



PRACTICING IN AN AI WORLD AHEAD OF PRECEDENT

Legal Tech, Doctrinal Drag, and the Modern Duty Of Competence

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Technology evolves faster than the law, a persistent gap driven by the rapid pace of innovation compared to the measured, deliberate nature of our legal system. Artificial intelligence (AI), cloud platforms and automated data systems now shape nearly every aspect of modern legal practice, yet judicial doctrine continues to develop incrementally and often by analogy to a paper-based past. Courts are still resolving disputes about electronically stored information (ESI), digital evidence, and AI-assisted advocacy by mapping legacy rules onto unfamiliar technological terrain.

At the same time, professional conduct standards are moving in the opposite direction, increasingly treating technological competence as a baseline obligation rather than a specialized skill. The result is a growing tension: attorneys are expected to adopt and competently use advanced technology even as precedent lags—and even as courts may later judge those decisions using frameworks never designed for modern systems.

This article explores that tension. It offers (1) a brief account of how the gap between technology and precedent emerged, (2) three pressure points where doctrinal drag is most visible—discovery sanctions,

authentication of digital evidence, and AI-assisted advocacy—and (3) a practical framework for making technology decisions defensible when clear precedent does not yet exist.

FROM PAPER TO PLATFORMS: HOW THE GAP OPENED

In the early 2000s, discovery and evidentiary practice assumed a paper world: discrete documents, identifiable custodians, and visible destruction. Email and shared drives were emerging, but most doctrine still rested on physical metaphors.

As technology accelerated, judicial doctrine struggled to keep pace. Mobile devices, cloud storage, collaboration platforms, and automated retention systems introduced complexity that paper-era rules were never designed to measure. By 2011, BlackBerry devices had captured a sizeable market share among professionals wanting a secure mobile email device before losing popularity to iOS and Android touchscreen devices. Recognizing the need for attorneys to be technologically savvy, in 2012, the American Bar Association added specific language that keeping current with “benefits and risks associated with relevant technology” is integral to an attorney’s

duty of competency under Model Rule of Professional Conduct 1.1. Courts analogized where necessary—emails became letters, servers became filing cabinets, and deletion became shredding—preserving continuity while also embedding assumptions that no longer hold in light of today’s technological advances.

The 2015 amendments to the Federal Rules of Civil Procedure attempted to modernize discovery by elevating proportionality and expressly addressing ESI, but many applications of those rules still require judges to stretch precedent to fit unfamiliar systems. Federal Rule 26 frames discovery as limited to what is “relevant” and “proportional,” but what counts as “proportional” can turn on technical details about data volume, accessibility, and system burden that paper-era doctrine never had to measure.

Ethics rules, however, have moved more decisively. Since 2012, most U.S. jurisdictions have adopted similar language to Rule 1.1 requiring technological upkeep. Competence now explicitly includes understanding how technology affects confidentiality, accuracy, efficiency, informed consent, fees, and client service.

The gap between technology and legal precedent persists today and is at risk of

further widening. Courts continue to resolve disputes using analog-era reasoning, while attorneys are professionally obligated to understand and use modern technological tools. That tension is most visible where litigation risk intersects with technological complexity, particularly in the context of AI.

DISCOVERY SANCTIONS IN A WORLD OF ESI AND AUTO-DELETION

Spoliation disputes remain one of the clearest examples of doctrinal drag. Federal Rule 37(e) governs the loss of ESI and centers on whether a party took “reasonable steps” to preserve information when litigation was reasonably anticipated. Severe sanctions require intent to deprive, but even unintentional loss can result in curative measures, cost shifting, or adverse inferences. What constitutes “reasonable steps,” however, is inseparable from the technology itself. Retention policies, auto-delete settings, ephemeral messaging, cloud collaboration tools, and mobile device management all affect what is preserved—and what is lost. Courts are often asked to assess those decisions after the fact, applying precedent developed in a very different technological context.

Consider a common scenario: a company preserves email but notifies no one to suspend auto-deletion in an unsanctioned messaging platform where key discussions occurred. When relevant messages disappear, the court’s analysis will not focus on intent alone. It will ask whether counsel understood how employees actually communicated and whether preservation efforts reflected modern business reality. Legacy case law still supplies the framework, but the judgment turns on technological awareness and foresight.

The lesson is not that every system must be preserved in every case. It is that preservation decisions must be informed, deliberate, and documented. When precedent lags, defensibility depends less on the outcome and more on the reasonableness of the process used to reach it.

AUTHENTICITY AT SCALE: PROVING DIGITAL EVIDENCE IS WHAT YOU CLAIM

Authentication presents a similar challenge. Rule 901 requires evidence sufficient to support a finding that an item is what the proponent claims it is. That standard is straightforward when the exhibit is a paper document. It is more complex when the evidence is a system log, platform export, geolocation dataset, or automated record. Modern digital artifacts can be altered without a visible trace, and their integrity often depends on system configuration

and extraction methods. While courts still rely on familiar foundations—witness testimony, distinctive characteristics, or process evidence—disputes increasingly turn on technical details that traditional custodians cannot explain.

The 2017 amendments to the Federal Rules of Civil Procedure, adding Rules 902(13) and 902(14), offer a partial solution by allowing certain electronic records and data copies to be self-authenticated through certification. Properly used, these rules shift the focus from rhetorical assurance to process proof: how the data was generated, extracted, and verified.

For litigators, the takeaway is clear. Authenticity disputes are best addressed upstream through documented, repeatable processes that can be explained without requiring the court to master the underlying technology. When precedent is thin, structure and transparency become substitutes for doctrinal certainty.

GENERATIVE AI AND THE REASSERTION OF ATTORNEY AS GATEKEEPER

No area better illustrates practicing ahead of precedent than generative AI. Courts have been quick to clarify that AI itself is not prohibited in the legal industry; unchecked and irresponsible use is. Recent decisions across jurisdictions have sanctioned attorneys for submitting filings containing fabricated citations, misquoted authority, or nonexistent cases “hallucinated” by AI tools. The emerging judicial consensus is consistent: existing duties of candor, diligence, and supervision apply regardless of whether work product is generated by a human or a machine. Courts have invoked Rule 11, professional conduct rules governing candor and supervision, and inherent authority to sanction AI-related misconduct.

In response, many judges have issued standing orders requiring disclosure or certification of AI use. While these orders vary in form from judge to judge or court to court, they share a common theme: responsibility for accuracy, candor, diligence, and truthfulness remains with the attorney who signs the filing. Failure to comply can result in sanctions (including fines, striking of pleadings, case dismissal, and/or referral to a state bar association for disciplinary proceedings), as well as reputational harm and strategic disadvantage for the client.

The practical lesson is not “never use AI.” It is to treat AI output like non-lawyer or junior work product—useful, efficient, and potentially powerful, but never final without human oversight and verification. AI does not displace the lawyer’s role as gatekeeper; it intensifies it.

ETHICAL COMPETENCE AND RESPONSIBLE TECHNOLOGY USE

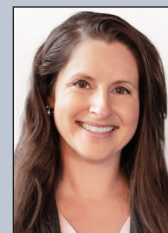
Model Rule 1.1 and its state analogs make technological competence an ethical obligation for attorneys. That obligation extends beyond knowing how to operate tools; it requires understanding their benefits, risks, and limitations. In 2024, the ABA’s first formal opinion on generative AI emphasized that competency, confidentiality, informed consent, and reasonable fees are all implicated by AI use.

Attorneys must safeguard client information regardless of its source, communicate with clients about how objectives will be achieved—including the use of AI—and remain alert to risks such as bias, inaccuracy, and overreliance. Ethical exposure is more likely to arise from unmanaged risks than from the mere use of advanced technology tools like AI.

While superhero culture may have popularized the maxim, “with great power comes great responsibility,” the principle is centuries old and still relevant. Technological advances, including the capacity of AI to rapidly synthesize case law, draft pleadings, and automate discovery, are impressive. For attorneys, “great responsibility” is not just a moral ideal but increasingly part of ethical mandates and client expectations.

PRACTICING AHEAD OF PRECEDENT

Practicing ahead of precedent is the new normal. Courts will continue to rely on analog-era concepts, while ethics rules and clients will demand fluency in modern technology tools. The answer is not avoidance, but rather disciplined adoption grounded in informed judgment, verification, and documentation. When precedent lags, defensibility lies in process: understanding the technology, anticipating courts’ analysis, and creating a record that reflects reasoned practice. Attorneys who navigate it successfully will be those who combine technological competence with professional judgment—long before the case law catches up.



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