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TECHNOLOGY

Is Your Head in the Cloud?

How to Talk Techy to Your IT Staff

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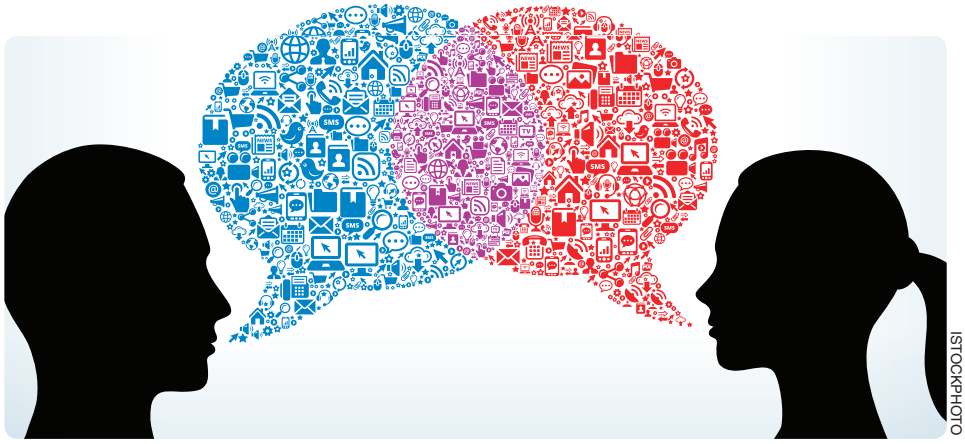
ONE OF THE MOST DIFFICULT issues lawyers face when dealing with technology is that technology professionals often use a different kind of language. Whether the issue involves licensing agreements, electronic discovery, internal support (e.g., the printer will not print), or software purchases, the inability to communicate effectively with the IT staff can cause misunderstandings that can be costly.



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For instance, it is not unusual for a lawyer to circulate a litigation hold letter that describes certain types of information that the company should retain. If the litigation hold says that the instructions apply to all electronic information located on the company's computers, the IT staff will not necessarily know that all information included on mobile devices are included in the hold. Below are some common terms that cause significant confusion between legal and IT staffs.

1 **COMPUTER.** Legal professionals regularly use the word computer regardless of the type of device they intend to identify. IT professionals will be better able to answer questions or provide information if they understand the types of computers that are implicated in the request. Depending on the company, a computer could be a personal computer, also known as a desktop, a laptop, a tablet, a server, a mobile computing device, a virtualized server, a cluster of servers, or a section of virtualized servers located in a third-party's datacenter. Other devices that could be included in the definition of computer are networked facsimile machines, voicemail systems and mainframes.

It is also helpful to discuss whether there are portable storage devices (also known as flash, USB, or thumb drives) and external hard drives with potentially relevant or discoverable information.

To help reduce the risk of omitting an important information repository from discovery request or other queries related to technology, legal professionals should ensure that they are using the proper terminology.

2 **CLOUD COMPUTING.** Dictionary.com defines cloud computing as: Internet-based computing in which large

groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources.

The term "cloud" has become a catch-all phrase meaning anything from the amorphous place people store photos located on their mobile devices to large data centers providing services to thousands of customers. If the staff working on a cloud services transaction does not understand exactly what information will be placed into the cloud, the staff may not include appropriate protections in the cloud services agreements.

Initially, when approached about the possibility of storing corporate data in the cloud, counsel should determine whether the proposed cloud solution involves the public cloud or a private cloud. A public cloud is available to the general public and is generally less expensive than a private cloud. Alternatively, a private cloud is owned by a particular organization and is not available to the general public. Usually, when technology representatives talk about moving corporate data to the cloud, they are not referring to a private, dedicated cloud.

Some of the struggles that companies face when considering a move to the cloud include:

- Cloud services provider may not be able to agree to a specific location for the data;
- Cloud services provider may be more vulnerable to intrusion;
- Limitations of liability are often too low to cover potential costs of lost or misappropriated data; and
- In a dispute, Cloud services provider may have the ability to hold data hostage until resolution.

3 BACKUPS. Although it is not only a semantic problem, misunderstandings also frequently occur surrounding use of backups. Many companies either have an internal staff or outsourced resources that make backups of critical systems.

Counsel does not always understand that not all systems are backed up, and when they are included in the backups, the backups are not always retrievable for a variety of reasons. Additionally, lawyers often believe that a backup of a personal computing device is a replicated copy of the device that can be recalled by merely plugging it in. That is typically not the case. Usually, a backup is a compressed set of files that have to be restored appropriately before they are useful.

Accordingly, knowing the scope of the scheduled backups, as well as the process required to restore a backup can help eliminate some frustration.

4 LICENSING. Lawyers who work with clients regarding software licensing learn quickly that not everyone means the same thing when they say they have a license to use software. The technical team likely believes that a license key, serial number, or a certificate of authenticity constitute proof of a license. The legal team generally believes that the written license agreements are sufficient to demonstrate the right to use a product. A publisher or software auditor generally will not accept as proof of a license anything but an invoice, receipt, licensing statement from the publisher, or other dated proof of entitlement.

When updating software asset management and internal governance practices and procedures, it is helpful to understand that it is important to keep all of the documentation described above. Knowing how to access the information needed for a specific license query can save significant time and money.

Many attorneys and technical staff are often talking in different languages. Identifying potential sources of misunderstandings and treading those discussions carefully can lead to much better outcomes in situations where legal and technical issues intersect. ■

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