Special Challenges to 21st Century Lawyers: The Use and Misuse of Technology

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PROGRAM 7

Special Challenges to 21st Century Lawyers: The Use and Misuse of Technology

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SPECIAL CHALLENGES TO 21ST CENTURY LAWYERS:
THE USE AND MISUSE OF TECHNOLOGY

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Scholarly Publications
Books
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• Revolution in Courtroom Technology Presents Opportunity and Risk, TRIAL, Nov. 1994, at 86.
• The Road to the Military Courthouse (ABA Committee on General Practice, 1976) (pamphlet).
In his practice, Richard K. Herrmann handles many forms of complex litigation, including intellectual property, commercial and technology. Richard has been actively practicing patent litigation in the District of Delaware for more than 15 years. Representative clients have included Alcon, Allied Signal, Allergan, Amgen, Amoco, Borg Warner, Dow, GlaxoSmithKline, Interdigital, Micron, Motorola, and Netscape. Representative law firms have included Finnegan Henderson, Hovey Williams, Kelly Drye, Kirkland & Ellis, Milbank, Paul Hastings, Sidley Austin, and Winston & Strawn. He teaches Electronic Discovery for the National Judicial College and Widener University School of Law.

Honors and Awards
The Best Lawyers in America®, Woodward/White, Inc., 2005-2008
Delaware Today magazine, Named as one of Delaware's "Power Attorneys", 2004
Order of the Coif
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Activities and Affiliations
Delaware State Bar Association, Technology Committee, Chair and Computer Law Section, Former Chair
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Before joining West, Andy was an associate in the Labor and Employment Law group at Faegre & Benson, in Minneapolis, Minnesota, where he advised and represented businesses in all areas of Labor and Employment Law. Andy received his JD in 1990 from the University of Chicago Law School, and is admitted to the Bar in Minnesota.
What do you include when you speak of courtroom technology?

Courtroom technology normally includes making the court record through or with the help of one or more forms of technology; presentation of evidence through visual display on monitors; assistive technology to help in particular those who have difficulty in seeing, hearing, or moving, and remote appearances by what has been called videoconferencing and increasingly is now called telepresence.

Much of “courtroom technology” is invisible. The infrastructure includes cables, switches, amplifiers, microphones and much more. Infrastructure continues to develop and provides attorneys and judges ever greater courtroom options. However, the constant changes sometimes create equipment incompatibilities. The Center for Legal and Court Technology’s McGlothlin Courtroom is believed to be the world’s only entirely digital Courtroom. In the process of upgrading I to an entirely digital facility, digital rights management and other issues surfaced.

How prevalent is courtroom technology?

We know of no current accurate data on how many courtrooms are substantially high-tech, let alone those that have very basic equipment such as the ability to display paper exhibits by document camera (“Elmos”) to judge and jury monitors. We do know that courtroom technology is increasingly frequent and the goal of the Administrative Office of the United States Courts is that all federal trial courts should be high tech. In 2003, we estimated that at least 25% of federal trial courtrooms were significantly technology-enabled.

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1 Chancellor Professor of Law and Director, Center for Legal and Court Technology (CLCT), William & Mary School of Law; filede@wm.edu. The answers to these FAQ come from 17 years of experience in the area of courtroom technology. In lieu of footnotes, please see the references listed in the bibliography at the end.
Why use courtroom technology?

Courtroom technology is generally believed to increase fact-finder understanding and memory of the facts, to significantly decrease trial time, to provide a better and more immediate court record, to make the proceedings more transparent when exhibits can be seen by those in the and to provide access to those with disabilities, including judges, counsel, jurors, and witness, and to permit receipt of evidence and court appearances from those who could not otherwise participate.

But, won’t jurors think that technology-using lawyers are “city slickers” not to be trusted?

Not that we can tell. As far as we know, jurors assume that technology exists and ought to be used.

Who runs the equipment when digital evidence is offered?

Although evidence images can consist of television pictures of paper exhibits placed by the lawyer under a document camera, most electronic evidence is stored on a computer and displayed from it through courtroom distribution systems that make multiple copies of the image available throughout the courtroom. Ordinarily, a lawyer’s support staff loads the lawyer’s notebook computer before the trial or hearing. Then the lawyer can present the evidence in court after the lawyers or court staff connect the computer into the courtroom display system with a cable. However, many lawyers use staff or vendors to display digital evidence with the computer being located at counsel table or elsewhere in the courtroom.

How far have we gone; can we be like Captain Kirk of Star Trek and transport into the courtroom?

Not quite that - yet. However the Center for Legal and Court technology used holographic evidence and immersive virtual reality evidence years ago. It’s amazing what you can do. Technology continues to change, and courtroom options multiply as a result. Lawyers, for examine, now sometimes use Google Earth images at trial. The same 360 degree picture technology used on hotel market web sites to illustrate hotel rooms can be used to show a jury or judge a comprehensive view of a location.

Are there drawbacks to electronic evidence presentation?

Yes!!!!!! In jury trials, when displaying document pages, leave them showing long enough to be read by the fact finder. When doing a “callout,” selecting and enlarging a portion of a document on the screen, don’t cover up other parts of the document until jurors have read it. When the evidence will be available in the jury room during deliberation, counsel should ask the judge to explain during preliminary instructions that the counsel will be emphasizing key portions of the evidence, but that the evidence will be made available to the jurors during deliberations.
What happens during jury deliberations?

In most cases, the jurors receive paper copies of the evidence for use in deliberations. However, as CLCT proved along ago, jury use of display technology to assist jurors in focusing on the exhibits during deliberations works well. Some courts have moved display equipment originally installed in their courtroom to jury deliberation rooms when that equipment was replaced by new equipment.

What do we use video conferencing for?

Possibilities include remote motion practice from a lawyer’s desk, remote witness testimony (preferably from another courthouse), remote counsel appearances, and remote judges.

Jurors don’t actually believe remote witness testimony, do they?

Yes! And, two separate controlled civil case scientific studies conducted in the McGlothlin Courtroom years ago, showed no statistically significance in verdicts when trial outcomes were based on opposing medical experts and the experiments varied where the experts testified from.

Is remote testimony constitutional in criminal cases?

Yes, if it is offered by the defense. When offered by the prosecution, courts have differed as to whether the confrontation clause is violated. Compare United States v. Yates, 483 F.3d 1307 (2006)(disapproving en banc) with United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008)(sustaining constitutionality for a deposition in a terrorism case). The seminal case remains State v. Harrell, 709 So.2d 1364 (Fla.), cert. denied, 525 U.S. 903 (1998); Harrell v. Butterworth, 251 F.3d 926 (11th Cir. 2001)(denying habeas as the Florida Supreme Court did not act unreasonably in Harrell).

What types of technology-based or assisted court record is now available?

Both stenographic and voicewriter (stereomask) court reporters use technology to help them make the record. Realtime court reporters provide a draft electronic transcript to counsel and judge as the words are taken down and via the internet that transcript can be supplied to anyone, including a party’s experts, who may communicate back to counsel via instant messaging etc. It is now possible for court reporters to work remotely with realtime appearing in the courtroom even if
the court reporter is on the other side of the country. Digital audio, digital audio and video recording, including remote transcription are now available.

*What about foreign language interpretation?*

CLCT is unaware of any technology that will substitute for human interpreters. However, technology permits remote interpretation. Based on CLCT’s experience, ideal remote interpretation provides two-way audio accompanied by one-way video showing the interpreter the image of the person whose testimony is being interpreted. Remote interpretation potentially makes more interpreters available to a given court at a substantial costs savings.

*What types of assistive technology are available?*

In addition to being wheelchair accessible, many courtrooms have infra-red assistive listening systems of various types designed to help those who have difficulties hearing. Those who cannot hear at all can use remote American Sign Language interpreters (the witness sees the signs of the remote interpreter on a personal monitor and the other courtroom participants hear the voice interpretation over the courtroom speakers) or view the realtime transcript. Participants with limited vision can use various devices and programs to enlarge text; those with macular degeneration can use displays that permit different colored backgrounds in addition to enlargement in order to amplify visibility. Blind judges and jurors can use scanners to read documents to them and a CLCT-originated Court Explicator to describe to them (with concurrent electronic recording for the court record) evidence and other matters not able to be seen by judge or witness. In one experimental case, CLCT used a Segway Transporter to permit a lawyer with limited mobility to roll about the courtroom and make final argument before a jury.

*Are there problems with the admissibility of electronic evidence?*

In theory, no. Most electronic evidence is offered and admitted under the usual evidence rules. Authentication can require extra effort in some cases. Email, for example, may well need foundational evidence of process, *see, e.g.*, Fed. R. Evid. 901(b)(9), to be authenticated. In practice, however, lawyers sometimes seem to be unable or unwilling to properly use the rules of evidence when dealing with electronic evidence. *Lorraine v. Markel Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007).

Although there seem to be few special problems with electronic evidence as a theoretical matter, that may be because we have not as yet needed to come to grips with metadata - “data about data.” Most computer files contain identifying or explanatory information which is visible on the computer but not when a document is printed out. This includes file data including origination and access dates and times, file size, and to some extent the author’s identity. It is thus possible to have, for example, ten different files, each generating the same printed document, but each with different metadata. This has rarely been a problem in the real world, so we have not had best evidence (or, as it might be better called, “original document rule”) issues. However, that cannot continue indefinitely.
To what extent does all this technology contribute to problems caused by jurors or courtroom visitors tweeting or blogging during a trial?

None at all, in a direct causative sense. However, the courtroom technology revolution is the result of the development of technologies that make easily or reasonably possible what used to be difficult or impossible. Not only are there new possibilities, we tend to believe that we ought to, if not need to, take advantage of them. Mark Zuckerberg, the founder of Facebook, has said that effectively privacy is dead or at least very limited.² He might also have posited that each person has a right to access to information on the Internet. Jurors who research case details, even during trial, are simply doing what they expect to do; indeed, what they may believe that have a right to do. Jurors who tweet, for example, are taking advantage of communication means that although new has become part of the public consciousness. The extraordinary success of Twitter and Facebook in particular have led numerous users to believe that they have a right to instant contemporaneous communication notwithstanding the surrounding circumstances.

How can I learn more about this or even get hands-on training on how to be a high-tech trial lawyer or judge?

Contact CLCT; see www.legaltechcenter.net, call (757)221-2494; or email Professor Lederer at filede@wm.edu

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² See http://www.readwriteweb.com/archives/facesbooks_zuckerberg_says_the_age_of_privacy_is_over.php


What is a Technology Inn of Court?

As you see on our website, Delaware was the first to Charter a Technology Inn of Court in 2009. As the Inn’s website explains, “it has been established for the purpose of bringing together judges, lawyers and law students to study the impact of technology on business and the effect of technology on the practice of law and in particular electronic discovery. In the past 20 years, the ‘computerization of information’ has dramatically changed the way business is conducted and by extension, how the discovery of electronically stored information in litigation is handled. Moreover, in what seems today to be an ever-changing landscape of ways people communicate, e.g., electronic mail, instant messaging, and social networking web sites just to name a few, the legal community is struggling to keep up with the business community in terms of understanding the technology and advising clients how to efficiently, effectively and ethically manage such electronically stored information in litigation.”

What Kind of Background Should a Lawyer Have to Be Interested in Learning More About Technology?

Unfortunately many believe they must have a certain level of understanding to even begin to learn about how technology impacts them in their practice. They feel too far behind and at a loss to catch up with others. This concern was as real in 1990 as it is today. But today there is a difference. In 1990, a lawyer could practice law without the use of technology in his or her daily practice. Voice mail was not well accepted in our industry and email was yet to be embraced. Calendars were in Daytimer Notebooks and cell phones did not exist. Many boasted their ignorance of technology.

Today it is different. The practice has changed. The question is not whether you have a cell phone; it is whether you have a Blackberry, an iPhone or a Droid? The ethics opinions do not relate to whether you can communicate with your client by email; they focus on wiping programs and encryption and data mining. We are not faced with questions of whether we should use technology in the daily practice of law. The issue is whether we have a reasonable understanding of the tools we use, so that we are capable of practicing law competently. Every lawyer has an obligation to know the consequences likely to result from his or her own conduct. This includes knowing about “track changes” in Microsoft Word, and in knowing that client confidentiality can be breached in the event the tool is inadvertently left on and the changes have not been accepted when a document is emailed to a third person.

The more we use technology in our practice of law, the more we come to rely on its consistency and efficiencies. The question posed was “What Kind of Background Should a Lawyer Have to Be Interested in Learning More About Technology?” The question should not focus on the background of the lawyer. Rather, it should focus on the lawyer’s interest in being
competent at what he or she does. Increasing technology skills in the areas of technology we use will have a positive impact on the manner in which we competently practice of law.

**What Is the Greatest Challenge We as Lawyers Face Today Regarding Technology and the Law?**

Without a doubt, the greatest challenge we, as lawyers, face today regarding technology and the law is to maintain the culture of mentoring and professionalism, which was so historically significant in 20th century. We talk to each other far less today and email and text each other almost incessantly. Lawyers in adjoining offices will send an email rather than visiting or picking up the phone. Is it more efficient? In some cases. Is it preferable? I think not. We need to take the time to communicate with each other the old fashion way, face to face. More senior members of the bench and bar need to share values and wisdom with those who will succeed us. While it is not impossible to share a nugget of wisdom by texting, it loses something in the translation.

The dynamics of lawyer/client relationship are changing as well. Should a lawyer be satisfied by leaving important communications with a client on voicemail? Is an email more professionally appropriate? Has traditional networking been replaced by social networking. We are already seeing ethics opinions questioning whether it is appropriate for a judge to have friends on Facebook.

The problem is very similar to the one we face since the introduction of the handheld calculator 40 years ago. Few people today can actually add and subtract. That skill is no longer needed; our brain is doing something else with those muscles. Clear professional communications skills are going the way of math. We communicate in short Blackberry like sentences. The art of writing has been replaced with the art of tweeting or writing is short bursts. As a positive side effect, judges are beginning to realize a lawyer can now present an argument in 20 pages, which may have required 40 pages 10 years ago. The small keyboards require greater efficiency in communications. The prose of the past is on the way out, to be replaced by Emoticons. BTW, IMHO the Judges will begin issuing orders in a similar manner. It won’t be long before we see a docket entry denying Plaintiff’s motion “π :-(“

**What Do You Believe Will Be the Most Significant Technologically Law Related Issue To Impact Us in the Next Ten Years?**

We actually face two major technologically law related issues during the next ten years. The most important to us as lawyers is the dilution of the attorney/client privilege, as we currently know it. We see it already in the discovery process. Rule 26 of the Federal Rules of Civil Procedure anticipates inadvertent production of privileged electronic documents. It recommends the parties discuss how to resolve the problems associated with inadvertent production early in the litigation. The most common method of dealing with the issue is to agree on a “claw-back” provision in the protective order. This permits a party to retrieve (or claw-back) a privileged document, which was inadvertently produced. So, the Rules assume there will be errors in production. Of course, it is necessary and reasonable to make this assumption due to the millions of pages of electronically stored information produced under the Federal Rules. By
way of example, in a 2 million pages production, even if the quality control was 99.8 percent effective, the .02 percent of inadvertently produced documents equals 4,000 pages. Because of the vast amount of discovery permitted, courts (and even the Federal rules of Evidence) sanction approaches such as one commonly known as the “quick peek”. This is an agreement among the parties to share the documents prior to the privilege review. Once the opposing party determines which documents it seeks, the producing party needs only to do a privilege review of those documents; a substantial savings in cost of electronic discovery – at the risk of diluting the sanctity of private communications between counsel and client.

The second major technologically related issue we will face during the next ten years will be loss of privacy. This will be both a law related and a personal loss. There are those who would argue there is no privacy now and the loss has already occurred. Others will contend the benefit of instant access to limitless information is worth the resulting loss. Few people from the Generation “Z” think in terms of privacy. Our current Orwellian lifestyle anticipates cameras on corners and public access to most information. However, we still have some privacy laws; not nearly as strict as in many other counties. We now do online electronic research on jury pools; and clients are doing the same when selecting counsel.

The crises will begin when the dilution of the attorney client privilege and the loss of privacy join; and it will not be long. We are beginning to talk with our computers. Many recently experienced the computer Watson challenge on television. Within the next few years we will be asking our computer to research a legal question for us and we will get instant results spoken or electronic or both. This is no longer science fiction. Our voice mail messages are now available to us as .wav files in our email. It is only logical to assume these computer discussions will be recorded for review and retrieval and archived. Once they are recorded, they will be subject to discovery. While most of the information may be protected by the work product privilege, we already assume that the information will be inadvertently produced, or the privilege will be diluted even further.

The question will be whether our mental impressions will be private. We already know they may be discoverable in certain circumstances. Taking the issue out of the courtroom and into our private lives, are we ready to subject our mental impressions, our very thoughts, to invasion by 3rd party subpoena? As the technology develops and as the law evolves, we are left with a very critical ethical issue, should we use the latest technology because it is there and we can? Are we ready for it? Is it likely to be misused because culturally we don’t understand its proper use? Unfortunately, the answer is an obvious one. How many continue to text while driving?

Here is a very current technology law related issue affecting lawyers as professionals and personally. Take a look at the following statistics relating to one clear misuse of technology:

- Distraction from cell phone use while driving (hand held or hands free) extends a driver's reaction as much as having a blood alcohol concentration at the legal limit of .08 percent. (University of Utah)

- The No.1 source of driver inattention is use of a wireless device
Drivers that use cell phones are four times as likely to get into crashes serious enough to injure themselves (NHTSA, Insurance Institute for Highway Safety)

10 percent of drivers aged 16 to 24 years old are on their phone at any one time

Driving while distracted is a factor in 25 percent of police reported crashes

Driving while using a cell phone reduces the amount of brain activity associated with driving by 37 percent (Carnegie Mellon)

(source 3/1/11 nationawide.com; http://www.nationwide.com/newsroom/dwd-facts-figures.jsp)
SOCIAL NETWORKING

BY JAN MICHELSIN, ESQUIRE

Q & A

1. **What attorney ethics rules are implicated by the use – and abuse – of social media and other Web 2.0 tools?**
   
   a. Must lawyers be adept in social media? Is failure to use social media itself an ethics problem? Because ABA Model Rule 1.1 requires lawyers to be competent in their representation of clients, if the use of the internet and social networks is so ingrained in contemporary society, it could be argued that lawyers who ignore it may not be able to provide "competent representation." For example, Comment 6 says lawyers "should keep abreast of changes in the law and its practice." Does that imply they must stay current in substantive and procedural changes?

   b. Model Rule 1.3, Comment 1, Duty of Diligence: requires an attorney to "act . . . with zeal in advocacy upon the client's behalf." This calls the question whether more than familiarity with social networking is required; i.e. perhaps the actual use of social networking is necessary. For example, the American Academy of Matrimonial Lawyers report 66% of divorce lawyers use Facebook as primary source for online evidence! Therefore, is a divorce attorney who fails to check Facebook for evidence about a client's soon-to-be former spouse less than a zealous advocate, perhaps akin to prosecutor who fails to conduct criminal background check on defendant's key alibi witness? Must an attorney warn a client against posting potentially damaging content on her Facebook page? Must a lawyer be required to be his client's Facebook friend so the lawyer can determine whether the client is posting harmful information or pictures? Or, must the lawyer monitor the internet for potentially damaging information about his client via Google Alerts or TweetBeep or similar means?

   c. What if client's Facebook page has information damaging to a client's case? Can his attorney advise the client to delete content or close the Facebook account? Probably not. Model Rule 3.4(c) prohibits attorney from altering or destroying evidence or assisting others to do so. Lawyers have an ethical duty to preserve electronic evidence including social networking profiles, so such spoliation of social networking sites could result in sanctions and adverse inference instruction. In fact, many discovery requests now specifically identify such profiles as relevant and responsive, and request opposing counsel to use Facebook’s new “download-my-profile-history” feature which provides a record, in one click, of all friends, wall postings, profiles, photographs, and emails that have appeared on an individual’s Facebook site.
d. Model Rule 4.4(a) forbids attorneys from using means to represent a client with no substantial purpose other than to embarrass, delay, or burden. This easily could impact use of social media given the plethora of embarrassing information profiles can contain. Remember, just because it's "juicy" doesn't mean it's relevant or ethical to use.

e. Attorney bios must comply with ethical rules on advertising, and more and more attorneys are using LinkedIn, Twitter, Facebook to tout their services and expertise. In connection with this trend, some attorneys are concerned about inaccurate or misleading information posted to profile by third party; e.g., on Avvo.com "clients" can post anonymous "reviews." For example, a South Carolina Bar Association Advisory Committee Opinion 09-10 (2009) said simple disclaimer on an attorney profile is not enough to satisfy a lawyer's duty to avoid misleading or untruthful statements. A "client review" would constitute "testimonial" or "endorsement" under South Carolina Rule 7.1 which prevents publication or endorsements that are misleading or create unjustified expectations.

f. If profiles are ghostwritten by a firm's marketing department, each attorney may have an ethical responsibility to ensure all information on his/her profile (and comments posted to the profile, if any) are not misleading or untrue. Persons who create an updated profile must be knowledgeable about what is and is not ethically permitted because a lawyer's supervisees also must understand social media. Model Rule 5.1, 5.3 makes an attorney accountable for unethical conduct of those she supervises such as other lawyers, paralegals, and staff. A firm must make "reasonable efforts" to have system in place to comply with ethical obligations. Accordingly, it could be argued that a law firm must make efforts to educate lawyers/non-legal personnel about ethical risk inherent in social media or, at a minimum, have an effective and well communicated social media policy.

g. The Pennsylvania Ethics Committee found it unethical for lawyer to instruct or permit a firm secretary to "friend" a non-party witness to gain Facebook information. Unless the lawyer's agent discloses who she is and the purpose of friend request this deception would be violative of Philadelphia Bar Assoc. Model Rule 8.4. This Advisory Opinion implicates Model Rules 1.1, 1.3, 5.3.

h. In "cloud computing," a customer's data is stored "in the cloud" (on the internet) on systems owned and operated by third parties. This way a user can access whenever he desires and customers don't pay for services until they use them. This pay-as-you-go offers many advantages: costs, convenience, flexibility, location. However, there also are risks, including (1) security/privacy (customer "owns" the data but doesn't have same level of control as if it were handled in traditional sense; i.e., stored within customer's infrastructure), (2) data location/movement (stored on server but third party has right to move data to maximize storage), and (3) potential for commingling of data with other companies' data. Attorney users of cloud computing must have systems and protocols to insure data not improperly accessed or removed by unauthorized user
and the service provider must be reputable, reliable, dependable. Model Rule 1.6 and Comments thereto require a lawyer to safeguard client confidentiality and confidential information. This means attorney must act competently to safeguard information relating to the client representation against inadvertent or unauthorized disclosure. Lawyer must employ "reasonable precaution" to prevent coming into hands of unintended recipients. Nothing inherently unethical about outsourcing to the cloud – like sending docs to Kinko's for copying. MRPC 1.15 was enacted to preserve client property and information from risk of loss (if you use cloud computing, must provide appropriate instruction and supervision to vendors (MRPC 5.3(b)) concerning ethical aspects i.e. not to disclose information. The North Carolina Bar Association Proposed Ethics Opinion on cloud computing suggests a law firm may contract with a vendor provided that the risks that confidential information may be disclosed or lost are "effectively minimized."

2. How are lawyers using social media and Web 2.0 as litigation resources; i.e., in discovery, to select juries, etc?

   a. The strategies for using social media and Web 2.0 tools as effective, inexpensive (often free) litigation support resources are varied and rapidly expanding. Lawyers access the internet to choose juries, to uncover information about a plaintiff or defendant helpful to their case, and otherwise to discover facts which heretofore have been impossible to locate or would have required prohibitively expensive research. For example, some lawyers are now trawling social networks and other sites to "peep" in on potential jurors, learning everything from their politics, to their affiliations, sexual preference, and income level. Although effective (and even seductive) for the very interesting information such a search can yield, this practice has sparked privacy concerns and may be unknown to the courts or the potential jurors. For example, a lawyer defending a black male charged with sexual assault noted that one prospective juror's Facebook page showed her pictured with several African American friends, suggesting that she did not have any racist tendencies, and fought to keep her on the jury. In another case involving product liability, a prospective juror posted on Facebook that Erin Brockovich, the well known plaintiff's advocate, was her hero, a sign that she may not be sympathetic to a large company's allegedly defective products. Because there are some restrictions on what can be asked on the paper-and-pencil jury questionnaires, online vetting may be used to bypass some of these restrictions and limitations. With the internet, lawyers can themselves become low-cost jury consultants. So far, the federal courts have not addressed the issue of online vetting of jurors, and only two states have said it's acceptable in some form. However, some individual judges ban the practice, at least in their courtrooms.

   b. The 2008 Sedona Conference was the site of the "cooperation proclamation" regarding civility in discovery. Today, we are seeing more frequent judicial opinions sanctioning parties for failure to comply with e-discovery obligations. For example, Wells Fargo Bank v. LaSalle Bank, 2009 W2 2243854 (S.D. Ohio 2009) (plaintiff not entitled to compel costly discovery of back up tapes where
parties failed to discuss in advance); Ford Motor Co. v. Edgewood Properties, 257 FRD 418, 427 (D. N.J. 2009) (court resolving discovery dispute regarding adequacy of document production noted parties must meet early to agree on search and retrieval terms and methodology); William A. Gross Constr. Assoc., 256 FRD at 136 (court refused to resolve disagreement about search terms for relevant e-mails, suggesting cooperation among counsel instead); Ross v. Abercrombie & Fitch, 2010 WL 1957802 *4 (S.D. Ohio 2010) (where dispute was whether all relevant documents produced, court suggested defendant tell plaintiff how it would be possible to search for more and how much time and money it would cost); Burt Hill, Inc. v. Hassan, 2010 WL 419433 *8 (W.D. Pa. 2010) (Plaintiff objected to overbroad RFP, court said Defendant must (1) narrow and (2) agree on search terms); In re: Direct Southwest FLSA Litigation, 2009 WL 2461716 at *2 (E.D. La. 2009) (Because parties did not discuss and agree regarding ESI, Court chose plaintiff's search terms over defendant's. This resulted in $100,000 additional cost to defendant).

c. Social media content increasingly is the subject of formal discovery requests. It can reveal extremely relevant – and harmful – information about one or both of the parties. For example, Barnes v. CVS Nashville, LLC, 2010 WL 2265668 (M.D. Tenn. 2010) (in order to expedite Facebook subpoena, Magistrate offered to create Facebook account to "friend" the plaintiff); Treat v. Tom Kelly Buick Pontiac GMC, 2010 WL 1779911 (N.D. Ind. 2010) (plaintiff sued for harassment/wrongful termination; to support harassment allegation, Plaintiff produced "less graphic" version of inappropriate sexual story posted by supervisor on MySpace); Quigley Corp. v. Karkus, 2009 WL 1383280 at *3-5 (E.D. Pa. 2009) (Facebook "friend" status of 10 defendants not relevant to SEC case regarding shareholder relationship); Mackelprang v. Fidelity National Title Agency of Nevada, 2007 WL 119149 at *1 (D. Nev. 2007) (in sexual harassment case where Defendant tried to get all private e-mails to show plaintiff's affair and promiscuity court denied motion to compel); Crispin v. Chistlau Audigler, Inc., 2010 WL 2293238 *1-2 (C.D. Cal. 2010) (Defendant served subpoena duces tecum on social networking sites wanting all subscriber information and all communications relating to lawsuit. Court found Facebook covered by Stored Communication Act and quashed subpoena.).

3. What are the risks and rewards of social media to law firms in their role as employers of attorneys and staff and why is it important for firms to implement a social media policy?

Many employers now regularly "google" employees and applicants; employees and applicants "google" employers and potential employers. In so doing, they uncover all sorts of information about each other. An employer may find a Facebook page, a MySpace profile, a blog or micro blog (such as Twitter), or information about an individual on someone else's web pages or blog postings. An employee may find a blog entry describing what it is like to work for an employer or other information about an employer's business or practices. A competitor may use Google or Yahoo! to check up on the competition and, in so
doing, bump into information posted by an employee or former employee that the employer believes is a protectable trade secret. There is an abundance of information out there – much of it interesting, some of it damning, and some of it false. And obtaining that information feels risk free and virtually untraceable. It only feels that way, though. The universe of employment laws apply to much of what happens when virtual sleuthing yields tangible job consequences.

As the paragraph above illustrates, the Internet has its own vocabulary. Google and Yahoo! are search engines. Facebook, MySpace, Classmates.com, Match.com and the like are social networking sites. These are places where "people" find one another and where they can post descriptions of themselves or look for love. There are also sites specifically designed for professional networking, such as LinkedIn.

Blogs are postings of opinion that invite response and commentary. Some sites actively encourage blogging about employment. For example, JobVent.com describes itself as follows: "JobVent is the web site for anyone who has ever said 'I hate my job,' or 'I love my job.' JobVent is the web site for people who are about to start a new job, and want to see what other people think of working there." There are also industry-specific or company-specific sites that invite postings from employees in that field or working for a specific company. Indeed, many employers have company-sponsored blogs to provide employees with a forum to express their opinions and to participate in the corporate discussion.

Other sites simply provide places where people can post their musings – including musings about work and the companies that employ them. In some ways, these communication channels are replacing more traditional mechanisms (teenagers "talk" to each other through Facebook pages) and in others they have spawned not only vocabulary ("poking," "friending," "tweeting") but a wealth of data, which is available to anyone who wants to see it.

Microblogs, such as Twitter, have grown in popularity, as has the use of social media by companies and their employees for promotion, marketing, recruiting and networking. With the greater use of social media, however, comes greater difficulty in controlling content, including the dissemination of trade secrets or proprietary information or disparagement of the company's reputation or brand. Both the National Football League and the National Basketball Association have banned players, coaches, and other personnel from using social media for 45-90 minutes before the start of a game until after post-game media availability, after controversial tweets about players from other teams or fans, and concerns about disclosing information to competitor teams or infringing on broadcast right holders' play-by-plays. Similar concerns affect other industries as well. Entertainment companies, for example, are considering banning actors and other employees from tweeting from production sets.

Like email, internet postings tend to be informal, overly familiar, and careless in construction. But, like email, because they are computer-based, they last forever. It's stunning sometimes to contrast the level of care people give traditional letters, which can be destroyed, with the attention they give to electronic mail and virtual postings, which endure in the virtual world forever. The postings can have a dramatic, real-world impact. Proofpoint, an internet
security firm, reported in August 2009 that 8% of companies it surveyed had actually terminated someone's employment for their behavior on social media, which was double the rate in 2008; 31% had terminated an employee for violating email policies, and 15% for violating multimedia sharing/posting policies. 34% of companies reported that their business was impacted by the exposure of sensitive or embarrassing information. (http://www.proofpoint.com/news-and-events/press-releases/pressdetail.php?PressReleaseID=245.)

Users of social media may jeopardize their employment if their "self-expression" conflicts with their employers' interests, for example, by publicly disclosing confidential information or undermining the employer's public image. The First Amendment does not prevent a private employer from terminating an employee for their expressive conduct. Indeed, media reports (and blogs in particular) have been filled with reports of employee terminations for social media blunders – i.e., employees who have been "dooced" (i.e. to lose one’s job because of one’s website, coined for the name of the first employee who was fired for that reason).

For example, a couple of employees at Domino's filmed themselves doing things to food and posted it on YouTube; they were promptly fired. Similarly, a Burger King employee posted a video of himself taking a bath in a kitchen sink at work, and was fired thereafter. A server at California Pizza Kitchen tweeted a complaint about the company's new uniforms; he was fired as well. Virgin Atlantic fired 13 cabin crew members for a Facebook discussion about the company. In one story that has gone "viral," a woman updated her Facebook status with "OMG I HATE MY JOB" together with an insult about her boss. Her boss, whom she had "friended" previously (and apparently forgotten about), wrote back a few hours later and fired her on Facebook.

Social media issues have also made their way into employment litigation. Delta Airlines, for example, was sued by a flight attendant who was fired after she posted suggestive pictures of herself in uniform on a plane. See Simonetti v. Delta AirLines, Inc., Case No. 5-CV-2321 (N.D. Ga 2005). Cisco Systems faces litigation because an in-house lawyer blogged anonymously suggesting misconduct by plaintiffs' lawyers suing Cisco. Two employees at a financial services firm lost their jobs because they posted negative comments about their chief executive officer on an internal company-sponsored blog. A woman was not hired because her Facebook page announced her affection for beer. Teachers have been fired for their MySpace pages. A sex harassment plaintiff's MySpace page is at the center of a case because she celebrates receiving precisely the kind of attention that is the basis for her suit. In each of these cases, postings that the poster may have considered private were found by the employer and consequences followed. Some of this is so predictable that college placement officers now caution students to be careful about the content of their Facebook and MySpace profiles.

Some of it is not predictable – other than in the sense that people are absolutely astonishing. Think of the Cisco case – an in-house counsel using the Internet to assault the integrity of the lawyers suing his employer. Or the Hawaiian Airlines case – an executive using an employee's personal information to log in to a private web site. See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002). Or cases in which one person creates web-based data (a Facebook profile or the like) as if he or she were someone else. The Internet doesn't
know what's true, and employers rely on what they find (but fail to verify) at their own peril. Just because you find it through Google or Yahoo!, doesn't mean it's so.

Part of what makes this universe such complex territory is that people operate within it as if they expect it is private even when they know it is not. Said another way, the content of the information posted reflects a sense of security, while the reality of the search engines and the actual operation of the web itself demonstrate that there is no reason for anyone to feel that their private information is secure. This is worrisome for employers that seek to use the web to post internal corporate information and it is worrisome for employees who use social networking sites to share information with the world that they might (before the Internet) have shared with only a select few friends. Cutting, pasting and posting is simply too easy – add the ubiquity of cell phone cameras to the mix and there are few limits to what the virtual world knows.

So, what to do with all of this? At least with regard to information about employees, this isn't rocket science (at least the law part) – it's the application of familiar principles to an ever-changing and unfamiliar virtual world. The challenges—including claims and lawsuits alleging harassment, discrimination, invasion of privacy, defamation, interference with protected, concerted activity, disclosure of trade secrets, Computer Fraud and Abuse, and violations of a variety of other federal and state laws-- are real but can be surmounted with care AND the development and consistent enforcement of a social media policy.

4. Can judge's use of social media violate the code of judicial conduct and what must judges know and do to avoid this problem?

a. Judges also are impacted by use (and abuse) of the web. For example, consider the nightmare for Judge Alex Kozinski, 9th Circuit Court of Appeals. In 2008, media reported he had posted sexually explicit material accessible via website while he was sitting by designation as trial judge on ironically, an obscenity case. The judge ultimately declared a mistrial and recused himself. The case was transferred to the 3rd Circuit where that court found possession of sexually explicit materials combined with carelessness in failing to safeguard his "sphere of privacy" was "judicially imprudent." Also, the court held that once the judge became aware that the information could be accessed by members of general public, he should have taken prompt corrective action. This amounted to disregard of serious risk of public embarrassment to institution and to federal judiciary.

b. Other examples include, a New York Advisory Committee on Judicial Ethics Opinion 08-176 (2009) (involved a judge who received e-mail invitation to join a social network and asked for advice. The response was that it was generally okay but jurist must consider whether online connections rise to level of close personal relationships requiring disclosure or recusal and also must employ use prudence, discretion and decorum i.e. avoid appearance of impropriety); Florida Ethics Opinion Op 2009- 20 (2009) (judge can post materials on social networking page
if it otherwise does not violate Code of Judicial Conduct but may not "friend" lawyer because that might suggest to others that the lawyer "friends" are in a special position to influence the judge); South Carolina Ethics Advisory Opinion (acceptable for magistrate judge to "friend" local law entitlement and employees of Magistrate so long as nothing discussed related to judge's position as Magistrate; concluded social networking participation encouraged so as not to isolate the judges from community, and allow judges to communicate and give community better understanding of judiciary); A North Carolina family court judge was reprimanded for misusing the internet in connection with a pending case. The judge and defendant's attorney were online "friends" and discussion of various aspects of case resulted in judge disqualifying himself, vacating the child custody and support order and ordering new trial.

c. In the case In Re Angela Dempsey, No. SC09-174 ( Fla. Feb. 4, 2010), a link and video posted by a political consultant without a judge’s knowledge was used the term “re-elect” in link to a campaign commercial. However, the judge had been appointed, not elected, so this was considered misleading.

5. How the public's uses of social media impact litigation and our justice system?

a. Mistrials from juror's use of internet

6. What are some of the new, and as-yet-unanswered questions that lawyers must answer related to social media?

a. What happens if a lawyer does not investigate social networking websites and fails to learn potentially useful information about the opposing party? Is this an ethical violation; i.e., lack of competence or lack of commitment to representation of the client?

b. If a lawyer/firm uses social networking sites, what obligations do they have to monitor information on site, including information placed on the site by others?

c. Do law firm website profiles constitute advertising? Can lawyers "tweet" or wall post their trial successes to friends and families?

d. Under what circumstance can electronic storage be destroyed?

e. What about metadata mining?

f. Is a discovery request for massive amounts of electronic information abuse of the system? Or would failure to make the request be considered poor representation of the client?
g. Have professionalism and civility suffered by advances in technology; i.e., sending e-mails while still angry, fewer face-to-face meetings, anonymous postings?

h. What expectations of privacy are reasonable in today's age of technology?

i. Because it is technologically possible to send private thoughts to hundreds or thousands of people, are there enhanced ethics requirements imposed upon lawyers to assure confidentiality of client communications?

j. Must lawyers counsel clients about recordkeeping storage practices and retention?

k. Are areas of training needed for client's employees or the lawyer's staff?

l. What client confidentiality issues are raised by "cloud computing?"

m. What about substantive legal questions impacted by technology and the internet?
   i. Can an attorney serve process by e-mail?
   ii. Are there other jurisdictional issues created?
   iii. Choice of law?
   iv. Attorney advertising?
   v. With internet communication, when is attorney/client relationship formed?
   vi. Unauthorized practice of law in other jurisdictions?
   vii. Which disciplinary system charged with supervision when violations occur in cyberspace?
How have legal research tools evolved over the years?

Early online systems merely provided electronic access to the primary and secondary law. Over three decades since, what distinguished leaders from followers were improvements that drove efficiencies in the research process (driving client costs down) while also exposing more nuances of the theory of and arguments around the primary law (driving better results for clients).

Improvements that drove the most efficiency came in the following areas:

- **Taxonomy / Subject Categorization** – Having legal documents grouped by subject – ideally with human review, as opposed to pure technological sorting.
- **Secondary Source Collections** – Having a vast number of up-to-date, authoritative secondary sources covering a wide variety of legal topics and jurisdictions.
- **Litigation Content Collections** – Like traditional secondary source collections, litigation content such as briefs, pleadings, motions, memoranda, and expert witness testimony help the researcher quickly get to the right primary law and better understand it.
- **Linking & Document Recommendations** – Extensive hyper linking to cited or related information can reduce research time by providing easy access to relevant information in context.

Some of the best legal research systems leverage all of these capabilities to drive even more efficiency, by offering:

- Improved search capabilities that make it easier and faster to get information
- New workflow tools that help researchers organize and store important research
- Collaboration features that allow sharing of information across an organization

In effect, cutting edge systems leverage meta-data assets to emulate the best practices of experienced legal researchers—consulting secondary sources, following citation networks, and drawing implicit connections between related documents even without formal cited-citing relationships—to deliver in minutes what used to take hours. Attorneys can spend less time finding the law, and more time analyzing the law and crafting winning arguments. Realizing the full benefit of these improvements can result in dramatic time-savings in legal research, which translate into lower costs and better results for clients.

**Do advances in technology offer efficiency gains to other parts of the legal workflow?**

Absolutely.

Advances in legal technology can offer efficiency gains throughout the legal workflow.
Attorneys spend much of their time drafting and revising documents. Technology can provide dramatic time-savings here, as well.

Knowledge Management tools targeted specifically at legal professionals enable them to more easily find, update, and re-use previous work product and share intellectual capital with their colleagues, rather than re-inventing previous work. The best of these tools don’t require attorneys to profile the documents before they are added to the system. Rather, these tools tag documents by firm, court, jurisdiction, document type so that they can easily be found and re-used.

The newest solutions combine research and case-related information with innovative drafting tools in the attorney’s word processor. For example, leading products allow attorneys to craft arguments in Word or Word Perfect and request legal authority to support those arguments without ever leaving their word processor. Similarly, the user can invoke a function to format the document according to the local rules in the jurisdiction they practice in.

In the transactional space, new workflow tools automate document proofing to make risk mitigation easier, even in the face of heightened regulatory scrutiny and increased compliance requirements. These tools:

- Reduce risk of technical oversight and omissions
- Ensure agreements are properly documented
- Reduce overall risk at every state of drafting

Perhaps most significantly, modern technology enables much more efficient and robust collaboration.

**How is the prevalence of mobile devices in the legal market impacting efficiency?**

As technology evolves, so does the way in which attorneys and legal professionals get their information – and when. Mobile devices allow the flexibility to work wherever you are, on any device you choose, and at any time. Gone are the days when you would have to wait to email a case to a judge after returning to the office – through the technological developments of legal research tools on such devices as smart phones and iPads®, legal research is now available at your fingertips, wherever you are. This makes attorneys and research professionals better able to serve their clients more efficiently. According to ILTA’s 2010 Technology Survey, “over a third of firms reported iPads in use after only a few months on the market.” To compete in this changing economy, the most modern legal research providers are responding to this trend by providing flexible and intuitive research capabilities designed to work well on all smart phones and mobile devices such as the iPad.

**How does modern legal technology improve profitability for law firms? There has been much discussion of AFA’s, changes in the traditional service delivery model as well as corporate counsel reducing outside counsel costs even further. How can these efficiencies contribute to increased realization in light of these market conditions?**

In order to understand how legal technology impacts and improves profitability it is critical to address the changes in the legal service model as well as the change in client expectations.
It is no surprise that the downturn in the economy has presented many challenges for law firms. Recently, Hildebrandt Baker Robbins published the 2011 Client Advisory which incorporated findings from Hildebrandt’s Law Department Survey (“HLDS”). Among the companies participating in the HLDS:

- 54 percent indicated an intention to impose rate reductions,
- 70 percent to continue rate freezes, and
- 85 percent to use AFAs for some portion of the work of their outside counsel.

The “current downturn has accelerated the demand for change from the client community and has created an environment in which efficiency and cost effectiveness have become the driving factors of law firm competition.”

In order to gain market share and growth, law firms need “to capture market share from other firms by differentiating [their] own services on the basis of quality, efficiency, or cost or … to identify and pursue those pockets of activity in the market (be they practice-driven or geography driven) where demand may be growing despite overall market trends or where demand can be stimulated by the use of new business models.

Moreover, client expectations have changed. Many corporate clients use the ACC Value Index to measure law firm value based on five factors. They are:

- Understands Objectives/Expectations
- Legal Expertise
- Efficiency/Process Management
- Responsiveness/Communication
- Predictable Cost/Budgeting Skills
- Results delivered/Execution

Fully leveraging technology allows firms to differentiate themselves with modern technology and keep pace with the evolving expectations of clients. It creates opportunities for law firms to grow revenue, improve realization and reduce costs to clients.