the years leading up to 2012.<sup>34</sup> Thus, the ABA began to recognize “technology’s growing importance to the delivery of legal and law-related services.”<sup>35</sup>

Therefore, Comment 8 requires that in order to maintain competence, lawyers 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 legal education requirements to which the lawyer is subject.”<sup>36</sup> To date, thirty-eight states have adopted Comment 8 in some form.<sup>37</sup> To under-

29. *Id.* at cmt. 1.

30. *Id.* at cmt. 2.

31. See Steven M. Puzis, *A Lawyer’s Duty of Technological Competence*, AM. BAR ASS’N, [https://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2017%20Meetings/Conference/conference\\_materials/session4\\_information\\_governance/puzis\\_lawyers\\_duty\\_technological\\_competence.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2017%20Meetings/Conference/conference_materials/session4_information_governance/puzis_lawyers_duty_technological_competence.authcheckdam.pdf) [https://perma.cc/GM23-YPCZ] (last visited Aug. 2, 2019).

32. Michael L. Shakman et al., *There but for the Grace of God Go I: A Look at the Modern Transactional Legal Malpractice Case*, 18 CBA REC. 32, 35 (2004).

33. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2018); ABA COMM’N ON ETHICS 20/20, REVISED 105A AS AMENDED 3 (2012) [hereinafter ABA COMM’N ON ETHICS 20/20 REVISED 105A AS AMENDED], [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_revised\\_resolution\\_105a\\_as\\_amended.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.pdf) [https://perma.cc/G9P9-3PZM].

34. See *infra* Section II.B.

35. Andrew Perlman, *The Twenty-First Century Lawyer’s Evolving Ethical Duty of Competence*, 22 PROF’L LAW. 24, 25 (2014).

36. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2018).

37. Bob Ambrogi, *And Now Another State Adopts Duty of Tech Competence, Bringing Total to 38*, LAW SITES (Dec. 2, 2019), <https://www.lawsitesblog.com/2019/12/and-now-another-state-adopts-duty-of-tech-competence-bringing-total-to-38.html> [https://perma.cc/58MX-DCZ2]. South Carolina, the most recent adopting state, joined Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida,

stand the applicability and enforcement of Comment 8 more deeply, a review of the history surrounding its adoption by the ABA is required.

In 2009, the ABA convened the Commission on Ethics 20/20 (the Commission) to tackle ethical and regulatory issues associated with the evolution in technology and increase of globalization.<sup>38</sup> The process for recommending and adopting amendments to the Model Rules included a comment period, open meetings, public hearings, and other methods for obtaining feedback on the proposed resolutions from diverse segments of the bench, bar, and academy.<sup>39</sup> The Commission ultimately produced fifteen resolutions resulting in amendments to several of Model Rules and comments thereto (collectively, the 20/20 Amendments), which were adopted by the ABA in 2012.<sup>40</sup>

We can trace the genesis of Comment 8 by looking first to discussion from the various meetings convened prior to its adoption. The minutes of the meeting on October 15, 2010 highlight that Commission members had some concerns about the use of technology to meet client demands more efficiently, in addition to discussing the evolution of legal practice itself.<sup>41</sup> Commenters specifically pointed out “new technologies are forcing lawyers to collaborate more with clients and colleagues in the performance of their duties.”<sup>42</sup>

Nonetheless, significantly more commentary pointed out concerns surrounding confidentiality and data storage concerns surrounding technology. Commenters urged the Commission to “consider providing the profession with greater guidance about how lawyers and law firms handle client data.”<sup>43</sup> The focus on technology ineptitude as a risk to client confi-

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Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Bob Ambrogi, *Tech Competence*, LAW SITES, <https://www.lawsitesblog.com/tech-competence> [https://perma.cc/HHA5-5RQ5] (last visited Mar. 4, 2020) (this site, maintained by Robert Ambrogi, includes an interactive map of adopting states). Note also that “California, while not having formally adopted the change to its rules of professional conduct, has issued an ethics opinion that expressly acknowledges a duty of lawyers to be competent in technology.” *Id.*; Cal. State Bar Formal Op. 2015-193 (addressing issues associated with e-Discovery, and quoting Comment 8).

38. See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.pdf) [https://perma.cc/M3MZ-YRJN] [hereinafter ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW].

39. *Id.* at 2–3, 13.

40. See generally *id.*

41. ABA COMM’N ON ETHICS 20/20, *Minutes of Meeting on October 15*, at 7 (2010), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20101510\\_minutes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20101510_minutes.authcheckdam.pdf) [https://perma.cc/G3R5-AEBD].

42. *Id.*

43. *Id.*

dentality is notable in these minutes and throughout the adoption process of Comment 8. These concerns stand in contrast to the minority voice, which urges a focus on enhanced collaboration and expanded use of technology to improve efficiency.

Upon the adoption of the Amendments in 2012, the Commission noted several concerns regarding technology in its *Introduction and Overview* to the Amendments (the Introduction). Specifically, the Commission discussed lawyers' methods of conducting investigations, research, discovery, and advising clients.<sup>44</sup> However, based on the Introduction's coverage, the Commission retained as its primary concern maintaining confidentiality in light of evolving technology for storing and transmitting client information.<sup>45</sup> These concerns around "data security" appear to have retained their position of primary importance to the Commission, echoing the voices of the commenters in the meeting minutes.<sup>46</sup>

In discussing the reasoning behind the proposed adoption of Comment 8, the Commission noted in the Introduction that technology was changing at a "bewildering pace."<sup>47</sup> The Commission suggested that a duty of technological competence was already implicitly encompassed in Rule 1.1, but it had now decided to make "explicit" the duty to understand the "benefits and risks" of relevant technology.<sup>48</sup> Echoing the emphasis on data storage throughout the Introduction, the notes on the proposed Comment provided a particular emphasis on previous ethics opinions concerning cloud computing.<sup>49</sup> The Commission made clear that the duty to maintain technology competence, while not new, was being made explicit by the new Comment 8.<sup>50</sup>

As mentioned above, it is important to note that the final version of Comment 8 included the word "relevant," limiting the requirement for technology competence to only "relevant technology."<sup>51</sup> The term was added at some point after the February 21, 2012 draft<sup>52</sup> and prior to the final

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44. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW, *supra* note 38, at 4.

45. *Id.* at 4–5.

46. *See id.* (delivery of legal services and security/safety client communications are mentioned in four out of seven of the paragraphs devoted to the discussion of technology).

47. *Id.* at 8.

48. *Id.* (noting that while technology competence was implicitly required in pre-existing Comment 6 to Rule 1.1, a new comment specifically addressing technology was required in order to make this requirement explicit).

49. *See id.*

50. *Id.*

51. ABA COMM'N ON ETHICS 20/20, REVISED 105A AS AMENDED, *supra* note 33, at 3.

52. AM. BAR ASS'N COMM'N ON ETHICS 20/20, REVISED DRAFT RESOLUTIONS FOR COMMENT, TECHNOLOGY AND CONFIDENTIALITY (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120221\\_ethics\\_20\\_20\\_revised\\_draft\\_resolution\\_and\\_report\\_technology\\_and\\_confidentiality\\_posting\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revised_draft_resolution_and_report_technology_and_confidentiality_posting_final.pdf) [<https://perma.cc/2URP-YAV3>].

adoption of the Comment 8 in August 2012. The meeting minutes and the Introduction are silent as to why the term “relevant” was added, and similarly silent as to the application of the term. It remains unclear if the technology with regard to which a lawyer must maintain competence should be relevant to the lawyer’s practice, firm, industry, client, or some other area. This lack of clarity impacts the enforcement of the rule and precipitates some of the problems in directly applying Comment 8 in the context of transactional lawyering, as will be discussed in Sections III.B and III.C, *infra*.

The Commission also issued a final report on Comment 8 (the Report), which provides additional information regarding the Commission’s goals and objectives in adopting a technology competence requirement.<sup>53</sup> The Report, mirroring the meeting minutes and Introduction, places primary importance on developing “guidance for lawyers regarding their ethical obligations to protect [clients’ confidential] information when using technology.”<sup>54</sup> However, the Report does address additional types of technology in creating a baseline for technology competence.

Specifically, the Report notes that in 2012’s environment, “a lawyer would have difficulty providing competent legal services . . . without knowing how to use email or create an electronic document.”<sup>55</sup> The conclusion to the Report further notes that increased use of technology by lawyers “can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services.”<sup>56</sup> The conclusion to the Report also reminds lawyers, once again, of the “risks to clients’ confidential information” associated with the increased use of technology.<sup>57</sup> Nonetheless, the overall tenor of the Report focuses on Comment 8 as a means of encouraging an increase in technology use by lawyers. Further, the Report provides a sense of an evolving baseline, due to the note that email competence would be required in “today’s environment.”<sup>58</sup>

Scholars who have studied the early impact of the resolutions promulgated by the Commission praise Comment 8 as one of the successes of the Commission, particularly as juxtaposed with the Commission’s work on globalization. In reflecting on her work with the Commission, and the outcome of its work, Laurel Terry notes that “the Commission was much

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53. ABA COMM’N ON ETHICS 20/20, REP. TO THE N.Y. H.D., RESOLUTION TO AMEND THE MODEL RULES OF PROFESSIONAL CONDUCT, H.D. DOC. NO. 105A, AT 1 (Aug. 2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.pdf) [https://perma.cc/R6SQ-SMW3].

54. *Id.* at 1.

55. *Id.* at 3.

56. *Id.* at 6.

57. *Id.*

58. *Id.* at 3.

more successful with the technology aspect of its work than it was with [its] globalization aspect.”<sup>59</sup> Specifically, Terry points out that the technology competence requirement was drafted as a “structural” change to the competence requirement.<sup>60</sup> As such, Comment 8 “created a framework to address future issues.”<sup>61</sup> Other scholars have described Comment 8 as “purposefully broad” and capable of addressing “technologies that have not yet been conceived.”<sup>62</sup>

Further, in Terry’s opinion, the framing of Comment 8 to encompass “relevant” technologies creates an “adaptable” standard.<sup>63</sup> This standard, according to Terry, works better than the standards enacted by the Commission with regard to globalization, because Comment 8 “requires lawyers to keep abreast of technology changes without any additional action required on the part of the ABA.”<sup>64</sup> By avoiding discrete, overly-prescriptive drafting in Comment 8, therefore, the ABA created a “gift that will keep on giving.”<sup>65</sup>

Terry’s conclusion that Comment 8 provides an evolving standard is accurate and comports with the guidance gleaned from the Commission’s final Report on Comment 8.<sup>66</sup> Terry’s insights are also helpful in considering how Comment 8 applies to transactional lawyers in the face of current enforcement measures, which focus primarily on data security. However, state regulators enacting and enforcing the Comment, as well as scholars who have discussed it, have instead provided narrow, prescriptive guidance and enforcement. In doing so, these regulators have frustrated the purpose of Comment 8, while also leaving transactional lawyers with insufficient guidance on how to attain technological competence.

Specifically, transactional lawyers already face significant ambiguity concerning the application of the Model Rules to their practice, as will be discussed in Part III, *infra*. As such, prescriptive, litigation-focused guidance is doubly unhelpful.

Therefore, this Article suggests a client-focused interpretation of Comment 8, which goes beyond familiarity with clients’ own technology, to address issues of efficiency in transactional legal practice overall. Specifically, should Comment 8 be interpreted to align with client needs, efficiency and outcomes can be improved. However, before exploring the benefits of client-centered guidance, it is necessary to understand the cur-

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59. Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 HOFSTRA L. REV. 95, 95–96 (2014).

60. *Id.* at 105 (emphasis omitted).

61. *Id.*

62. Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 557 (2018).

63. Terry, *supra* note 59, at 107 (emphasis omitted).

64. *Id.* at 106.

65. *See id.*

66. *See* ABA COMM’N ON ETHICS 20/20 REVISED 105 AS AMENDED, *supra* note 33, at 3.

rent landscape of enforcement surrounding Comment 8. Unfortunately, current enforcement by the ABA and early adopting jurisdictions is overly narrow, prescriptive, and litigation-focused.

*B. Adopting Jurisdictions' Approaches to the Enforcement and Applicability of Rule Comments*

In order to provide guidance as to enhanced enforcement and interpretation of Comment 8 to benefit transactional lawyers, we must first understand current enforcement models in jurisdictions that have adopted it. The way states enforce the comments to the Model Rules overall impacts the applicability of Comment 8 in each jurisdiction. As a result, variations in state enforcement of the Model Rules and comments influence the ways in which each state will attempt to regulate lawyers' technology competence, in both litigation and transactional practice.

Specifically, most states that have adopted the Model Rules indicate that the comments provide "guidance for practicing in compliance with the rules," or have used similar language.<sup>67</sup> Most of those states have also adopted additional language from the Scope of the Model Rules, which indicates the comments do not "add obligations" to the Model Rules, and "the text of each Rule is authoritative."<sup>68</sup> A handful of other states, however, are either silent as to the comments, specifically indicate that they

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67. *See, e.g.*, IND. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019) (noting that the "Comments are intended as guides to interpretation, but the text of each Rule is authoritative").

68. MODEL RULES OF PROF'L CONDUCT Pmb. & Scope ¶¶ 14, 21 (AM. BAR ASS'N 2018). For states that have adopted some form of the "guidance" language in the Model Rules, see ALA. RULES OF PROF'L CONDUCT Scope 4 (2017); ARIZ. CODE OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2016); ARK. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); COLO. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2018); CONN. RULES OF PROF'L CONDUCT Scope (2019); DEL. LAWS' RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2013); FLA. RULES OF PROF'L CONDUCT Scope (2019); IDAHO RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2014); ILL. RULES OF PROF'L CONDUCT OF 2010 Scope ¶¶ 14, 21 (2016); IND. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); IOWA RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2015); KAN. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); KY. RULES OF PROF'L CONDUCT Scope ¶¶ 15, 22 (2019); MASS. RULES OF PROF'L CONDUCT Scope ¶¶ 1, 9 (2019); MO. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); NEB. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); NEV. RULES OF PROF'L CONDUCT r. 1.10A (2018); N.M. RULES OF PROF'L CONDUCT Scope (2019); N.C. RULES OF PROF'L CONDUCT Scope ¶¶ 1, 8 (2019); N.D. RULES OF PROF'L CONDUCT Scope ¶¶ 1, 5 (2019); OHIO RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); OKLA. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); PA. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); S.C. RULES OF PROF'L CONDUCT Scope ¶ 1 (2019) TENN. RULES OF PROF'L CONDUCT Scope ¶¶ 15, 23 (2019); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT Scope ¶ 10 (2019); UTAH RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); VA. RULES OF PROF'L CONDUCT Scope (2019); VT. RULES OF PROF'L CONDUCT ¶¶ 14, 21 (2019); WASH. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2019); W. VA. RULES OF PROF'L CONDUCT Scope ¶¶ 14, 21 (2018); WYO. RULES OF PROF'L CONDUCT FOR ATT'YS AT LAW Scope ¶¶ 14, 21 (2019).

have not adopted the comments in any way, or specify that they have not adopted the comments but publish them only for convenience.<sup>69</sup>

The fact that the various states enforce the comments inconsistently raises the question as to why the ABA chose to include the technology competence requirement in a comment. The Commission's work is silent as to this decision. Perhaps the Commission's position that the requirement for technology competence was already inherent in Rule 1.1<sup>70</sup> led them to decide that a comment was an appropriate vehicle for emphasizing and clarifying the requirement.<sup>71</sup> These inconsistencies make it all the more urgent to fully examine the enforcement of Comment 8, and determine what additional guidance should be provided to lawyers on a national level, to enhance clarity.

Adding to the confusion, several of the states that have adopted Comment 8 have taken different positions on whether to adopt it verbatim, or to edit, limit, or expand the language provided by the Commission.<sup>72</sup> Of the thirty-eight states that have adopted Comment 8, the majority adopted the language provided by the Commission verbatim.<sup>73</sup> The states that have altered the Commission's language have primarily done so in order to either strengthen or clarify its coverage. Interestingly, of the six states that have adopted alternative versions of Comment 8,<sup>74</sup> one is silent on the enforceability of the comments,<sup>75</sup> and another has published but not

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69. Louisiana has not adopted the comments, and its rules are silent with regard to them. *See* LA. RULES OF PROF'L CONDUCT (2018). Montana appears not to have adopted the comments, but the preamble to its rules includes the "guidance" language. MONT. RULES OF PROF'L CONDUCT Pmbl. ¶ 15 (2016). Finally, Minnesota, New Hampshire, New York, and Wisconsin publish the comments, but note that they are not endorsed or adopted. MINN. RULES OF PROF'L CONDUCT (2018); N.H. Sup. Ct. Order (July 25, 2007) (repealing and replacing New Hampshire Rules of Professional Conduct); N.H. RULES OF PROF'L CONDUCT Statement of Purpose (2018); N.Y. RULES OF PROF'L CONDUCT (2018); WIS. RULES OF PROF'L CONDUCT FOR ATT'YS SCOPE (2017).

70. *See* ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW, *supra* note 38, at 8.

71. *See id.*

72. Baker, *supra* note 62, at 563–66.

73. *Id.* at 564; *see also* Ambrogio, *supra* note 37; ARK. RULES OF PROF'L CONDUCT r. 1.1 cmt. on Maintaining Competence (2019); IND. RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (2019); KY. RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (2019); LA. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2018); MO. RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (2019); MONT. RULES OF PROF'L CONDUCT Pmbl. ¶ 5 (2016); TEX. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2019); VT. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2019).

74. The six states that have altered the Commission's language are Colorado, Florida, Indiana, Montana, New York, and West Virginia. *See* COLO. RULES OF PROF'L CONDUCT 1.1 cmt. 8 (2018); FLA. RULES OF PROF'L CONDUCT r. 4-1.1, cmt. ¶ 3 (2019); IND. RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (2019); MONT. RULES OF PROF'L CONDUCT r. 1.1, Pmbl. ¶ 5 (2016); N.Y. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2018); W. VA. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2019).

75. Louisiana is silent as to the effect of the comments. *See* LA. RULES OF PROF'L CONDUCT (2018).

officially adopted the comments.<sup>76</sup> Thus, the overall enforceability of the comments in these states is unclear, yet they provide some of the most insightful and detailed adaptations of Comment 8.

Three of the six states that have made changes to Comment 8, New York, Indiana, and Colorado, have revised the Comment's substantive obligations. Specifically, New York's version of Comment 8 provides that the lawyer must "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.*"<sup>77</sup> Additionally, Indiana indicates that the lawyer must stay up to speed with regard to "the benefits and risks associated with the technology *relevant to the lawyer's practice.*"<sup>78</sup> Colorado requires competence in both "*changes in communications and other relevant technologies.*"<sup>79</sup>

The three other states that have altered the language of Comment 8, Montana, West Virginia, and Florida, made changes to the strength and enforceability of the Comment, rather than the substance. Montana indicates that Rule 1.1 itself implies an obligation to abide by the technology competence comment,<sup>80</sup> and West Virginia indicates that lawyers "must" (rather than "should") stay abreast of changes in technology.<sup>81</sup> Finally, Florida notes that maintaining technology competence may require "retention of a non-lawyer advisor with established technological competence in the relevant field."<sup>82</sup> Among other states, Florida also requires a mandatory continuing legal education on technology use.<sup>83</sup>

These outliers in their adoption of Comment 8 provide considerable insight into the potential problems associated with the framing of the Comment by the Commission. While the broad phrasing provides the benefits of evolution with emerging technology, and the "structural" characteristics noted by Terry<sup>84</sup> limit the need for future amendments to Comment 8, the lack of guidance provided by the Commission is reflected in

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76. Montana references the comments in the Preamble to the Rules, but has not officially adopted them. MONT. RULES OF PROF'L CONDUCT PmbL. ¶ 15 (2016). The New York State Bar Association issued the Preamble, Scope, and Comments, but they were not enacted along with the Rules. See N.Y. RULES OF PROF'L CONDUCT (2018).

77. N.Y. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2018) (emphasis added).

78. IND. RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (2019) (emphasis added).

79. COLO. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2018) (emphasis added).

80. MONT. RULES OF PROF'L CONDUCT r. 1.1 PmbL. ¶ 5 (2016).

81. W. VA. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (2019).

82. FLA. RULES OF PROF'L CONDUCT r. 4-1.1 cmt. ¶ 3 (2019) ("Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question.").

83. THE FLORIDA BAR, *Frequently Asked Questions About CLE Requirements*, <https://www.floridabar.org/member/cle/cler-faq/> [https://perma.cc/QBQ3-E5CQ] (last visited Nov. 3, 2019) (noting that "[o]ver a 3-year period, each member must complete 33 hours, 5 of which must be in the area of ethics, professionalism, substance abuse, mental illness awareness, or bias elimination and 3 hours of technology").

84. Terry, *supra* note 59, at 95.



the changes made by these six states. In particular, the focus by New York and Indiana on the lawyer's clients and practice is particularly telling. This change suggests that the use of the term "relevant" in the Commission's version might lack sufficient clarity, leading states to adopt a more workable guideline. The changes to Comment 8 in New York and Indiana provide a clearer alternative to the term "relevant"—keying the scope of technological competence to practical and client-focused considerations.

Further, the strengthening of the enforcement of Comment 8 in Florida, Montana, and West Virginia suggest that some states disagree with the placement of the requirement in a potentially unenforceable comment. Further, the edits made in these states reveal that the Commission's belief that the technology requirement was already "inherent"<sup>85</sup> in the text of the Rule 1.1 might not be shared by enforcing jurisdictions. Thus, an authoritative statement concerning the enforceability of Comment 8 provided in an ABA formal ethics opinion might be a more appropriate method of providing lawyers (particularly transactional lawyers) with guidance regarding Comment 8's scope and enforcement.

The differences in phrasing, interpretation, and enforcement across jurisdictions provides an opportunity for the ABA to reinforce its intent in passing Comment 8, and provide consistent, broadly applicable guidelines for enforcement. The approaches taken to clarify and enforce Comment 8 in several of the adopting states provide helpful starting points for considering how the ABA might frame any additional guidance. This Article will continue by exploring the ABA and other adopting jurisdictions' enforcement to date.

### C. *Ethical Guidance and Specific Decisions Concerning Technology Competence*

The ABA has issued only one formal opinion specifically mentioning technology competence since the passage of Comment 8 in 2017.<sup>86</sup> Issued in 2017, ABA Formal Ethics Opinion 477 focuses on the security of client information when transmitted electronically.<sup>87</sup> Specifically, the opinion looks at the language of Comment 8 in conjunction with the requirements of Rule 1.6.<sup>88</sup> Based on this review of the updated requirements under the Comment and Rule 1.1, the ABA opines that to safeguard client information being transmitted by email, "lawyers must exercise reasonable ef-

85. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW, *supra* note 38, at 8.

86. ABA COMM'N ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 477 (2017). Note that two opinions focusing on social media by lawyers and judges have been issued since the passage of Comment 8, but neither are relevant to competence in technology use, rather its misuse. *See* ABA COMM'N OF ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 466 (2014); ABA COMM'N OF ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 462 (2013).

87. *See* ABA COMM'N ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 477 (2017).

88. *Id.*

forts.”<sup>89</sup> However, according to the ABA, “[w]hat constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.”<sup>90</sup> The opinion proceeds to provide a set of flexible, objectively measured factors for lawyers to use in determining the level of protection and types of technology required to be used in safeguarding client information transmitted electronically.<sup>91</sup>

This opinion is important and telling for two reasons. First, it telegraphs the ABA’s position that one of the main areas of focus in connection with the enforcement of Comment 8 rests on the issue of client data security, a position that has been echoed by state and local regulators, as discussed below. Secondly, the opinion suggests that the use of flexible factors constitutes a helpful mechanism for determining whether lawyers’ behavior rises to the level of technologically competent. These insights are helpful as a lens through which to view the enforcement of Comment 8 by state and local regulators. They also assist in considering ways in which the ABA could provide guidance to transactional lawyers regarding technological competence.

State regulators have issued a significantly deeper body of decisions and guidance concerning technology competence than the ABA. Despite their numbers, the focus of many of these opinions echoes ABA Formal Opinion 477’s concern for the security of client information. Scholars have noted that state ethics regulators have “applied the [technology competence] duty mainly to electronic discovery, electronic storage of information, social media, and the cloud.”<sup>92</sup> In reviewing state ethics opinions concerning technology competence, it becomes clear that a majority of the guidance issued before and after the ABA’s enactment of Comment 8 has dealt primarily with electronic storage of law firm and client data. Specifically, twenty-one states have issued ethics opinions permitting the use of cloud storage for law firm data, with several of these states issuing multiple opinions on the issue.<sup>93</sup> This number includes five states that have yet to adopt Comment 8.<sup>94</sup>

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89. *Id.*

90. *Id.*

91. *See id.*

92. Baker, *supra* note 62, at 557–58.

93. Ala. Ethics Op. 2010-02 (2010); Ariz. State Bar Formal Op. 05-04 (2005); Ariz. State Bar Formal Op. 09-04 (2009); Cal. State Bar Formal Op. 2010-179 (2010); Conn. Informal Op. 2013-07 (2013); Fla. Bar Op. 12-3 (2013); Ill. Adv. Op. 16-06 (2016); Iowa Ethics Op. 11-01 (2011); Me. Ethics Op. 207 (2013); Mass. Ethics Op. 12-03 (2012); Nev. Ethics Op. 33 (2006); N.H. Ethics Op. 2012 13/4 (2012); N.J. Adv. Comm’n on Prof’l Ethics Op. 701 (2006); N.Y. Ethics Op. 842 (2010); N.Y. Ethics Op. 1020 (2014); N.C. 2011 Formal Ethics Op. 6 (2011); Ohio Informal Ethics Op. 2013-03 (2013); Or. Ethics Op. 2011-188 (Revised 2015); Pa. Ethics Op. 2011-200 (2011); Tenn. Ethics Op. 2015-F-159 (2015); Vt. Ethics Op. 2010-6 (2010); Va. Ethics Op. 1872 (2013); Wash. Adv. Op. 2215 (2012).

94. *See id.* Specifically, Alabama, California, Maine, Nevada, and Oregon.

The issue of cloud<sup>95</sup> or other internet or electronic storage of data is disproportionately covered in ethics opinions, as compared to any other type of technology. Specifically, since the ABA's passage of Comment 8 in 2012, thirteen opinions concerning cloud storage of data have been issued.<sup>96</sup> In that same timeframe less than half as many opinions have been issued covering other types of technology.<sup>97</sup> Those additional ethics opinions discuss issues such as use of email tracking, metadata, social media, and virtual law offices.<sup>98</sup> Further, only New York has issued an opinion regarding technology competence with a specific reference to transactional practice.<sup>99</sup> This opinion permits the use of cloud access to transactional documents, subject to confidentiality requirements.<sup>100</sup>

With regard to cloud storage in general, every state ethics opinion addressing the issue has permitted the use of cloud (also referred to as "software as a service") storage for law firm data, often subject to certain limitations. The most common limitation on cloud storage is the requirement that a lawyer assure oneself that the data stored on the cloud will be safeguarded, in order to protect against violations of the lawyer's confidentiality requirements.<sup>101</sup> These opinions indicate that the lawyer can typi-

95. Tenn. Formal Ethics Op. 2015-F-159 (2015) ("Cloud computing is technology which allows a lawyer to store and access software or data through the cloud—a remote location which is not controlled by the lawyer but by a third party which provides the storage or other computing services. It is the use of a network of remote servers, hardware and/or software to store, manage, transmit, process and/or retrieve data off the lawyer's premises, rather than on a server or personal computer on the lawyer's premises.").

96. Conn. Informal Op. 2013-07 (2013); Fla. Bar Op. 12-3 (2013); Ill. Adv. Op. 16-06 (2016); Me. Ethics Op. 207 (2013); Mass. Ethics Op. 12-03 (2012); N.H. Ethics Op. 2012 13/4 (2012); N.Y. Ethics Op. 1020 (2014); Ohio Ethics Op. 1020 (2014); Or. Ethics Op. 2011-188 (revised 2015); Tenn. Ethics Op. 2015-F-159 (2015); Va. Ethics Op. 1872 (2013); Wash. Adv. Op. 2215 (2012).

97. *See* Cal. Ethics Op. 2012-184 (2012) (virtual law office); Colo. Formal Ethics Op. 127 (2015) (social media); N.Y. Ethics Op. 1020 (2014) (transactional data); Ohio Ethics Op. 2017-05 (2017) (virtual law office); Va. Ethics Op. 1872 (2013) (virtual law office). Note that several of these opinions addressed both cloud computing and other technologies.

98. *Id.*

99. N.Y. Ethics Op. 1020 (2014) (opining that "[w]hether a lawyer for a party in a transaction may post and share documents using a 'cloud' data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information").

100. *Id.*

101. *See, e.g.,* Ariz. State Bar Formal Op. 05-04 (2005) (in order to use cloud storage, "an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence."); Conn. Informal Op. 2013-07 (2013) ("In order to determine whether use of a particular technology or hiring a certain particular service provider is consistent or compliant with the lawyer's professional obligations, a lawyer must engage in due diligence."); Fla. Bar Op. 12-3 (2013) ("[L]awyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service pro-

cally attain this assurance through due diligence into the terms of the cloud service provider, or by consulting with an expert on cloud technology.

While states granting permission for lawyers to use cloud data storage provides a safe harbor for lawyers with regard to one particular type of technology, these opinions tend to stop short of providing any clear, broadly applicable guidelines which a lawyer might use as a measuring stick to independently evaluate additional types of technology, or the lawyer's existing tech practices. Rather, the opinions put much of the risk associated with technology use on the lawyer. For example, the Tennessee opinion on cloud storage notes that “[d]ue to rapidly changing technology, the Board doesn’t attempt to establish a standard of care.”<sup>102</sup> Further, one of the New York opinions notes that due to “the fact-specific and evolving nature of technology, we do not purport to specify in detail the steps that will constitute reasonable care in any given set of circumstances.”<sup>103</sup>

However, some of the opinions do provide helpful guidance, which could potentially be considered by the ABA or other state ethics enforcers in determining ways to provide lawyers, particularly transactional lawyers, with more specific guidance on how to analyze their technology competence. Specifically, states such as California and Washington provide “factors” for lawyers to use in considering whether technology use meets ethical requirements (whether imposed by Comment 8 or otherwise).<sup>104</sup>

Despite not having adopted Comment 8, the factors provided in the California ethics opinion create a potentially helpful framework for analyzing additional technologies beyond cloud storage software. The factors provided by the California Bar, despite focusing on cloud software, can potentially be adapted to additional types of technology. The factors include:

- (a) The attorney’s ability to assess the level of security afforded by the technology . . . .
- (b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person’s electronic information. . . .
- (c) The degree of sensitivity of the information. . . .
- (d) Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges. . . .
- (e) The urgency of the situation. . . . [and]
- (f) Client instructions and circumstances.<sup>105</sup>

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vider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.”).

102. Tenn. Ethics Op. 2015-F-159 (2015).

103. N.Y. Ethics Op. 1020 (2014).

104. Cal. State Bar Formal Op. 2010-179 (2010); Wash. Adv. Op. 2215 (2012).

105. Cal. State Bar Formal Op. 2010-179, at 3–6 (2010).

While these factors are instructive, they remain limited to the use of one type of technology. As such, this opinion, and others similarly focused on cloud computing, fail to provide a valid framework for transactional lawyers to assess developing technology as it becomes available. Further, none of these opinions discuss the types of technology lawyers use to create documents or work product. Rather, the analysis remains focused primarily on the storage and communication of such work.

As such, the major problem surrounding the enforcement and guidance provided thus far by both state bar associations and the ABA harkens back to Laurel Terry's identification of Comment 8 as a "structural" one.<sup>106</sup> If Comment 8 was constructed to evolve along with the evolution of technology without need for any amendment by the ABA, as Terry asserts,<sup>107</sup> then guidance focused specifically on existing technologies misses the mark. Guidance must be provided in a similarly structural manner in order to prove effective and lasting. To determine a standard for enforcement for Comment 8, we must first look to current guidance from active scholars and transactional lawyers about technology competence in practice.

This study will reveal that, much like state regulators, many scholars focus on particular types of technology that must be mastered in order to obtain technology competence. This narrow focus fails to provide lawyers or regulators with the type of flexible, structural guidance necessary for Comment 8 to reach its potential in encouraging innovation and enhancing efficiency of lawyers. Nonetheless, an understanding of current guidance on best practices in both litigation and transactional practice can assist in identifying broader best practices, and from there, we can begin to formulate (and suggest that the ABA provide) helpful, structural guidance for regulators and transactional lawyers with regard to Comment 8.

## II. CURRENT LEGAL TECHNOLOGY: PRACTICES, GUIDANCE, AND CHALLENGES

Much has been written regarding the impact technology competence requirements will have on litigation practice. The bulk of this scholarship discusses particular technologies, and focuses on the same main concerns as those raised by the ABA and state legislators in their enforcement actions: data storage and security. However, certain scholars and commentators have provided more detailed guidance on the types of technologies lawyers should (or must) familiarize themselves with in order to maintain competence. In order to better guide transactional lawyers looking to attain technology competence, we must first discuss the types of technologies that commentators have suggested are necessary to attain competence in litigation practice, then address the unique position of transactional practice within the regulatory structure of the Model Rules, and finally

106. See Terry, *supra* note 59, at 105.

107. *Id.* at 105–06.

assess current concerns with the use of technology in transactional practice.

#### A. *Technology in Litigation Practice*

In the years immediately following the passage of Comment 8 by the ABA, and as it began to gain traction among the states, much of the scholarship discussing Comment 8 tracked the ground covered in the various ethics opinions discussed above. Scholars have focused much of their coverage on data security, communication, and cloud storage risks.<sup>108</sup> However, an emerging body of scholarship has begun to discuss additional types of technology lawyers should master in order to attain technology competence.<sup>109</sup> This body of scholarship, however, is almost exclusively focused on specific, litigation-oriented technologies such as e-Discovery,<sup>110</sup> electronic filing,<sup>111</sup> voir dire,<sup>112</sup> and the use of artificial intelligence to predict litigation outcomes and craft more effective litigation documents.<sup>113</sup>

Further, certain litigators have even suggested that only five realms of technological competence exist, each of which is keyed to technologies used primarily in litigation practice.<sup>114</sup> Those realms have been identified as data security, electronic discovery, social media discovery, technology used by clients in their businesses, and technology used to present media in the courtroom.<sup>115</sup> Other scholars of legal technology have added insights concerning more broadly applicable technologies, such as social media,<sup>116</sup> blockchain,<sup>117</sup> and artificial intelligence.<sup>118</sup> A small minority of articles, including Drew Simshaw's piece on artificial intelligence, have suggested the necessity for additional, structural guidance by the ABA for

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108. See, e.g., Peyton, *supra* note 7, at 8 (identifying common risks associated with a lack of technology competence, and centering the list of common risks around data theft risks).

109. See, e.g., *infra* notes 110–113 and 116–119, along with accompanying text.

110. See, e.g., Stacey Blaustein, Melinda L. McLellan, & James A. Sherer, *Digital Direction for the Analog Attorney—Data Protection, E-Discovery, and the Ethics of Technological Competence in Today's World of Tomorrow*, 22 RICH. J.L. & TECH. 10 (2016).

111. See, e.g., Peyton, *supra* note 7, at 8.

112. See, e.g., Katy (Yin Yee) Ho, *Defining the Contours of an Ethical Duty of Technology Competence*, 30 GEO. J. LEGAL ETHICS 853, 859 (2017).

113. See, e.g., McPeak, *supra* note 23, at 463–64.

114. Puiszis, *supra* note 31, at 2.

115. *Id.*

116. See, e.g., Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 846 (2014).

117. Marco Dell'Erba, *Demystifying Technology. Do Smart Contracts Require a New Legal Framework? Regulatory Fragmentation, Self-Regulation, Public Regulation*, U. PENN. J.L. & PUB. AFF. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3228445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228445) [<https://perma.cc/4ZQW-GMRR>].

118. See, e.g., Simshaw, *supra* note 17; McPeak, *supra* note 23.

lawyers grappling with evolving technology, but this approach remains the minority.<sup>119</sup>

Nonetheless, most of the scholarship discussed above focuses on the requirement that lawyers obtain and maintain competence in certain suggested, narrow types of technology. This narrow, prescriptive approach to attaining competence does little to assist transactional lawyers seeking to assess their own competence, as very few of these articles have addressed technology related to transactional practice. Further, ever fewer of these articles have suggested the need for additional guidance from the ABA or state regulators in the application of Comment 8 in various lawyering contexts. Both of these concerns need to be addressed in order to better equip transactional lawyers with the tools necessary to both understand and achieve the requirements of Comment 8 with regard to their evolving area of practice.

The next section continues by discussing the unique position of transactional lawyering under the Model Rules' litigation-oriented framework, outlining some emerging technologies aimed at transactional practice, highlighting how these technologies can assist transactional lawyers in providing more robust and effective client service, and concludes by identifying client-focused guidelines as a more effective means of defining and applying the technology competence requirement under Comment 8.

### B. *The Unique Position of Transactional Law*

One concern around providing guidance to transactional lawyers with regard to a technology competence requirement housed in the Model Rules rests on the fact that they are notoriously litigation oriented. The two main predecessors to the current Model Rules, the ABA Canons of Professional Ethics<sup>120</sup> and the ABA Code of Professional Responsibility,<sup>121</sup> each concentrate primarily on problems associated with litigation.<sup>122</sup> Scholars of ethics have noted that the Canons of Professional Ethics, published in 1908, "dealt almost exclusively with" litigation issues.<sup>123</sup> Further, scholars active at the time of the drafting of the Code of Professional Responsibility noted that the concerns of litigators were much more directly regulated than the typical activities of the transactional lawyer.<sup>124</sup>

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119. See, e.g., Simshaw, *supra* note 17, at 208.

120. ABA CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908).

121. MODEL CODE OF PROF'L CONDUCT (AM. BAR ASS'N 1969).

122. Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 85 U. CIN. L. REV. 595, 597 (2016).

123. Louis M. Brown & Harold A. Brown, *What Counsel the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 455 (1976) (explaining that although the original Canons of Professional Ethics dealt solely with litigation, it is no longer appropriate and the historical bias towards litigation practice should be remedied).

124. *Id.*

This litigation focus bled into the current Model Rules, as evidenced by the fact that “with limited exceptions” there are no Model Rules directly on point concerning professional behavior by transactional lawyers.<sup>125</sup> The competence rule is notably broader in application than many ancillary rules. Nonetheless, the comments to Rule 1.1 must be analogized and applied to transactional work in a more tangential manner than required in litigation practice. Further, many of the litigation technologies discussed thus far in existing scholarship deal with court filings and processes.<sup>126</sup> This scholarship has perhaps provided litigators with handy benchmarks for assessing their technology competence, but leaves transactional lawyers struggling to analogize technology useful in deal-making to litigation tools.

Specifically, if a court has imposed a requirement for the use of technology, failure to use same would clearly fall below a competence duty for a litigator. However, because transactional lawyers practice in an extrajudicial context, outside of “the watching” function of the courts,<sup>127</sup> it is unlikely that requirements to adopt or use new technologies will be enforced by courts or any other outside source. This lack of clarity leaves transactional lawyers vulnerable to potential unforeseen enforcement of Rule 1.1.

However, early scholarship of transactional legal ethics may have provided some helpful guidance to transactional lawyers seeking to achieve technology competence. These scholars have noted that the transactional lawyer’s “aspirations of competence” should include attaining “the knowledge and skill to grasp the client’s goals, to reframe them if necessary, to initiate the discussion of alternative courses of conduct and, along with the client, to be creative regarding the uses of the law.”<sup>128</sup> This early framing of the competence duty in the transactional context implicitly requires that the transactional lawyer use the law in the way most beneficial to achieving such client goals.

This client-focused approach to competence can and should extend to the application of Comment 8. A client-centered approach can potentially provide a much more appropriate framework for transactional lawyers to assess their technology competence, as opposed to a framework based on assessing court requirements and analogizing the types of technologies required in litigation practice into a transactional context. Nonetheless, in order to better understand how such a client-oriented framework might improve applicability of Comment 8 in transactional

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125. STARK, *supra* note 15, at 455. Specifically, note that an entire Article of the Model Rules is dedicated to the role of the lawyer as “Advocate” with no corollary section devoted to the lawyer as dealmaker. *See* MODEL RULES OF PROF’L CONDUCT r. 3.1–3.7 (AM. BAR ASS’N 2018).

126. *See infra* Section III.A.

127. Paula Schafer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 262 (2011).

128. Brown & Brown, *supra* note 123, at 476.



practice, it will be helpful to identify technology concerns posited by transactional lawyers in the current practice environment.

### C. *Technology in Transactional Practice*

Another issue unique to transactional lawyers, with regard to adoption and enforcement of Comment 8, is the prevailing wisdom that “[t]ransactional lawyers have been notoriously slow to integrate technology into their practices.”<sup>129</sup> As Wasim Quadir, a transactional lawyer who recently left a BigLaw transactional practice to found a legal technology company, recently noted:

I think the last big [technological] improvement [for transactional lawyers] was the transition from typewriters to MS Word, and then the technology stack that lawyers have been using, it’s been largely stagnant since. I mean the way we draft agreements [has] pretty much been the same for many, many years. It starts with finding the right sample document, precedent to start from, [and] invariably that’s not going to match the parameters of the deal that’s in front of you.<sup>130</sup>

This resistance of transactional lawyers to integrate technology exists despite “about a \$1 billion inflow” into legal tech startups in recent years.<sup>131</sup> Judging by the list of exhibitors at the recent Legaltech tradeshow, many new tools are becoming available to transactional lawyers, particularly in connection with contract preparation.<sup>132</sup>

Nonetheless, in interviewing several lawyers for this Article, these lawyers remain frustrated with both the availability of technology applicable to their practice, and the functionality of tools their firms have adopted to date. These frustrations center primarily around the inability of available legal technology to adapt to the nuances of transactional practice, and the demands of transactional clients.

Of course, when interviewing lawyers with regard to their use of technology in transactional practice, the problems identified varied from firm to firm and lawyer to lawyer. However, in several interviews with lawyers practicing at small, mid-sized, and large law firms, several patterns

129. Betts & Jaep, *supra* note 25, at 216 (citing Kingsley Martin, *Emerging Contract Technology: Automating the Contract Life-Cycle*, LEGAL EXEC. INST. (Apr. 29, 2015)).

130. *The Future of Transactional Law Practice*, LEGAL TALK NETWORK PODCAST (May 29, 2019), <https://legaltalknetwork.com/podcasts/legal-toolkit/2019/05/the-future-of-transactional-law-practice/> [<https://perma.cc/U9R9-4QX4>].

131. *Id.*

132. See *2020 Legaltech Exhibitors*, LEGALWEEK, <https://www.event.law.com/legalweek/legaltech-exhibitors> [<https://perma.cc/L7MP-FVYF>] (last visited Mar. 6, 2020). Specifically, exhibitors included ContractPodAI (offering a contract automation product), eBrevia (offering an AI based contract data and analysis tool), and Kira Systems (offering automated contract analysis).

emerged.<sup>133</sup> Across the solo practitioner, mid-sized firm lawyer, and BigLaw partner interviewed, all of them still rely heavily on existing document forms in creating transactional documents. This pattern fits with Quadir's observations, discussed above. It is worth noting that none of the lawyers interviewed use or have experimented with more advanced contract creation or form-filling software or apps, such as those on exhibit at the Legaltech tradeshow.<sup>134</sup> The reasoning behind the decision varied from lawyer to lawyer, but focused on the lawyer's comfort level with existing forms, and the client's reluctance to "reinvent the wheel" when creating transactional documents.

One potential explanation for this reluctance was voiced by the a BigLaw partner, who noted in his interview that certain types of document creation software available to transactional lawyers have been created by specific interest and industry groups. This has made lawyers wary about whether using such technology would benefit their clients, depending on their role in the transaction, and the industry their client is engaged in.

Further, a mid-sized, regional firm lawyer noted that technology available from government agencies which lawyers use for transactional due diligence lacks sophistication.<sup>135</sup> This lawyer also noted that document management software in use at the lawyer's firm, while incorporating many specific sub-labels for litigation documents, had few options for specifying various types of transactional documents. This frustration provides a real world example of the problems with the litigation focus of most available legal technology tools and requirements.

Finally, a solo practitioner noted that law practice management software is woefully unresponsive to the billing practices and other specific needs of a transactional lawyer. Specifically, she noted that the software was not easily adaptable to alternative billing structures her clients sometimes request. This concern reflects the ABA's suggestions associated with billing, as the ABA Standing Commission on Delivery of Legal Services has

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133. Interviews with various transactional lawyers on file with the author, available upon request. Please note that these interviews in no way constitute a representative sample, but are rather intended as anecdotal examples of lawyer concerns across several different types of practice environment. Empirical research into technology use by and technology concerns of transactional lawyers would be helpful in developing a deeper body of scholarship on this subject, and the author is considering future projects of this nature.

134. These findings mirror formal empirical research into drafting of merger and acquisition agreements, where it was found that transactional lawyers "appear to use precedents that they are familiar with," many of which are available to attorneys through "data banks of model forms" available on law firms' "internal document management system[s]." Robert Anderson & Jeffrey Manns, *Engineering Greater Efficiency in Mergers & Acquisitions*, 72 BUS. LAW. 657, 661 (2017).

135. Specifically, the lawyer noted that state and local websites for searching recorded real estate documents and corporate organization documents were very difficult to navigate and unsophisticated.

noted that fixed fee and other alternative billing structures often help fee sensitive, small firm clients.<sup>136</sup>

Despite the differences in firm size and client sophistication, and the different technologies being discussed, the concerns expressed by these lawyers all seem to coalesce around the same basic topics—efficiency in practice management and enhanced client service. These concerns mirror those reflected in the commentary of legal technology scholars and experts.<sup>137</sup>

While Comment 8 itself appears silent to these concerns, both New York and Indiana, in adopting more nuanced versions of the Comment, appear to have appreciated these problems, and responded by tying their concepts of “relevance” under Comment 8 to the clients, and the lawyer’s practice, respectively.<sup>138</sup>

Therefore, the ABA should consider studying the approaches provided by these states, as well as the flexible factors provided in California’s relevant ethics opinion, to craft additional guidance for transactional lawyers seeking to abide by their technology competence duties. A more client-focused approach to technology competence could both provide more helpful guidance to lawyers, as well as potentially advance development and adoption of the legal technology tools transactional lawyers are seeking, such as advanced law practice management technology and document preparation tools.

Further, focusing (as previous scholars of this topic have done) on specific, limited types of technology provides an insufficient framework for lawyers, particularly transactional ones to appropriately gauge their level of technology competence. While several types of technologies litigators have suggested must be mastered for a lawyer to achieve technological competence in their field have easily identifiable transactional corollaries,<sup>139</sup> this type of regulation by analogy remains rooted in the outdated

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136. See ABA STANDING COMMITTEE ON DELIVERY OF LEGAL SERVICES, ALTERNATIVE FEE ARRANGEMENTS, [https://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/alternative\\_fees/](https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees/) [https://perma.cc/4NYK-8TTS].

137. See generally Betts & Jaep, *supra* note 25.

138. See *supra* notes 77–78.

139. Several types of technology applicable to transactional lawyering are comparable to the types of technology discussed by scholars of litigation technology as requisite to technology competence litigation practice. For example, e-signature technology can be compared to electronic filing technology, as it assists transactional lawyers in facilitating deal closings. See Andreas Rivera, *Electronic Signatures and the Law: What You Need to Know*, BUSINESS.COM (Dec. 21, 2017), <https://www.business.com/articles/electronic-signatures-and-the-law-what-you-need-to-know/> [https://perma.cc/9EA2-PNUT]. Further, new technology such as LawGeex AI tools, eBrevia’s “diligence accelerator,” and Kira Systems’s due diligence engine (among others) can assist transactional lawyers in due diligence review of contracts, which is similar to e-Discovery technology used by litigators. See *Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts*, LAWGEEX (2018), <https://images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf> [https://perma.cc/Y5D4-99N3]; *Diligence Accelerator*, EBREVIA, <https://ebrevia.com/diligence-accelerator>

conceptions of the Model Rules as being keyed primarily to the concerns of the litigator. Additionally, focusing enforcement and guidance around specific types of technology further erodes the “structural,” anti-prescriptivist approach to technology competence originally envisioned by the Commission, and championed by Laurel Terry.<sup>140</sup>

The best approach to making the requirements of Comment 8 clearer for transactional lawyers, while at the same time permitting them to serve as a springboard for innovation, lies in looking to some of the creative approaches taken by enforcing states. The flexible guidelines proposed by states such as California and Washington, as well as the substantive edits provided by New York and Indiana can help guide the ABA in developing appropriate national level guidelines for the enforcement and interpretation of Comment 8. The final Part of this Article will explore potential solutions for enforcement provided by states to date, and suggest a more workable alternative of providing guidance to transactional lawyers on the enforcement of Comment 8 through flexible factors dispensed by the ABA in a formal ethics opinion.

### III. RECOMMENDATIONS

There exist several potential avenues pursuant to which the ABA and state regulators could provide additional clarity and guidance for transactional lawyers in abiding by their technology competence requirements. Two such avenues, additional CLE requirements and edits to Comment 8, are discussed below. However, neither of these options provides a silver bullet to ensure that technology competence is attained and retained by transactional lawyers.<sup>141</sup> Reviewing these two options, however, helps clarify that there is a need for formal guidance by the ABA into how technology competence should be measured, and that providing client-focused guidelines can assist lawyers—particularly transactional lawyers—in attaining technology competence.

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[<https://perma.cc/4ZBJ-66A2>]; McPeak, *supra* note 23, at 462; Betts & Jaep, *supra* note 25, at 225. Finally, programs like Contract Catch, LexPredict, and Bloomberg’s Corporate Transactions, which use algorithms to review and provide insights into contract provisions, can be compared to technology like Ross Intelligence, Westlaw Edge, Casetext, and Compose, which leverage AI in the litigation context. See CONTRACT CATCH, <https://contractcatch.com/> [<https://perma.cc/FL6D-VU9A>] (last visited Nov. 3, 2019); McPeak, *supra* note 23, at 463; Betts & Jaep, *supra* note 25, at 226.

140. Terry, *supra* note 59, at 105.

141. Another potential method of standardizing technology competence requirements, and also encouraging lawyer compliance, could include looking to malpractice insurance providers to include technology competence and use guidelines in malpractice insurance policies. This approach would provide a private, non-regulatory method for motivating appropriate behavior, and would also potentially permit for requirements more closely tailored to a lawyer or law firm’s area of practice, market, and client base.

### A. *Additional CLE Requirements*

One potential method for providing lawyers with guidance regarding technology competence might be to follow the route taken by Florida to require mandatory one-hour CLE courses concerning technology. This approach has already been taken by many state bar associations with regard to ethics, mental health, and addiction in the legal profession.

While enacting additional CLE requirements may provide state bar associations with the comfort of knowing that each lawyer within their jurisdiction has “checked a box” with regard to technology competence, this approach will likely not address the concerns of transactional lawyers. Specifically, in keeping with the Model Rules’ already litigation-heavy bent, it takes no sophisticated prognostication to predict that state bar offerings concerning technology competence will be similarly litigation-oriented. In fact, a quick perusal of the technology CLE offerings available on the Florida State Bar website shows that the majority of the upcoming technology CLE offerings focus on litigation-oriented issues.<sup>142</sup>

Further, this solution does not further the ABA’s goal of including the technology competence requirement as an inherent, structural change to the way in which lawyers view their competence requirements. Adding a “check-the-box” method of fulfilling a core, complex duty will surely cause lawyers to undervalue an aspect of their practice that has both the potential for deeply enhancing their client-service ability, and landing them in ethical hot water. As such, adding a CLE requirement not only fails to solve the problem of technology competence, but may in fact exacerbate it.

### B. *Potential Revisions to Comment 8*

A better option for the ABA and state regulators might be to follow in the footsteps of states like Colorado, Indiana, and New York, and edit the technology competence Comment directly. Providing additional clarity regarding what the term “relevant technology” encompasses may be seen by additional states as a method of providing clarity to lawyers seeking to fulfill their obligations. However, similar concerns expressed with regard to the CLE requirement exist in connection with this potential approach, as well.

First, refocusing the edits to Comment 8 to address concerns primarily around “communication,” as was done in Colorado, simply amplifies the weaknesses inherent in the existing ethical guidance and enforcement on Comment 8. The focus on data safety, storage, and transmission misses ample opportunity for Comment 8 to serve as an impetus to use technology to improve legal efficiency. Further, this limited edit simply does not comport with the broad, structural change that the Commission envi-

142. THE FLORIDA BAR, CONTINUING LEGAL EDUCATION, <https://www.floridabar.org/member/cle/#UpcomingLiveCoursesAudio> [https://perma.cc/S7MP-QK8D] (last visited Nov. 4, 2019).

sioned in enacting the Comment. Nor do such edits recognize the ABA's position that the requirement to obtain technological competence is inherent in Rule 1.1.<sup>143</sup> If the overall requirement of competence is not limited to keeping client files secure (which it most surely is not), then the technology competence Comment simply should not be edited to include this limitation.

The edits provided by New York and Indiana, however, come closer to the mark of a helpful method of clarifying the technology competence requirement. A focus on the lawyer's practice, as in Indiana,<sup>144</sup> and the lawyer's clients, as in New York,<sup>145</sup> modify the term "relevant technology" and make it more grounded in the actual concerns of lawyers arising in their daily practice. Further, the broad structure of these edits comports much more closely with the ideals of the Commission in their initial promulgation of Comment 8.

Nonetheless, despite New York and Indiana's valiant efforts to edit and clarify Comment 8, problems remain with the enforceability of the Comment itself. As discussed in Section II.B *supra*, the majority of states view comments as guidance only, and New York specifically indicates that it publishes but does not adopt the comments to the Model Rules. Therefore, edits within Comment 8 itself may not provide a solid footing for lawyers seeking guidance as to their ethical obligations. Further, ethics scholars have suggested that edits to Comment 8 would require significant time to approve and enact.<sup>146</sup> Based on the speed at which change in legal technology is occurring, changes to the text of the Comment itself may not be the most effective means of assisting lawyers in achieving technology competence.

### C. *Guidance for Transactional Lawyers*

In considering the shortcomings of the approaches set forth above to provide transactional lawyers with helpful guidance to obtain and maintain technology competence, the idea of providing guidance in the form of an ABA formal ethics opinion, seems to present one of the most workable alternatives.

In looking to previous ABA formal ethics opinions related to this topic, as well as helpful opinions from other jurisdictions, such as California and Washington, a set of flexible guidelines presents the most workable solution. Rather than prescriptive solutions based on specific types of technology, or specific steps lawyers must take to "check a box" for technology competence, the quandary of the transactional lawyer would better be served by a set of guidelines describing the types of considerations that should be made in connection with determining technology competence.

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143. See *supra* note 48 and accompanying text.

144. See *supra* note 78 and accompanying text.

145. See *supra* note 77 and accompanying text.

146. Simshaw, *supra* note 17, at 206.

Having these guidelines come directly from the ABA, in the form of a formal opinion, would sidestep concerns expressed above with the varying levels of strength and enforceability granted to the comments themselves by various state bar regulatory bodies. This approach would also provide a consistent, if merely advisory, solution.

A list of flexible factors provided by the ABA in a formal opinion would provide a structural solution, permitting transactional lawyers to measure their current practices against a set of objective, non-prescriptive suggestions for the types of technologies necessary in their practice. The ideal set of factors would flesh out the term “relevant technology” as provided in Comment 8, giving transactional lawyers more comfort in knowing that adoption of specifically transactional technology can meet their competence requirements. Core to any set of factors provided to transactional lawyers must be transactional clients’ needs. Keying a set of factors to the needs of a client would also encourage the use of technology efficiently, as inherent in the needs of all clients is the ideal of keeping legal costs manageable.

A potential set of factors could include considerations such as:

- The lawyer’s practice area, client needs, and the nature of the client’s transaction;
- Whether an increase in the lawyer’s efficiency would be achieved through the use of the technology;
- The safety and security of client data stored on or transmitted with the technology, which may be analyzed by a third-party data-security expert; and
- Client instructions, circumstances, and industry standards.

Should the ABA provide a set of flexible factors, similar to the foregoing, in a formal opinion, transactional lawyers would be assured that their requirements for technology competence would not be keyed to the requirements of litigation practice, nor would they be overly prescriptive, and thereby diminish one of the most important accomplishments of the ABA 20/20 Commission in providing Comment 8 to Rule 1.1—providing an evolving, structural guideline for technology competence.

#### CONCLUSION

While no single suggestion for the enforcement or interpretation of Comment 8 provides a perfect roadmap for the transactional lawyer seeking to navigate the complex world of technology competence, each provide some insights into best practices transactional lawyers can adopt in efforts to meet their technology competence requirement. As such, lawyers should first and foremost abide by any and all technology competence CLE requirements put forth by their jurisdictions, and remain up-to-speed on all ethical enforcement or additional ethical guidelines published or adopted in their home jurisdictions.

However, the ABA has an opportunity to provide additional guidance to transactional lawyers by providing flexible factors, including an assessment of the client's needs, in determining whether a transactional lawyer has attained their technology competence under Comment 8. These flexible factors would both provide comfort to transactional lawyers that they are attaining baseline technology competence, while also providing a means to assess whether newly developed technology could be ethically applied to client transactions.

This dual application of a potential ABA formal opinion on technology competence for transactional lawyers would enable innovation, while reducing time spent on concerns of ethical compliance. The ability to harness newly evolving technological tools will permit transactional lawyers to survive and thrive in a landscape of relentless technological change, while also applying their core, human lawyering skills to deal strategy. Harnessing lawyers' skills while reducing billable time through the use of enhanced technology—as an effective enforcement model for technology competence would permit—will allow lawyers to reach more clients, more effectively, thus achieving the ABA's core, structural goals in enacting the technology competence requirement under Comment 8 to Rule 1.1.



