

EDUCATING THE DIGITAL LAWYER

Oliver Goodenough and Marc Lauritsen, Eds.



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Fred Galves has been a member of the Pacific McGeorge faculty since 1993. A noted proponent of technology in the classroom and the courtroom, he teaches all of his classes using display technology. Following graduation from the Harvard Law School, Galves served as a judicial clerk for Judge John L. Kane (U.S. District Court, District of Colorado). He practiced with the Denver law firm of Holland & Hart, specializing in complex commercial litigation and litigation against former directors and officers in failed banks and savings and loan associations. One of his articles, "Where the Not So Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance," 13 Harv. J.L. & Tech. 161 (2000) was the first law review article with an accompanying CD-ROM with full-animation video footnotes.

Oliver Goodenough is engaged the study of the implications of both the digital revolution and cognitive science for law and society. He is currently a Faculty Fellow at The Berkman Center for Internet & Society at Harvard University, where he has served as co-director of the Law Lab project, a Professor of Law and the Director of Scholarship at Vermont Law School, a Research Fellow of the Gruter Institute for Law and Behavioral Research, and an Adjunct Professor at Dartmouth's Thayer School of Engineering. His research includes cloud computing governance, digital institutions for supporting entrepreneurship, and the neurological basis for internal commitments. He has managed the development of a software

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Educating the Digital Lawyer: Introduction

This book grew out of a pair of conferences—one in October 2010 at Harvard Law School and one in April 2011 at Columbia Law School—that brought together several dozen academics and practitioners who are deeply interested in the technology of law and how law schools and other institutions should educate students and lawyers about it. We asked participants to contribute chapters to a compilation that would provide a snapshot of current ideas and aspirations. The result is this collection of informal and loosely coupled pieces. They cover a range of styles, formats and targets, from short essays meant to provoke thought, to practical “how to” guides, and on to scholarly treatments of education theory and digital jurisprudence.

What they have in common is an understanding that the digital revolution that is affecting so much of society is now changing how law works and, consequentially, how the legal academy needs to go about teaching the next generation of lawyers who will inhabit—and help shape—this changed world of law. This teaching will involve new courses on specific subjects like digital discovery, new techniques for teaching, like digitally-based simulations or the development of applications as student work projects, and new suites of courses and approaches, as “digital across the curriculum” becomes a goal.

We are grateful to LexisNexis for its support of this process from its early stages, and its willingness to experiment with us on modes of communication and delivery for this volume—delivery that is itself largely through PDF, eBook, and other digital means and formats. We have been particularly fortunate in having the guidance of Pavani Ready, now Senior Director of Continuing Legal Education Portfolio at LexisNexis, as we have conceived and developed this volume. Notwithstanding the normal LexisNexis boilerplate, content may be licensed by arrangement with the individual authors, who retain copyright in their individual chapters.

We are also grateful for the contributions of Harvard Law School’s Program on the Legal Profession and of the Berkman Center for Internet & Society at Harvard University which, with the participation of the Gruter Institute for Law and Behavioral Research, established the Law Lab project which incubated this book. The conferences at Harvard and Columbia were direct offshoots of the FutureEd gatherings organized by the Program on the Legal Profession in partnership with New York Law School. We thank the Ewing Marion Kauffman Foundation, and particularly Robert E. Litan, its Vice President for Research and Policy, for their support of the Law Lab project and for the model which the publication of *Rules*

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for Growth provided for a freely available collection of essays aimed at provoking thought and change.

The collection is organized into four parts, “Who is the Digital Lawyer and What Does She Do?,” “Understanding the Technology,” “Developing the Digital Curriculum,” and “Digital Jurisprudence and Scholarship.”

Brian Donnelly provides a broad review of scholarship on what it means to be a ‘digital lawyer,’ covering law-specific writers such as Katsh and Susskind, as well as more general scholars of electronic media, such as McLuhan and Ong. He describes clinical offerings at Columbia Law School that incorporate lawyering in the digital age, and the skills and topics covered. Fact finding, legal research, knowledge management, and ethical issues in this context are addressed, as are issues of pedagogy and creativity.

Marc Lauritsen takes up the subject of how lawyers should be prepared for practice in a world in which legal work increasingly can be and is being done by machines. He supplies an overview of the many ways in which law and the digital world interpenetrate, and the special issues presented by intelligent legal machines, including their implications for legal education. Lauritsen concludes with the imagined state of the legal ‘technium’ in the 22nd century and the imperatives for lawyers and law schools as technology continues to transform our institutions.

Matthew Reed and David Blaszkowsky discuss the rise of digital securities and other financial contracts and the demands they will place on law schools, lawyers and the continuing legal educational system. Their work also alerts us to the role digitization will play in challenging financial practice. Digital lawyering will be a necessity across the full sweep of legal services.

Harry Lewis gives us a resource for better understanding the technology, with a look “under the hood” of the Internet, summarizing its distinctive attributes and explaining how and why it was designed. Key concepts and phenomena are explained with which many lawyers, students, and teachers only have a glancing acquaintance.

Jeanne Eicks helps us make the transition from what a digital lawyer is and does to the questions of how the relevant technologies work and we locate technological literacy in the law school curriculum.

Brock Rutter surveys the small but growing number of courses at American law schools that address the questions of what technology can do for law. He recounts some of the history of efforts to engage students in building applications as part of their education, and how such applications play a role in increasing access to justice.

Chapter 7 deals more specifically with the teaching of technologies used in litigation. Fred Galves puts that form of instruction in the context of traditional Socratic methods, clinical education, research and writing programs, and global

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developments. He explores the exploding issues relating to electronically stored information and e-discovery, case analysis software, and trial presentation methods. Galves summarizes the reasons why courses in litigation technology deserve a regular place in the law school curriculum and includes a detailed outline of how such a course can be organized.

Ron Staudt describes the Apps 4 Justice project, an ambitious effort to transform both legal education and the distribution of legal assistance by proliferating law school courses and clinics in which students build useful applications for credit. He analogizes the opportunity as similar to the way in which clinical education caught fire in the law school world in the 1970s. Staudt describes his own Justice & Technology Practicum at Chicago-Kent School of Law, and the new partnerships that are possible with legal aid providers, courts, and other participants in access to justice communities.

Paul Maharg explores how digital simulation can be used in legal education, and describes a number of projects where simulation is currently in use in the UK, and is being developed in the USA. He provides case studies of those projects, including the use of a virtual environment in the form of a fictional town on the web, called Ardcalloch, and the evaluations these efforts underwent.

Stephanie Kimbro brings a practitioner's perspective to the question of what should be in a digital lawyering curriculum. She gives particular attention to social media and e-lawyering, covering the technical, ethical, and marketing challenges and opportunities. Kimbro provides comprehensive resources for the topics she identifies.

Barbara Bernier and Dennis Green contend that reforming legal education is pivotal to afford American law students the opportunity to be creative and collaborative in their work as ultimate legal knowledge managers. They challenge pedagogy as the touchstone of legal education and propose a more collaborative model that uses andragogy as the focus for a clinic that adapts simulation principles to a technological model known as Second Life. A case study of a Virtual Law and the Arts Clinic is presented.

Michael Bennett believes that legal educators inherit a set of societal and professional obligations to render the embrace of digital lawyering by the profession less impulsive and reckless than it might otherwise be. That includes acknowledging that technological enthusiasm is a perennial strain of American culture, and that technologies are hardly neutral artifacts. Courses about new tools of practice must not omit the ethical, professional, and societal implications of their use, and surrounding social realities such as the digital divide and the power of code to serve as de facto legislation through the architecture of our digital environments. Science fiction is suggested as a useful device for furthering critical assessments of these developments.

Gregg Gordons explore the impact of digitization on legal scholarship. He draws

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extensively on his experience at the Social Science Research Network (SSRN)—one of the services at core of the restructuring of scholarship—to illustrate the changes underway in how we research, write, and distribute scholarly work in the first decades of digital communication.

Oliver Goodenough provides a short concluding essay, an Afterword, that compares the possibilities for change that come from the digital revolution with those that created the current case-based methods of teaching and thinking about law. He challenges our readers to take a shot at putting an enduring stamp on the coming world of digital lawyering, in the process becoming the Langdell for the 21st century.

We hope that this diverse set of chapters will provide material for thought and action across a broad group of readers. Indeed, we offer the collection as a starting point, reflecting the beginning of an age of change, an age that will by necessity engage most of us who practice, teach, or study law. The true success for our volume will be to help spark the next round of thoughtful innovation as the Academy grapples with the challenges of *Educating the Digital Lawyer*.

Marc Lauritsen
Oliver Goodenough
December 19, 2011

Educating the Digital Lawyer: Introduction

Dear Reader:

If you are reading this book on an eReader, you are one of the 40% of the legal community that is experiencing the growth of the eReader as not just a personal use device, but a business tool as well. In and of itself, 40% may not seem significant but if you compare that to the numbers of one year ago we have experienced 167 percent growth eReadership in the Legal community year over year.

Impact of eBooks to the Digital Lawyer

This growth impacts law students, researchers, and lawyers and law libraries in significant ways. Below is a vision of how a lawyer and a law librarian might expect to be impacted by the introduction of eBooks:

The Attorney

A solo attorney in private practice spends a lot of time in court representing her clients. With a diverse client and matter base often times the solo attorney doesn't know what to expect and it is difficult to retain the right research materials for all situations. The ability to have an entire research library available wherever she goes — her bankruptcy materials, court rules, family law treatises and so on — would be the best answer. As legal publishers have begun to develop eBooks the solo attorney may now see this need fulfilled.

Often times, a solo attorney may have a device for personal reading already. Solo attorneys have now begun to use that device for work as well. As publishers release titles in eBooks in multiple, industry standard formats this is possible. In one folder on the device, an attorney may have her latest New York Times Best Seller and in another she has her New York court rules, etc.

In addition to the logistical benefits, the attorney also realizes significant efficiencies via legal eBooks:

- Easy navigation to her notes and back and forth between sections in her book
- Ability to copy and paste passages right from the book into a brief ; eliminating retyping
- Searching within the text
- One click navigation between citations in the book to her preferred online research system for more in depth research

All with native device and software functionality with which she's familiar.

The Law Library

A law librarian for a major law firm, has very demanding internal stakeholders, and rightly so. With billable hourly rates in the hundreds of dollars, failing to have the research material that attorneys need, all at a moment's notice, could cost the

firm significant revenue. Increasingly, law librarians have seen a spike in the mobile expectations of internal stakeholders — not only do they want all of the materials in the library, they want to be able to take those materials with them access them anywhere. All via cell phone, or laptop, or tablet. Often times they expect that they will not be restricted to just the firm issued device. In particular, younger associates are looking to access the library via their smart phone at any time.

Much the way that mobile, digital libraries have transformed public and higher education libraries, we expect that this solution will transform law libraries as well. Digital libraries offer significant benefits that transfer well to the law library:

Patrons	Librarians
A 24 hour, 7 day a week, always open library	No late returns of eBooks, ever
Patron driven access to content	Better data on popular and under-circulated titles for collection development
Access to the library from anywhere with Internet access	Integration to library management systems for streamlined resource access
Device flexibility and the ability to transfer of content from device to device	Lower cost library infrastructure

With digital library solutions a law librarian will be able to provide internal stakeholders the solutions that they are looking for while providing his management team an attractive cost structure and library staff with enhanced library management tools.

- In addition, digital libraries will bring new content licensing options to libraries that will have significant advantages for libraries and patrons. For example: Unlimited eBook licenses so that texts are always available in the library, which eliminate wait lists or retrieval of titles from somewhere within the firm for another associate
- Unlimited access to the publisher’s full collection of titles, providing patrons more access to more research materials without restriction or delay.

These are big changes envisioned for law libraries but we believe they are exciting options for the future.

eBook Adoption Considerations

These scenarios sound like legal research utopia however there are many considerations before establishing a digital law library. Among them the most important are:

- Which devices to utilize and support

- Mobility
- Purchasing vs. licensing and what these changes entail
- Content availability

Devices

There is no clear cut answer to which device to use for eReading. It often varies based on a user, library or firms needs and expectations. (Note: a recommendation on a specific device would likely also be obsolete by the time you read this!)

Following is some information and advice for consideration in selecting a device. There are currently four common devices/platforms for eReading:

- Amazon Kindle
- Apple iOS
- Barnes & Noble Nook
- Android OS devices

Among these devices (as of this writing), the Apple iOS is the most popular business device for the legal community and the Amazon Kindle is the most popular personal device.

With the exception of the Kindle, which supports a proprietary format called MOBI, these devices all support the ePUB format. Why is that important?

Via our research, we have received the following feedback related to devices:

- Amongst solo firms or individual users of legal publications we have heard a strong desire to continue to use their personal reading device for their business reading as well
- Amongst law librarians we have heard the following two device models:
 - The firm or library will prescribe which device will be supported and utilized by patrons in line with policies, or
 - The firm or library does not expect to have the ability to control the devices that will be used by patrons so they must support ALL devices

What does this mean? One key question you should ask your publishers: Are you device agnostic with your eBook support (e.g., do you support MOBI and ePUB)?

You should also, if you are planning to buy and support a specific device, compare each of these devices closely. Each has its own strengths and weaknesses and we would suggest you prioritize and examine the following key items within the context of your patron's needs:

- Mobile capabilities (WiFi vs. Wireless)
- Device functionality (copy/paste, email, highlight, notations)
- Additional capabilities (e.g., application support and portfolio)

- Cost

Mobility

In addition to the mobility considerations between devices as mentioned above (WiFi vs. Wireless and application support), the primary mobility question is around what the content mobility model is for the publisher(s) you are considering. In some cases, eBooks are applications and may only work when a user has Internet access. In other cases, eBooks are digital files stored on a users' device and others are a hybrid with some content cached offline. Each model has its own benefits and detractions that must be considered in-line with a library's mobile strategy. For example:

- Online applications are only available where a user has Internet access. Do you patron's local courts, classrooms, subways, etc. have Internet access?
- Additionally, an online application may mean that users have to go one place for some library content and another app for other content.
- Similar to online applications, a set of court rules that is only partially cached offline may not be of much use in a court room without Internet access.

In our opinion, a file stored on the device with syncing when Internet access is granted is the best mobile option for patrons. This model provides the best mix of usability and the easiest adoption for patrons.

Purchasing vs. licensing and what might these changes entail

In digital library description above, you may have noted that libraries will be presented new licensing models. Licensing, akin to software, provides the user rights to use the content for a specified period of time. However, ownership rights remain with the Publisher. This is a sharp change from 100+ years of purchasing books in the legal community.

The change is not all bad though, depending on the need to retain and reference content after the fact, a license for a period of time may suit your needs. For example, court rules may be just fine in a license model; a user would most frequently want the current court rules and no historical material. However, tax materials may have frequent historical reference. In this case a license may not be suitable. Our recommendation is that you ask your publisher:

- Whether you are purchasing or licensing the content
- What the license rights entail (e.g., they may grant perpetual access or just one year)
- What the alternative acquisition models and associated costs are

And make an informed acquisition based on the response.

Content availability

One of the key requirements for a digital library is the availability of content. If a digital library user cannot expect all of the library's content digitally it will lead to a unsatisfactory patron experience as they search first in one format and then another.

Our recommendation is that you make sure you understand your publisher(s) eBook strategy. Are they planning to convert their entire content portfolio to eBook? What formats will they support? How often will they be updating the content? Is it at least as frequent as the Print?

The Future of the Legal eBook

Readers of this title via eBook are also experiencing the start of a conversation on what the future of a Legal eBook might be. This title contains:

- Linking to the Internet
- A new model for page numbering

Individually, these may not seem large but they are a significant departure from the 100+ year history of legal publishing.

In the future we expect that Legal eBooks will also contain:

- Interactive Content (audio and video)
- Live news
- Content that updates itself every time the book is opened
- Interactive charts and tables

We would like to ask the reader to participate in the conversation on how these ideas will evolve Legal eBooks.

Participate in the Conversation

This is only the start of the evolution (or is it a revolution?) of the "print" medium for our industry's transformation to the Digital Lawyer. We invite you to help steer the future by participating in the conversation in our Digital Lawyer community forum here:

www.lexisnexis.com/digitallawyer

Thank you and happy reading.

Sincerely,

Scott Meiser

On behalf of the LexisNexis™ eBooks Team

