

# The Search for Clarity in an Attorney’s Duty To Google

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## Introduction

Attorneys have a professional duty to investigate relevant facts about the matters on which they work. There is no specific rule or statute requiring that an attorney perform an Internet search as part of this investigation. Yet attorneys have been found by judges to violate what commentators call a “Duty to Google”<sup>1</sup> by failing to discover relevant information about a matter, when that information was available through the investigative use of an Internet search.<sup>2</sup>

This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it *must* be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both. Discussion of an attorney’s Duty to Google is filtering into court opinions, articles, and continuing legal education classes.<sup>3</sup>

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<sup>1</sup> Megan Zavieh, *Lawyers’ Duty to Google: Not Changing Anytime Soon*, ATT’Y AT WORK (July 7, 2020), <https://www.attorneyatwork.com/lawyers-duty-to-google/>.

<sup>2</sup> To “Google” a subject for inquiry on the Internet is a ubiquitous term. See Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1139 n.7 (2014) (“to use a search engine such as Google to find information, a website address, etc., on the internet”) (quoting *Google*, DICTIONARY.COM, <http://dictionary.reference.com/browse/google?s=>) (last visited Mar. 11, 2021). This article generally uses the term “to Google” to mean performing an Internet search using a search engine such as Google.

<sup>3</sup> See, e.g., *The Cybersleuth’s Guide to Fast, Free, and Effective Investigative Internet Research*, KING CTY. BAR ASS’N (No. 22, 2019), [http://www.kcba.org/Portals/0/cle/pdf/!2019Cyber\\_Sleuths\\_Guide11222019.pdf](http://www.kcba.org/Portals/0/cle/pdf/!2019Cyber_Sleuths_Guide11222019.pdf). This CLE description stated,

It is a strange and wonderful time to be alive. Using the Internet to locate a fact is a commonplace activity for people with easy access to the Internet. But it is also a fast and inexpensive way for an attorney undertaking a factual inquiry to obtain an immense amount of information in a short time, and “[l]awyers, after all, are in the information business.”<sup>4</sup> As Andrew Perlman concluded, “Simply put, lawyers cannot just stick their heads in the sand when it comes to Internet investigations.”<sup>5</sup> Such an “ostrich-like” attorney would risk more than reputational embarrassment and client dissatisfaction, as courts have issued sanctions for an attorney who fails to Google pertinent information. Judges have reprimanded or sanctioned attorneys in cases in which the attorney failed to conduct an Internet search for relevant information about a matter, specifically about their own client,<sup>6</sup> a party,<sup>7</sup> witness,<sup>8</sup> or third party,<sup>9</sup> and that failure either caused harm or wasted the court’s time.<sup>10</sup>

Even though the Internet has been around for several decades now, and even though courts have been imposing a Duty to Google for nearly that long, there has been no real attempt to bring coherence to this disjointed set of cases, and importantly, to define the breadth and depth of what the Duty to Google should be. Where does this Duty arise? How much electronic information must an attorney search to meet this Duty? How does an attorney know when a technology has become so ubiquitous

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In this fast-paced investigative research seminar, you will learn to create more effective Internet searches to locate information crucial to your matters, which you might otherwise miss.

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Don't be left behind in exploiting this gold mine of information that will assist you in meeting your investigative research and due diligence obligations. And, in addition to meeting your ethical duty, be conversant with the benefits and risks of technology.

*Id.*

<sup>4</sup> Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 570 (2018).

<sup>5</sup> Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 PROF. LAW. 24, 28 (2014).

<sup>6</sup> See, e.g., *Cajamarca v. Regal Entm't Grp.*, No. 11 Civ. 2780, 2012 WL 3782437, at \*2 (E.D.N.Y. Aug. 31, 2012) (explaining that in discovery, attorney did not search client's publicly available social media posts, which would have cast severe doubt on her employment discrimination claims); *In re Axam*, 778 S.E.2d 222, 222 (Ga. 2015) (holding that attorney should have verified transaction details before assisting in transaction).

<sup>7</sup> *Dubois v. Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (denouncing as insufficient attorney's attempt to locate missing defendant by calling directory assistance); *Munster v. Groce*, 829 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2005) (reasoning that failure to Google absent defendant made attempted service void); *Weatherly v. Optimum Asset Mgmt., Inc.*, 928 So. 2d 118, 122–23 (La. Ct. App. 2005) (holding that tax sale notice was invalid where attorney failed to conduct an Internet search for the address of the current owner, who lived out of state).

<sup>8</sup> *Cannedy v. Adams*, No. ED CV 08-1230-CJC(E), 2009 WL 3711958, at \*30 (C.D. Cal. 2009) (concluding that attorney's failure to search for an Internet message containing a purported molestation victim's recantations was ineffective assistance of counsel).

<sup>9</sup> *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295, 303 (Iowa 2013) (disciplining attorney for not discovering that a deal that a client was considering was an obvious scam).

<sup>10</sup> *Johnson v. McCullough*, 306 S.W.3d 551, 598–99 (Mo. 2010) (en banc) (suggesting that an attorney could waive objection to a juror before trial if the attorney could have learned of the juror's bias with an Internet search).

that its use is compulsory to meet this Duty? This article explores these questions and proposes a solution.

Section 1 of this article includes a discussion of what obligations attorneys have under existing rules with respect to fact investigation and examines the sources of the historical duty of fact investigation.

Section 2 discusses the emergence of Internet research as a logical extension of an attorney's duty of fact investigation.<sup>11</sup> In doing so, it examines scenarios in legal practice where the Duty to Google has applied.

Section 3 examines the extent of the Duty to Google, in an attempt to find some guidance for attorneys to meet this emerging professional requirement. It suggests a codified Duty to Google as a specific addition to the rules of professional conduct with respect to attorney competency. It also explores how an emerging technology might become so ubiquitous that it becomes part of an attorney's investigation duty.

The article concludes with thoughts of the future, and how further advances in technology may shape this duty in the years to come.

## 1. An attorney's existing duty to investigate facts

The Duty to Google has its roots in an attorney's duty to investigate the facts surrounding their work. This duty to investigate is generally considered to be an outgrowth of a rule of attorney competence in the Model Rules of Professional Conduct (hereinafter Model Rules),<sup>12</sup> but can also be found to some extent in effective assistance of counsel standards, the Federal Rules of Civil Procedure, malpractice statutes, and general practice norms. This section discusses each of these sources in turn.

### 1.1. The Model Rules of Professional Conduct

There is no flat directive or specificity that attorneys must use a specific technology as part of their fact investigation. However, the cases discussed in this article seem to suggest that such a directive exists. To reach the conclusion that an attorney must use electronic search technology like Google to investigate certain facts, one must read together portions of the commentary language in Model Rule 1.1, dealing with

<sup>11</sup> See Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 862 (2014) (reviewing cases and concluding that "legal ethics rules impose a duty on lawyers to use reasonable efforts to investigate facts and to avoid frivolous claims, even with computer-aided legal and factual research").

<sup>12</sup> MODEL R. PROF'L CONDUCT 1.1 cmt. 5 (AM. BAR. ASS'N 2020). Of course, the Model Rules do not in and of themselves have legal effect—states must adopt them, and often do, but not word-for-word. For a breakdown of the adoption of this change to the Model Rules, see John G. Browning, *The New Duty of Digital Competence: Being Ethical and Competent in the Age of Facebook and Twitter*, 44 U. DAYTON L. REV. 179, 180–84 (2019).

attorney competence.<sup>13</sup> This rule states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>14</sup>

Two comments in the rule work together to outline how a duty to investigate can be affected by technology. In comment 5, the rule explains that competent representation includes “inquiry into and analysis of the factual and legal elements of the problem and the use of methods and procedures meeting the standards of competent practitioners.”<sup>15</sup> Lori Johnson notes, “Existing comments to Rule 1.1 indicate that competence is considered on a case-by-case basis, in a somewhat subjective manner. Specifically, comment 1 to Rule 1.1 indicates that competence is keyed to the ‘nature of the matter’ and ‘the lawyer’s training and experience in the field.’”<sup>16</sup> Comment 8 makes clear that this competency includes technological proficiency, not just rote use.<sup>17</sup> It clarifies Rule 1.1 to mean that a lawyer must stay abreast of “relevant technology.”<sup>18</sup> As of this writing, thirty-eight states have adopted that rule in some way.<sup>19</sup> (Though as Mark Britton noted, this adoption is slow and incomplete.<sup>20</sup>) Florida and North Carolina now require attorneys to take yearly technology continuing legal education classes in the same way most states require yearly ethics or mental health CLE classes.<sup>21</sup>

13 See, e.g., Perlman, *supra* note 5, at 24 (“Lawyers no longer need to rely exclusively on private investigators to uncover a wealth of factual information about a legal matter. Lawyers can learn a great deal from simple Internet searches. Lawyers ignore this competency at their peril.”).

14 MODEL R. PROF’L CONDUCT 1.1.

15 *Id.* cmt. 5.

16 See Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 VILL. L. REV. 159, 165–66 (2020).

17 Browning, *supra* note 12, at 196–97 (discussing failures of attorneys to use technology and concluding that attorneys must be “knowledgeable of both the benefits and the risks of the technology that is out there, including the functionality of the technology they are actually using (or, in some cases, should be using”).

18 MODEL R. PROF’L CONDUCT 1.1 cmt. 8.

19 Johnson, *supra* note 16, at 166 (discussing comment 8). “As Rule 1.1 clearly focuses on the ‘client’ and ‘representation,’ guidance surrounding Comment 8 must do the same, and lawyers should be required to become and remain competent in any technology used by, or beneficial to, their clients.” *Id.* at 163.

20 See Mark Britton, *Behind Stables and Saloons: The Legal Profession’s Race to the Back of the Technological Pack*, FLA. B.J., Jan. 2016, at 34 (noting that the slow adoption is further evidence that “[l]awyers lag behind their clients (the general population) and even other professions in adopting new technology”).

21 See Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 CASE W. RES. J.L. TECH. & INTERNET 1, 26 n.177 (citing Bob Ambrogi, *North Carolina Becomes Second State to Mandate Technology Training for Lawyers*, LAW SITES (Dec. 5, 2018), <https://www.lawsitesblog.com/2018/12/north-carolina-becomes-second-state-mandate-technology-training-lawyers.html#:~:text=North%20Carolina%20has%20become%20the,CLE%20devoted%20to%20technology%20training>).

## 1.2. Effective assistance of counsel standards

An attorney's duty to investigate matters has evolved in an instructive way in the capital criminal defense context.<sup>22</sup> A long progression of cases exists interpreting whether an attorney's investigation in a capital case violates the American Bar Association's standards for ineffective assistance of counsel, a standard that has been adopted by many courts.<sup>23</sup> In a 1984 case, *Strickland v. Washington*, the Supreme Court cited the ABA standards and noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."<sup>24</sup> Subsequently, the issue of adequate investigation by defense counsel in capital cases has received attention in scholarship and by courts.<sup>25</sup> That attention expanded outside of capital cases and into other criminal cases. Today, the ABA standards with respect to criminal investigation include a specific description of a defense attorney's duty to investigate. ABA Standard 4-4.1 ("Duty to Investigate and Engage Investigators") provides that criminal defense attorneys have a duty to investigate the sufficiency of the factual basis for the criminal charges their clients face.<sup>26</sup> One court noted, "An attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doing so."<sup>27</sup>

In a later case, the Supreme Court interpreted the ABA standards and guidelines to include a reasonability requirement, stating, "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."<sup>28</sup> Notably, the ABA standards and guidelines became more specific over time and as courts interpreted them as a standard

<sup>22</sup> See John H. Blume & Stacey D. Neumann, *It's Like Deja Vu All Over Again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 132 (2007) (noting that the duty to investigate is "the most heavily scrutinized aspect of defense counsel's representation" in ineffective assistance of counsel cases).

<sup>23</sup> See Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007); see also Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1279 (2018) (noting that the guidelines "have been cited favorably by courts in more than 350 reported opinions, adopted in substantive part by at least ten capital jurisdictions").

<sup>24</sup> *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

<sup>25</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (collecting cases showing widespread inadequate investigation by criminal defense counsel in capital cases); Rigg, *supra* note 23, at 88–93 (describing a series of cases in the early 2000s).

<sup>26</sup> ABA, *Criminal Justice Standards for the Defense Function*, AM. BAR ASS'N Standard 4-4.1, [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) (last visited May 12, 2021).

<sup>27</sup> See Rigg, *supra* note 23, at 90 n.95 (quoting *Stevens v. Del. Corr. Ctr.*, 152 F. Supp. 2d 561, 576–77 (D. Del. 2001)).

<sup>28</sup> *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); see also Rigg, *supra* note 23, at 91 n.105.

for the reasonableness of an investigation.<sup>29</sup> Courts then used the ABA's guidance to help determine and define the "prevailing professional norms' in ineffective assistance cases."<sup>30</sup> Later cases have noted that courts must examine an investigation, in particular a decision not to investigate, for "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."<sup>31</sup>

This language is certainly helpful for attorneys looking to better understand their factual investigation obligations, but it is of course limited to the specific context of criminal cases. It can be instructive in determining an overall Duty to Google, as explored in section 2.

### 1.3. The Federal Rules of Civil Procedure

The duty to investigate may be found in the Federal Rules of Civil Procedure, at Rule 11. Rule 11 requires that an attorney make a reasonable inquiry to determine that the arguments in a filed document are not frivolous.<sup>32</sup> Therefore, it seems that at least a cursory factual investigation such as an Internet search is required for an attorney to adequately make the good faith assertion that a filing is not being advanced for an improper purpose. Per the rule, the attorney must make a "reasonable inquiry" to build information and belief of proper purpose. This language and directive is helpful, but limited in context to litigation.

### 1.4. Malpractice or agency law

George Cohen notes that "other law may impose on lawyers a duty to investigate," citing malpractice law and agency law.<sup>33</sup> Cohen observes that these sources of a duty to investigate generally come from the Model Rules or Rule 11.<sup>34</sup> That is so because these sources arise as part of a negligence claim based on an attorney acting as a fiduciary to the client, which carries with it a duty of competent representation.<sup>35</sup> It is likely, then, that a charge of malpractice for the violation of the duty to investigate would be in addition to, not instead of, a violation of a rule of professional conduct or Rule 11.

<sup>29</sup> See Rigg, *supra* note 23, at 93 ("Later, and current, ABA Guidelines relating to death penalty defense are even more explicit.")

<sup>30</sup> See *id.* at 95 (citing *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003)).

<sup>31</sup> See *id.* at 96–97 (citing *In re Lucas*, 94 P.3d 477, 502 (Cal. 2004)).

<sup>32</sup> FED. R. CIV. P. 11.

<sup>33</sup> See George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 128 (2014) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. c (AM. LAW INST. 2000) and RESTATEMENT (THIRD) OF AGENCY § 8.11(1) (AM. LAW INST. 2006)).

<sup>34</sup> See *id.* at 129.

<sup>35</sup> See Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 103 (2008).

## 2. The curious appearance of the Duty to Google

Enter Google and other easily accessible means of obtaining information, which lower the cost of an attorney's investigation efforts to such a degree that their use is, to an extent, required. A series of unrelated cases has emerged over the last decade where courts have admonished or sanctioned an attorney for that attorney's failure to use electronic search technology as part of that attorney's duty to investigate a matter. These sanctions can be monetary, in the form of refunded client fees and other damages based on the error, or can take the form of prescribing attorney training or a certification that Internet research will be part of future conduct. The latter sanctions are a public reprimand, a "benchslap"<sup>36</sup> that creates bad press in an industry that relies on reputation.<sup>37</sup>

It is clear from the cases below that today's attorney has a duty to use technology—for the purposes of this article, "Googling" or another public Internet search—to investigate key aspects of a matter such as their client, adversary, facts, and even potential jurors. These cases show that a savvy attorney satisfying their Duty to Google should at least consider using the Internet to research social media evidence, the location of missing witnesses or parties, verifiable facts in dispute, and even the attorney's own client.

### 2.1. The Duty to Google missing witnesses and parties

One of the first and perhaps the most obvious instances in which the Duty to Google arises is one in which the attorney must locate a person, for service or other participation in a legal proceeding. For example, in *Munster v. Groce*,<sup>38</sup> the Court of Appeals of Indiana questioned the plaintiff's efforts to effectuate service on a missing individual defendant. The court found the plaintiff's efforts to be insufficient because the plaintiff's attorney did not run a skip trace, a public records search, or an Internet search.<sup>39</sup> Worse still, the court itself performed a search and found that it

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<sup>36</sup> This term is colloquial, and refers to an admonishment from the bench to a misbehaving counsel (or litigant). See Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC 109, 109 (2014); Dwight H. Sullivan & Eugene R. Fidell, *Winding (Back) the Crazy Clock: The Origins of a Benchslap*, 19 GREEN BAG 2D 397, 397 n.1 (2016) ("Benchslap" made its Black's Law Dictionary debut in the 10th edition, defined as: 'A judge's sharp rebuke of counsel, a litigant, or perhaps another judge; esp., a scathing remark from a judge or magistrate to an attorney after an objection from opposing counsel has been sustained.").

<sup>37</sup> Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176–83 (2008).

<sup>38</sup> *Munster v. Groce*, 829 N.E.2d 52, 61 (Ind. Ct. App. 2005).

<sup>39</sup> *Id.* at n.3.

would be easy for an attorney to find an address for the defendant, and the names of family members who may have known his whereabouts.<sup>40</sup>

In a similar case in Florida, *Dubois v. Butler*,<sup>41</sup> the plaintiff searching for a missing defendant checked directory assistance looking for an address to serve a defendant—and nothing more. The standard for whether such an effort is sufficient is, in the court’s words, whether the plaintiff failed to follow an “obvious” lead or available resource.<sup>42</sup> The court found that an Internet search was an “obvious” avenue that the plaintiff ignored.<sup>43</sup> In taking issue with the plaintiff’s sole call to directory assistance, the court cheekily stated that “advances in modern technology and the widespread use of the Internet have sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo.”<sup>44</sup>

In *Weatherly v. Optimum Asset Management, Inc.*,<sup>45</sup> a Louisiana trial court considered whether a party was “reasonably identifiable” for the purposes of requiring actual service of a tax sale. The defendant argued that the plaintiff was not “reasonably identifiable” because the defendant did not have basic contact information for the plaintiff.<sup>46</sup> The trial court performed its own Internet search for plaintiff and, based on its results, found that the plaintiff was “reasonably identifiable.”<sup>47</sup> The appeals court questioned the ability of the judge to take judicial notice of its own Internet search, but noted that plaintiff nevertheless did not perform a sufficient search.<sup>48</sup>

Relatedly, an attorney has a Duty to Google a client the attorney cannot locate. A New Jersey appeals court found that an attorney could not withdraw representation from an absent client where she did not make diligent efforts to locate the client, including an Internet search.<sup>49</sup> The Alaska Bar Association issued an ethics opinion stating that attorneys

40 *Id.* Specifically, the court wrote,

We do note that there is no evidence in this case of a public records or internet search for Groce . . . . In fact, we discovered, upon entering “Joe Groce Indiana” into the Google search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce’s mother that listed numerous surviving relatives who might have known his whereabouts.

*Id.*

41 *Dubois v. Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005).

42 *Id.* at 1030.

43 *Id.* at 1031.

44 *Id.*

45 *Weatherly v. Optimum Asset Mgmt., Inc.*, 928 So. 2d 118, 121 23 (La. Ct. App. 2005).

46 *Id.*

47 *Id.*

48 *Id.* at 122–23.

49 *Garrett v. Matisa*, 927 A.2d 177, 182 (N.J. Super. Ct. Ch. Div. 2007).

representing a client in a criminal appeal, where the client cannot be contacted,<sup>50</sup> must make “reasonable efforts” to contact the client, which specifically include an Internet search.<sup>51</sup>

The Duty to Google should certainly exist where attorneys seek to show that they performed a diligent search for the location of witnesses or absent parties.<sup>52</sup> As a cautionary tale, Michael Whiteman notes that in one Pennsylvania case, a court found that a Google search *by itself* did not suffice as a reasonable search, when that Google search did not reveal the contact information for a missing party.<sup>53</sup> Therefore, a Google search would need to be performed in addition to, not instead of, searching for a party by conventional means (for example, in a phonebook).

It makes sense that an attorney would need to use any readily available technology when searching for a participant in a suit, particularly since this duty is so closely tied to the attorney's duty of candor to the tribunal. The extent of that search, of course, should be reasonable to the importance of the party or witness to the case, and the resources at hand.

## 2.2. The Duty to Google verifiable disputed facts in litigation

An attorney also has a Duty to Google facts in dispute in litigation. In *Cannedy v. Adams*,<sup>54</sup> a California court considered an ineffective assistance of counsel claim in a molestation case against a stepfather accused of molesting his stepdaughter.<sup>55</sup> The stepfather argued that, against his urging, his attorney failed to investigate a friend of the victim, who would have testified that she saw exculpatory evidence (essentially, that the victim fabricated her allegations) on the victim's social media page, specifically an AOL Instant Messenger profile.<sup>56</sup> The court found the failure to follow up with this witness to be ineffective assistance of counsel.<sup>57</sup> In attempting to ascertain why the stepfather's attorney failed to contact this witness, the court surmised that the attorney may have lacked the technological knowledge and skill to appreciate the value of this information and to obtain it.<sup>58</sup> The court concluded that the attorney may have

50 Perhaps a somewhat common problem on the last frontier.

51 Alaska Bar Ass'n, Ethics Op. 2011-4, at 1 (2011).

52 See *supra* note 7 and accompanying text.

53 Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27, 43 (2010) (citing *Fernandez v. Tax Claim Bureau of Northampton Cty.*, 925 A.2d 207 (Pa. Commw. Ct. 2007)).

54 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).

55 *Id.* at \*28.

56 *Id.* at \*16.

57 *Id.* at \*29.

58 *Id.* at \*34 n.19.

“misunderstood the workings of AOL Instant Messenger in ways that caused him to depreciate the value of the information.”<sup>59</sup> It is interesting to note here that the stepfather’s attorney was held to the ineffective assistance of counsel standard—one in which the attorney’s conduct falls “below an objective standard of reasonableness”<sup>60</sup>—not because the attorney did not use certain technology but because the attorney lacked the technical knowledge to use it proficiently. This case provides an example of the idea discussed in section 1 that technological *proficiency*, not just *use*, comprises the Duty to Google. So the Duty to Google really is one of technological competence, where an attorney must have both a breadth and a depth of knowledge of electronic information resources. An attorney must know *where* to look, locating relevant electronic information resources, but then also how to find relevant information from each resource. These resources change constantly with the winds and whims of usage. Today’s Facebook may end up being tomorrow’s MySpace.

On that note, the Duty to Google facts has extended into searching social media. As one commentator noted, “In light of the amount of time Americans spend online, and the ease with which users freely share information with others, it follows that lawyers should utilize social media to research and investigate cases on behalf of their clients.”<sup>61</sup> In *Lorraine v. Markel American Insurance Co.*,<sup>62</sup> Judge Paul Grimm considered the admissibility of social media evidence, and in an oft-cited opinion noted, “[I]t is not surprising that many statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical) will be communicated in electronic medium.” In other words, social media evidence can be among the most important evidence in a case, and is generally only available through an electronic search and often the use of the social media platform.<sup>63</sup> Discovering that evidence is thus a part of a lawyer’s duty of competent representation.<sup>64</sup>

Using the Internet to investigate verifiable facts in dispute in litigation also seems commonsensical. It certainly should be required by attorneys at the beginning of a case as part of their ethical duty to verify the facts

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<sup>59</sup> *Id.*

<sup>60</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>61</sup> Vanessa S. Browne-Barbour, “Why Can’t We Be ‘Friends?’: Ethical Concerns in the Use of Social Media,” 57 S. TEX. L. REV. 551, 552 (2016).

<sup>62</sup> 241 F.R.D. 534, 569 (D. Md. 2007).

<sup>63</sup> McPeak, *supra* note 11, at 877.

<sup>64</sup> *Id.* at 880 (“Although lawyers should, as a matter of professional competence, search social media in informal discovery, they must also be aware of the ethical limitations of doing so.”).

asserted in legal pleadings. The extent of an attorney's duty to investigate the facts of a claim has been discussed by the ABA as depending on any number of factors:

the complexity or nature of the claims or contentions to be investigated or developed, the time in which the investigation must be conducted, the resources available to the lawyer to conduct the investigation, the availability and cooperation of potential fact and expert witnesses, whether expert witnesses must be consulted, the availability of evidence that can be obtained without formal discovery, whether any investigation has been conducted prior to the lawyer undertaking the representation, the existence of parallel proceedings that complicate or expedite matters, and probably more.<sup>65</sup>

Internet searches fit into these factors in a number of ways. For one, a basic Internet search should be a resource available to almost every attorney, and should be able to be performed in little time. Therefore, the extent of the search rests on the nature and complexity of the claims. In a complex case with expert testimony and many "moving parts," it may be prudent for an attorney to use an investigator or research service to conduct an extremely comprehensive search.<sup>66</sup> These methods may be outside of an attorney's knowledge, but if the attorney's investigation warrants such methods, the attorney has a duty to contract with professionals who can capably perform the search.<sup>67</sup>

Also, the Duty to Google exists for both parties as part of their responsibility to cooperate in discovery, if only because parties are strongly encouraged to eliminate disputes over facts and stipulate to facts.<sup>68</sup> Using Internet technology to narrow the facts of a case by finding objective, verifiable information to which parties can stipulate will be a welcome development for courts and clients. It is said that parties should

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<sup>65</sup> DOUGLAS R. RICHMOND, BRIAN SHANNON FAUGHNAN & MICHAEL L. MATULA, PROFESSIONAL RESPONSIBILITY IN LITIGATION 4 (2016).

<sup>66</sup> A new profession has emerged of "digital private investigators," who specialize in using Internet searches and databases to collect information. See, e.g., *Digital Private Investigators and Family Law*, FOURNIER LAW FIRM BLOG (May 29, 2016), <http://fournierlawoffice.com/blog/digital-private-investigators-and-family-law/>.

<sup>67</sup> This duty is explicit in an attorney's duty of technological competence. See, e.g., Cal. Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-193, at 3 (2015) (noting that to satisfy an attorney's duty of technological competence the attorney "must try to acquire sufficient learning or skill, or associate or consult with someone with the necessary expertise to assist").

<sup>68</sup> See generally William Matthewman, *Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective*, 71 FLA. L. REV. 1261 (2019) (discussing changes to the Federal Rules of Civil Procedure designed to increase cooperation among opposing parties in discovery).

ask judges to take judicial notice of facts more often.<sup>69</sup> The Duty to Google can be a key tool in that trend.<sup>70</sup>

### 2.3. The Duty to Google clients

An attorney has a Duty to Google their own client, particularly to verify the facts represented to the attorney by their client.<sup>71</sup> Joel Cohen investigated examples of this phenomenon:

Must lawyers “Google” their (prospective) clients to learn “who” they’re dealing with—meaning how reliable they’re likely to be? Shouldn’t lawyers research their clients’ claims by not only looking at the information provided by the client, but by making sure it makes sense; that documents fit with the client’s story and other information received? The rules seem to require it.<sup>72</sup>

The ABA noted that an attorney presenting false information to a tribunal runs afoul of Model Rule 3.3, “Candor Toward the Tribunal,”<sup>73</sup> and that “it is reasonable to note that pressure is mounting from the government to increase private lawyers’ obligation of due diligence in representation of clients as to financial transactions.”<sup>74</sup> This duty is maybe most obvious when an attorney is engaged in issuing an opinion, such as an opinion letter providing advice on a proposed merger or tax obligation.<sup>75</sup> George Cohen notes that “[l]egal duties of inquiry imposed are perhaps most developed for securities lawyers,” particularly with respect to the issuance of materials to investors.<sup>76</sup> This duty would be tied very directly to the duty of competence—an attorney who provides an opinion letter based on unverified facts is gambling, at least.

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<sup>69</sup> Judicial notice allows a court to accept a proposition without presented evidence of that proposition’s veracity. See FED. R. EVID. 201; Paul J. Kiernan, *Better Living Through Judicial Notice*, 36 LITIG., Fall 2009, at 42–43, 45.

<sup>70</sup> See Bellin & Ferguson, *supra* note 2, at 1137, 1141 n.18 (quoting RICHARD A. POSNER, REFLECTIONS ON JUDGING, 141–42 (2013) (“The Internet is not going away. The quality and quantity of online material that illuminates the issues in federal litigation will only grow. Judges must not ignore such a rich mine of information.”)).

<sup>71</sup> See Joel Cohen, *The Lawyer’s Duty to Check Facts*, N.Y. L. J. (Feb. 9, 2015), <https://www.stroock.com/uploads/newyorklawjournal.pdf>.

<sup>72</sup> *Id.* at \*5. For example, George Cohen notes that the ABA issued an opinion on “Client Due Diligence, Money Laundering, and Terrorist Financing” in which it stated, “It would be prudent for lawyers to undertake Client Due Diligence (“CDD”) in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity.” Cohen, *supra* note 33, at 126 (quoting ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 13-463 (2013)). He explains further that lawyers must “determine a non-frivolous basis in fact and law for bringing or defending against a civil claim.” *Id.* at 127.

<sup>73</sup> MODEL R. PROF’L CONDUCT 3.3 (AM. BAR ASS’N 2020). Section 3.3(a)(3) states, “A lawyer shall not knowingly offer evidence that the lawyer knows to be false.” *Id.*

<sup>74</sup> Dennis A. Rendleman, *What to Do When Your Client Lies*, ABA ETHICS IN VIEW (Sept. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/september-2019/what-to-do-when-your-client-lies/>.

<sup>75</sup> See Cohen, *supra* note 33, at 129.

<sup>76</sup> *Id.*

It is clear that attorneys should do something more than operate on faith that the client is telling the truth about who they say they are and what they are doing.<sup>77</sup> Vendors now market “people search” solutions to attorneys to accomplish this goal.<sup>78</sup>

One such case in which a “people search” would have been most useful is *Iowa Supreme Court Attorney Disciplinary Board v. Wright*.<sup>79</sup> There, an attorney learned from a client that the client stood to inherit a large sum of money from a long-lost relative in Nigeria, such sum to be released once the client paid an outstanding tax debt to the Nigerian government.<sup>80</sup> The attorney agreed to represent the client for a ten percent commission on the recovered funds.<sup>81</sup> The attorney then reached out to other clients and arranged for those clients to lend money so that the Nigerian tax debt could be paid.<sup>82</sup> The attorney then facilitated the repayment of the Nigerian tax debt.<sup>83</sup> Most readers of this article sadly shaking their heads reading this paragraph already know what the attorney in *Wright* did not; the “business deal” was actually a classic Internet scam referred to as the “Nigerian Prince” scam.<sup>84</sup> The client and attorney received no money, and the other clients who lent money were never repaid.<sup>85</sup> The attorney’s license to practice law was suspended for a year.<sup>86</sup> In suspending it, the Iowa Supreme Court noted (somewhat charitably) that the “evidence in this case established that a cursory internet

<sup>77</sup> See RICHMOND ET AL., *supra* note 65, at 4 (“[L]awyers must conduct some type of preliminary investigation into clients’ intended claims and contentions.”).

<sup>78</sup> Jeremy Byellin, *Investigate Your Potential Client? It’s More Important Than You Think*, THOMSON REUTERS PRACTICE OF LAW BLOG (July 14, 2016), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/investigate-your-own-client-its-more-important-than-you-may-think/> (describing the importance of an attorney conducting due diligence via Internet search on potential clients and marketing “PeopleMap”).

<sup>79</sup> Iowa Supreme Ct. Att’y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301–04 (Iowa 2013).

<sup>80</sup> *Id.* at 297.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 301. The “Nigerian Prince” scam has been known since the 1990s and has made its way into popular culture on television shows such as “30 Rock” and “The Office.” See Finn Brunton, *The Long, Weird History of the Nigerian E-mail Scam*, BOS. GLOBE (May 19, 2013), <https://www.bostonglobe.com/ideas/2013/05/18/the-long-weird-history-nigerian-mail-scam/C8BlhwQSVoygYtrlxS/TJJ/story.html> (“The deal is this: You make a small initial outlay (the advance fee), in exchange for an enormous return. But once you take the bait, things inevitably begin to go wrong. The customs staff changes, new bribes are needed, a key person in the transaction falls ill. Just a little more money, the writer promises, and you’ll make it all back”). It is a version of the “advance fee” scam, which has its roots at least as far back as the “Spanish Prisoner” scams of the nineteenth century. *Id.* In that scam, a Spanish soldier concealed money while fighting in the Spanish-American war, only to be tragically and inconveniently imprisoned in Spain, needing an American to recover it. *Id.* This scam is still in use today. See Megan Leonhardt, *‘Nigerian Prince’ Email Scams Still Rake in Over \$700,000 a Year—Here’s How to Protect Yourself*, CNBC.COM (Apr. 18, 2019), <https://www.cnbc.com/2019/04/18/nigerian-prince-scams-still-rake-in-over-700000-dollars-a-year.html>.

<sup>85</sup> Iowa Supreme Ct. Att’y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 299 (Iowa 2013).

<sup>86</sup> *Id.* at 304.

search . . . would have revealed evidence that [the client's] dream of a Nigerian inheritance was probably based on a scam."<sup>87</sup> The court further observed that "Wright appears to have honestly believed—and continues to believe—that one day a trunk full of . . . one hundred dollar bills is going to appear upon his office doorstep," and that other attorneys had fallen for the same ruse.<sup>88</sup>

The *Wright* case's Nigerian prince taught an attorney a lesson that all transactional attorneys should heed—the Duty to Google certainly extends into the transactional side of practice. A transactional attorney should, for example, Google all sides of a negotiation for a proposed transaction, especially if one or more of those sides is an unfamiliar entity. Indeed, the Duty to Google can and should extend to material representations made during negotiations, to the extent such representations are reasonably verifiable through an Internet search.

In another example, a high-profile attorney in Georgia, Tony Axam, voluntarily surrendered his license after an ethics investigation showed that he failed to take any steps to verify information about a transaction in a matter and thus facilitated illegal activity.<sup>89</sup>

The Duty to Google facts about one's client has extended to social media information, at least to the extent such information is available to the attorney.<sup>90</sup> For example, in *Cajamarca v. Regal Entertainment Group*, a sexual harassment case, readily available social media evidence revealed that the plaintiff, rather than being severely incapacitated as a result of the incidents of harassment, engaged in "an extraordinarily active travel and social life."<sup>91</sup> In sanctioning the plaintiff's attorney under Rule 11, relating to an attorney's duty to avoid frivolous filings,<sup>92</sup> the court stated

<sup>87</sup> *Id.* at 301.

<sup>88</sup> *Id.* at 300.

<sup>89</sup> *In re Axam*, 778 S.E.2d 222, 222 (Ga. 2015). Specifically, Mr. Axam agreed to act as a "paymaster" for a client and distribute funds for the client, taking a commission as payment. *Id.* Mr. Axam received a wire transfer from an individual connected to his client and deposited that money into his firm operating account. *Id.* Axam admitted that he did not read the terms of the trading platform contract in connection with which he was serving as "paymaster," that he did not know the nature of the business dealings between his client and the other individual, and that he asked no questions about the transaction that he facilitated. *Id.*

<sup>90</sup> See Peter Segrist, *How the Rise of Big Data and Predictive Analytics Are Changing the Attorney's Duty of Competence*, 16 N.C. J.L. & TECH. 527, 605 (2015) ("It has also been suggested that there is an affirmative obligation for attorneys to inquire into social networking information that may hold potential relevance in a given matter.")

<sup>91</sup> *Cajamarca v. Regal Entm't Grp.*, No. 11 Civ. 2780, 2012 WL 3782437, at \*2 (E.D.N.Y. Aug. 31, 2012).

<sup>92</sup> FED. R. CIV. P. 11. Rule 11 provides in relevant part,

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

that “plaintiff’s lawyer should be roundly embarrassed. At the very least, he did an extraordinarily poor job of client intake in not learning highly material information about his client.”<sup>93</sup> Margaret DiBianca concluded, “Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations.”<sup>94</sup>

## 2.4. The Duty to Google jurors

An attorney trying a case may have a Duty to Google jurors. This specific area of law is developed but still somewhat unsettled.<sup>95</sup> The genesis of this duty is in an attorney’s ability to conduct due diligence on jurors “in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.”<sup>96</sup> The ease of Internet research, obviously, makes this due diligence common, if perhaps imprecise. “Googling” jurors is now common.<sup>97</sup> One article quotes a state judge in Florida as having an “unspoken expectation” that attorneys will research jurors before and during a case, because such research is part of an attorney’s duty of competence.<sup>98</sup>

One case illustrates the complexity of this practice. In *Johnson v. McCullough*,<sup>99</sup> an attorney on appeal in a medical malpractice case argued that a juror in the trial court had lied during voir dire, when asked if he had ever been a party to a lawsuit.<sup>100</sup> The attorney discovered this falsehood by searching for the juror on Missouri’s automated court record system,

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For an excellent summary of Rule 11, see Julia K. Cowles, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading*, 56 *FORDHAM L. REV.* 697 (1988).

<sup>93</sup> *Cajamarca*, 2012 WL 3782437, at \*2; see also Donna Bader, *Have You Googled Your Clients Lately?*, AN APPEAL TO REASON (Sept. 11, 2012), <http://www.anappealtoreason.com/home/2012/9/11/have-you-googled-your-clients-lately.html>. An additional complexity is that the user of a social media account controls the privacy settings, and the account may not be available to an attorney without the attorney “friending” the user, which may raise ethical concerns. See Pa. Bar Ass’n, Formal Op. 2014-300, at 7–8 (2014) (stating that attorneys may connect with clients and former clients, but not represented persons); see also *infra* notes 106–09 and accompanying text.

<sup>94</sup> Margaret M. DiBianca, *Ethical Risks Arising from Lawyers’ Use of (and Refusal to Use) Social Media*, 12 *DEL. L. REV.* 179, 182 (2011).

<sup>95</sup> See J.C. Lundberg, *Googling Jurors to Conduct Voir Dire*, 8 *WASH. J.L. TECH. & ARTS* 123 (2012). Lundberg notes, “The growing efficacy of the Internet as a tool for conducting jury research has far outpaced the development of guidelines for its use, leaving Internet-based jury research in an ambiguous position.” *Id.* at 125.

<sup>96</sup> *Id.* at 130 (quoting *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991)).

<sup>97</sup> See John G. Browning, *Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection*, THE BRIEF (Apr. 25, 2019), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/the\\_brief/2016\\_17/winter/voir\\_dire\\_becomes\\_voir\\_google\\_ethical\\_concerns\\_of\\_21st\\_century\\_jury\\_selection/](https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2016_17/winter/voir_dire_becomes_voir_google_ethical_concerns_of_21st_century_jury_selection/).

<sup>98</sup> Ben Hancock, *Should You ‘Facebook’ the Jury? Yes. No. Probably*, THE RECORDER (Apr. 26, 2017), <http://www.therecorder.com/id=1202784626601/Should-You-Facebook-the-Jury-Yes-No-Probably>.

<sup>99</sup> 306 S.W.3d 551, 598–99 (Mo. 2010) (en banc).

<sup>100</sup> *Id.* at 554.

Case.net.<sup>101</sup> The Court bristled at the idea of attorneys searching for juror information after a case to undermine a verdict, and directed attorneys to affirmatively search for information about jurors on Case.net *before* trial. As one observer noted, attorneys “now have a free and potentially easy means to search a prospective juror’s litigation experience.”<sup>102</sup> Attorneys who fail to perform such a search risk waiving the ability to argue juror nondisclosure in voir dire on appeal.<sup>103</sup> That is to say that attorneys are not just *permitted* to Google jurors. They may be *required* to Google jurors to preserve a right on appeal.<sup>104</sup>

*Johnson* was not the only case in which a judge noted that an attorney’s failure to discover juror bias during voir dire was the result of an insufficient investigation using electronic search technology.<sup>105</sup> The ABA’s Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating that it is acceptable for attorneys to research prospective jurors on the Internet and/or through social media, provided that the attorneys do not make any sort of “active” contact with the targets of their research, such as “friending” or “following” them (and as long as such research is not prohibited by law or court order).<sup>106</sup> There, the ABA noted in a footnote,

While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful . . . that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>107</sup>

The bar associations of New York, New Hampshire, and Pennsylvania have issued similar opinions, though these opinions do not so much establish a bright-line rule as they analogize jurors to opposing parties

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<sup>101</sup> *Id.* at 555.

<sup>102</sup> John Constance, Note, *Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025*, 76 Mo. L. Rev. 493, 494 (2010).

<sup>103</sup> See *Johnson*, 306 S.W.3d at 559.

<sup>104</sup> Lundberg, *supra* note 95, at 132. Requiring attorneys to investigate jurors using electronic sources such as social media carries with it an additional responsibility. Attorneys must be aware of the ethical constraints of investigation and contact with unrepresented parties. These constraints, of course, are evolving. See, e.g., Browning, *supra* note 97.

<sup>105</sup> For example, in a personal injury case, attorneys for a defendant discovered after a trial that jurors had misrepresented prior involvement in litigation, and used that misrepresentation as a basis for appeal. *Burden v. CSX Transp., Inc.*, No. 08–cv–04–DRH, 2011 WL 3793664, at \*9 (S.D. Ill. Aug. 24, 2011). The court rejected this argument and stated that the attorney should have discovered that information during voir dire, and that such Internet searches constitute “reasonable diligence.” *Id.*

<sup>106</sup> ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 14–466 (2014).

<sup>107</sup> *Id.* at 2 n.3 (quoting MODEL R. PROF’L CONDUCT 1.1 cmt. 8).

with respect to the permissiveness of contact.<sup>108</sup> A district judge in the Eastern District of Texas has issued a standing order providing guidelines for the Internet research of jurors, prohibiting active communication such as “friending” but allowing for passive communication such as profile viewing, noting that in so doing, “The Court recognizes the duty imposed on diligent parties to secure as much useful information as possible about venire members.”<sup>109</sup>

In the closest formal rule with respect to a Duty to Google to date, shortly after the *Johnson* decision, in 2010, the Missouri Supreme Court adopted Rule 69.025, which addresses juror nondisclosure.<sup>110</sup> It states in relevant part,

(b) Reasonable Investigation. For purposes of this Rule 69.025, a “reasonable investigation” means review of Case.net before the jury is sworn.

...

(e) Waiver. A party waives the right to seek relief based on juror nondisclosure of information that would be readily apparent from a reasonable investigation unless the party does the following before the jury is sworn:

(1) Conduct a reasonable investigation.

But this rule by no means settled the issue. In a later opinion in *King v. Sorensen*,<sup>111</sup> the Missouri Supreme Court stated, “While Rule 69.025(b) specifically requires Case.net searches of prospective jurors, it neither specifies the extent of an attorney’s research obligation nor instructs how searches are to be conducted.”<sup>112</sup> This was an issue in that particular case because an attorney’s search for information about a juror was deemed by a lower court to be insufficient, but the court provided the attorney with the incorrect name of the juror. At issue was whether the attorney had a duty to search variants of the juror’s name.<sup>113</sup> In concluding that the attorney’s reliance on the court was reasonable, the Court in *King* observed, “No Missouri court has addressed the issue of what type of

<sup>108</sup> See N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05, at 2 (2012) (stating an attorney’s “general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent”); N.Y. Cty. Lawyers Ass’n Comm. on Prof’l Ethics, Formal Op. 743 (2011); Pa. Bar Ass’n, Formal Op. 2014-300 (2014).

<sup>109</sup> U.S. District Judge Rodney Gilstrap, *Standing Order Regarding Research as to Potential Jurors in All Cases Assigned to U.S. District Judge Rodney Gilstrap*, U.S. DIST. CT. FOR THE EASTERN DIST. OF TEX. 2 (Jan. 25, 2017), <http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20--%20Juror%20Research%20%28signed%29.pdf>.

<sup>110</sup> Mo. R. Civ. P. 69.025.

<sup>111</sup> 532 S.W.3d 209, 215 (Mo. Ct. App. 2017).

<sup>112</sup> *Id.* at 215.

<sup>113</sup> *Id.* at 212.

‘review of Case.net’ will be deemed ‘reasonable investigation’ with regard to Rule 69.025.”<sup>114</sup>

Subsequently, Missouri appellate courts have noted that the standard for researching jurors on the Internet is not one of perfection and omniscience, stating that it cannot be the rule that “*any and all* research—Internet based or otherwise—into a juror’s alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empaneled or the complaining party waives the right to seek relief from the trial court.”<sup>115</sup> Instead, Missouri courts seem in agreement with the rather nebulous rule

that the day may come that technological advances may compel our Supreme Court to re-think the scope of required “reasonable investigation” into the background of jurors that may impact challenges to the veracity of responses given in voir dire before the jury is empanelled—[but] that day has not arrived as of yet.<sup>116</sup>

That conclusion does not inspire confidence in the current state of guidance with respect to a Duty to Google. While the ABA may not be imposing an affirmative obligation, the difficulties attorneys have faced in cases such as *Johnson* suggest that an attorney’s obligation is more than a wise choice—it seems like a requirement.<sup>117</sup>

As noted above, there is a growing body of law with respect to the appropriateness of Googling jurors in voir dire.<sup>118</sup> Proponents of the practice argue that a juror’s online presence is unable to misrepresent bias the way a juror can while under pressure of questioning in open court, while opponents of the practice note that it is tantamount to opening the voir dire process beyond questioning under oath and raises a host of reliability issues.<sup>119</sup> This is one of the few areas to date in which Rule 1.1 has

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<sup>114</sup> *Id.* at 215.

<sup>115</sup> *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo. Ct. App. 2012).

<sup>116</sup> *Id.* at 203.

<sup>117</sup> See Browning, *supra* note 97 (“Researching the social media activity of prospective jurors, and continuing to monitor social media activity during trial, can be vital to seating an honest, unbiased jury and to ensuring that any online misconduct is promptly brought to the court’s attention.”).

<sup>118</sup> See, e.g., Patrick Schweih, Page Vault & Eric Pesale, *Common Ethical Issues to Consider When Researching Jurors and Witnesses on Social Media*, ABOVE THE LAW (Mar. 14, 2017), <http://abovethelaw.com/2017/03/common-ethical-issues-to-consider-when-researching-jurors-and-witnesses-on-social-media/citing>.

<sup>119</sup> 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) (collecting sources and noting a tension in commentary). Mesenbourg cites one set of commentators for the premise that “lawyers cannot ignore the fact that social media affects every single stage of the litigation process, and urges litigators to expand juror research to social sites in order to get a full and real profile [of] potential jury members.” *Id.* at 460 n.13 (citing Stephen P. Laitinen & Hilary J. Loynes, *Social Media: A New “Must Use” Tool in Litigation?*, FOR DEF., Aug. 2010, at 16). He then contrasts that premise with another commentator who wrote that “lawyers[’] use of social media research could have an adverse effect on jurors’ perceptions of the legal process in general if

been explicitly interpreted to apply to factual investigations. As Lauren Kellerhouse noted in the context of searching jurors' social media profiles, "[A] lawyer who, following Rule 1.1, knows the risks and benefits associated with social media, can quickly come to the conclusion that not searching social media during *voir dire* may be grounds for a malpractice claim."<sup>120</sup> The prudent attorney should at least consider it in serious cases, especially high-stakes civil cases and criminal cases, to the extent that juror information is provided to attorneys by the court.<sup>121</sup> Kellerhouse continues,

Therefore, as it now stands, [ABA Rule 1.1] Comment 8 does not impose an affirmative duty to search the social media accounts of potential jurors during *voir dire*. However, reasonable attorneys can recognize the profound benefits that a simple search can bring to the process and would be wise to start performing basic searches to meet their clients' expectations of using technology in their representation.<sup>122</sup>

## 2.5. And more to come

The Duty to Google is not limited to these scenarios—they instead represent a reflection of current caselaw, or more to the point, of the published cases to date in which a trier of fact and/or law determined that an attorney should have engaged in an Internet search. One can spend hours thinking of atypical scenarios in which a particular Internet search is required. Should an attorney probating a will Google death notices? Should an attorney handling an immigration case target a Google search of foreign news for information about her client? Should a labor and employment attorney research the social media profiles of an employee who threatens a suit? Unfortunately, absent clearer guidance, those searching for clarity in the Duty to Google may only obtain it by reading a "benchslap."

What these cases all have in common is that they extended an attorney's duty of fact collection, and in so doing, did not point to a specific rule, requirement, or even a guideline that Internet research was

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they feel as though their privacy is invaded—which could also hinder their willingness to be an impartial participant in the process." *Id.* (citing Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 WASH. J.L. TECH & ARTS 93, 101 (2011)). Mesenbourg comes to the fair conclusion that like it or not, some amount of digital *voir dire* is becoming (or has become) the norm. *Id.* at 485–86.

<sup>120</sup> Lauren Kellerhouse, *Comment 8 of Rule 1.1: The Implications of Technological Competence on Investigation, Discovery, and Client Security*, 40 J. LEGAL PROF. 291, 297 (2016).

<sup>121</sup> See Lundberg, *supra* note 95, at 125 n.1 ("Multiple decisions have imposed some sort of obligation on attorneys to conduct Internet research on jurors or members of the venire in order to preserve a possible claim of juror misconduct or non-disclosure on appeal").

<sup>122</sup> Kellerhouse, *supra* note 120, at 298.

now warranted. What is concerning about all of them is that the attorneys involved violated a duty to their client that they *may not have known existed until after they violated it*.

It is clear from these cases that a technological revolution is changing the way attorneys must research their work. But is the Duty to Google just another example of how attorneys must become proficient in technology to meet their professional ethical obligations? What kind of professional duty is it? And when should it arise? These questions form the basis of the next section of this article.

### 3. Toward a codified Duty to Google

There is ample support for, at least, enhancing Model Rule 1.1 to more fully describe an attorney's responsibility to maintain technological proficiency, which could include guidance with respect to factual investigation of legal matters.<sup>123</sup> Commentators are already calling on the ABA to provide guidance of the contours and extent of an attorney's duty to use technology in practice.<sup>124</sup> Even then, it is clear, as Heidi Frostestad Kuehl noted, "[S]cholars and judges are still grappling with a functional definition for what would constitute competent representation within the era of this widely expanding digital age for attorneys."<sup>125</sup>

Attorneys worried that they are not researching enough (or at all) and taking on risk need some sort of relief. Reliance on judicial opinions is reactive, as described above. Knowledge of where a landmine sits is much more useful prior to stepping on it. Attorneys could consult their state bar for more focused guidance, but reliance on state bar ethical opinions is misplaced. Those opinions are difficult to find and vary from state to state.<sup>126</sup> Also, they can lack the dependability of a baseline rule from which deviation invites explanation,<sup>127</sup> if they are followed at all.<sup>128</sup>

<sup>123</sup> See Johnson, *supra* note 16, at 186 ("A better option for the ABA and state regulators might be to follow in the footsteps of states like Colorado, Indiana, and New York, and edit the technology competence Comment directly. Providing additional clarity regarding what the term 'relevant technology' encompasses may be seen by additional states as a method of providing clarity to lawyers seeking to fulfill their obligations.")

<sup>124</sup> Katy Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853 (2017).

<sup>125</sup> Kuehl, *supra* note 21, at 4.

<sup>126</sup> See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 752 (2002) (noting variance in opinions); Lawrence K. Hellman, *When Ethics Rules Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 323–24 (1996).

<sup>127</sup> See, e.g., Lawrence K. Hellman, *A Better Way to Make State Legal Ethics Opinions*, 22 OKLA. CITY U. L. REV. 973 (1997) (discussing the problems with the current scheme of non-authoritative state ethics opinions and offering suggested reforms and value analysis of a controlling form of ethics opinions).

<sup>128</sup> Green, *supra* note 126, at 742

What current guidance exists about the Duty to Google is in a comment to a Model Rule. As commentators have noted, states interpret comments to the Model Rules (and even the rules themselves) inconsistently and quite differently, making the boundaries of acceptable conduct even more murky.<sup>129</sup> As Peter A. Joy noted, “[E]ven jurisdictions with an identical ethical rule often interpret and apply the rule differently.”<sup>130</sup> Multiple states have made changes to the rule, though none have specifically discussed an attorney’s duty of investigation.<sup>131</sup> The current landscape is unclear, at best. Katy Ho put it bluntly: “Attorneys cannot fulfill their duty of competence if they do not know what it entails.”<sup>132</sup>

Elevating the Duty to Google from a comment to a clearly described rule makes some sense. While its interpretation may still be murky, it is clear from the Duty to Google cases thus far that some, if not many, attorneys can use as much guidance as rulemakers can provide. Further, the exercise in drafting such a rule would invite and advance the development of the professional norm of a “reasonable investigation.” Adopting such a rule would also hasten the creation or enhancement of a much-needed system of education and communication to the bar promoting technological proficiency.

Technology has changed factual investigation, much in the same way that it has changed essentially all of legal practice.<sup>133</sup> It is possible that the cases above reflect some resistance to that change.<sup>134</sup> In fact, legal practice seems even more resistant to adapt to technology than other industries.<sup>135</sup> Introducing a codified rule would help reduce that resistance, which would result in better, more affordable legal service to clients.<sup>136</sup> This section proposes a rule of professional conduct that is intended to be clear enough for lawyers to understand their ethical duties to investigate but broad enough to encompass emerging technologies. Its purpose is to provide a framework for an observer to appreciate the many different

129 See Johnson, *supra* note 16, at 173; Hellman, *supra* note 127, at 323–24, 975–76.

130 Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers’ Conduct*, 15 GEO. J. LEGAL ETHICS 313, 330 (2002).

131 Johnson, *supra* note 16, at 173.

132 Ho, *supra* note 124, at 870.

133 See Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1, 2 (2015).

134 *Id.*

135 See *id.* at 2 n.12 (borrowing the observation that “many lawyers still practice law ‘as if it were 1999’”) (quoting Nicole Black, *Lawyers, Technology and a Light at the End of the Tunnel*, THE DAILY RECORD (Nov. 6, 2013), <http://nylawblog.typepad.com/suigeners/2013/11/lawyers-technology-and-a-light-at-the-end-of-the-tunnel-.html>).

136 Ho, *supra* note 124, at 867 (“The ABA should take a disciplined approach to rule-making by explicitly identifying areas in which technology amplifies concerns . . . . As a normative matter, setting explicit rules will help manage expectations and provide a minimum standard for attorneys to meet.”).

circumstances that may affect an attorney’s investigation of a matter using electronic search technology, which can include the cost of the search, resources of the client, and availability of technology. It is also intended to be somewhat deferential to an attorney’s judgment, to compensate for an *ex post* tendency to hold an attorney overly accountable for a mistake that seems more obvious looking backward from now.

### 3.1. Proposal for a codified Duty to Google

A codified Duty to Google—we could call it a “Duty of Technological Use in Investigations”—may best fit as language in a rule of professional conduct, likely Model Rule 1.1. An example of this language might read like the following:

Competent handling of a particular matter includes a reasonable investigation of the factual circumstances surrounding that matter, including the competent use of common electronic search technology.

A comment to this language would provide more detail on two important factors: the breadth and the depth of an investigation. First, the comment would describe the breadth of an acceptable investigation:

Factual circumstances surrounding a matter will differ in each matter, but may include facts stated in a legal filing; facts regarding a client, witness, or adverse or third party; facts conveyed to a lawyer from the lawyer’s client; facts upon which a lawyer’s legal opinion necessarily relies; or facts about a potential juror.

Next, the comment would describe the depth of an acceptable investigation:

Circumstances surrounding a matter will also differ in each matter and may differ over time during a representation. In determining the scope of an investigation, a lawyer should take general standards of reasonableness and defensibility of decisionmaking into account. Factors used in determining the “reasonableness” of a fact investigation include: (a) the issues and/or amount at stake in the matter; (b) the resources available to the attorney, including where applicable, the resources of the client; (c) the availability of and cost to locate the overlooked information at the time of the search.<sup>137</sup> Reasonableness should also (d) account for

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<sup>137</sup> This standard may be similar to the reasonableness standard for a factual inquiry with respect to disclosures made in discovery. See Patrick Oot, Anne Kershaw & Herbert Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 542 (2010) (quoting a judge’s discovery ruling that when challenging a reasonable inquiry, counsel should consider “(1) the number and complexity of the issues; (2) the location, nature, number and availability of potentially relevant

the availability, cost, and adoption of new search technologies.<sup>138</sup> Lastly, the reasonable standard should take into account the lawyer's professional judgment in evaluating the results of the lawyer's search, including evaluating the reliability of the sources of search results.

Certain specific phrases are discussed below.

### 3.1.1. "Competent handling of a particular matter includes"

This phrase intends to bring the new language in line with the existing framework of competent representation, as seen in Model Rule 1.1. This additional language should be considered a clarification of the parameters of the existing duty to investigate, and not a new duty. This additional language is more direct and provides more guidance than the current regime, which requires attorneys to take a general duty of competence and apply it to a duty to keep up with technology. It provides a framework for an attorney to use in creating a process for factual investigation, and a basis for defending the choices made as to the extent of that investigation.

### 3.1.2. "A reasonable investigation of the factual circumstances surrounding that matter"

"Reasonable" is the word doing the most work here. The duty to investigate has conceptual limits and should be proportional to a reasonable degree. An attorney must consider when searching for information about a matter ceases to be a benefit—at that point, the attorney should stop. In the capital case context, the Supreme Court has noted that attorneys need not "scour the globe on the off chance something will turn up" and that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."<sup>139</sup> However, the lesson from the cases described in section 2 is that an attorney must make some sort of Internet search, and critically, the attorney must successfully locate important information.<sup>140</sup> There is an allure to simply relying on the comfortable language requiring an "inquiry into and analysis of the factual and legal elements of the problem and the use of methods and procedures meeting the standards of competent practitioners."<sup>141</sup> But this is an *ex post* requirement; to satisfy the duty the attorney must find the golden nugget of

witnesses or documents; (3) the extent of past working relationships between the attorney and the client, particularly in related or similar litigation; and (4) the time available to conduct an investigation").

<sup>138</sup> Accordingly, lawyers would not be required to be "early adopters" of advanced search technology under most circumstances, but would be required to stay reasonably current with widely-adopted technology.

<sup>139</sup> *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

<sup>140</sup> See Anna Massoglia, *The Voodoo and How-To of Lawyers' Duty to Search the Internet*, LAWYERIST.COM (Aug. 8, 2016), <https://lawyerist.com/104698/voodoo-howto-lawyers-duty-search-internet/>.

<sup>141</sup> MODEL R. PROF'L CONDUCT 1.1 cmt. 5.

information. To fail to find the nugget is to violate the duty.<sup>142</sup> If no nugget exists, no searching is required. *Strickland v. Washington* provides an example. There, the Court noted that “choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”<sup>143</sup>

This phenomenon has been examined in the legal research context. Ellie Margolis noted that when judges sanction attorneys for inadequate searches of legal authority, they do so mainly “based on the perception that the authority should have been known, or could have been easily found through basic research techniques known to all lawyers. Many courts judge the reasonableness of the research by the sufficiency of the argument, rather than looking at the research itself.”<sup>144</sup>

George Cohen described the extent of the duty to investigate as wide, but not unlimited, and subject to reasonableness:

It is true that any duty to investigate that the lawyer owes to the client under the Model Rules is not boundless. The duty to investigate is subject to a reasonableness requirement. Thus, a lawyer must calculate whether the likely value of the investigation exceeds the costs. The scope of the duty to investigate can also be limited by the nature and duration of the representation, as well as by specific agreements between the client and the lawyer concerning the scope of the representation or the type of advice sought.<sup>145</sup>

Also, Cohen has noted that statutes or guidelines requiring that an attorney have actual knowledge of a certain fact—for instance, whether their client has skipped bail—do not necessarily require an investigation, even if a reasonable attorney might suspect that fact to be true.<sup>146</sup> As Cohen put it, “Most duties to investigate . . . are created by substantive rules, not by the scienter standard.”<sup>147</sup> Further, the *Strickland* Court allowed for instances in which an attorney may rely on a client’s statements with respect to reasonably limiting an investigation, noting that “when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.”<sup>148</sup>

142 See Ho, *supra* note 124, at 868 (“What happens if an attorney mistakenly uses a new technology and gets sanctioned—what additional steps should she have taken to avoid a breach in her ethical duty of technological competence?”).

143 *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

144 Margolis, *supra* note 133, at 99.

145 Cohen, *supra* note 33, at 128.

146 See *id.* at 125–26.

147 *Id.* at 126.

148 466 U.S. at 691.

Evaluating that judgment will be fact-specific and should be viewed under a reasonableness standard.<sup>149</sup> Some parallels exist and perhaps some guidance can be found in courts' application of the standard for effectiveness of counsel as it relates to an attorney's duty to investigate facts in a criminal case, adopting the language from *Rompilla v. Beard* that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."<sup>150</sup> For example, is a result on the second or third page of search engine results so obviously available that the failure to notice it is sanctionable?<sup>151</sup> This question is likely to be fact specific. It bears noting for any reasonableness determination that 95% of Google searchers never make it to the second page of results.<sup>152</sup>

Looking back from an *ex post* approach has its dangers. It is important that judges avoid the approach in which the *value* of the overlooked information affects the evaluation.<sup>153</sup> A judge should instead focus on the *cost* of locating that information. For example, if a free Google search would not have located the information that the attorney missed, but a professional search firm would have found that information, the cost of the search firm should be a factor in determining reasonableness.

In judging where a proper amount of Internet searching occurred, a ruling authority should be very careful to remember that timing is also an issue.<sup>154</sup> Internet searches are ephemeral—taking judicial notice of an Internet search that the judge makes during the case creates a temporal problem.<sup>155</sup> A reality of the Internet is that content comes and goes in a literal instant, and many links—perhaps even the ones in the footnotes

149 See Margolis, *supra* note 133, at 102 (examining the use of the Internet in determining the sufficiency of legal research and noting that "[s]ince the court measures reasonableness by considering what other attorneys in a similar position would do, it follows that the research techniques employed by the majority of lawyers are those that are standard in practice, and thus set the bar for reasonableness").

150 *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

151 See Jessica Lee, *No. 1 Position in Google Gets 33% of Search Traffic*, SEARCH ENGINE WATCH (June 20, 2013), <https://searchenginewatch.com/sew/study/2276184/no-1-position-in-google-gets-33-of-search-traffic-study>.

152 *Id.*

153 This may cause some tension to the extent that a judge views a Duty to Google sanction in the same vein as a discovery sanction. Discovery sanctions in particular can require a court to examine the importance of the information in question. See, e.g., FED. R. CIV. P. 37(e)(1) (requiring that a court considering discovery sanctions for spoliation of evidence weigh the "prejudice to another party" of the loss of evidence, which necessarily requires an examination of that evidence's importance to the party); *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 205 (1999) (stating that in discovery, "[a]n evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response").

154 See Jill Lepore, *Can the Internet Be Archived?*, THE NEW YORKER (Jan. 19, 2015), <http://www.newyorker.com/magazine/2015/01/26/cobweb>.

155 *Id.* (noting that "[t]he average life of a Web page is about a hundred days" and that "[t]he Web dwells in a never-ending present. It is—elementally—ethereal, ephemeral, unstable, and unreliable."). Link rot is a serious issue, especially for judicial opinions. One article notes that over a third of citations to the Internet in published appellate court opinions in Kentucky between June 2011 and July 2017 no longer worked. See Michael Whiteman & Jennifer Frazier, *Internet Citations in Appellate Court Opinions: Something's Still Rotting in the Commonwealth*, 82 *Bench & B.*, July/Aug. 2018, at 20, 21.

of this article<sup>156</sup>—will disappear over time, a phenomenon known as “link rot.”<sup>157</sup> Attorneys should be judged by the information available in such a search at the time they should have made it. A judge performing a proper search during the case is searching later—often much later—in time, and the judge’s search results in the present will likely be different than the attorney’s results in the past.

A different sort of availability issue exists with social media information. Most social media platforms have privacy settings that allow their users to control public access to any content that the users post.<sup>158</sup> Social media users can, usually, change those settings at any time. So information on, for example, a juror’s bias that is seemingly available upon review today may not have been available at the time of voir dire. Practically, there is little way to determine the availability of such information in the past, without discovery into the history of the privacy settings of the juror’s social media account.

“A reasonable investigation of the factual circumstances surrounding that matter” is also intended to account for the flexibility in “factual circumstances” specific to each matter, with the commentary fleshing out some examples. “Surrounding that matter” is also intended to be extremely broad.

### 3.1.3. “Including the competent use”

This language intentionally carries with it a professional responsibility for information literacy. It requires an attorney to evaluate sources in a more advanced way than a pre-Internet search comprising a check of a limited number of vetted information sources. Internet search engines tend to rank results by popularity, not veracity, and display unreliable information next to reliable information.<sup>159</sup> It is easy to confuse a misleading source with an “institutional depository of information.”<sup>160</sup>

156 As much as it pains the author of this article to note.

157 See Coleen M. Barger, *On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 438 (2002). Professor Barger points out the ironic observation of law librarian Mary Rumsey, author of a study about link rot, that “authors who cite Web sites instead of paper sources probably think they are making their sources more available to readers, rather than less.” *Id.* (quoting Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 L. LIB. J. 27, 34 (2002)).

158 For example, on Facebook, a user can choose an “audience” for each piece of account information or content—and can choose between making that content essentially unpublished, only available to the user’s Facebook “friends,” or available to the general public. See *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242> (last visited Feb. 20, 2021).

159 Baker, *supra* note 4, at 570 (observing that “information retrieval is generally now reliant upon algorithms to provide ‘relevant’ results. The list of relevant results provided with relative ease is an absolute benefit of using algorithms in law. It allows for great efficiency, which equates to greater access to justice. However, the problem is how competent it all looks, enticing lawyers to blindly rely on the results.”).

160 Barger, *supra* note 157, at 422.

As Michael Whiteman has noted, “The ease of using Google can lull an attorney into a false sense of security, but attorneys should be cautious because ‘search engine returns are incomplete for research purposes.’”<sup>161</sup>

It should also be clear that the *attorney's judgment* is subject to the duty, and not the search algorithm's effectiveness.<sup>162</sup> This relationship between attorney and algorithm has been aptly described as the attorney acting as an “information fiduciary.”<sup>163</sup> Jamie J. Baker, who first adapted the term to attorneys, concludes that “competent lawyers must understand the information they rely on and provide advice to a client that is the result of the lawyer's independent, educated judgment.”<sup>164</sup> In this way the attorney's duty to interpret search results does not differ much from the attorney's interpretation of, for example, due diligence research or a form contract.

It is possible to fashion criteria for evaluating an Internet source, of course. Collen Barger has suggested that a critical Internet researcher should examine “a site's completeness, along with its author and publisher, source of data, language, accuracy, currency, coverage, archiving, workability, stability, user interactivity, cost, and licensing.”<sup>165</sup> Technological proficiency is, once again, essential to the reasonableness of the attorney's judgment in interpreting search results. Lauren Kellerhouse notes that attorneys perform a similar task in interpreting search results in predictive coding searches in discovery, where attorneys must understand the technology to make sure it has worked correctly.<sup>166</sup> Kellerhouse notes that this technical proficiency is in harmony with comment 8's charge that the attorney should “keep abreast of changes in the law and its practice, including the *benefits and risks* associated with relevant technology.”<sup>167</sup> Attorneys must then understand search technology enough to critically evaluate its results.

### 3.1.4. “Of common electronic search technology”

This specific language is intentionally broad. Jamie Baker notes that the Model Rules with respect to technological competence are drafted as

161 Whiteman, *supra* note 53, at 46.

162 Baker, *supra* note 4, at 574 (noting that “a lawyer, at a minimum, must be aware of the issues surrounding the use of algorithms and use reasonable care”).

163 *Id.*

164 *Id.*

165 Barger, *supra* note 157, at 426 n.24 (citing Mirela Roznovschi, *Evaluating Foreign and International Legal Databases on the Internet*, LLRX (Feb. 1, 1999), <https://www.llrx.com/1999/02/features-evaluating-foreign-and-international-legal-databases-on-the-internet/>).

166 Kellerhouse, *supra* note 120, at 298–300. Predictive coding is a method of machine-aided document review by which a computer algorithm and “machine learning” assist a reviewer in locating relevant information in a set of electronically stored information. *Id.* at 298.

167 *Id.* at 299 (quoting MODEL R. OF PROF'L CONDUCT 1.1 cmt. 8).

“purposefully broad,” such that they can address “technologies that have not yet been conceived.”<sup>168</sup> However, the guidance thus far published about these rules has been extremely narrow, focusing mainly on data security.<sup>169</sup> So while these rules *can* adjust to new technologies with respect to Internet searching, absent specificity in the rules, attorneys are on their own to extrapolate the rules to new technologies.<sup>170</sup> Indeed, there is some support for intentional flexibility in the rules and guidelines with respect to technological competence *because* technological innovation will invariably move faster than those rules and guidelines.<sup>171</sup>

Most of this article assumes that Google is the first, best, and last piece of technology to provide for an increased ability to conduct factual investigation into a legal matter. That is, of course, shortsighted. Somewhere in the world an entrepreneur is developing a piece of technology that will become as widely used as Google, and will affect many aspects of life, including factual investigations. At what point does that technology become the next “Google,” in other words, “common” technology, and thus part of the “Duty to Google”?

Some parallels can again be found in the development of electronic legal research. In one of the first, but still very relevant, discussions of how access to the Internet changed legal research, Michael Whiteman discussed the question about what standard an attorney should follow in conducting legal research.<sup>172</sup> To do so, Whiteman cited a standard from a California Supreme Court case, *Smith v. Lewis*,<sup>173</sup> where the Court wrote,

As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.<sup>174</sup>

Whiteman concludes, “Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then

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<sup>168</sup> Johnson, *supra* note 16, at 170 (quoting Baker, *supra* note 4, at 557).

<sup>169</sup> *See id.*

<sup>170</sup> *See id.* (noting that “state regulators enacting and enforcing the Comment, as well as scholars who have discussed it, have instead provided narrow, prescriptive guidance and enforcement”).

<sup>171</sup> *See id.* at 189.

<sup>172</sup> Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney’s Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000).

<sup>173</sup> 530 P.2d 589 (Cal. 1975).

<sup>174</sup> Whiteman, *supra* note 172, at 91 (quoting *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975)).

lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.”<sup>175</sup> He points to the following factors to determine whether the use of an electronic source is a “standard technique”: the level of adoption and whether attorneys charge for its use.<sup>176</sup>

Ellie Margolis chronicled the evolution of electronic legal research technology, noting where a tool made the key jump from “luxury” to “necessity.”<sup>177</sup> Specifically, Margolis pointed to Shepardizing as an example of a technology that is so ubiquitous in legal practice as to be required for an attorney’s legal research work to be competent.<sup>178</sup> She notes that certain factors contributed to the “expectation” that a technology would be used for competent legal research: (a) its widespread use among attorneys in legal representation, (b) its inclusion as a billed service passed on by attorneys to clients, (c) its adoption as part of a practical curriculum in law schools, and (d) its essentialness in accessing certain sources of information.<sup>179</sup>

### 3.2. Application of the Duty to Google

Following a Duty to Google may compel attorneys to handle the intake and management of matters a little differently. As a matter of best practices, absent an explicit rule, attorneys should carefully document their Internet searches and results. They should consider drafting a memo to file describing their interpretation of the results, along with any potential follow-up research or tasks. Importantly, attorneys should recognize at the time that the memorialization of this process cuts into the very time- and money-saving benefits of the electronic search, and document their decision to discontinue a line of investigation.

To that end, an attorney has to build this additional fact investigation into the cost of representation. After all, attorneys often bill by the hour and while Internet searches take milliseconds, scrolling through search results, reading, digesting, and following up on those results can take some time. Is an attorney’s investigation now more expensive, because more information is available, even though relevant information is much easier to locate?<sup>180</sup>

175 *Id.*

176 *See id.* at 91–102.

177 Margolis, *supra* note 35, at 119.

178 *Id.* at 92. Indeed, it is notable that “Shepardizing,” like “Googling,” is a proper noun that has become ubiquitous.

179 *See generally id.* at 107–10.

180 That technology would reduce time to perform a task but nevertheless increase cost in litigation has for years been the reality in litigation discovery. *See generally* Rebecca Simmons, Monica Lerma & Steve S. McNew, *Discovery in 2016: New Rules, Cases and Technology*, 74 *ADVOC. (TEX.)* 61 (2016).

Given these cost considerations, it may be appropriate for an attorney in many instances to delegate the required investigation duty to a paralegal or support staff. But in which instances? The line is certainly not clear; however it is common and ethically proper for attorneys to delegate their professional responsibilities, under supervision.<sup>181</sup> That being said, the higher the stakes and the more potentially important the information, the more the attorney will want to be involved in the Internet search and analysis.

The existence of the attorney's rationale for interpreting search results will provide a factfinder with the ability to evaluate the attorney's judgment at the time, rather than in a backwards-looking manner. In the capital case context, the Supreme Court in *Wiggins v. Smith*<sup>182</sup> made a telling distinction in finding an inadequate investigation by concluding, "The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."<sup>183</sup> Attorneys should be ready to evidence their judgment in setting the scope of an investigation, including their use (or lack of use) of available search technology.

Should an attorney Google each and every client, every matter? It is hard to say. There do not appear to be any recent cases holding that even though the attorney didn't perform an Internet search, the attorney's investigation was nonetheless sufficient. An attorney handling a routine matter for a longstanding client may not need to Google the matter, for example.

It seems likely that in most matters of any size, some measure of Googling is required. Even a cursory Google search seems prudent in almost every circumstance. Think about that for a moment. In a little more than a generation, an attorney's duty to investigate has grown to the point where, at the absolute minimum, the attorney needs Internet access and the ability to make a reasonably skilled Internet search.<sup>184</sup>

The reasonableness of frequency and intensity of searches should depend on the issues and resources available. Attorneys would be well advised to set up automatic "alerts" for certain keywords involving important clients or matters, so that they are automatically notified of potentially important new Internet content.<sup>185</sup>

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**181** See R. Thomas Howell Jr. & Eric G. Orlinsky, *What Paralegals Can Do: And the List Goes on*, 16 BUS. L. TODAY 17 (2007).

**182** 539 U.S. 510 (2003).

**183** *Id.* at 526.

**184** See Margolis, *supra* note 35, at 110 (referencing the "Google Generation" of young attorneys who grew up using the world wide web constantly to learn about the world).

**185** For example, Google offers free Google Alerts, in which a user can have a daily, weekly or monthly email sent to them collecting new articles that meet user-defined keywords. See, e.g., *Google Alerts*, GOOGLE, <https://www.google.com/alerts> (last visited May 12, 2021).

## Conclusion: Looking ahead

The bar and legal academia should incorporate Internet fact-finding into basic legal training and continuing legal education.<sup>186</sup> Several CLEs exist to teach attorneys how to conduct effective Internet searches,<sup>187</sup> but they tend to focus on building on a core competency that each attorney possesses. It is likely that many attorneys can benefit from fine-tuning their search skills, but it may be more impactful for more CLEs to focus on basic electronic search skills. Attorney technological competency is famously poor, despite such competency being an ethical requirement.<sup>188</sup> There are anecdotal and empirical examples of skilled attorneys who lack technological competency.<sup>189</sup> It may take an outreach program to educate the bar to bring its overall competency up to the appropriate level—if that level is discernible. This outreach program would incorporate basic skills for attorneys who need them but would feature recent technology, helping attorneys “keep up with the times.” Further, as Ellie Margolis pointed out, advances in technology *raise* standards for competency, meaning that the expectations judges and clients have for attorney fact investigation are now higher (and will increase).<sup>190</sup>

In the future, it is not difficult to see more state bar associations requiring technology CLE credit in the same specialized way that they require ethics CLE credit, and even to see law schools offer technological competency courses.<sup>191</sup> While practicing attorneys reading this paragraph may have audibly groaned at *yet another* licensure requirement, closing the “technology gap” is a worthwhile enterprise. Attorneys who lack basic skills and resist innovation would be at least exposed to the technology

<sup>186</sup> See Browning, *supra* note 12, at 196 (“But as a practical matter, how do we go about achieving the goal of technological competence? The key is education.”).

<sup>187</sup> See, e.g., *CLE Webinar Covers Ethics of Social Media Research*, INTERNET FOR LAWYERS (June 2020), <https://www.netforlawyers.com/content/social-media-research-ethics-mcle-0227/>; *Google-Based Legal Research for Lawyers (On Demand)*, LAW PRACTICE CLE (Nov. 4, 2020), <https://lawpracticecle.com/courses/google-based-legal-research-for-lawyers-on-demand/>.

<sup>188</sup> Britton, *supra* note 20, at 34 (“Even back in the 19th century, lawyers were failing to adopt the newest technology—the telephone. In 1891, 7,000 businesses in the New York/New Jersey area had telephones. Among those, there were 937 doctors, 363 saloons, 315 stables, and last were 146 lawyers. Lawyers’ biggest technological challenge, then, has nothing to do with a specific technology; the hesitation and reticence with which they adopt *any* technology is the primary obstacle they must overcome.”).

<sup>189</sup> Michael E. McCabe Jr., *What They Didn’t Teach in Law School: The Ethical Duty of “Technical Competence,”* MCCABE IP ETHICS LAW BLOG (Aug. 17, 2015), <https://www.ipethicslaw.com/what-they-didnt-teach-in-law-school-the-ethical-duty-of-technical-competence/> (describing a colleague, a talented patent lawyer who never used a computer, and urging attorneys to take CLEs to become technologically competent).

<sup>190</sup> Margolis, *supra* note 35, at 111.

<sup>191</sup> See Browning, *supra* note 12, at 196. Indeed, as Browning notes, Suffolk University Law School offers a six-course Legal Innovations and Technology Certificate designed for practicing attorneys. *Id.*

they should be using, and more technologically savvy attorneys would have a good reason to stay current.

It is clear that attorneys have a requirement to perform an Internet search about prospective (and current) clients, witnesses, potential matters, and in certain cases, potential jurors. It is less clear where that requirement extends to other areas of legal representation and troubling that those areas may only be discovered after an attorney faces sanctions. Reliance on ethical opinions from state bar journals to avoid these sanctions is not enough. For guidance's sake, it makes sense to codify this requirement as part of the rules governing an attorney's professional responsibility. Drafters of such a rule face a real challenge of scope and depth as they search for the right balance between expectation and fairness. Greater detail with respect to an attorney's technological competence will help the bar stop searching for answers about its Duty to Google.