Luddite Lawyers Are Ethical Violations Waiting To Happen

By Megan Zavieh on July 10th, 2015 934 Shares

"We have not quite reached the level of 'if you can google it, you must,' but we are fast approaching it."

Technological incompetence used to be merely a competitive disadvantage. Now, it is a potential ethics violation — or even legal malpractice.

During my first year of law school, we were not allowed to do computerized research. Instead, we were taught to use the leather-bound reporters, Shepherds, and treatises. It was only during our second year that we were deemed worthy to use Westlaw and Lexis to "confirm" our book findings. (Of course, I doubt any of us ventured into the stacks again.)

This approach reflected the general attitude of the legal profession in the mid-to-late 1990s. Technology was grudgingly accepted, but not required. Lawyers at big firms had online research accounts and solos went to the law library to use the books. Nobody thought anything was wrong with this, although online research did give big firms a competitive edge.

In 2013, email is ubiquitous, and just about every lawyer has some form of electronic research available on his laptop, tablet, or phone. And everyone — lawyers included — uses Google to find everything else. In law practice, that includes research on witnesses, opponents, judges, and anything else not found in a Fastcase, Westlaw, or Lexis database. Technology is an unavoidable part of practicing law.

Ethics Rules Follow Practice

The ethics rule makers have taken note of this evolution, and the rules have grown to require technological competence.

Lawyers Cannot Ignore Technology

The ABA made it abundantly clear that lawyers must keep up with technology when it amended comment 8 to Model Rule 1.1 on competence. Comment 8 now reads (emphasis added):

> 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.

As Nicole Black, Director of Business Development at MyCase, puts it, "I think it's pretty clear that […] lawyers can no longer turn a blind eye to technological advancements and their effect on the practice of law." Without necessarily invoking the ABA comment, courts are taking a similar approach.

> *"The court considered it a "matter of professional competence" that lawyers should investigate social networking sites …."*

The Duty to Google

A seminal case in the area of availability of information and lawyers' obligations to seek it out is *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010, *en banc*), in which a party sought a new trial based on a juror's nondisclosure of his litigation history. While acknowledging the lack of a Supreme Court rule on the extent to which a party is required to research a potential or actual juror, the court stated:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net [state online database similar to PACER] search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.
>
> *Johnson*, 306 S.W.3d at 558-59.

The court ultimately ruled parties must use "reasonable efforts" to conduct the described search, and courts must ensure the parties have a reasonable opportunity to do so. Given this rule, if a lawyer in Missouri fails to conduct this search and later discovers information that may have impacted a juror's service, he is likely to find the court unsympathetic to a motion for new trial. And in that case, the lawyer may have committed malpractice and an ethical violation.

Maryland took a similar approach in *Griffin v. Maryland*, 192 Md. App. 518 (2010), where the court considered it a "matter of professional competence" that lawyers should investigate social networking sites as part of their due diligence. (*Griffin*'s holding on authentication of that social media evidence was overruled on appeal, but the appellate court took no issue with the idea that attorneys have an obligation to review social media evidence as part of their due diligence.)

Judges Can Use Google, Too

Other courts have ruled against parties claiming not to be able to find particular people (usually other parties to the case) when searches turn up contact information not found by the complaining party. For example, *see Munster v. Groce,* No. 18A02-0409-CV-738, n.3 (Ct. App. Ind. 2005) (court stated that "In fact, we discovered, upon entering 'Joe Groce Indiana' into the Google™ search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce's mother that listed numerous surviving relatives who might have known his whereabouts."); *DuBois v.*

Butler, 901 So.2d 1029 (2005) (in referring to locating a party, "advances in modern technology and the widespread use of the Internet have sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo").

We have not quite reached the level of "if you can Google it, you must," but we are fast approaching it. Lawyers are no longer safe ignoring potentially discoverable information online.

These examples pertain to due diligence in litigation, but the vast possibilities for extrapolating these rules are limitless. What if a party to a contract could have discovered a mistake of fact or a fraudulent misrepresentation with a simple Google search? Parties' rights may be tremendously affected by the availability of information online, and attorneys' failure to attempt to locate that information may prove fatal to claims and careers.

Technology Competence is Now Required

Even seemingly minor administrative details of practicing law are now unavoidably ruled by technology. In the mid-1990s, as email began to emerge as a societal trend, it was frowned on by the legal profession. In 1999, email was still a clunky and barely-used tool at the federal court where I clerked. It was used primarily to let us know of building closings and fire drills. We certainly had no significant contact with each other or counsel appearing before the court. We did not even email draft opinions to our judges; they were printed out and hand-delivered.

> *"The obligation to keep up with technology is not a directive to buy every new gadget and gizmo."*

Now, many states require attorneys to maintain an active email account, to monitor that account and respond to messages, and to disclose the email address to the state bar. A South Carolina lawyer was even suspended recently for failing to do so. *See* Supreme Court of South Carolina Order in Appellate Case No. 2012-213164 (discussed in detail by Nicole Black on her blog, *Sui Generis*). Attorneys must at least be competent in electronic discovery and know what options are available for electronic storage of documents and files.

E-Discovery Competence

In order to competently conduct discovery and meet the relevant ethical obligations, lawyers cannot bury their heads in the sand about electronic documents and the trails they leave behind.

When the concept of e-discovery began to emerge, it seemed primarily limited to BigLaw litigation involving big, corporate clients. My own experience was a securities enforcement action in 2001, where we combed through audit workpapers and emails using a Lotus database. Now, even litigation between individuals represented by solo attorneys is likely to involve electronic discovery.

Effectively performing e-discovery is required by basic rules such as ABA Model Rule 1.1 on the duty of competence and the Federal Rules of Civil Procedure on e-discovery. Preservation of electronic documents on your own side of litigation is mandated by the same rules always governing preservation of evidence (such as ABA Model Rule 3.4), and also by specific e-discovery rules in place in the Federal (such as FRCP 26(f)) and some state courts. Moreover, the Federal courts require parties and counsel to report to the court on the details of their e-discovery, bringing in attorneys' duty of candor to the tribunal (ABA Model Rule 3.4).

Failure to adequately and competently perform e-discovery is a host of ethical violations just waiting to happen.

Staying on top of Tech Trends

The obligation to keep up with technology is not a directive to buy every new gadget and gizmo. It most certainly does not mean you must use them in your practice.

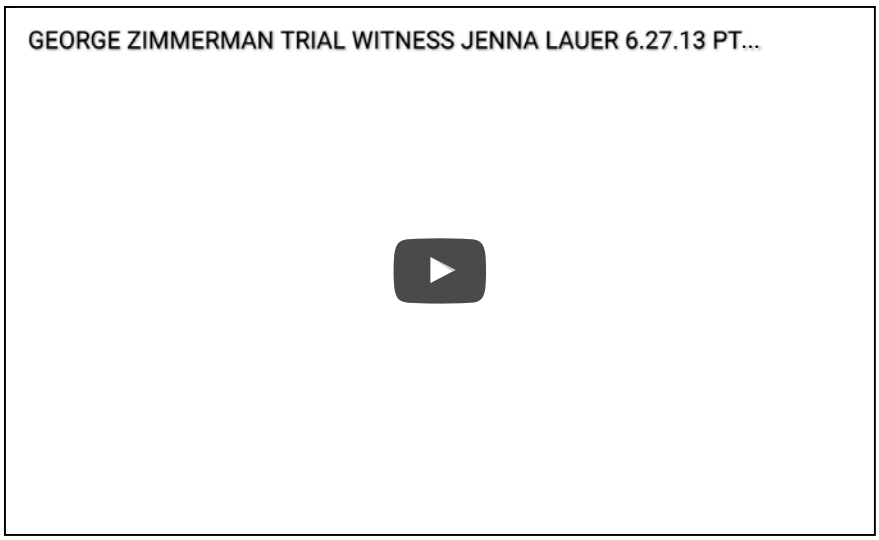
New technology like cloud computing makes tasks like file sharing quick and easy, but lawyers must consider client confidentiality and data security. So far, seventeen states have weighed in on the question of how to use cloud computing within the confines of ethical rules. They primarily focus on balancing risks and benefits while ensuring client files remain safe and secure. (For more detail, see my article on upcoming regulations.)

Of course, approaching new technology with caution does not mean discarding it until ethics regulators form an opinion. Regulators are often slow to act, for good reasons, and while we wait for them, some technology has the potential to quickly resolve dilemmas facing attorneys. For example, disasters like hurricanes Katrina and Sandy resulted in chaos in the courts as courts and attorneys lost files. It would most likely be a violation of Model Rule 1.1 to ignore remote backup in any state, but especially if you live in an area at risk of similar natural disasters.

Luddites Are at a Competitive Disadvantage

Technological competence is not just unethical; it can make you look foolish and impair your effectiveness as an advocate.

A great illustration of this went viral during the George Zimmerman murder trial, when the prosecutor attempted to show that a witness had close ties to Zimmerman's brother by introducing her Facebook and Twitter pages.



Here, he attempts to show the brother and witness were connected on Facebook and Twitter. But his complete lack of understanding of either platform makes the whole thing laughable. The prosecutor may not have violated any ethics rules, but he looked like a fool in front of the jury.

This problem is not limited to the courtroom. Private lawyers may have a hard time getting hired if they cannot use technology efficiently. Billable rates are already high, and technologically-incompetent lawyers may spend too much time on tasks that technology should make simple. The result is, effectively, churning of the bill. One in-house lawyer even gives a skills test to potential outside counsel. The results of his initial test had 100% of 9 firms he tested failing miserably.

Where the Rules Are Heading

New rules and comments on attorneys' need to keep up with technology have begun to propagate, and more will follow. With substantive rules come ethical obligations and malpractice standards. The age of the law firm partner who can't remember what Facebook is called, or who asks his secretary to print out his emails, or who goofs up a video conference during trial, is past. Technology is integral to the practice of law, from both a practical and ethical perspective.

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