

# Are You Technologically Competent?

by Kellam T. Parks

Along with technology's changes to the practice of law come new twists on attorney ethical obligations. Although there are many examples of these, such as the inadvertent disclosure of documents, internet marketing, cloud computing, and virtual law offices, the first consideration should be the general duty of competence regarding the use of technology in the practice of law.<sup>1</sup>

While Virginia has not adopted any formal statement on the necessity of competence with technology, the American Bar Association did so with its August 2012 amendment to Comment 8 to Model Rule (MR) 1.1 on general competence: "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." (emphasis added)

The report accompanying the resolution for the amendment states: "[T]he proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent." This accompanying statement indicates the ABA's intent was not to add new obligations to attorneys, but rather to at least bring technology into counsel's field of vision as they consider their ethical duty of competence.

While Comment 8's addition to MR 1.1 is not new<sup>2</sup>, it bears repeating and is even more relevant today than when first enacted in 2012. Examples of how legal competence (or the lack thereof) has played out are illuminating.

One earlier case is *Munster v. Groce*, 829 N.E.2d 52 (Ind. App. 2005) where a lawyer was chastised for his lack of use

of technology in attempting service of process. The court declined to find that due diligence had been used to locate a non-resident defendant after the plaintiff's counsel had filed a "long arm" affidavit stating that the defendant's address could not be found. The court, in finding that no real effort was made, noted "[i]n 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." *Id.* at 62.

Another more recent case is *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010, *en banc*). In *Johnson* the court allowed a new trial based on a juror's nondisclosure of his litigation history. It noted, however, that the plaintiff's counsel discovered the information using Missouri's automated case record service *after* the trial. Acknowledging a lack of a Supreme Court rule governing this area, the court imposed an affirmative duty on attorneys to make online investigation of potential juror's prior litigation history a key part of their jury selection process "in light of advances in technology allowing greater access to information." *Id.* at 558-559.

Internet use in due diligence searches was also discussed in *Griffin v. Maryland*, 192 Md. App. 518 (2010). There, the court cited with approval a statement found in the bar president's law review article *The Legal Implications of Social Networking*<sup>3</sup> that it is a "matter of professional competence" that lawyers should investigate social networking sites.<sup>4</sup> *Id.* at 535.

Attorneys are increasingly using the Internet in their legal practice, as evidenced by an American Academy of Matrimonial Lawyers survey from 2010 that identified Facebook as the "unrivaled leader for online divorce evidence" with 66 percent citing it as a primary source.<sup>5</sup>

It cannot be anything but more important in 2014.

The purpose of this article is to bring further attention to the importance technology plays in modern law practice. It is irresponsible, and perhaps unethical, to overlook the available technological resources when representing your clients.

## Endnotes:

- 1 My thanks to James M. McCauley, ethics counsel for the Virginia State Bar in assisting with some of the source material for this article, which came from a CLE he and I prepared for the Norfolk Portsmouth Bar's Bench Bar Conference in April 2013.
- 2 In fact, Alan S. Goldberg wrote about this general topic for *Virginia Lawyer* in the October 2012 edition.
- 3 Sharon D. Nelson, et al., 22 Regent U.L.Rev. 1 (2009/2010)
- 4 This case also ruled on authentication of social media evidence, which was ultimately overturned, but the discussion of the obligation to review social media as part of due diligence was not challenged.
- 5 <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey->



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