JOURNAL

OF THE KANSAS ASSOCIATION FOR JUSTICE

Vol. XXXIX | No. 2 | November 2015

IN THIS ISSUE

KANSAS ASSOCIATION FOR JUSTICE

Technology for Litigators: Pointing and Clicking Our Way Through Trial

By Daniel E. Monnat & Paige A. Nichols

DANIEL E. MONNAT

Daniel E. Monnat of Monnat & Spurrier, Chtd., has been a practicing criminal defense lawyer for the past 39 years in his hometown of Wichita, Kan. A cum laude graduate of California State University, San Francisco, he received his J.D. from the Creighton University School of Law. Monnat frequently lectures throughout the United States on a variety of criminal defense topics and has been listed in The Best Lawyers In America for a quarter of a century. He has also been listed as one of the top 100 Super Lawyers for Kansas and Missouri from 2006–2014. Monnat is a past two-term president of the Kansas Association of Criminal Defense Lawyers; a former member of the Board of Directors of the National Association of Criminal Defense Lawyers; a member of the KsAJ Board of Governors and Executive Committee; a graduate of the Gerry Spence Trial Lawyers College; and a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the Litigation Counsel of America.

*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.*

– Comment [8] to K.R.P.C. 1.1 Competence, effective March 1, 2014 (emphasis added).

We've all seen the headlines: Lawyers are "light years behind" the technology curve;[1] "dinosaur" lawyers need to "up their tech game";[2] opting out of technology is "no longer an option" for lawyers;[3] "lawyers can't be luddites anymore."[4] As the above comment suggests, even the Kansas Rules for Professional Conduct are telling us that the future is yesterday, and it is time for lawyers to catch up. For firm managers, this duty includes understanding digital data management and cloud security—subjects that are constantly evolving and strike fear in the trial litigator's heart. Fortunately, there are plenty of experts and articles available to guide practitioners in this arena.[5] This article will focus instead on the uses of technology directly related to trial practice. For instance, in what ways are we allowed—or perhaps *required*—to use social media to aid our pretrial investigations of jurors and witnesses? And what technologies might we be allowed or required to use in the courtroom? The following sections will address the benefits and risks associated with litigation-related technology.

PAIGE A. NICHOLS

Paige A. Nichols has been a criminal defense lawyer for over 20 years. She is the host of "Just In Case," a twice-monthly podcast of criminal law cases just in from the United States Supreme Court, the Tenth Circuit, and the Kansas Appellate Courts, sponsored by Monnat & Spurrier, Chartered, and available at www.monnat.com/podcast.

Why can't we be friends? Using social media to investigate jurors and witnesses

Some ethics experts have warned that "lawyers who elect not to participate in social media may be in for a rude awakening."[6] According to these experts, "the understanding and use of social media is becoming a requisite component of competent legal practice and . . . the failure to consider social media in a case may subject a lawyer to a disciplinary proceeding or a malpractice claim."[7] Social media has become so central to lawyering that the New York State Bar Association has issued detailed social media ethics guidelines for everything from advertising to client communications to investigating jurors and witnesses to communicating with judges.[8] The New York Guidelines—updated in June of 2015—are a great place to start for the lawyer wondering about the benefits and risks of lawyering through social media.

Investigating jurors

It does not appear that the Kansas appellate courts have considered whether and to what extent Kansas lawyers may use the Internet to investigate prospective or sitting jurors. Under the New York Guidelines and other persuasive authorities, "[a] lawyer may research a prospective or sitting juror's public social media profile and posts."[9] At least one appellate court has gone further and held that in some circumstances a lawyer *must* conduct at least a modicum of online juror research. In *Johnson v. McCullough*, the Missouri Supreme Court held that a lawyer who wishes to challenge a juror based on the juror's litigation history "must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial."[10]

The benefits of investigating jurors online—especially through their social media postings—are many. Online posts by or about jurors may expose biases and help counsel develop both for-cause and peremptory challenges; a juror's social media communications may expose juror misconduct; and learning about jurors' online likes and dislikes may help counsel bond with jurors.[11]

That said, there are both practical and ethical risks to using social media to investigate jurors. As a practical matter, we should always proceed with caution online, recognizing the difficulty of authenticating user identity and other information on the Internet.[12] Additionally, online personas can be misleading, and no Internet investigation can wholly substitute for questioning a prospective juror face-to-face during voir dire.[13]

As for ethical considerations, Kansas lawyers and their agents are bound to avoid inappropriate communications with jurors,[14] not to make material false statements to third parties,[15] and not to engage in conduct involving dishonesty.[16] These rules can be implicated during even innocent-seeming online juror investigations. Consequently, a conservative approach to research of potential or sitting jurors on the Internet by counsel or counsel's agents would adhere to the following three rules:

First, to avoid improper juror communications, neither we nor our agents should directly "friend," "subscribe to," "connect with," or "follow" a juror's social media account.[17] Second, in keeping with our duties of honesty and truthfulness to third parties, neither we nor our agents should pose as someone else or otherwise use subterfuge to gain access to a juror's social media account.[18] Finally, to avoid even the appearance of an improper communication, neither we nor our agents should look at a juror's profile on a website that will alert the juror to our presence in such a way that we can be identified by the juror.[19] Adhering to this third rule requires knowledge of how particular social media websites work, and when a viewer's mere presence (and identity) will be revealed to the user.[20]

Making use of technology in the courtroom is no longer optional. Jurors expect lawyers to be proficient in technology, and its use in the courtroom has been shown to effectively aid juror comprehension and reduce the dead time that results from lawyers shuffling through paper exhibits at trial.

Investigating witnesses

As with using social media to investigate jurors, some courts and commentators have warned that a lawyer's failure to make use of social media to investigate witnesses may implicate the rules of competence and diligence.[21] The ethical risks of such investigations are similar to the risks involved with investigating jurors. While counsel is not prohibited from communicating with witnesses (unless the witness is represented[22]), the above rules for observing honesty and truthfulness to third parties apply equally when conducting social media investigations of witnesses.[23]

The tech-effective courtroom lawyer

Making use of technology in the courtroom is no longer optional. Jurors expect lawyers to be proficient in technology, and its use in the courtroom has been shown to effectively aid juror comprehension and reduce the dead time that results from lawyers shuffling through paper exhibits at trial.[24] We all have different learning styles—from visual to auditory to

kinesthetic—and technology that combines words with images, diagrams, and charts can help counsel reach every juror in the box.[25]

Trial by PowerPoint

Remember the days of flip charts and transparencies? These days, PowerPoint, Sanction, and TrialDirector are among the digital methods of choice for presenting exhibits and demonstrative evidence to jurors. Holography and immersive virtual reality may yet have their day in court. But while the methods change, the rules do not. Whether presenting a case through paper, bytes, or beams of light, counsel must make all required disclosures before trial, follow the rules of evidence,[26] and preserve and file the evidence in some reviewable form for appeal.[27]

The urge to get creative with PowerPoint slides—especially for closing argument—can sometimes lead to trouble. The Kansas Supreme Court is among several courts that have cautioned prosecutors against including impermissible commentary on closing argument slides.[28] Such slides should not alter admitted evidence or superimpose derogatory comments or counsel's personal opinions about a party, a witness, or the case.[29] As the Washington Supreme Court has observed, "in order to help the jury more easily understand other evidence, modern visual aids can and should be utilized. A trial judge must, however, be careful to avoid letting the visual aids be used more for their shock value than to educate."[30]

Testimony by Skype

While witness testimony must ordinarily be taken in open court, Kansas law provides that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."[31] Witness testimony by Internet-based videoconferencing is a handy solution for a material witness who, for reasons of poor health or other compelling circumstances, cannot travel to trial.[32] Most courtrooms are now equipped with Wi-Fi, and well-established systems such as Skype, Zoom, and WebEx are readily available and reliable.[33]

Granted, it may be debatable whether "jurors can spot someone on a screen trying to pull one over on them,"[34] or whether, instead, "distance beclouds guile," because "[t]he more shielded a person is from the questioner and judge, the less emotion plays a role in the person's behavior."[35] But sometimes a remote witness is better than no witness, with one important caveat: Testimony by videoconference, when used by the State over a criminal defendant's objection, may violate the defendant's constitutional right to confrontation.[36] As one court has stated it, "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."[37]

In a court that has not previously used Internet-based videoconferencing, counsel should move for leave to present the remote testimony sufficiently early in the case to allow the court to resolve the motion and counsel to iron out any logistical kinks with the witness and courtroom personnel well before trial. Doing a mock remote run with the witness—whether from the courtroom or from the law office—is also good practice, as is having a plan in place for presenting the witness with exhibits and demonstrative aids at trial.

Tablets at the podium

Tablets with touchscreens are a tidy alternative to the paper-packed three-ring binder at the podium. Whether for jury selection, opening statements, witness examinations, closing arguments, or oral arguments at motions hearings or on appeal, a tablet can put the entire casefile literally at counsel's fingertips. Tablets are preferable even to laptops, which require a steady hand at the mouse or trackpad (a difficult prospect in the heat of trial or argument), and create a physical barrier with their opened lids. These days it is easy to find trial-specific apps and other programs such as OneNote and Evernote that will run on a tablet and can be used for just about any purpose imaginable in the courtroom.

The risks of using a tablet in court are both predictable and avoidable. As with any technology, it is wise to check with the court ahead of time to make sure that your technology is welcome, and to find out whether your judge has any special technology rules. Practicing using your tablet during mock examinations and arguments is crucial to ensuring a smooth presentation in court. A visit to the courtroom with your device ahead of time will tell you whether your power cord is long enough to reach a power source, whether the overhead lighting is going to create a glare on your screen, and whether the podium height is such that you are going to struggle to read your screen. A back-up plan might consist of a second device, a paper copy of your examinations and arguments, or both. Lastly, day-of-court considerations include making sure that your device is password-secured and well-charged, that your sound is turned off, and that your screensavers are not distracting or inappropriate.

One final note about tablets and similar devices in court: Once a case is loaded and cross-linked and digitally ready to go, the ease of touch-screen access to the information makes it tempting to cede all authority to the machine. But we must keep our heads up in court, and be wary of allowing our technology to substitute for our own well-developed knowledge of our cases.

Conclusion

We trial lawyers may indeed be slouching, surely and steadily, if slowly, towards technology. As long as we embrace technology as simply another litigation tool—subject to the same ethical and evidentiary rules with which we are already familiar—we cannot go wrong in assessing its benefits and risks, and using it to better represent our clients.

1. Geoffrey A. Vance, *Lawyers, Light Years Behind*, The Nat' L.J. (July 20, 2015) (arguing that lawyers "still haven't gotten the message about tech-assisted review" of e-discovery).
2. Stephen Fairley, *Dinosaur No More: Lawyers in New York and Florida Told to Up Their Tech Game*, The Nat'l L. Rev. (August 31, 2015) (discussing new bar guidelines regarding social media and metadata).
3. Leanne Mezrani, *Opting out of technology no longer an option*, Law. Weekly (March 10, 2015) (cautioning that "professional bodies could mandate the use of certain technologies in the near future").
4. Darla W. Jackson, *Lawyers Can't Be Luddites Anymore: Do Law Librarians Have A Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology?*, 105 Law Libr. J. 395 (2013) (discussing ways in which librarians can help lawyers with computer-assisted legal research, e-discovery, courtroom technology, and confidentiality).
5. A simple WestlawNext search of law-review articles containing (cloud /s secur!) in their titles yields such results as Ed Finkel, *Feeling Secure in the Cloud*, 103 Ill. B.J. 20 (2015); Sarah Jane Hughes, *Did the National Security Agency Destroy the Prospects for Confidentiality and Privilege When Lawyers Store Clients' Files in the Cloud—And What, If Anything, Can Lawyers and Law Firms Realistically Do in Response?*, 41 N. Ky. L. Rev. 405 (2014); and Chris May, *Seeing into the Cloud: How to Mitigate Potential Ethical and Security Issues*, 60-APR Fed. Law. 69 (2013). Practical advice about digital data management and cloud security can be found in various legal newspapers, and at the ABA's Legal Technology Resource Center here: http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html. The ABA has collected cloud ethics opinions from around the nation here: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.
6. Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring A New Mandate for Competence in the Practice of Law,* 68 U. Miami L. Rev. 445, 447 (2014).
7. *Id*.
8. James M. Wicks, *et al*., Social Media Ethics Guidelines (NYSBA June 9, 2015) ("New York Guidelines), *available at* http://www.nysba.org/socialmediaguidelines/.
9. *Id*. at 25. *See also Lawyer Reviewing Jurors' Internet Presence*, ABA Formal Opinion 466 (ABA April 24, 2014) ("Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial"); *Carino v. Muenzen*, 2010 WL 3448071 at *9-10 (N.J. App. Aug. 30, 2010) (trial judge abused discretion in forbidding counsel from using laptop in courtroom equipped with Wi-Fi to Google prospective jurors) (unpublished).
10. 306 S.W.3d 551, 559 (Mo. 2010) (en banc), *codified at* Mo. Sup. Ct. R. 69.025.
11. *See* Zachary Mesenbourg, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. Marshall L. Rev. 459 (2013); Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. Kan. L. Rev. 611 (2012).
12. *See* Mesenbourg, *id.* at 474-75 (noting that "Facebook itself acknowledged that roughly eighty-three million user accounts are fake").
13. *Id*. at 474. *See also* Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 The Advoc. 44, 46 (Fall 2012) (cautioning that "[n]o amount of social media sleuthing can replace the benefit of looking a juror in the eye and talking through some of the issues that will come up in the case").
14. K.R.P.C. 3.5(b).
15. K.R.P.C. 4.1(a).
16. K.R.P.C. 8.4(c).
17. *See* New York Guidelines, *supra* note 8, Guideline Nos. 6.B, 6.D.
18. *See* New York Guidelines, *supra* note 8, Guideline No. 6.C.
19. *See* New York Guidelines, *supra* note 8, Guideline Nos. 6.B, 6.D.
20. *See* Lindsey Titus, *Juror, Attorneys Are Looking at Your Profile: Exploring the Ethical Implications of Attorney Research via Electronic Social Media*, 28 Geo. J. Legal Ethics 929, 945 (2015) (noting that all social-media platforms "make their user agreements and privacy policies available online," and that the rule of competency likely requires "a basic understanding of the capabilities and features" of these platforms).
21. *See, e.g., Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013) (lawyer who failed to interview witness to victim's social-media recantation of sexual-abuse allegation rendered ineffective assistance of counsel); Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 Ariz. St. L.J. 845, 857 (2014) ("The existing ethics rules should be read to affirmatively include social media content as part of the duty to investigate facts."); Jacobowitz & Singer, *supra* note 6 at 482-83 (discussing increasing expectation that lawyers will understand and use social media for investigations, and warning that "lawyers who do not take heed of the availability and significance of social media are vulnerable" to malpractice and ethics complaints).
22. K.R.P.C. 4.2.
23. McPeak, *supra* note 21 at 880-88 (detailing potential for social-media investigations to implicate ethical rules).
24. *See* Jaihyun Park & Neal Feigenson, *Effects of a Visual Technology on Mock Juror Decision Making*, Appl. Cognit. Psychol. 27: 235-46 (2013) (discussing studies suggesting that PowerPoint enhances juror recall and persuasion); Charles E. Bruess, *What You Didn't Learn in Law School About Trial Practice*, 55-MAR Res Gestae 14, 24 (2012) (former federal courtroom deputy reporting that "[j]urors like and expect technology"). Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial at 44, 52-53 (Federal Judicial Center 2001), available at http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf%20. This latter guide, despite its age, remains remarkably relevant in its discussions of the practical and evidentiary considerations of courtroom technology.
25. *See* James O. Ruane & Jeremy Brehmer, *Closing Arguments: Powerful Visuals Pack A Punch*, 38-AUG Champion 20, 21 (2014).
26. *See State v. Williams*, 299 Kan. 509, 563-64, 324 P.3d 1078, 1114 (2014) (discussing Kansas rules for using demonstrative evidence).
27. *See State v. Warren*, ___ Kan. ___, ___ P.3d ___ 2015 WL 5081260 at *10 (Aug. 28, 2015) (declining to consider documentary evidence appended to appellate brief that was "never formally introduced as evidence in the proceedings below or added to the record").
28. *See State v. Kimble*, 291 Kan. 109, 238 P.3d 251 (2010) (reversing Jessica's Law conviction for cumulative error, including prosecutor's improper comment on defendant's post-*Miranda* silence, which was included on prosecutor's PowerPoint presentation); *State v. Walker*, 341 P.3d 976 (Wash. 2015) (en banc) (reversing murder and other convictions because of prosecutor's improper PowerPoint slides).
29. *Walker, id.*, 341 P.3d at 985.
30. *Id*., 341 P.3d at 986 (citation omitted).
31. K.S.A. 60-243(a); *see also* K.S.A. 22-3415(a) ("[t]he provisions of law in civil cases relative to compelling the attendance and testimony of witnesses, [and] their examination . . . shall extend to criminal cases so far as they are in their nature applicable, unless other provision is made by statute").
32. *See, e.g., White v. State*, 116 A.3d. 520, 540-49 (Md. App. 2015) (forensic technician—who was "unable to travel due to a debilitating back condition"—was properly allowed to testify at trial via Skype and WebEx; listing cases).
33. *See, e.g., People v. Novak*, 971 N.Y.S.2d 197, 199 (N.Y. County Ct. 2013) (finding that "Internet Skype communication is reliable, accurate and widely used in society and commerce" and granting defense motion for remote testimony of defense witness).
34. Fotios (Fred) M. Burtoz, *Beam My Witness In*, 40-AUG Colo. Law. 107, 108 (Aug. 2011).
35. Jery Payne, *Sometimes, You Just Have to be There*, 40-AUG Colo. Law. 107, 109 (Aug. 2011).
36. *See* Kan. Bill of Rights § 10 ("In all prosecutions, the accused shall be allowed . . . to meet the witness *face to face*.") (emphasis added). *See also* Daniel E. Monnat & Paige A. Nichols*, The Loneliness of the Kansas Constitution (Part 2),* 34 J. Kan. Ass'n for Justice 5, 18 (2010) (discussing state confrontation right as applied to remote testimony); *Commonwealth v. Atkinson*, 987 A.2d 743, 751 (Pa. Super. 2009) (witness's remote testimony during suppression hearing violated defendant's right to confrontation; cautioning that "convenience and cost-saving are not sufficient reasons to deny constitutional rights"); *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (witness's remote testimony at trial violated defendant's confrontation rights).
37. *Yates*, *id*., 438 F.3d at 1315.