MINNESOTA LAWYER

October 21, 2013 minnlawyer.com THE DOLAN COMPANY Vol. 17, No. 42

Ignore technology at your own peril

By Eric Magnuson

We probably all know at least one Luddite who adamantly refuses to learn technology, flaunting his or her ignorance with a bit of pride. "I'm an old fashioned lawyer, and don't do all that tech stuff." However, lawyers have an ethical duty to their clients to be competent, and this includes some technological proficiency. And if you choose to ignore the impact of technology on your practice, you could be courting trouble.

The rules for lawyers

The comments to the Model Rules of Professional Conduct were amended in February to specifically address a lawyer's obligation to understand the technology impacting the practice of law. Under Rule 1.1, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Ignorance or even limited understanding is no excuse for failing to comply with either the court's requirements or an attorney's ethical obligations in the face of changing technology. Minnesota is rapidly moving towards mandatory electronic filing and notification in all cases. One need only review the eCourtMN Supreme Court Orders to see the speed and certainty of this change. And those who don't keep up will either be left behind, or, in some cases, run down by the train of progress.

In a recent case, a lawyer filed a belated appeal, claiming Fed. R. App. P. 4(a)(6) permitted this relief because he had never received notice of the judgment. In truth, the lawyer had neglected to update his email address, and therefore did not receive electronic notice of the filing of the decision disposing of the case. The Second U.S. Circuit Court of Appeals reversed the District Court's allowance of the untimely appeal, holding that the extension of time to appeal was an abuse of discretion. See *In re: World Com, Inc.*, 708 F.3d 327, 336 (2d Cir. 2013). These and other horror stories serve as reminders that lawyers cannot ignore technology without potentially dire consequences.

Eric Magnuson

The risks extend beyond court filings. In 2009, an Illinois Administrator of the Attorney Registration and Disciplinary Commission filed charges against an assistant public defender alleging, among other things, improper disclosure of confidential client information. (See complaint available at https://www.iardc.org/09CH0089CM.html). The attorney had published a client's jail identification number and other information on her blog, which was open to the public. Id. And recently, bar associations have begun considering attorneys' ethical obligations with social networking mediums like Facebook, LinkedIn, and Twitter. (See, e.g., San Diego County Bar Ass'n, Legal Ethics Op. 2011-2 (May 24, 2011), available at https://www.sdcba.org/index.cfm?pg=LEC2011-2 (concluding that an attorney could violate California Rule of Professional Conduct 2-100 by sending an ex-parte friend request to a represented adverse party.)

And judges too

Judges are not immune from the impacts of technology and lawyers need to keep that in mind. One cornerstone of our adversarial judicial system is the lawyers' ability to choose what facts they bring before the tribunal, and an extensive code of evidentiary rules controls what courts may consider. But what happens to that system when the world of factual information is just a mouse click away? May a judge conduct independent internet research on something other than the law?

The ABA Model Code of Judicial Conduct Rule 2.9(C) prescribes limits on

independent judicial inquiry: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Comment [6] explains that this includes the Internet: "The prohibition . . . extends to information available in all mediums, including electronic." But this prohibition is both general, and under inclusive. For example, no provision in the Code of Conduct for United States Judges parallels the prohibition in ABA Model Code. Moreover, Fed. R. Evid. 201(c)(1) provides that the court "may take judicial notice on its own." And Rule 201(d) provides that "The court may take judicial notice at any stage of the proceeding."

To be sure, when making decisions, judges are not limited to the ingredients served up by the lawyers, but may rely on their own knowledge and experience in appropriate circumstances. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (noting that assessing the merit of claims is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). At times, however, the limits of common knowledge and the scope of judicial notice become unclear.

For example, in *Matthews v. National Football League Mgmt. Council*, 688 F.3d 1107, 1113 (9th Cir. 2012), the court took judicial notice of the fact that Matthews' teams played 13 games in California during Matthews' 19–year career—a fact found on the Internet that was relevant to its inquiry, but not taken from its own experience.

A number of courts have addressed the propriety of judicial use of Internet resources. See e.g., *M.P. v. M.P.*, 54 A.3d 950, 955 (Pa. Super. Ct. 2012) (concluding that the trial court abused its discretion by relying on information from its own internet search after the hearing had been concluded). Because the rules of evidence appear to require notice and an opportunity to be heard before the court may base any part of its decision on independent Internet research, even the most innocent attempts by judges to discover facts helpful to resolution of the issues have limits. See Fed. R. Evid. 201(e) ("If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.").

But the Rules of Evidence seem to invite certain kinds of judicial inquiry. Indeed, Rule of Evidence 902 lists a wide variety of items that are "self-authenticating", including "A book, pamphlet, or other publication purporting to be issued by a public authority." Fed. R. Evid. 902(5) (emphasis supplied). The way seems clear then for courts to freely refer to government websites. See e.g. *McGaha v. Baily*, No. 611-1477-RMG, 2011 U.S. Dist. LEXIS 73389, at *4 (D.S.C. July 7, 2011) ("[The] court may take judicial notice of factual information located in postings on governmental websites. . .").

And perhaps more alarming, the rule includes resources that may be even more suspect – newspaper and periodical websites are deemed to be self-authenticating as of May 2011, when Rule of Evidence 101 (6) went into effect. See Fed. R. Evid. 902(6); Fed. R. Evid. 101(b)(6) ("[A] reference to any kind of written material or any other medium includes electronically stored information.") (emphasis added).

Judges should think long and hard before they venture into the ethersphere. And lawyers need to be prepared for just such exploring outside the record. Sometimes, the results can be stunning.

Take for example the two lawyers arguing a business case in the Seventh U.S. Circuit Court of Appeals, *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003). At the end of the appellate argument in a hotly contested controversy, one judge asked both lawyers to confirm that their clients were diverse. The court had looked up the two business entities on the Internet, and discovered facts that lead it to question whether there was actual diversity. After taking a short time to research, the lawyers quickly confirmed that there was not complete diversity. Not surprisingly, without diversity of citizenship or another basis for jurisdiction, the appellate court vacated all of the proceedings. But having jurisdiction over the lawyers, the court directed them to re-litigate the case in state court with no additional attorneys' fees charged to their clients. Id. at 694.

Technology is here to stay. It will unquestionably impact you, your clients and the courts before whom you appear. Ignore it if you like, but do so at your own peril.

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