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Some Thoughts on Technology and the Practice of Law

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Some Thoughts on Technology and the Practice of Law

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The Bencher--January/February 2014

By Professor Fred Lederer

Predicting the future is understandably difficult. Jeff Stibel's 2013 *Breakpoint* reports that, in the 1880s, a group of experts analyzed New York City's future. Correctly estimating that the New York of the 1980s would have an immense population, they declared that the city would collapse: All those people would need more than six million horses, and the manure and urine generated by those horses would make the city uninhabitable. Internal combustion and electricity, of course, were not part of their calculation. Understanding the present and its trends may be similarly difficult.

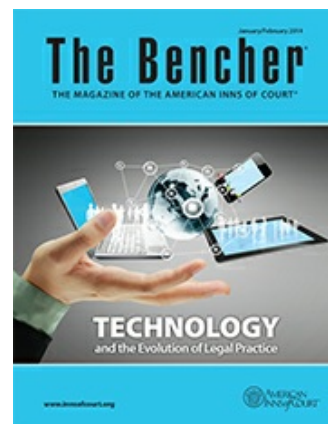
The degree to which young people are addicted to texting is clear, if only from the effort to stop texting while driving. The social and collateral consequences may be less clear. Jerry Scott and Jim Borgman, authors of the comic strip *Zits*, have addressed the issue frequently. They have illustrated how teens standing next to each other text rather than talk, how e-mail is so "last generation," and, my favorite, how one should schedule a phone call. Three years ago, supervising simulated legal representations, a colleague and I were amazed to learn that a number of our student "lawyers" were highly annoyed that they were expected to be available to their "clients" by phone, without prior appointment. More recently, the Wall Street Journal reported the difficulties faced by some companies whose employees refuse to use the phone, favoring electronic text communications. Can we predict the degree to which electronic communications will affect our culture generally and the law specifically?

Having now asserted my defense of difficulty, let me hazard some conclusions and predictions.

Paper files? Surely you're kidding. Everything now starts as or becomes digital. The enormous amount of electronic evidence has already created the electronic discovery industry. The extraordinarily inexpensive storage of what realistically amounts to unlimited amounts of data, coupled with the multiplication of copies stored in other locations (now the "cloud" of internet accessible servers), means that much information evidence can never be lost or hidden. That evidence comes with metadata: data about data, including spreadsheet formulae and author identities and the like, most of which is fair game during discovery. Unfortunately, the cost of retrieval increases the cost of litigation, impelling either discovery limits or recourse to alternative dispute resolution. Of course, newer forms of electronic searching, e.g. predictive coding, might compensate for the increased amount of data.

Easy public access to electronic legal knowledge and forms will change the lawyer's role, eliminating much of the daily work of many lawyers. As consistently argued by Richard Susskind in a series of books, of which the most recent is *Tomorrow's Lawyers, An Introduction to Your Future*, technology is a prime reason why many lawyers will find themselves forced from traditional practice. Counselors-at-law and advocates will survive the ongoing revolution more easily than traditional law firms.

Further, the electronic elimination of distance increasingly will require lawyers to regularly deal with the law of jurisdiction in which they are not admitted or located. Indeed, elimination of distance will affect the daily practice of law, including dispute resolution. For years we have predicted remote motion practice, remote mediation and arbitration, and remote interpretation. Remote motion practice by telephone is quite customary in some jurisdictions, especially California. Video will make it more desirable. Remote witness testimony at trial, usually in civil cases, isn't new and is increasingly routine. Remote judicial or lawyer appearances are less common but also not groundbreaking. What may be groundbreaking could be a new expectation that lawyer and client will meet remotely.



The impact of modern technology on trial practice seems clear. Most evidence is and will be digital in nature, largely eliminating any need to show the "original" physical exhibit in evidence. Indeed, as most people are visually and data oriented, jurors and even judges will expect to see as much information as possible on screens in front of them. The trial lawyer will continue to be essential, but the underlying evidence will become even more important—and it will need to be visually presented. The advent of the smartphone with camera foreshadowed what we think the short-term future will bring—a huge increase in recorded incident video. It's hard now to have something happen in the world without recorded video from phones and tablets.

Personal drones and Google Glass, the forehead-worn monitor, computer, and recording device, could give us even more intimate video of nearly every facet of human life. Setting aside the potential impact on whatever privacy we have left, it may be that nearly every trial will include, "Let's go to the video."

Although the digital evidence may be brought to the courtroom on CDs, jump drives, or lawyers' computers, it may also be retrieved during trial from the "cloud" as the Center for Legal and Court Technology (CLCT), at William & Mary Law School did in its recent experimental (simulated) legislative hearings. As for cloud computing, we as lawyers will have to address whether we know where our privileged information is, whether it's secure from prying eyes, and even whether we can count on it to survive natural, technical, or business failure.

Speaking of trials, we are clearly in the age of the tablet. Lawyers and judges who were uncomfortable with computers in the courtroom have far fewer concerns about iPads in particular. We hear constantly about lawyer interest in jury selection, evidence presentation, and even jury use of iPads. That iPads in particular were not designed for easy secure courtroom use matters not; everyone wants in on the iPad revolution. Evidence presentation via iPad seems to be increasingly popular, notwithstanding security and display connection issues.

Just as we don't yet have personal helicopters to get to work, we don't yet have three-dimensional holograms in the courtroom, although CLCT used holographic evidence in an experimental case years ago. More likely in the near future is 3D evidence presentation. With the help of WolfVision and Panasonic, CLCT demonstrated the first known courtroom use of 3D evidence at the 2013 Court Technology Conference, showing a bat and jagged brick in 3D in a simulated road rage trial. (Yes, we have reached the point at which the judge's instructions include, "Jurors should now put on their 3D glasses.") It's unclear whether 3D evidence should be admissible or, if so, should await 3D monitors without glasses.

I have long thought that electronic evidence would pose few issues in terms of admissibility. In *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 Pa. L. Rev. 331 (2011), my colleague, Professor Jeff Bellin, has shown that applying traditional hearsay rules to modern electronic communications can create unexpected consequences. In his article, he relates how coupling the present sense impression with Twitter and texting can permit the admission of fabricated hearsay exception evidence.

Metadata will be increasingly important. We live in an age when multiple computer files can yield identical printouts, but data concerning date of file creation, author, access, and the like can be different for each file. In some cases, the metadata will be determinative of key issues, yielding difficult authentication issues.

Perhaps more troubling is the risk that the move to electronic evidence may imperil the entirety of litigation. In a series of science fiction books, years ago the late Gordon Dickson contemplated that, in future warfare, sophisticated scientific counter-measures might force a return to low-technology infantry weapons. How will jurors—or judges—react when everyone realizes how easy it is to alter electronic evidence? Will they reject everything? Can we prove absence of alteration to a fact-finder's satisfaction?

The issue, of course, is the authenticity of "data." Yet "data" is a concept that more people seem to take as a given in their daily lives. Surely nearly every lawyer and judge has read of jury trials where jurors used social media improperly or consulted news sources to obtain information about the case. Whether it's access to Google in the jury box, blogging in the back of the courtroom, or wishing instant access to the full record of trial (including evidence), people seem to believe that they have a fundamental right to information and to create information. Trial by Facebook or YouTube is not as absurd as one might have expected. And, this discussion fails to address the professional responsibility issues inherent in lawyer advertising via social media, "friending" potential witnesses or even judges, or mining opposing counsel's documents for useful or embarrassing metadata, with the last continuing to divide ethics authorities. See, e.g., http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadachart.html.

The trial lawyer
will continue to
be essential, but the
underlying evidence
will become even
more important—
and it will need to be
visually presented.

There is still no substitute for a court reporter if counsel and/or judge want an immediate draft text transcript. Only stenographic or "voice writer" (users of trained speech recognition technology) can produce real-time transcripts. However, the advent of remote transcription of digital audio provides not only cheaper and faster digital court transcripts than before, but also the possibility of truly fast transcript product. In 2012, Court Record Solutions demonstrated at the annual CLCT Court Affiliates Conference the return from a remote transcriber of text transcript approximately 15 minutes after the content was said orally. Creation of real-time multimedia court records, text, digital audio and video, and images of the evidence as presented not only suggest shortening appeal time but, given the ability to see and hear witnesses at trial, the possibility of affecting the degree of deference appellate courts will give fact-finders below.

Privacy issues are becoming more difficult as our society seems to reject privacy in our minute-by-minute Facebook posting (while complaining that potential employers shouldn't have access to negative data). The digital nature of nearly all information means easier theft of critical data and increased difficulty in protecting-and litigating about-trade secrets.

Until recently, it would have been entirely normal to end an article such as this with the question of whether lawyers will spend their time to be "competent" in the many issues that technology may demand. After all, a modern trial lawyer will need a surprisingly large amount of knowledge to cope with e-discovery; purging metadata from outgoing documents; obtaining, controverting, and offering electronic evidence; dealing with remote hearings; and navigating the wilds of social media, to mention just some of the current hurdles.

However, in 2012, the American Bar Association modified the Comments to Model Rule 1.1, Competence. In defining the lawyer's duty of competence, Comment 8 now specifies that counsel must "*keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....*" Non-binding though it may be, the modification of the Model Rules emphasizes that today's lawyers now have an ethical duty to know enough about current technology to properly deal with it. One can only imagine how we will cope with the technology to come.

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