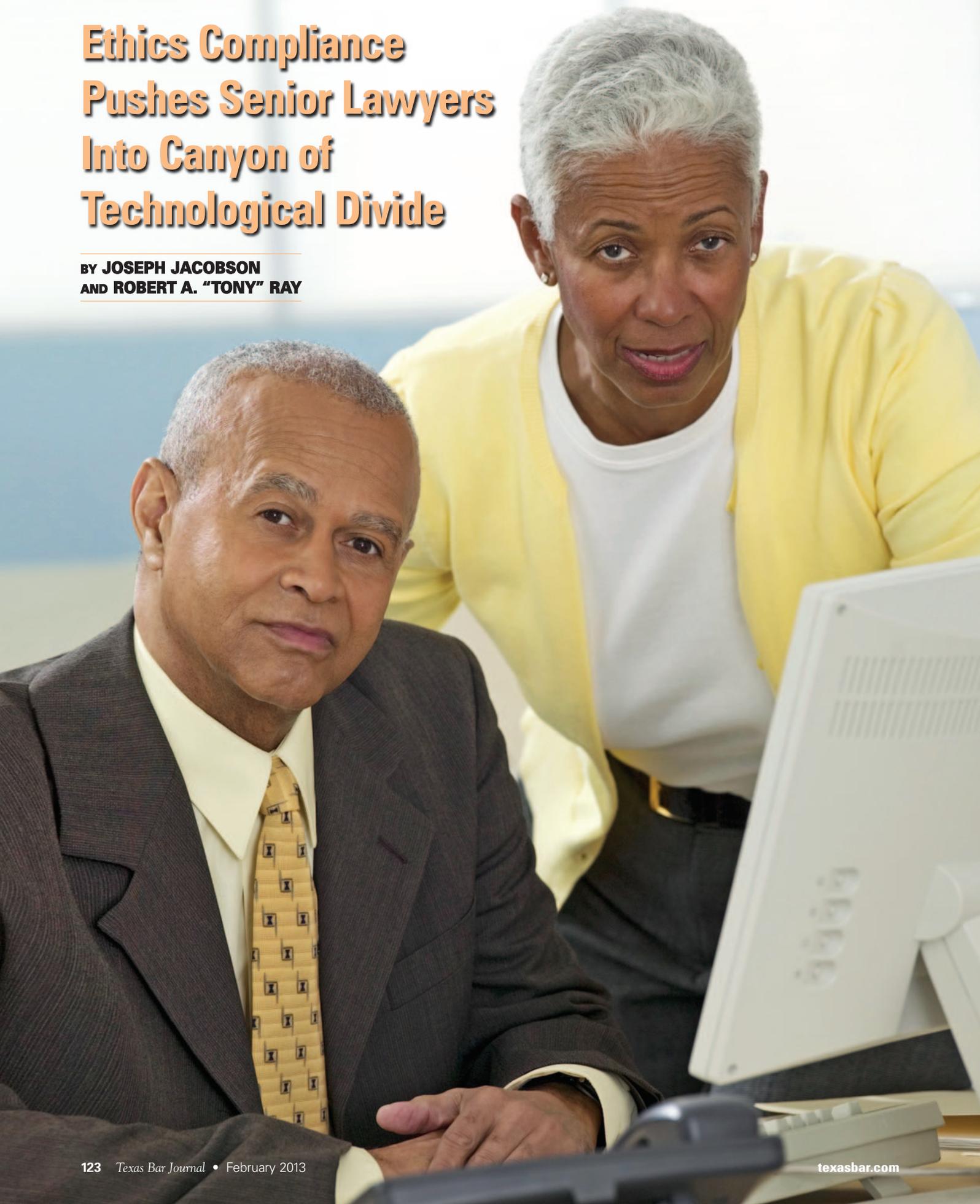


# Ethics Compliance Pushes Senior Lawyers Into Canyon of Technological Divide

BY JOSEPH JACOBSON  
AND ROBERT A. "TONY" RAY



**THE AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20 HAS PROPOSED NEW RULES<sup>1</sup> BECAUSE “TECHNOLOGY AND GLOBALIZATION HAVE TRANSFORMED THE PRACTICE OF LAW IN WAYS THE PROFESSION COULD NOT ANTICIPATE IN 2002.”**

The commission noted, “Technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services.”

The comment to the first rule, Rule 1.1 Competence, states, “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.” A Northwestern University Law School professor said these changes address attorney

earning less than \$75,000, 75 percent of those Americans use the Internet.

The Internet, with innumerable communication options, is so pervasive and has fully integrated itself into every American household. For instance, parents have privacy concerns about their teenagers’ use of the Internet.<sup>5</sup> If parents have privacy concerns about their children and the Internet, there is no reason to believe these already-formed concerns are dropped off on the way to work. Technology’s natural extension is for privacy and confidentiality issues to reach the workplace. You, as an attorney, are part of that workplace. If you talk business with anyone 30 to 49 years of age, 87 percent of them use the Internet.<sup>6</sup>

Ethics compliance is not addressed to law firms or government, but to each individual lawyer — that means

*If you’re unprepared to adopt technology to suit your clients, then you’ll (1) provide limited client service; (2) put your and your insurance carrier’s assets at risk; and (3) soon be out of business.*

uneasiness.<sup>2</sup> Uneasiness may lead to a loss of clients or client actions against you for violation of conflict rules or loss of confidential information. Put simply, if you do not have any uneasiness about technology, then you do not understand technology, privacy, and confidentiality issues, or you’ve already attended the State Bar of Texas Computer & Technology Section presentation on encryption (or its equivalent).

This article is about making money and reducing liability risk, especially for the senior lawyer. We offer no discussion on encryption or best practices but explain why these issues are critical to you.

**TECHNOLOGICAL ISOLATION HAMPERS SUCCESS**

There are no longer two types of clients: those using technology and those *not* using technology. Eighty percent (yes, 80 percent) of Americans use the Internet.<sup>3</sup> Even if you target clients from Middle America, you still need to be technologically competent since the Internet is used by 95 percent of households with incomes of \$75,000.<sup>4</sup> Your technological isolation becomes a greater barrier to your success. Even if you target households

you. Being an established, senior lawyer and doing things “the old way” is no longer an option.

**ATTORNEY-CLIENT RELATIONSHIPS AT STAKE**

According to Charles Adams,<sup>7</sup> University of Tulsa law professor, “Technology use is a matter of competency.” Adams, who teaches evidence and civil procedure courses, says he began encrypting his exams after he suspected that a student stole a paper copy of an exam from his office. The University of Tulsa does not require this level of security; so, he made an individual choice within a large organization.<sup>1</sup> Adams integrated encryption into his work flow. An attorney’s competency for representing a client governs whether a relationship should even exist. An attorney must make a commitment to stay or become competent in technology to properly and ethically represent the client. Adams’ comments are noteworthy since he specifically included technology’s impact in litigation, such as e-discovery matters and spoliation of evidence.

If you’re unprepared to adopt technology to suit your clients, then you’ll (1) provide limited client service; (2) put your and your insurance carrier’s assets at risk; and (3) soon be out of business.

## IMPROVING TECHNOLOGY PROFICIENCY

The State Bar of Georgia provides assistance to attorneys, young and old, who need help with technology. As part of the dues paid by the attorneys in Georgia, the bar staffs and subsidizes a Law Practice Office providing direct individual practice management assistance. The LPO service is personal and in a style developed with experience helping senior lawyers. They can provide on-site visits. These visits may be as basic as a review of hardware from starting the computer, to reviewing email, word processing, and document assembly, or as complex as helping an office switch to a new, more efficient case management system or time and billing system. These Georgia Bar employees offer credible advice supported by their experience focused only on law practices. The LPO's on-site charges begin at a minimum fee of \$37.50 an hour. The consultations, while extremely valuable, are not the bulk of what they do. Most members seek answers via email and phone calls, and make use of a resource library that the office keeps.

The office will send people to an attorney's office to assist the attorney in implementing, upgrading or learning office technology. This is followed by a written report that indicates issues, recommendations about the issues, and an action plan for the member firm. The consultants are employees of the Georgia Bar who are certified on most of the software programs on which they provide assistance. They get a firm started properly on systems and then offer additional support directly and as a liaison to the software vendors where needed.

Firms can get basic tech support through them based on their services to the firm, but the firms are also urged to use the vendors' tech support and maintenance services, too, when facing advanced concerns. They recommend the services of other accounting and consulting firms where they deem the needs of their members are best met by their offerings.

As for their general consultations, they believe that they are uniquely situated from the perspective of having the Georgia State Bar involved in the review of operations and to bring a reliable level of expertise as far as Bar rules compliance goes. They reach out to the other vendors and maintain relationships with them to help them better assist their members if asked.

The ABA Law Practice Management Section issued a paper in 2000 to help state bars implement practice management assistance programs. The paper can be downloaded at [americanbar.org](http://americanbar.org).

## DOES AGE MATTER?

The number of senior lawyers is growing. State Bar of Texas membership shows that 55 percent of all practicing

attorneys are at least 46 years old, and 44 percent are 51 or older. If you are not a senior lawyer, you are surrounded by them. Therefore, every attorney should be concerned about technology issues.<sup>9</sup>

Not all senior attorneys need such basic help. Some attorneys who are seniors consider themselves to be on the cutting-edge of technology. They recognize that in order to stay current, they need the latest technology in their office. Maybe as a more experienced attorney at a partner level or sole proprietor with an associate or other support staff such as paralegals, these senior attorneys obtain more money as a result of new technology adoption. A consultant in the Houston area indicated that she finds many senior attorneys are more technologically up-to-date than younger ones.<sup>10</sup>

The issue cuts both ways. Some senior attorneys need basic technology training, but there are some who are more advanced than the average practicing attorney. Regardless of a senior attorney's like or dislike of technology, ethics and clients demand currency.

You have to act now, if not to anticipate specific technological rules, then to match the experience and expectations of your technologically competent clients, associates, or staff. Privacy and confidentiality are significant issues in the rest of the world.<sup>11</sup> Some countries seek to maintain data privacy protection even after the data leaves control of a company in that country. With use comes reasonable fear for breaches of privacy and confidentiality — and reasonable responses. Do you have sufficient information to adopt and use those reasonable responses? If you don't, then your practice management, your clients, or your insurance carrier will require it. Finally, the State Bar of Texas, and each state's governing body, will ultimately integrate technology into ethics. Your license will depend on it. **TBJ**

## NOTES

1. ABA Commission on Ethics 20/20, Center for Professional Development, 2012, [americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).
2. John P. Ratnaswamy, Ethics 20/20 and Confidentiality, American Bar Association GPSolo, Vol. 29, No. 6, Nov./Dec. 2012, [americanbar.org/publications/gp\\_solo/2012/november\\_december2012privacyandconfidentiality/ethics\\_20\\_20\\_confidentiality.html](http://americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/ethics_20_20_confidentiality.html).
3. Kathryn Zickuhr and Aaron Smith, *Digital Differences*, Pew Institute, April 13, 2012, [pewinternet.org/Reports/2012/Digital-differences/Overview.aspx](http://pewinternet.org/Reports/2012/Digital-differences/Overview.aspx).
4. Jim Jansen, "Use of the Internet in Higher Income Households," Nov. 24, 2010, Pew Research, [pewinternet.org/Reports/2010/Better-off-households.aspx](http://pewinternet.org/Reports/2010/Better-off-households.aspx).
5. Mary Madden, Sandra Cortesi, Urs Gasser, Amanda Lenhart, and Maeve Duggan, "Parents, Teens, and Online Privacy," Nov. 20, 2012, [Pew Research, pewinternet.org/Reports/2012/Teens-and-Privacy.aspx](http://PewResearch.org/Reports/2012/Teens-and-Privacy.aspx).
6. Kathryn Zickuhr and Aaron Smith, Internet adoption over time, The Demographics of Internet Users in 2000 and 2011 (chart), Pew Institute, April 13, 2012, [pewinternet.org/Reports/2012/Digital-differences/Main-](http://pewinternet.org/Reports/2012/Digital-differences/Main-)

[Report/Internet-adoption-over-time.aspx](#).

7. Professor Adams teaches courses on evidence, intellectual property law, and the Internet. University of Tulsa, College of Law, [utulsa.edu/academics/colleges/college-of-law/Faculty%20and%20Administration/A/Charles%20Adams.aspx](http://utulsa.edu/academics/colleges/college-of-law/Faculty%20and%20Administration/A/Charles%20Adams.aspx).
8. Interview with Professor Charles Adams, Dec. 3, 2012.
9. State Bar research showing 55 percent of all attorneys are older than 46.
10. Camille Hamilton, CMIT Solutions of Northwest Houston Suburbs. Under Australia's proposed Data Privacy Principles, an Australian company may be deemed noncompliant if it transferred data to a foreign non compliant entity. Hong Kong has criminalized wrongful sale of personal data. DLA Piper, "Australia: Data Privacy Compliance in Asia Pacific," *Mondaq: Connecting Knowledge and Technology*, Nov. 17, 2012, [mondaq.com/australia/x/206518/data+protection/DATA+PRIVACY+COMPLIANCE+IN+ASIA+PACIFIC&email\\_access=on](http://mondaq.com/australia/x/206518/data+protection/DATA+PRIVACY+COMPLIANCE+IN+ASIA+PACIFIC&email_access=on).
11. European Union's proposed data privacy proposals will integrate each country's regulations into one statute for all member-countries. Proposed fines for violations are as great as 2 percent of a company's worldwide sales. Kemp Little Commercial Technology Group, "European Union: New EU Data Privacy and Data Protection Laws

Unveiled," *Mondaq: Connecting Knowledge and Technology*, March 6, 2012, [mondaq.com/x/167010/Privacy/New+EU+Privacy+And+Data+Protection+Laws+Unveiled](http://mondaq.com/x/167010/Privacy/New+EU+Privacy+And+Data+Protection+Laws+Unveiled).



#### JOSEPH JACOBSON

*is an officer of the State Bar of Texas Computer & Technology Section. His Dallas-based transaction practice includes a long-standing involvement in e-commerce, data breach/notification, and privacy issues. Jacobson helped draft sections of the Texas Business & Commerce Code that deal with computers and networks.*



#### ROBERT A. "TONY" RAY

*is both a past chair of the State Bar of Texas Computer & Technology Section and a past ex-officio member of the Texas Supreme Court's Judicial Committee on Information Technology. Litigating throughout Texas from his Tyler base, he limits his practice to claims arising from inheritance disputes, including will contests, fiduciary responsibility claims, and associated torts.*

## Starting your own Practice?

The Texas Young Lawyers Association's *Office in a Flash* provides you with valuable information you may need to start your own firm – all on a flash drive!

Office in a

# FLASH<sup>®</sup>

#### TOPICS INCLUDE:

Developing a Business Plan • Renting Office Space  
Setting-up Client Trust Accounts • Free 1 Hour of CLE Included

*Office in a Flash* is available at [tyla.org/officeinaflash](http://tyla.org/officeinaflash).