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### Virtual Virtuous Living: How Can the I-Generation of Lawyers Best Love and Serve its Neighbors

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## Lectures

### VIRTUAL VIRTUOUS LIVING: HOW CAN THE I-GENERATION OF LAWYERS BEST LOVE AND SERVE ITS NEIGHBORS?

Theresa A. Gabaldon\*

#### I. INTRODUCTION

E-lawyering presents new ethical challenges. Some of these challenges simply have to do with the fit—or lack of fit—between technology and existing rules of professional responsibility.<sup>1</sup> They include, for instance, the more obvious questions of dealing with misdirected electronic communications,<sup>2</sup> preserving confidentiality while using various electronic devices,<sup>3</sup> and metadata mining,<sup>4</sup> as well as the issues that arise while engaging in electronic advertising and solicitation.<sup>5</sup> Determining how these issues are to be resolved ideally involves the distillation and application of the larger principles that the arguably pertinent rules of professional responsibility seek to serve. These larger principles then may—or may not—be of help in answering somewhat less obvious questions, such as exactly where one is engaged in the practice of law<sup>6</sup> and whether the adequacy of legal representation suffers as the result of physical distance from our clients.<sup>7</sup> I will posit, as a starting point that the answers to some of these larger questions generationally differ, and eventually will concede that, at least in part, they probably should.

The title of my talk is *Virtual Virtuous Living: How Can the i-Generation of Lawyers Best Love and Serve Its Neighbors?* I should acknowledge very quickly that, insofar as a definition of virtue is

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\* Lyle T. Alverson, Professor of Law, George Washington University Law School. I would like to thank Mr. Glenn Tabor for the gift making the Tabor Lecture series possible, as well as Valparaiso University School of Law for the invitation to give this year's Tabor Lecture. I would also like to thank Robert L. Palmer for his invaluable efforts and insights, and William T. Palmer for his inspiration.

<sup>1</sup> Unless stated otherwise, references in this essay to the "Rules of Professional Responsibility" should be understood as references to the American Bar Association's MODEL RULES OF PROF'L CONDUCT (2008) [hereinafter MODEL RULES].

<sup>2</sup> See *infra* text accompanying notes 35–40.

<sup>3</sup> See *infra* text accompanying notes 44–52.

<sup>4</sup> See *infra* text accompanying note 92.

<sup>5</sup> See *infra* text accompanying notes 19–34.

<sup>6</sup> See *infra* text accompanying notes 94–100.

<sup>7</sup> See *infra* text accompanying notes 77–78.

## 1046 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

concerned, I stand before you as a fraud. Although I have taught Professional Responsibility since God made dirt (1987), I have no formal training in moral philosophy and no definition of virtue that I am willing publicly to share (although in conversations with my son it seems to feature finishing one's homework before turning on the Xbox®).

I do, however, seek in my Professional Responsibility classes to talk about virtue—specifically about moral philosophy—and to coax the students into doing so. I ultimately do, on the final quiz of the year, ask them to articulate and apply their own moral philosophy. I grade this on a pass/fail basis, judged by the metric “shows at least a little effort vs. didn't think about this for two minutes,” and I am reasonably happy with what it achieves. I firmly feel that the rules of professional responsibility do not answer all possible questions that will arise,<sup>8</sup> and that this is obviously and particularly true in the realm of the unforeseen. There are, in fact, a myriad of issues that technology currently presents that the rules do not do a particularly good job of answering. Assuredly, there will be more, and I predict that any attempt by the rule-drafters to keep up with and/or anticipate them is doomed. If anyone were to care to quote me on that, I would ask them to make sure that “doomed” is spelled with a capital “D.”

In cautioning that the rules of professional responsibility cannot answer all possible questions that technology will present, hard on the heels of having alluded to virtuous living, I seem to be suggesting that there is, otherwise, some strong relationship between the rules and the subject of virtue. I actually question this in some regards—for instance, the requirement of the American Bar Association's Model Rules of Professional Conduct (“Model Rules”) that an advertisement contain the lawyer's office address,<sup>9</sup> the requirement that a lawyer never contact someone known to be represented without the consent of his or her attorney,<sup>10</sup> and the requirement that client confidences be kept unless divulgence is necessary for, among other things, the attorney to collect his or her bill.<sup>11</sup> I will assume, however, for purposes of this talk that the more general duties imposed by the rules by and large reflect commonly accepted principles of virtue.

Take, for example, the duty not to mislead. This pops up in various places in the rules of professional conduct in specific contexts of client

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<sup>8</sup> Cf. MODEL RULES, *supra* note 1, at Preamble (2008). “Within the framework of these Rules . . . many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” MODEL RULES, *supra* note 1, at 9.

<sup>9</sup> MODEL RULES, *supra* note 1, at R. 7.2(c).

<sup>10</sup> *Id.* at R. 4.2.

<sup>11</sup> *Id.* at R. 1.6(b)(5).

representation,<sup>12</sup> but most generally is stated in the following form: “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation[.]”<sup>13</sup> This applies, not incidentally, in our everyday lives and not just in the context of our representation of clients.<sup>14</sup>

Let us not be distracted by the absolutes. We need not resolve whether we can or cannot compliment our spouses on what, in truth, are hideous haircuts or pants that do, in fact, emphasize recent failure with respect to portion control. Neither do we need to address a situation—doubtlessly manifesting itself everyday—in which someone will shoot us unless we divulge the whereabouts of the person the aggressor actually is seeking to kill. Hopefully, most folks will concede that most rules of the *no dishonesty* sort really are statements of general principle that cannot possibly grapple with all situational nuance, and that properly should say, “Thou shall not lie unless there’s a really good—well, in the case of the haircut or unflattering pants a pretty good—reason.”<sup>15</sup> In the generally non-controversial just so long as you do not get carried away category, I group, along with the duty not to mislead, the duty of competent representation<sup>16</sup> and the duty not to betray a confidence.<sup>17</sup> These, as well as the somewhat more controversial duty of zealous representation, which has been demoted from a canon to a comment,<sup>18</sup> all will be implicated as we move along.

## II. THE ETHICAL CHALLENGES OF TECHNOLOGY

It is time to turn, then, to specifically consider at least some of the challenges—either to particular rules or to more general principles—that

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<sup>12</sup> See, e.g., MODEL RULES, *supra* note 1, at R. 3.3(a) (duty to tribunal); MODEL RULES, *supra* note 1, at R. 3.4(a), (b), (c), & (e) (duties to opposing parties and their counsel); MODEL RULES, *supra* note 1, at R. 4.1 (truthfulness in statements to third parties); MODEL RULES, *supra* note 1, at R. 4.3 (duty to correct certain misunderstandings by those unrepresented by counsel); and MODEL RULES, *supra* note 1, at R. 7.1 (duty to avoid misleading in communications about services).

<sup>13</sup> MODEL RULES, *supra* note 1, at R. 8.4(c).

<sup>14</sup> See *id.* at Preamble (“[T]here are Rules that apply to lawyers . . . even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline . . . . See Rule 8.4.”).

<sup>15</sup> For amplification of this position see Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 9–13 (1995).

<sup>16</sup> See MODEL RULES, *supra* note 1, at R. 1.1.

<sup>17</sup> See *id.*, at R. 1.6.

<sup>18</sup> Compare American Bar Association MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1981) (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”), with MODEL RULES, *supra* note 1, at R. 1.3 cmt. (“A lawyer must also act . . . with zeal in advocacy upon the client’s behalf.”).

## 1048 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

are presented by advancing technology. I will speak first to the issues that are given special cognizance in the rules of professional responsibility, then deal with those that may fall within the contemplation of the broader principles, and finally turn to concerns with which the rules do not even come close to grappling.

A. *Technological Issues Specifically Contemplated by the Rules of Professional Responsibility*

It actually is a bit startling to observe just how few instances there are of situations in which the rules of professional conduct specifically acknowledge the problems of modern technology. Even more startling, when they do purport to address those problems, they fall short of providing anything like comprehensive resolutions.

1. Solicitation and Advertising

I believe that the only place the Model Rules, as opposed to their accompanying comments,<sup>19</sup> actually use the *e-word* is in connection with solicitation and advertising.<sup>20</sup> As we shall see, this is far from the only context in which e-prompted issues arise, so one might wonder why they merit express attention here but not elsewhere. There are several possible answers. One is that advertising is an area in which the bar has been in the process of actively playing catch-up since the 1970s—catching up, that is, both with Constitutional case law and changes in culture.<sup>21</sup> After all, as long as you are re-writing the rules almost every year (a slight exaggeration), why not go ahead and recognize technology while you are at it?<sup>22</sup> Another is that advertising and solicitation are the profession's first interface with the public, and arguably responsible for shaping the public's reaction to the bar. Can it be a coincidence that the number of lawyer jokes has skyrocketed along with the proliferation of

<sup>19</sup> See MODEL RULES, *supra* note 1, at Scope ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.").

<sup>20</sup> MODEL RULES, *supra* note 1, at R. 7.2(a) and R. 7.3 (a)–(c) (discussed *infra* at notes 25–32).

<sup>21</sup> For a description of recent developments, see, e.g., Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437 (2006).

<sup>22</sup> This is not to say, however, that the coverage of technology-related advertising issues is anything but complete. For commentary on unresolved issues, see, e.g., Sarah Hale, *Current Developments 2006–2007: Lawyers at the Keyboard: Is Blogging Advertising and if So, How Should It Be Regulated?*, 20 GEO. J. LEGAL ETHICS 669 (2007); Connor Mullin, *Current Developments 2006–2007: Regulating Legal Advertising on the Internet: Blogs, Google and Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835 (2007).

lawyer advertising?<sup>23</sup> In addition, it is hard to forget—if you are old enough to have known in the first place—that it was two lawyers from Arizona who initially were credited with the invention of spam.<sup>24</sup>

In any event, here is all that the Model Rules have to say (in paraphrase) on the subject of electronic anything:

(1) A lawyer may advertise services through written, recorded, or electronic communication, including public media.<sup>25</sup>

(2) Notwithstanding (1), there generally can be no solicitation by real-time electronic contact for a lawyer's pecuniary gain.<sup>26</sup>

(3) Even where not for pecuniary gain, there can be no recorded or electronic solicitation (real-time or otherwise) if the prospective client has made known a desire not to be solicited, or if the solicitation involves coercion, duress, or harassment.<sup>27</sup>

(4) Electronic communications to prospective clients known to be in need of legal services in a particular matter must be marked as advertising.<sup>28</sup>

As noted above, even here, where electronic communications are expressly contemplated, there are many things that are not covered. One of these is spam itself. We probably should not feel too badly about that, since there are, of course, actual laws dealing with spam,<sup>29</sup> as well as a few state bar ruminations on the subject<sup>30</sup>—in addition to a Model Rule Comment indicating that communications following up on one to which there is no response may constitute a form of solicitational harassment.<sup>31</sup> I personally would love to extend the *harassment* analysis to pop-up ads, but fear that they are advertisement rather than solicitation and thus may not be covered by the literal call of the Model Rules.<sup>32</sup> I also have a

<sup>23</sup> As evidence of the widespread cultural presence of lawyer jokes and lawyer advertising, I suggest the reader simply Google them both.

<sup>24</sup> See Ray Everett-Church, *The Spam That Started It All*, WIRED (Apr. 13, 1999), available at <http://www.wired.com/political/law/news/1999/04/19098/>.

<sup>25</sup> MODEL RULES, *supra* note 1, at R. 7.2.

<sup>26</sup> *Id.* at R. 7.3(a).

<sup>27</sup> *Id.* at R. 7.3(b).

<sup>28</sup> *Id.* at R. 7.3(c).

<sup>29</sup> For discussion of spam laws and their arguable shortcomings, see, e.g., John Soma, Patrick Singer & Jeffrey Hurd, *Spam Still Pays: The Failure of the Can-Spam Act of 2003 and Proposed Legal Solutions*, 45 HARV. J. ON LEGIS. 165 (2008).

<sup>30</sup> See, e.g., Ohio Board of Commissioners on Grievance and Discipline Adv. Op. 2004-1 (2004) (addressing ethical constraints on lawyers' ability to use spam). See also *In re Canter*, Tenn. Sup. Ct. Docket Nos. 95-831-O-H, 96-868-O-H, 96-908-O-H, 96-910-O-H (1997) (disciplining lawyer for use of spam and other ethical transgressions).

<sup>31</sup> The relevant Comment is MODEL RULES R. 7.3 cmt. [5].

<sup>32</sup> For a discussion of the sometimes propounded theoretical divide between advertising and solicitation, see, e.g., Ruth Fleet Thurman, *Direct Mail: Advertising or Solicitation? A Distinction Without a Difference*, 11 STETSON L. REV. 403 (1982). This is not a division I

## 1050 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

somewhat difficult time trying to figure out what to do about subliminal imagery embedded in electronic ads (on television or elsewhere). They would, of course, be forbidden if misleading<sup>33</sup> but I fear that concept may not be adequately comprehensive. Similarly, I fear that we have no way to deal with quick-flash or click-through disclaimers that may be included in ads or appear on websites in the interests of *full disclosure*, even though everyone knows they are not often read.<sup>34</sup>

## 2. Misdirected Faxes and Email

The next stop is a rule that does not specifically allude to electronic communications, even though it is an open secret that its passage was prompted by technology issues—the proliferation of faxes and emails, along with their misdirection. A fairly recently added Model Rule tells us that if we receive documents related to the representation of a client that we reasonably should know were inadvertently sent, we must notify the sender.<sup>35</sup> This, to be sure, covers old fashioned letters and production of physical documents, but as I said, we all know what triggered it.<sup>36</sup> Who among us has not at least once inadvertently and embarrassingly hit *Reply All*? In any event, in case there is any doubt about coverage, a Comment specifically notes that “‘document’ includes e-mail or other electronic modes of transmission subject to being read or put into readable form.”<sup>37</sup>

What the Model Rule does not say is, of course, just as interesting as what it does. Obviously, the drafters knew that they were not answering the larger question of what the unintended recipient can and/or should do with the message other than notify the sender;<sup>38</sup> evidently, different authorities are expected to go in different directions about whether it is

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generally find useful. See Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 454 n.123 (1988).

<sup>33</sup> See MODEL RULES, *supra* note 1, at R. 7.1.

<sup>34</sup> There is an analogy to the more-often discussed approach of computer software companies to “shrinkwrap” licensing. Cf., e.g., Garry L. Founds, *Shrinkwrap and Clickwrap Agreements: 2B or Not 2B*, 52 FED. COMM. L.J. 99, 100 (1999) (reflecting on tendency not to read fine print).

<sup>35</sup> MODEL RULES, *supra* note 1, at R. 4.4(b).

<sup>36</sup> For discussion of the genesis of R. 4.4(b), see Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767 (2006).

<sup>37</sup> MODEL RULES, *supra* note 1, at R. 4.4, cmt. [2].

<sup>38</sup> See *id.* at R. 4.4, cmt. [2]. (“Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, . . .”).

permissible to read the message, use it, etc.<sup>39</sup> Almost as interesting, though, is at least one thing that the drafters probably were not thinking about at all, and that the comment quoted above seems to preclude covering. This is the mistaken voice mail. Suppose, for instance, that you are on a conference call with your client and attempt to call the other side. No one is available, so you leave a voice mail message, disconnect from the message recipient—you think—and then proceed to talk with your client, unaware that every word you both say is being recorded. It could happen, and, not surprisingly, already has.<sup>40</sup>

*B. Technological Issues Addressed, Though Not Specifically Contemplated, by the Model Rules*

The next subject involves technology-related conduct that the rules of professional responsibility clearly do cover, even though their special challenges may be hard to recognize. In this area, it generally is the case that a certain bottom line is mandated (once the issue is identified), but its method of achievement is somewhat murky.

1. Technology and the Duty of Confidentiality

We all know that lawyers have a duty not to disclose their clients' confidences.<sup>41</sup> It is also well-known (and acknowledged in a Comment to the Model Rules), that when this duty is combined with the duty of competent representation, there is a duty to safeguard client information from inadvertent or unauthorized disclosure.<sup>42</sup> Thus, for instance, since there is no reasonable expectation of privacy in our trash (which we are, in the discharge of our duty of competence, supposed to know) there is a fairly well-acknowledged duty to shred before we discard.<sup>43</sup>

The Comment to the Model Rule enunciating the duty of confidentiality in fact tells us that care—although not necessarily special care—must be taken in “transmitting” information that may come into

<sup>39</sup> *Id.* at R. 4.4 cmt. [3] (characterizes the decision as one that either will be made by “applicable law” or as a matter of “professional judgment[]”). At least two jurisdictions have adopted the amended versions of R. 4.4(b) that do require the return of misdirected documents. *See* LA. RULES OF PROF'L CONDUCT R. 4.4(b); N.J. RULES OF PROF'L CONDUCT R. 4.4(b).

<sup>40</sup> *See* *Howell v. Joffe*, 483 F. Supp.2d 659 (2007) (upholding attorney client privilege and denying action for infliction of emotional distress).

<sup>41</sup> *See* MODEL RULES, *supra* note 1, at R. 1.6.

<sup>42</sup> *Id.* at R. 1.6, cmt. (providing that “[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure[]”).

<sup>43</sup> *See, e.g.*, N.J. Ethics Op. 692 (Supp.) (2002); N.Y. Ethics Op. 641 (1993); Ore. Ethics Op. 2005-141 (2005); W. Va. Ethics Op. 2002-01 (2002); Wisc. Ethics Op. 98-1 (1998).



## 1052 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

the hands of unintended recipients.<sup>44</sup> This is the partial flip side of the rule requiring notification that documents have inadvertently been transmitted,<sup>45</sup> no doubt, but goes further. In fact, various bar opinions and academically-offered hypotheticals have led to fairly well-grounded speculation that each of the following may be true:

- a. There may be a duty to encrypt particularly sensitive information.<sup>46</sup>
- b. There may be a duty to install firewalls, etc. (note the clever use of “etc.” to cover up my lack of conversance with the technology I’m purporting to discuss), to protect electronic client files.<sup>47</sup>
- c. There may be a duty to secure wireless intra-office networks against possible hackers.<sup>48</sup>
- d. In some jurisdictions, there may be a duty to use secure mobile phones and texting devices, at least for particularly sensitive information.<sup>49</sup>
- e. There probably is a duty to remove at least some types of “metadata” from client documents that are provided electronically to those other than the client.<sup>50</sup>

<sup>44</sup> See MODEL RULES, *supra* note 1, at R. 1.6 (“This duty . . . does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.”).

<sup>45</sup> See *supra* text accompanying note 35.

<sup>46</sup> See, e.g., American Bar Association Formal Ethics Op. 99-413 (1999) (lawyers generally may communicate with clients by unencrypted email, unless special circumstances warrant special precautions).

<sup>47</sup> See, e.g., Ariz. State Bar Comm. on Rules of Prof. Conduct Op. 05-04 (2005) (suggesting duty to take precautions against hackers exists if law firm computers connect to Internet).

<sup>48</sup> See Eric Van Buskirk, *Information Security 101: Protecting Yourself and Your Clients*, 43 ARIZ. ATT’Y 34, 37-38 (2006) (discussing dangers of wireless networks).

<sup>49</sup> Interestingly, an early wave of ethics opinions suggesting that the use of mobile phones was professionally irresponsible was reversed in the late 1990s when encryption of transmissions became standard and interception was, in many instances, made illegal. See Del. State Bar Ass’n Comm. on Prof. Ethics Op. 2001-2 (2001) (discussing status of issue in Delaware and other jurisdictions); see also Karin Mika, *Of Cell Phones and Electronic Mail: Disclosure of Confidential Information under Disciplinary Rule 4-101 and Model Rule 1.6*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 112 (1999) (discussing status of issue in late 1990s). Nonetheless, mobile phones transmit without encryption while in roaming mode; thus, discussing sensitive information while in roaming mode may not be reasonable. See Van Buskirk, *supra* note 48, at 38-39. It also has been noted that mere use of cell phones or hands-free communication devices enhances the dangers of being overheard. See Darshana T. Lele, *Speakers Reveal Perils and Benefits of Using Technology in Law Practice*, 21 LAWS. MANUAL ON PROF. CONDUCT (ABA/BNA) 310 (2005).

<sup>50</sup> See Colo. Bar Ass’n Ethics Comm. Op. 119 (2008) (advising that lawyers have a duty to remove metadata before transmission but that Colorado attorneys—unlike those in some other jurisdictions—have no duty to refrain from looking for metadata in documents received unless they have been notified of the sender’s mistake).

- f. There also is surely a duty to scrub hard drives before you dispose of them—and I did not know this before I started research for the Tabor lecture—but this duty applies to Blackberries® too!<sup>51</sup>

Almost without a doubt, the younger members of the audience will know not only what a firewall is—but in most instances how to install, activate, and maintain one. And they will take, as a matter of course, that it should be done. As in, “Mmmpfh, what’s the big deal? Who wouldn’t be doing that already?” Note, then, the feedback effect this will and probably should have on professional norms—the more certain it is that reasonable people would do it—whatever the “it” is that you are talking about—the relatively more certain it is that it is the sort of thing a reasonable lawyer would do and therefore the type of thing that there is an affirmative duty to do—with no excuse for dinosaurs.

Law firms of even moderate size presumably will have taken care of all this already, but even they may have some gaps. For instance, what about the computer hygiene of lawyers who occasionally work at home? And what about the duty to make sure that each and every client is adequately informed of what they need to do to preserve the attorney-client privilege?<sup>52</sup> What can you assume your client already knows? In other words, are you going to tell the general counsel of Procter & Gamble that you need to have a nice, long talk about computer security? Nahh, even if the talk would be billable, you will probably wind up with some form that the client initials, acknowledging that the client understands everything he needs to know about the computer security precautions he should take. And before you know it, that will be the nice, standard way to take care of the issue, never minding that it will be completely meaningless to the people who actually need the information—unless you are very careful about who your client really is.

At this point, I will note my generational fear—that the attorneys who already know everything there is to know about firewalls may assume that everyone is equally adept, and may be reluctant to give the computer security talk to anyone. Ask someone like my fourteen-year-old son what he thinks of the idea, and what you might get is “Mmmpfh. You wanna’ treat somebody like he’s stoopid?” (Spelling deliberate). My view, indeed, is that even if someone has a Ph.D. in computer science as well as a pierced tongue, you should assume that he or she is not practicing good computer hygiene *vis à vis* the attorney client privilege, but I am not at all sure that my view will be generationally shared.

<sup>51</sup> See Van Buskirk, *supra* note 48, at 36 and 38.

<sup>52</sup> See generally MODEL RULES, *supra* note 1, at R. 1.1 (duty of competence) and R. 1.4 (duty to communicate with client).

## 1054 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

My opinion notwithstanding, I urge a brief pause to reflect on the importance of the life experience of both rule-makers (including opinion drafters) and rule-followers in dealing with the challenges of technology. I urge, too, caution in assuming that in some regards technology will be able, before too long, to take care of itself—that all electronic equipment will come with adequate firewalls (etc.) to resolve the issues I have described. Why? Because something else will come along. Notwithstanding my view that the effort will not be wholly successful—I believe I used the term “Doomed”—it really must be some sentient being’s job to look for the unexpected.

## 2. E-Mail and the Duty Not to Assist Crime or Fraud

Some, though not all, of the problems I have just noted have to do with the migration of communications with our clients from face-to-face conversations to e-mail. Obviously, this migration also has taken place with respect to our clients’ internal communications. The simple fact that many more things are *written down* presents sensitive issues. What, oh what, are we to tell our clients, either in advance, or after the fact, about a smoking e-mail?<sup>53</sup> By way of prevention, my mother always told me never to write anything down unless I wanted the whole world to know it, and I am much inclined both to heed that advice and to urge it on others. That said, it obviously is not all that practical in a business situation to abjure the written word. I am not a litigator and I have not thought about this issue at great length. I am intuitively inclined to think, though, that whatever it is we used to tell our clients about what to put in a letter or memo, and what not, should prove useful by way of analogy. Similarly, destruction of electronic files on the same schedule as paper files seems to suggest itself.<sup>54</sup> But you know what? I am not sure. I think there is a tremendous danger in too readily equating electronic commemorations to writings and looking no further. There may, as in the case of flashing subliminal images and disclaimers in advertisements, be either more or less than meets the eye. Until more is known, it seems to me that it is best to forswear the easy analogy.

## 3. Technology and the Duty of Competence

I would now like to shift gears, moving on to consider some issues that I consider to be more-or-less *cleaner* issues related to the duty of

<sup>53</sup> Lawyers have a duty, of course, to refrain from counseling or assisting their clients in the commission of a fraud or crime. See *id.* at R. 1.2(d) and R. 4.1(b).

<sup>54</sup> Cf. Steven Lubet, *Document Destruction after Arthur Andersen: Is It Still Housekeeping or Is It a Crime?*, 4 J. APP. PRAC. & PROCESS 323 (2002) (discussing document destruction).

competence (that is, issues not also associated with the duty of confidence, or the duty to avoid assisting crime or fraud). I do this, however, without meaning to suggest that either the issues or their solutions will be as clear-cut to everyone else as they are to me.

*a. Computer Research*

Herein I speak first of—quoting another—the “baleful impact” of computer research.<sup>55</sup> The youngest in the audience are now invited to go “Mmmphf” (all together now!) or to engage in a bout of collective eye-rolling at what doubtlessly will smack of profound fogginess. To quote the same other (Ian Gallacher at Syracuse Law School), “It is logical . . . for [law students] to believe that their teachers are simply out of touch with the way things are now[.]”<sup>56</sup>

To clear out some of the underbrush—do I personally crack a lot of books down in the stacks? Truth be told, not nearly as many as I used to, although I guarantee that my research assistants crack quite a few. I will note, moreover, that I write in only three areas—and primarily in my first two loves of securities regulation and corporate law. I have been thus limiting myself, and doing my primary teaching in those areas, for well over twenty years. I have a great deal of context for the questions I investigate. More important, as an academic, I have the luxury of being able to define, and therefore know, *exactly* what question I’m trying to answer—until, of course, I change my mind if the research fails to provide sufficient fodder. As I recall, that does *not* describe the life of the recent law school graduate—who, let’s face it, is the type of lawyer most likely to be doing legal research,<sup>57</sup> and doing so in response to the muttered (or quickly texted) instructions of a senior attorney responding to a fact pattern presented by real life.

In 1930, Felix Frankfurter, who later served as an Associate Justice on the United States Supreme Court, used the following words to describe the process of legal research:

[R]esearch requires the poetic quality of [the] imagination that sees significance and relation where others are indifferent or find unrelatedness; the synthetic quality of fusing items theretofore in isolation; [and] above all the prophetic quality of piercing the future, by

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<sup>55</sup> Ian Gallacher, *Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 153 (2006).

<sup>56</sup> *Id.* at 160.

<sup>57</sup> *Id.* at 157.

1056 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

knowing what questions to put and what direction to give to inquiry.<sup>58</sup>

I *suppose* this description could be applied to the process of crafting a Lexis or Westlaw search, but it somehow strikes me as something less than apt in that context. And I am pretty sure that for most law students, once given the keys to the electronic legal kingdom, in the form of the requisite passwords, online full-text searches become the name of the game.<sup>59</sup> This is, in no small part, because they flow so naturally from the Google experience which (quoting author Mary Ellen Bates)

has taught us that it is no longer necessary to go through the effort of defining our information need. We just put a word or two into the search box and let a search engine disambiguate the query . . . . We have learned to look through some possible results, and hope that we recognize the “right” site from within the first page or two of results. We have given up on the need to think through the reason for our query, or to clearly articulate the gap in our information . . . .<sup>60</sup>

I might pause to note here that authors reporting on the research habits of students at Stanford Law School observed a group that, when asked to find the statute of frauds for California, in fact bypassed even Lexis and Westlaw and merely Googled to the answer.<sup>61</sup>

Although I did not find any recent, comprehensive study of how most law students actually do research, there is at least one general study relating to college students—seventy-three (73) percent of whom say they use the internet more than library books to conduct research for term papers and only nine percent of whom used hard library resources more than the internet.<sup>62</sup> An interesting study from Georgetown Law

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<sup>58</sup> Felix Frankfurter, *The Conditions for, and the Aims and Methods of, Legal Research*, 15 IOWA L. REV. 129, 134 (1930).

<sup>59</sup> See Mark Herrmann, *This is What I'm Thinking: A Dialogue Between Partner and Associate*, 25 LITIG. 8, 64-65 (1998); Theodore A. Potter, *A New Twist on an Old Plot: Legal Research is a Strategy, Not a Format*, 92 LAW LIBR. J. 287, 287 (2000).

<sup>60</sup> Mary Ellen Bates, *Is That All?*, ECONTENT (2003), <http://www.econtentmag.com/Articles?ArticlePrint.aspx?ArticleID=5579&ContextSubtypeID=13> (quoting Gallacher, *supra* note 55, at 183 n.154).

<sup>61</sup> Erica V. Wayne & J. Paul Lomio, *Book Lovers Beware: A Survey of Online Research Habits of Stanford Law Students*, 14-15 (2005). See also Gallacher, *supra* note 55, at n.78.

<sup>62</sup> Steve Jones, *The Internet Goes to College: How Students are Living in the Future with Today's Technology*, PEW INTERNET AND AM. LIFE PROJECT (2002), available at [http://www.pewinternet.org/pdfs/PIP\\_College\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_College_Report.pdf).

School also indicated that between 1991–1992 and 1998–1999 physical book use (judged by number of books shelved) dropped from 263,050 to 96,601—a decrease of sixty-three (63) percent.<sup>63</sup> I dare say the trend has not reversed itself in the intervening decade. In any event, the Stanford report I referred to a moment ago had seventy-nine (79) percent of law students asserting in 2004 that they did at least eighty (80) percent of their research online.<sup>64</sup>

I am not the only law professor who regards this situation as problematic. One said “Given the existence of annotated statutes, annotated restatements, treatises and hornbooks, encyclopedias, and digests, I can’t fathom how anyone could [begin] research on a topic with which he or she is unfamiliar online.”<sup>65</sup>

You would think, given these attitudes, that the literature would be rife with computer-legal-research horror stories. This is not the case. There is, however, at least one from the medical field. In 2001, a woman died after participating in an asthma experiment in which she was given a drug known since the 1950s to cause severe side effects.<sup>66</sup> Sadly, the doctor administering the study had done his research in an electronic database containing articles dating back only to 1960.<sup>67</sup> Obviously, if he had had either more experience with the drug or a more complete database, there might have been a different outcome.

There are, of course, several possible responses to my concern. First, perhaps the duty imposed by the Model Rules to supervise lawyers in one’s own firm takes care of any possible problem, for at least the time being.<sup>68</sup> The idea here would be that we greybeards can and should be relied upon to provide the necessary context, “poetic quality of imagination” and “prophetic quality of piercing the future,”<sup>69</sup> thus presciently posing precisely the perfect question to be asked before unleashing our young attorneys with their flying research fingers and superior screen vision.

Even were this adequate at the moment, I would have to ask, “Yeah, but *then* what?” We greybeards are not immortal and what happens

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<sup>63</sup> Gary J. Bravy & K. Celeste Feather, *The Impact of Electronic Access on Basic Library Services: One Academic Law Library’s Experience*, 93 LAW LIBR. J. 261, 265 (2001).

<sup>64</sup> Wayne & Lornio, *supra* note 61, at 11. See also Gallacher, *supra* note 55, at n.78.

<sup>65</sup> Posting of Peter Friedman to LWIONLINE (Oct. 1, 2002) (quoting Gallacher, *supra* note 55, at 163).

<sup>66</sup> Jonathan Bor & Tom Pelton, *Hopkins Faults Safety Lapses: Panel Says Volunteer Likely Died from Drug Used in Asthma Study; Board, Researcher Blamed*, BALT. SUN, Jul. 17, 2001, available at <http://www.baltimoresun.com/bal-te.md.hopkins17jul17,0,5369216.story>.

<sup>67</sup> *Id.*

<sup>68</sup> See MODEL RULES, *supra* note 1, at R. 5.1.

<sup>69</sup> See *supra* note 58.

## 1058 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

when we keepers of the flame are gone? Besides, it is legitimate even on an immediate basis to worry about a feedback loop. Just because a greybeard thinks he or she remembers something well enough to phrase the question, is that really enough to launch an associate into the internet—without a net of his or her own context, so to speak? If the associate were going back to basics—treatises and the like, he or she might form enough of an opinion to challenge the greybeard's framing, perhaps even bearing in mind the Model Rule permitting deference to a supervisor, but only with respect to reasonable resolutions of arguable questions of professional duty.<sup>70</sup>

Another way to throw water on my cotton candy, of course, would be to point out that there are, in fact, treatises online. This indeed is true, but my guess is that online treatise reading is not where young lawyers start, in no small part because of the extremely high cost to clients of doing so, something that I will talk about more in the context of billing.<sup>71</sup> If you then were to suggest that young lawyers really *are* doing book research in hard copy, or even in offline electronic treatises, turning to online sources only for the primary case and statutory law searches many of us old-timers feel should follow the gathering of context, I would have a response. My response would be flatly disbelieving, owing to the Google phenomenon discussed above.<sup>72</sup>

Moreover, even were it true that computer research were reserved for follow-up searches of primary authorities, there still would be cause for concern. A 1985 study of full-text computer searching concluded that when researchers who were experienced in a subject believed they probably had located 75 percent of the relevant documents in a database, they in fact had found only twenty (20) percent.<sup>73</sup> I should note that both Lexis and Westlaw naturally took exception with the study, but further empirical inquiry seemed to confirm it.<sup>74</sup>

This all raises a series of linked questions in my mind. Do we greybeards have an obligation to the clients of tomorrow's generation of lawyers to make sure that there is someone to receive the torch of at least semi-traditional legal research? Whether we do or do not have such a duty, could torch-bearers even be found? Could a present-day law

<sup>70</sup> See MODEL RULES, *supra* note 1, at R. 5.2.

<sup>71</sup> See *infra* text accompanying notes 90–92.

<sup>72</sup> See *supra* text accompanying notes 59–61.

<sup>73</sup> David C. Blair & M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 20 COMM. ASS'N. COMPUTING MACHINERY 289 (1985) (quoting CHRISTOPHER G. WREN & JILL ROBINSON WREN, USING COMPUTERS IN LEGAL RESEARCH: A GUIDE TO LEXIS AND WESTLAW 769 (1994)).

<sup>74</sup> For a discussion of the exchange on this topic, see Daniel P. Dabney, *A Reply to West Publishing Company and Mead Data Central on the Curse of Thamus*, 78 LAW LIBR. J. 349 (1986).

student ever find it in him or herself to believe it is necessary to turn back the clock? Could he or she ever believe that there actually is a flame to be kept alive? One of my favorite books in high school, admittedly because it was given to me by a guy I liked, was *A Canticle for Leibowitz*, which focused on the importance of guarding ancient wisdom.<sup>75</sup> I was curious about whether anyone still read it and, of course, went online to check it out at Amazon.com. I'm happy to report it has been reissued several times, most recently in 2006, and seems to be holding its own. That said, I remain gloomy. I tend to suspect that we are on the verge of a new paradigm, one in which the normative standard for the acquisition of wisdom will be set by whatever the actual practice is and the results of which may be unpredictable, both in terms of professional duty and in terms of the shape of the law itself.<sup>76</sup>

*b. A Possible Duty to Use the "New" Technology*

To at least momentarily give the rolling eyeballs a rest, however, I would like to acknowledge that it is not at all implausible to argue for a duty even now to use the *new* research technology, if not in lieu, in augmentation, of traditional sources. No matter the aspersions cast thus far, where *will* you go for a last minute Shepard's check, or for the most up-to-the-minute version of a statute? And how will you *best* stay abreast of current events in your field without, say, BNA's daily online reporter? I confess, I would feel naked without it.

I think that most lawyers also properly would feel uncovered were they not using computer technology for such purposes as billing, docketing, and conflict checks. I would be willing to argue, at least in the large firm context, that such use presumptively is now a question of duty. In fact, that seems so obvious that it is not much fun to talk about, and so I shall pass on to the *truly* eye-rolling topic of just how one knows one's clients in the internet age.

*c. Knowing Your Client and Your Client's Goals*

The subject of knowing one's clients and one's clients' goals is a subject that strikes me as quite within the heartland of a lawyer's duty.<sup>77</sup>

<sup>75</sup> WALTER M. MILLER, JR., *A CANTICLE FOR LEIBOWITZ* (1960). I would like to point out that I was not given the book in 1960; I received it in 1971.

<sup>76</sup> For discussion of the standard for the duty of care owed by lawyers to their clients, see generally Buddy O. Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 75-79 (1998).

<sup>77</sup> See generally MODEL RULES, *supra* note 1, at R. 1.1 (competence); MODEL RULES, *supra* note 1, at R. 1.2 (scope of representation and allocation of authority between client and lawyer); MODEL RULES, *supra* note 1, at R. 1.4 (communication).



1060 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

In the internet age, it also is a subject that strikes a fogey as quite problematic.

i. The Virtual Client

Without a doubt, there are lawyers today who are giving advice to and drafting documents for clients they have *met* only on-line and/or by phone. This may be true of lawyers using a specific on-line practice model, and also may be true of lawyers working for more traditional firms. In the latter case, perhaps a partner brought in an institutional client the old-fashioned way, dragged from the country club or golf course. Having done so, he or she passes one of the client's matters on to a younger attorney who contacts, or is contacted by, an institutional constituent by phone or email. Perhaps they live in the same city, perhaps not; in any event it just seems simpler (especially to someone who grew up with IM and Facebook) to proceed electronically.

The stage is set, then, for those of us who used to sit, actually breathing the same air as our clients, to say, "How do you know what your client's objectives really are? How can you tell whether they really understand what you are saying to them, or whether they still harbor uncertainties and unanswered questions?" I stoutly contend that there is an analogy here to answering students' questions. I think it is vastly more productive for all concerned for students to ask their questions in my office. When I see the light go on, I can stop talking; when attempting to answer by e-mail, I cannot see the light, and thus, I must type on. Conversely, if a student looks or sounds uncertain at a particular point, I can amplify. Surely the same type of validation could be expected to occur in the attorney-client setting, ultimately producing a better, and perhaps even cheaper, service product.

I will freely admit, however, that my younger colleagues generally do not seem to share my set of preferences/biases, and it makes me wonder if there may be some sort of compensating skills at work. I have read that those with vision impairment hear more in voices than those with normal sight, and that those with differing hearing abilities may be particularly proficient at reading visual clues. Might there be something like that going on? While I was pondering my "how do you know your client" qualms, it occurred to me to worry, more specifically, about how one would know if one's clients were lying if one could not see their tics and sweating brows. I asked my son if he thought he could tell if someone was lying to him on the internet. "Mmmphh." Eye-roll. I'm pretty sure that means he thinks he can, but I still have parental controls on the computer so I can see if I think he is talking to predators.

## ii. The Internet Legal Expert

I next invoke an issue that might fit under the heading of internet research, but falls equally well here. It is the issue of what one is to do with a client who already has done his or her own internet research and who thinks he or she knows exactly what the problem is. In fact, before he or she comes in your door, virtual or otherwise, he or she may even have formed firm opinions about what the solution is and exactly what service is required.

Another of my free admissions is that I have done my share of online medical research and probably have gone to doctors predisposed to emphasize the symptoms that I think best dovetail with my self-diagnosis. I think we are less far down this road with respect to the law than is the case with medicine, but I am not so sure. Just Google “rule against perpetuities” and see what you get. I have yet to address the effects of technology on the entire profession,<sup>78</sup> but at the moment, I would like to emphasize the difficulty an individual lawyer may have both in diagnosing and in de-programming a half-informed client. In so doing, I doubtlessly will stimulate some very legitimate arguments about the importance of improving access to the law, demystifying the law, making the obtaining of legal services less costly, and so forth. Still, as a self-confessed fogey, the idea of dealing with a Google-soaked client (pardon the expression) creeps me out.

Creeped out or not, I must at this point confront the possibility—nay, certitude—that all questions of competence are cultural and generational. Transitions simply must be made. To cook a meal, I do not insist on growing, or grinding, my own wheat. I do not insist on making my own bread. I will leave my other culinary compromises veiled in shadow, but nonetheless note that there always is a question of whether a transition will be hard or easy. In the legal context, *hard* transitions risk injury to clients and malpractice recoveries against lawyers. *Easy* transitions presumably are the result of foresight, even if doomed to imperfection and training.

## 4. Technology and the Duty to Supervise

Not unrelated to the duty of competence, and certainly not unrelated to the possibility of cultural generational divide, is the duty to supervise.<sup>79</sup>

<sup>78</sup> See *infra* text accompanying notes 114–16.

<sup>79</sup> See MODEL RULES, *supra* note 1, at R. 5.1.

## 1062 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

*a. Billable Hours*

First, I will make the point that there is some real likelihood that a senior attorney may not know how long it will take a newer attorney to complete a task, given computer research skills (however competently used), given electronic form files, given flying fingers and spelling and grammar checkers and working from home . . . you get my drift. Even assuming an earnestly applied ability to judge the resulting product, how, again, is one to know how long it honestly took to create? Do I suspect that there might be room and even invitation for hours cheating?<sup>80</sup> Why yes, I do. Perhaps this should be part of a different conversation, but surely we are all aware of the extraordinary pressures on young lawyers to keep up their billings.<sup>81</sup> Moreover, over forty (40) percent of law students admit cheating in law school.<sup>82</sup> Do I think that taking the bar examination is going to cause a quick about-face in this particular matter of character? Not really. Do I think that a generational/cultural divide that facilitates hours cheating might exacerbate the situation? Again, why yes I do.

*b. Outsourced Legal Work*

Next, I want to take a moment on the special problems of supervising outsourced legal work, both domestically and abroad. In fact, I recently read that a surprising amount of legal work is outsourced to lawyers in India.<sup>83</sup> Clearly, this is not something that would have been particularly practicable before the quick communication and turnarounds of modern times. I mean, by this reverie, to insinuate absolutely nothing about the professional responsibility or capability of contract and/or foreign lawyers. I do, however, mean to ask the following question: granting (without necessarily conceding) the ability of a distant supervising lawyer to adequately evaluate the resulting work

<sup>80</sup> Cf. *id.* at R. 1.5(a) (fee must be reasonable) and R. 8.4(c) (duty to avoid dishonesty).

<sup>81</sup> See generally Lawrence J. Fox, *End Billable Hour Goals . . . Now*, 67 OR. ST. B. BULL. 17 (2007) (discussing pitfalls of hourly billing goals); Mary Ellen W. Harrison, *Report of the Alabama State Bar Quality of Life Survey*, 67 ALA. LAW. 368, 370 (2006) (discussing billable hours stress).

<sup>82</sup> See Caroline P. Jacobson, *Current Development 2006–2007: Academic Misconduct and Bar Admissions: A Proposal for a Revised Standard*, 20 GEO. J. LEGAL ETHICS 739, 740 (2007) (discussing the above-mentioned statistic and alternate statistics).

<sup>83</sup> See, e.g., Laurel S. Terry, *The Legal World is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 536–37 (2008) (describing outsourcing and other phenomena of globalization); Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS (May/June 2005), available at [http://www.legalaffairs.org/issues/May-June-2005/scene\\_brook\\_mayjune05.msp](http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjune05.msp) (describing outsourcing).

product, can a lawyer adequately supervise the conduct of someone he or she has never met and never will? Assuming, for purposes of analysis, that the *someone* would not be deemed a lawyer in the jurisdiction regulating the supervisor, the Model Rule to apply would be one requiring oversight of all non-lawyers “employed or retained by or associated with a lawyer[.]”<sup>84</sup> I believe that the concepts of *employment*, *retention*, and *association* are of adequate breadth to cover whatever relationship might exist between outsourcer and outsourcee. The oversight mandated by the rule requires (glossing over a few details) reasonable efforts to ensure that the person’s conduct is compatible with the professional responsibility of the lawyer.<sup>85</sup> Are contract assurances adequate? Periodic trips to India by some other partner in the firm? Subcontracting through some entity that contractually ensures compliance? I just do not know, and I think we should, as a profession, give it some thought.

#### 5. Additional Issues Relating to Billing

Next up at home plate are issues arising in connection with billing but not necessarily involving the duty to supervise. As I am sure we all know and as I intimated above, a lawyer’s billings must not be unreasonable;<sup>86</sup> moreover, there must be no misleading in the billing process.<sup>87</sup>

##### *a. Electronic Form Files*

Even in the 1980s, when I left practice, electronic form files were coming into existence and proliferating mightily. For a time, it struck practitioners as reasonable to bill clients for whom a form was used something like the same number of hours as were expended for the client for whom the form initially was developed. The American Bar Association has now told us in a formal ethics opinion that such is not the case, in fact that type of billing practice is misleading.<sup>88</sup> In some types of practice, this has pressed lawyers toward *fixed-rate* or *value*

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<sup>84</sup> MODEL RULES, *supra* note 1, at R. 5.3. Note that the American Bar Association in 2006 adopted a Model Rule for the Licensing and Practice of Foreign Legal Consultants, *available at* <http://www.abanet.org/cpr/mjp/FLC.pdf>, that fails to make clear the relationship between a licensed foreign legal consultant and a licensed domestic attorney with whom the foreign legal consultant works.

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* note 80 and accompanying text.

<sup>87</sup> See *supra* note 80 and accompanying text.

<sup>88</sup> See American Bar Association Formal Ethics Op. 93-379 (1993) (characterizing billing practice described in text as unethical).

## 1064 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

billing, which many hail is not at all a bad thing.<sup>89</sup> In any event, although the ABA approach seems well reasoned and now well accepted, it seemed worthwhile to mention it as an example of a more-or-less accomplished transition before moving on to some things that still may be a bit rocky.

*b. Word Processing*

The first such thing is billing for the time of a lawyer spent on word processing. There indeed was a time when lawyers did not type. They did, however, dictate and some of us scratched on legal pads, in the latter case arguably taking at least as much billable time as it takes the flying fingers of today to produce a memo. What we did not do, however, was take back the document that we had given a senior partner for review and input his—yes, it was almost always *his*—changes. We did not format and re-format; we did not make things pretty. From my anecdotal experience, at least some law firm associates today do spend a significant amount of time *prettifying* documents and exhibits; the time often is described as document *revision*. It happens quite naturally and with the best of intentions—as in, “I’m here, I’ve got the document open on the screen, I know what needs to be done”—but it also contributes to overall hours billed at fairly hefty rates. In any event, I believe that there is a cultural shift in this regard that is well underway and that may already have been accomplished without adequate contemplation.

*c. Computer Research Revisited*

My earlier tirade about computer research either promised or threatened to revisit the issue when I talked about billing. I now am making good.

The first step is acknowledging what I believe to be the fact that most law firms of any size do still maintain at least modest physical libraries. This is an overhead cost which is factored into billing rates and thus passed on to all clients.<sup>90</sup> When traditional research is performed for a client, the client pays for the lawyer’s time, calculated at the overhead-reflecting rate. If, on the other hand, the lawyer performs on-line research in a proprietary data base, the lawyer’s time will be billed at the overhead-reflecting rate, *and* the client will be billed as a separate

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<sup>89</sup> See, e.g., Ronald D. Rotunda, *Moving from Billable Hours to Fixed-Fees: Task-Based Fees and Legal Ethics*, 47 U. KAN. L. REV. 819 (1999) (discussing the desirability of shifting billing formats).

<sup>90</sup> See Gallacher, *supra* note 55, at 200.

expense, for the cost charged by the on-line database.<sup>91</sup> Obviously, if the lawyer's time is diminished enough to balance the database usage charge, all is well and good (quality issues aside), but I honestly do not know that anyone has *done the math* to prove that this is usually the case. What I *do* know is that many sophisticated clients, who presumably have done at least a bit of math of their own, put specific limits on the use of proprietary databases in order to constrain their costs.<sup>92</sup>

C. *Technological Issues Not Addressed by the Model Rules*

I have maintained, thus far, that the things of which I spoke were either dealt with specifically by the rules of professional conduct or probably were covered by more general rules, albeit in ways that might sometimes be difficult to recognize. I turn now to areas where the rules themselves either clearly or probably do not apply. This is not to say, however, that there is not some general principle, or animating spirit, that might be helpful. The problem with general principles and animating spirits, however, is that there often can be more than one and they, like homely aphorisms, can point in opposite directions with no clear way to prioritize. If many hands make light work, but too many cooks spoil the broth, when do we close the kitchen door? If a stitch in time saves nine, but haste makes waste, do we pop out the sewing kit or not? And if conduct that seems vaguely cheesy nonetheless advances the interests of our client, what are we to do?

1. Metadata Mining

First up, and much in the news (well, professional responsibility news), is metadata mining, examining an electronically provided document for traces of prior drafts and the like. Is it actually unfair to do it? On the other hand, are we failing to do our very best for our clients if we do not? The model rules of professional responsibility do not purport to address the subject; in fact, there are different opinions emanating from different bar authorities even as I speak.<sup>93</sup> I wish to raise the possibility, however, that it might make a difference if the opinion drafters all were of the "mmmpfh, everyone knows that"

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<sup>91</sup> This frequently is true even if the firm itself pays a negotiated flat fee for its access to a proprietary data base. See *id.* Gallacher's accompanying discussion of the dim view of this practice sometimes taken by courts is well worth noting.

<sup>92</sup> See, e.g., Paul S. Smith et al., *Engagement Letters*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (Robert L. Haig ed., 2003) (describing limits on billing for computerized legal research); see also Gallacher, *supra* note 55, at n.57 (describing anecdotal accounts of such limits).

<sup>93</sup> See *supra* note 50.

## 1066 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

generation. If you view the situation as presenting the opportunity to take advantage of someone who hadn't a clue, you may have one kind of reaction. If you view the situation as taking advantage of someone who certainly should have known better, since everyone does, you might have a different one, at least in degree. In my mind, even taking advantage of a "shoulda known better" adversary is still taking advantage, thus unfair and thus prompting a balancing act with the zealous representation thing, but I know that not everyone necessarily will agree.

## 2. The Unauthorized Practice of Law

Second up is engaging in the unauthorized practice of law. Certainly, the rules of professional responsibility generally preclude a lawyer licensed in a jurisdiction from engaging in the unlicensed practice of law elsewhere on other than a temporary basis (and then only under certain conditions).<sup>94</sup> They also tell us that a lawyer cannot establish an office or other systematic and continuous presence for the practice of law in a jurisdiction where not admitted.<sup>95</sup> Unfortunately, they do not tell us what the practice of law is. A Comment makes it clear that it is up to the statutes and judiciary of each jurisdiction to figure that out.<sup>96</sup> That Comment also makes it clear, however, that a systematic and continuous presence for the practice of law does not require physical presence.<sup>97</sup>

What is going on here? Have rule-makers not noticed that a lawyer can have an office, or work from his or her home, in one jurisdiction and regularly dispense advice over the internet to clients in jurisdictions far flung? Actually, I am sure that they have; the Comment just referred to more-or-less gives up the game in that regard. Did they think that it is not important to deal with the issue of where legal practice occurs in a meaningful way? I doubt that, but I think there are a couple of reasons they are not doing a better job of grappling with it.

First is the historical difficulty in defining the practice of law.<sup>98</sup> This may be partially the effect of lobbying on behalf of real estate agents,

<sup>94</sup> See MODEL RULES, *supra* note 1, at R. 5.5(a) and (c).

<sup>95</sup> See *id.* at R. 5.5(b).

<sup>96</sup> See MODEL RULES, *supra* note 1, at R. 5.5, cmt. In addition, an American Bar Association task force in 2003 called for every state and territory to adopt a definition. American Bar Association Task Force on the Model Definition of the Practice of Law, Report to the House of Delegates (August 11, 2003), available at <http://www.abanet.org/cpr/model-def/home.html> [hereinafter American Bar Association Task Force].

<sup>97</sup> See American Bar Association Task Force, *supra* note 96.

<sup>98</sup> See generally Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773 (2002) (describing historical difficulty of definition); Soha F.

accountants, financial planners, etc., but also may represent an unwillingness to paint too narrowly. The tests for what the practice of law is generally are cast in terms of *doing what lawyers do* or *performing tasks requiring the use of legal judgment*.<sup>99</sup> This vagueness, if nothing else, provides a nice *in terrorem* effect – nice, that is, from the standpoint of the bar. It may be that the inability or unwillingness to define *it*, the practice of law, renders impracticable any attempt to conclusively determine where you are doing *it*. In addition, vagueness with respect to the question of location may have the same, nice *in terrorem* effect as failing to define law practice itself.

Another possibility is that coming to grips with internet practice threatens a result that is too all or nothing. Could some jurisdiction actually have the moxie to say that anyone giving internet advice to any of its residents is practicing law in the jurisdiction? Would that not then signal some indubitably non-dischargeable obligation to police against so practicing unless licensed? On the other hand, saying that someone whose seat is not firmly planted in a chair in the jurisdiction in question is not practicing law there presumably would open the floodgates for cross-border invasion in a manner that could hardly be to the benefit of the lawyers who actually do seat themselves in the state and attempt to carry on something resembling a traditional practice.

My final, and favorite explanation, is that there is some fear that once internet practice is actually widely acknowledged and a serious attempt is made to rationalize its regulation, the writing may be on the wall. It may be recognized that the only rational solution is some sort of national licensing of internet practitioners and thus, the first step down the slippery slope of national licensing for lawyers more generally.<sup>100</sup> And this reckons without the issues posed by non-U.S. practitioners! In any event, I suspect that state bars are not willing to lose grip on their

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Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903 (2004) (describing difficulty of defining the practice of law and proposing an alternative definition). It is worth noting that the American Bar Association Task Force Report declared the “basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives or another person or entity.” American Bar Association Task Force, *supra* note 96, at 13.

<sup>99</sup> See generally *supra* note 98.

<sup>100</sup> Pressures toward nationalizing regulation of lawyers have been discussed by many commentators. See, e.g., Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339 (2002); Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & PUB. POL'Y 953 (2002); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002).



## 1068 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

franchise; nor, would I think, should they be until a great deal more thought is given to the matter. Part of this thought necessarily will have to do with general principles. Assuming the principle that assuring lawyer competence is first and foremost, how can this be achieved? Although the legal profession is not alone in confronting issues of internet practice, its position is more confounding than that of, say, the medical profession. After all, medicine is somewhat more *hands on the patient*; more importantly, the symptoms and nature of a patient's disease do not, as far as I know, jurisdictionally differ.

## 3. Choice of Law Rules

Conceptually related to the problems presented by unauthorized practice are the problems presented by the *choice of law* rules offered by the most modern rules of professional responsibility. The default position, for matters not pending before a tribunal, is that if a lawyer is admitted in multiple jurisdictions, the rules to be applied are those of the jurisdiction in which the lawyer's conduct occurred.<sup>101</sup> If, however, the predominant effect of the conduct is in a different jurisdiction, the rules of the affected jurisdiction prevail.<sup>102</sup> Assume with me that lawyer X is admitted in States A, B, C, D, and E. Unlikely, I admit, although I did have a friend who was a bar-taking prodigy and who went from state to state in the first few years after graduation taking the bar everywhere she thought she might move later in life. Besides, it makes for a flashier hypothetical. Lawyer X usually works in her office in State A but happens to be visiting a friend in State B when she receives and responds to an e-mail request for advice from a client in State C about voting the shares of a privately held corporation incorporated in State D but whose operations are carried on in State E. Which rules apply? It may or may not make a delightful essay question, but I would say that one way or another there are likely to be problems with detection and enforcement. The rule's bottom-line—I think necessarily—is that the lawyer is protected if conforming her behavior to the rules of the jurisdiction in which she reasonably believes the predominant effect of her conduct will occur.<sup>103</sup> This bottom line may be necessary, but I think it may also represent a step toward conceding that it really should not matter, for purposes of protecting the public, exactly which jurisdiction's rules apply (parenthetically and conveniently assuming the lawyer's baseline competence, in contrast to the discussion above of the problems of

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<sup>101</sup> See MODEL RULES R. 8.5(b)(2).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

unauthorized practice). This creates at least some momentum toward convergence, I think, which can only be of help in this day and age.

### III. LIVING WITH TECHNOLOGY

I would be remiss, as a greybeard, if I did not take advantage of this occasion to share at least a few thoughts on the present and looming effects of technology on the lives of individual lawyers and on the profession as a whole.

#### A. *The Effects of Technology on the Lives of Individual Lawyers*

First, with respect to the effects of technology on the lives of individual lawyers, there is some good news and some bad.

##### 1. Telecommuting

Telecommuting, even a few days a week, can be extremely helpful for those who are balancing various family demands.<sup>104</sup> These demands can include, of course, the presence of children of any age within the home, the needs of elderly parents, and the career requirements of significant others who need to live someplace that your job is not. I recently and fortuitously read, in an edition of the *Arizona Attorney* magazine, a letter from a young woman admitted to the Indiana Bar.<sup>105</sup> She began her practice in Indiana and was well liked by her firm and her clients when her husband's career necessitated a move to Arizona in 2003. She continued to work for the same firm and clients, flying back on an as-needed basis, cutting back to part-time when she had her first child. She continues that arrangement and manifests a great deal of appreciation for her firm, and enthusiasm for her life choices.

Unfortunately, other telecommuters have indicated some amount of dissatisfaction with the isolating effects of the work equivalent to bowling alone.<sup>106</sup> These less happy campers also note that they have

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<sup>104</sup> A number of interesting articles discuss the benefits and detriments of telecommuting. See, e.g., Audrey J. Lee, *Negotiating Part-Time Work: An Examination of How Attorneys Negotiate Part-Time Arrangements at Elite Law Firms*, 6 PEPP. DISP. RESOL. L. J. 405 (2006) (discussing methods of part-time employment, including telecommuting); Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261 (2003) (emphasizing disadvantages of current telecommuting practices).

<sup>105</sup> Leanne S. Titus, *Soundoff: Part-Time Benefits*, 44 ARIZ. ATT'Y 8 (Mar. 2008).

<sup>106</sup> Cf. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (describing shifting patterns of modern relationships).

1070 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

issues in separating their home and work lives, and feel as though they never are off the job.<sup>107</sup>

2. Never Turning Off

The never turning off phenomenon is not, of course, unique to telecommuters. E-mail, cell phones, Blackberries®, etc., all logically contribute to a blurring of boundaries between leisure and work. I do not mean to suggest that this is unique to lawyers, but it does not seem to be doing anything generally to make them feel happier about their lives. We all have heard the statistics about depression, alcohol abuse, and drug addiction amongst lawyers,<sup>108</sup> and they do not seem to be getting better. I do not think that this is just fogeyism. I think this is real. And I think that never being able to turn off is a contributor.

3. Twenty-Four Hour Turnaround

Relatedly, it is my opinion, although hardly a novel one, that technology has increased the pace of everyday life.<sup>109</sup> This logically extends to the pace of legal transactions. It is now possible to expect twenty-four hour (or less) turnaround; thus, clients and senior partners do. I think it is very much a case of failing to say, "Just because we can, doesn't mean we should," from all sorts of perspectives. "Marry in haste, repent at leisure," can apply to corporate combinations, and expecting sleep- and relationship-deprived associates to keep working toward what may be an ill-advised union, just because they can, has little to recommend it.

4. The Public-Private Lack of Distinction

Finally, on the individual front, but shading toward impact on the profession, I would like to echo the observation that the culture of electronic life seems to be contributing to a decline in any distinction between public and private life.<sup>110</sup> You may or may not have heard about an incident this winter in my home county, Fairfax County,

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<sup>107</sup> See Matthew Brelis, *Beyond Lonely: Life as a Telecommuter*, BOSTON GLOBE C1 (Jan. 17, 1999). For in-depth consideration of the detriments of telecommuting, see, e.g., Travis, *supra* note 104.

<sup>108</sup> See Theresa A. Gabaldon, *Miles from Home and Not Where We Thought We'd Be: A Map Through the Forest and a Light Through the Trees*, 9 GEO. J. LEGAL ETHICS 195, 196 (1995) (discussing phenomenon of lawyer dysfunction).

<sup>109</sup> Cf. ALVIN TOFFLER, *FUTURE SHOCK* (1970) (describing increasing pace of change).

<sup>110</sup> See, e.g., Marc Fisher, *In Cyberspace, Everyone Can Hear You Scream*, WASH. POST B01 (Jan. 24, 2008).

Virginia.<sup>111</sup> A high school student was unhappy when snow started to fall and school was not cancelled. After all, we had upward of one-quarter of an inch! He called the gentleman responsible for the decision at home. The gentleman's wife took explicit verbal exception to the domestic intrusion, the recording of which verbal exception was promptly spread all over the internet. In public discussions of who was right and who was wrong, the point was often made that the student saw no distinctions between the school authority's work and home, and no reason not to put on the internet a, um, statement that the authority's wife did not intend for that purpose.<sup>112</sup> I think, on the basis of this type of reasoning, it is not entirely specious to wonder whether a young lawyer coming of age in this culture will ever really *get* some aspects of client confidentiality the same way as do those of prior generations. After all, what could possibly *be* confidential anymore, other than secret formulas and, perhaps, business models?<sup>113</sup>

*B. The Effects of Technology on the Profession*

In any event, that was my segue into effects on the profession, and was intended to be an indicator that some of the effects of technology on individual lawyers have unavoidable counterparts with respect to the profession as a whole. These may be quickly summarized.

More telecommuting? You bet, probably with some effect on the camaraderie of the profession, such as it is. *And*, the logical extension of telecommuting—more outsourcing, with whatever problems of supervision it brings with it, as well as the possibility of loss of American law-related jobs. Other forms of cross-border competition made possible by the internet also are inescapable; the lawyer across the river, across the country, across the world, suddenly is much closer than ever before.

The profession will also be competing with the information on the internet itself. I mentioned earlier the difficulty of dealing with a client who already had checked out a legal problem on Wikipedia.<sup>114</sup> That, at least, was a client who followed through to visit a lawyer. The ready online availability of legal forms and information logically will lead to less and less demand for at least some types of legal services.

More generally, I will acknowledge the obvious. We are welcoming to the profession a group that is likely to have received substantially

<sup>111</sup> See *id.* for a complete description of the incident.

<sup>112</sup> *Id.*

<sup>113</sup> Similarly, I am somewhat inclined to wonder just how much our up and coming lawyers really will care about rights to privacy.

<sup>114</sup> See *supra* text accompanying note 78. I am assuming that Wikipedia is the first thing that turned up in the Google search to which I earlier referred.

1072 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

more technological training than in days gone by.<sup>115</sup> It is said that they read differently, process information differently, and even think differently than prior generations.<sup>116</sup> More simply, it may also be interesting to note that the time put in on technology almost certainly has meant a reduction in time spent on liberal arts, including civics and philosophy. A common background that used to be assumed is—I will resist the urge to say *dwindling*—in transition.

IV. MOVING AHEAD

By and large, although I may at times have sounded critical, either of e-researchers or the bar or what have you, I do not mean to imply that everything of which I have spoken actually is a problem—exactly. What I *do* view as a problem is negotiating the transitions I have described. With that said, I personally try to avoid any sort of major deconstruction or even minor nitpicking that is not accompanied by some attempt at something affirmatively constructive;<sup>117</sup> so, here we go with my attempt at making some suggestions.

A. Education

I think we have to start by acknowledging that we cannot just prohibit change until we figure out its implications. One possibility that I came up with as having more practical promise is, and given what I do for a living this will not be much of a surprise, a two-pronged training program. Prong one would require, as a condition of admission to the bar, that the applicant have received some number of hours of training in “having a *real* life and keeping it.” Prong two would be a mandatory continuing legal education requirement that all lawyers attend an annual—by internet if necessary—update on the professional implications of technology. The newest among you may be bored for a year or two, but, based on my own experiences it is truly amazing how quickly the young attorneys of today become the fogeys of tomorrow.

Not stopping there, on the education front I would also propose an LL.M. program in “Negotiating Technological Transition.” I firmly believe those receiving the degree would be in high demand by various

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<sup>115</sup> See generally Joan MacLeod Heminway, *Caught in (or on) the Web: A Review of Course Management Systems for Legal Education*, 16 ALB. L.J. SCI. & TECH. 265 (2006) (describing background of law students and new methods of law teaching).

<sup>116</sup> It sometimes even is claimed that they have significantly shorter attention spans. See *id.* at 288 n.77.

<sup>117</sup> I say this with deep respect for and apologies to those who take a different approach, including many feminist and other critical legal theorists.

bar regulators and law firms of even moderate size. One of the required courses would be titled “Cultural Translation,” designed to permit the degree-holder to facilitate communications between lawyers with different experience and expectation sets.

*B. Expanded Principles*

I thought of recommending, as an important step in easing transition, the adoption of at least one new duty—or, if not entirely new, a clear expression of the applicability of something older and more general. This would be the duty to refrain from taking advantage of another lawyer’s technological error.<sup>118</sup> Again, I thought about proposing this, and then I imagined a hand thrust aloft. When called upon, the speaker asked (with emphasis in the original), “So—does that mean that if you are defending someone against a charge of *murder* and the lawyer for a co-defendant *accidentally* e-mails you information that would *totally exculpate* your client you can’t *use* it?” Sigh. That is the problem with rules that do not end with *unless there is a really good reason*.<sup>119</sup> And when a rule is couched that way, it is something less like a rule and something more like a principle.<sup>120</sup> I thus will propose as a principle that no lawyer should take advantage of another lawyer’s technological error.

While at it, I further propose a principle of intergenerational cooperation and acceptance. A principle that the experience of others should be welcomed, and that a lot of what I just did (the eye-rolling and mmmphing, I mean) assiduously should be avoided.

## V. CONCLUSION

What I cannot propose, as much as I would like to do so, is a whole new paradigm for the profession’s integration of technology. What follows is the best that I can, at the moment, provide.

As you might have guessed, I am not a user of PowerPoint®. If I were, I would have been flashing on a screen some of the key elements of what I have been saying (or, for the printed version, helpfully have

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<sup>118</sup> Something approaching this duty has been advanced by some bar authorities. See *supra* note 50.

<sup>119</sup> See Gabaldon, *supra* note 15.

<sup>120</sup> For an excellent critical discussion of the purported rules/principles dichotomy see Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based” Systems in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411 (2007). For an insightful discussion of the concept of “rule,” see Robert L. Palmer, *When Law Fails: Ethics, Commerce, and Tales of Value*, 2 S. CAL. INTERDISC. L.J. 245, 251–52 (1993).

1074 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

provided an accompanying CD). In a final ta-da moment, they might all be flashed again by way of summary. If so, they would read:

- There will be feedback from actual practices on professional norms.
- Don't make assumptions about what other people know.
- The life experience of rule-makers may not easily translate into the experience of rule followers.
- It has to be someone's job to look for the unexpected.
- Forswear the easy analogy.
- My favorite: you shouldn't start research in an area you don't know well with a full-text electronic search of primary materials.
- Not all technology is bad, and there may be a duty to use it.
- Do the very best that you can to know your client.
- Competence is cultural and generational.
- Transitions must be made.
- Points of reference change, and quickly.
- Just because you can doesn't mean you should.
- Distance and new technology create opportunities to mislead.
- Do the math before you wholeheartedly subscribe to a new technology.
- Some nationalization of regulation may be inevitable.
- Convergence of regulation is predictable and probably a good thing.
- Values change with experience.
- The internet represents burgeoning competition.

As I said, it's not a paradigm, but it might be something to think about. And I'll be happy to e-mail you a copy or post it on the web.