

THE SEARCH FOR CLARITY IN AN ATTORNEY'S DUTY TO GOOGLE

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INTRODUCTION

Discussion of an attorney's "Duty to Google"¹ is filtering into court opinions, articles and Continuing Legal Education classes.² Attorneys

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¹ 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 (2014) (citing *Google*, DICTIONARY.COM, <http://dictionary.reference.com/browse/google?s=>) ("[T]o use a search engine such as Google to find information, a website address, etc., on the Internet."). This Article uses the term "to Google" to mean "to perform an internet search."

² See, e.g., *The Cybersleuth's Guide to the Internet: Super Search Engine Strategies for Discovery, Trial Preparation, and to Successfully Complete Transactions*, NEW YORK CITY BAR CENTER FOR CLE (July 25, 2013), https://www.nycbar.org/CLE/pdf/07_13/edu/Super%20Search%20Engine-072513.pdf (CLE description which states that attorneys can "[l]earn how the Internet is changing the way legal professionals need to research and run their practice to competently represent their clients." It continues:

Find out if failing to "Google" as part of the due diligence process could keep you from winning a case or successfully completing a transaction. Uncover the best research strategies and learn to master Google. Don't be left behind in exploiting this gold mine of information that will assist you in meeting your investigative research obligations...

Id.

have been reprimanded or sanctioned in cases in which they failed to conduct an internet search for relevant information about a matter, whether it is about their own client,³ a party,⁴ witness,⁵ or third party,⁶ and that failure either caused harm or wasted the court's time.⁷

The "Duty to Google" has its roots in an attorney's duty to investigate the facts surrounding her work, which is commonly tied to

³ See, e.g., *Cajamarca v. Regal Entertainment Group*, 2012 WL 3782437 (E.D.N.Y. Aug. 31, 2012) (In discovery, attorney did not search own client's publicly available social media posts which would have cast severe doubt on her employment discrimination claims); *In the Matter of Tony L. Axam*, 297 Ga 786 (Ga. 2015) (Attorney should have verified transaction details before assisting in transaction).

⁴ *Munster v. Groce*, 829 N.E.2d 52, 62 n 3 (Ind. Ct. App. 2005) (failure to Google absent defendant made attempted service void); *Dubois v. Butler ex rel. Butler*, 901 So.2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (Attorney's failure to Google in attempt to locate missing defendant was denounced by the Court); *Weatherly v. Optimum Asset Mgmt., Inc.*, 923 So. 2d 118 (La. App. 2005) (Tax sale notice was invalid where attorney failed to Google address before attempted service of current owner, who lived out of state).

⁵ *Cannedy v. Adams*, 2009 WL 3711958 at 280 (C.D. Cal. 2009) (Failure to search for and find evidence of a profile containing a purported molestation victim's recantations was ineffective assistance of counsel); *Griffin v. Maryland*, 192 Md. App. 518, 524 (2010) (citing Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U.L. REV. 1, 1-2 (2009/2010) and noting that "it should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.")

⁶ *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295, 303 (Iowa 2013) (Failure to search and discover that a deal that a client was considering was an obvious scam).

⁷ *Johnson v. McCullough*, 306 306 S.W. 3d 551, 598-599 (Mo. banc 2010) (Failure to object to juror before trial was waived where juror's bias was available to attorneys upon an internet search).

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the Model Rules of Professional Conduct (hereinafter “Model Rules”).⁸ The Model Rules state that “competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”⁹ Searching for publicly-available information is then “encompassed within an attorney's duty to investigate,” and thus part of an attorney’s core competency.¹⁰ This competency includes technological proficiency, not just rote use.¹¹

Notably to that effect, the American Bar Association has included technological competence as part of the duty of competence described in Rule 1.1 of the Model Rules, and as of this writing, 38 states have adopted that rule in some way.¹² (Though as Mark Britton noted, this

⁸ MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 5 (2015) (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.”) Of course, the Model Rules do not in and of themselves have legal effect – states much 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, 180-184 (2019).

⁹ MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 5 (2015).

¹⁰ Vanessa S. Browne-Barbour, *Why Can't We Be Friends: Ethical Concerns in the Use of Social Media*, 57 S. TEX. L. REV. 551, 561-562 (2016), quoting Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 875-876 (2014).

¹¹ Browning, *supra* note 8, at 196-197 (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).”)

¹² 9 MODEL RULES OF PROF’L CONDUCT R. 1.1 (Am. Bar Assoc. 2016) (“Model Rules”) The rule states that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”; Lori D. Johnson, *Navigating Technology*

adoption is suspiciously slow and incomplete).¹³ “Competence” is of course subject to interpretation, but is defined by the rule as requiring “inquiry into and analysis of the legal and factual elements of the [legal] problem.”¹⁴ Lori Johnson notes that “[e]xisting 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.”¹⁵

Googling is an extraordinary 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.”¹⁶ As Andrew Perlman concluded, “[s]imply put, lawyers cannot just stick their heads in the sand when it comes to Internet investigations.”¹⁷ Such an “ostrich-like” attorney would risk more than just violating a state rule of professional conduct; as the cases below illustrate, a failure to investigate the facts of a matter can expose an attorney to allegations of ineffective assistance of counsel and malpractice.

Part I of this Article surveys cases of these “ostrich” occurrences

Competence in Transactional Practice, 65 VILL. L. REV. 159, 163 (2020), <https://digitalcommons.law.villanova.edu/vlr/vol65/iss1/3> (“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.”).

¹³ Mark Britton, *Behind Stables and Saloons: The Legal Profession's Race to the Back of the Technological Pack*, 90 FLA. B.J. 34 (Jan. 2016) (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.”).

¹⁴ 9 MODEL RULES OF PROF’L CONDUCT R. 1.1 (Am. Bar Assoc. 2016).

¹⁵ Johnson, *supra* note 12, at 165-166.

¹⁶ Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S. C. L. REV. 557, 570 (2018).

¹⁷ Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 PROFESSIONAL LAWYER 22, 28 (2014).

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and recent commentary, noting the curious emergence of googling as a logical extension of an attorney's duty of investigation.¹⁸ Part II examines the sources of the duty of investigation, and in doing so, speculates as to the best location for a unified Duty to Google. Part III examines the likely scenarios in legal practice where the Duty to Google could apply. Part IV examines the extent of the Duty to Google in those circumstances, in an attempt to find some guidance for attorneys to meet this emerging professional requirement. It explores how an emerging technology might become so ubiquitous that it becomes part of an attorney's investigation duty, and also whether it is possible to provide a baseline for an extent of reasonable use of that technology. Part V attempts to define the parameters of a codified Duty to Google as an addition to, or its own, rule of professional conduct. The Article concludes with thoughts of the future, and how further advances in technology may shape this duty in the years to come.

I. THE CURIOUS APPEARANCE OF THE DUTY TO GOOGLE

The "Duty to Google" contemplates that certain readily-available information on the public internet is so accessible that it *must* be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both. Beyond reputational embarrassment and client dissatisfaction, courts can issue – and have issued – sanctions for an attorney who fails to Google pertinent information. These sanctions can be monetary, in the form of refunded client fees and other damages based on the error, or could take the form of prescribing attorney training or a certification that Googling will be part of future conduct. The latter sanctions are of the nature of a public reprimand, a "benchslap"¹⁹ that creates bad press in an industry that

¹⁸ Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 862 (2014) (Reviewing cases and concluding that "[L]egal 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.")

¹⁹ This term is colloquial, and refers to an admonishment from the bench to a misbehaving counsel (or litigant). See Dwight H. Sullivan & Eugene R. Fidell, *Winding (Back) the Crazy Clock: The Origins of a Benchslap*, 19 GREEN BAG 2D 397 (2016) ("'Benchslap' made its Black's Law Dictionary debut in the 10th edition, defined as: 'A

relies on reputation.²⁰

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 her client, adversary, facts, and even potential jurors. These cases show that a savvy attorney satisfying her Duty to Google should consider at least the following sources in her internet research: social media evidence, the location of missing witnesses or parties, verifiable facts in dispute, and even the attorney's own client.

a. The Duty to Google the Location of Missing Witnesses and Parties

Perhaps the most obvious instance 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*,²¹ 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, do a public records search or

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.”) Citing BLACK'S LAW DICTIONARY 185 (10th ed. 2014)”; Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC: JALWD 109 (2014).

²⁰ Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176-183 (2008) (Discussing the importance of attorney reputation); *id.* at 176 (“Most obviously, lawyers' reputations are important for clients planning to hire an attorney. In the absence of mechanisms that publicly grade attorneys, clients' means of selecting lawyers are limited to reviewing the lawyers' objective qualifications (e.g., their educational background), interviewing candidates, contacting references, and word of mouth.”).

²¹ 829 N.E.2d 52, (Ind. Ct. App. 2005).

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an internet search.²² Worse still, the court itself performed a search and found that it 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.²³

In a similar case in Florida, *Dubois v. Butler*,²⁴ 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.²⁵ The court found that an internet search was an “obvious” avenue that the plaintiff ignored.²⁶ In taking issue with the plaintiff’s sole call to directory assistance, 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.”²⁷

In *Weatherly v. Optimum Asset Mgmt., Inc.*,²⁸ 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

²² *Id.*

²³ 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.

²⁴ 901 So.2d 1029 (Fla. Dist. Ct. App. 2005).

²⁵ *Id.* at 1030.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 923 So.2d 118 (La. Ct. App. 2005).

that the plaintiff was not “reasonably identifiable” because the defendant did not have basic contact information for the plaintiff.²⁹ The trial court performed its own internet search for plaintiff and, based on its results, found that the plaintiff was “reasonably identifiable.”³⁰ 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.³¹

b. The Duty to Google Verifiable Facts in Dispute

An attorney also has a Duty to Google facts in dispute, especially those advanced by a witness. In *Cannedy v. Adams*, a California court considered an ineffective assistance counsel claim in a molestation case against petitioner, a stepfather accused of molesting his stepdaughter.³² Petitioner 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.³³ The court found this failure to follow up with this witness to be ineffective assistance of counsel, in that it was unreasonable conduct.³⁴ In attempting to ascertain why petitioner’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.³⁵ The Court concluded that the attorney may have “misunderstood the workings of AOL Instant Messenger in ways that caused him to depreciate the value of the information.”³⁶ It is interesting to note that here petitioner’s attorney was held to the ineffective assistance of counsel standard – one in which the attorney’s conduct falls “below an objective standard of

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 123.

³² No. ED CV 08-1230-CJC(E), 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).

³³ *Id.* at *16.

³⁴ *Id.* at *29.

³⁵ *Id.*

³⁶ *Id.* at 34 n.19.

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reasonableness”³⁷ – not because the attorney did not use certain technology but because the attorney lacked the technical knowledge to use it proficiently. If this case is an indicator, technological proficiency, not just use, comprises the Duty to Google.

In *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Wright*,³⁸ 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.³⁹ The attorney agreed to represent the client for a 10% commission on the recovered funds.⁴⁰ 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.⁴¹ The attorney then facilitated the repayment of the Nigerian tax debt.⁴² Most readers of this Article sadly shaking their heads reading this sentence 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.⁴³ The client

³⁷ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

³⁸ 840 N.W.2d 295, 301-04 (Iowa 2013).

³⁹ *Id.* at 301.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* 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,” *Boston Globe*, May 19, 2013. <https://www.bostonglobe.com/ideas/2013/05/18/the-long-weird-history-nigerian-mail-scam/C8bIhwQSVoygYtrlxsJTIJ/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 19th 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

and attorney received no money, and the other clients who lent money were never repaid.⁴⁴ The attorney's license to practice law was suspended for a year.⁴⁵ In so doing, the Iowa Supreme Court noted (somewhat charitably) that the "evidence in this case established that a cursory internet search Would have revealed evidence that [the Client's] dream of a Nigerian inheritance was probably based on a scam."⁴⁶ 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.⁴⁷

The Duty to Google facts has also 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."⁴⁸ In *Griffin v. Maryland*,⁴⁹ the court considered the admissibility of social media evidence. Citing a seminal case in this area, *Lorraine v. Markel Am. Ins. Co.*,⁵⁰ the court noted that "[t]he design and purpose of social media sites make them especially fertile ground for 'statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical)[.]'"⁵¹ 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

American to recover it. *Id.* The 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, April 18, 2019, <https://www.cnbc.com/2019/04/18/nigerian-prince-scams-still-rake-in-over-700000-dollars-a-year.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Browning, *supra* note 8, at 193, citing *Wright*, 840 N.W.2d at 300.

⁴⁸ Browne-Barbour, *supra* note 10, at 552.

⁴⁹ 995 A.2d 791 (Md. 2010).

⁵⁰ 241 F.R.D. 534, 569 (D. Md. 2007).

⁵¹ *Griffin*, 995 A.2d at 800 (collecting cases).

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platform.⁵² The Court adopted *Lorraine*'s reasoning that "it should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."⁵³

c. The Duty to Google the Client

An attorney has a Duty to Google her own client. For example, a high-profile attorney in Georgia, Tony Axam, voluntarily surrendered his license after an ethics investigation where he failed to verify transaction information in a matter.⁵⁴ Specifically, Mr. Axam agreed to act as a "paymaster" for a client and distribute funds for the client, taking a commission as payment.⁵⁵ Mr. Axam received a wire transfer from an individual connected to his client and deposited that money into his firm operating account.⁵⁶ The Georgia Supreme Court noted that:

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. Although Axam noted that the disbursement instructions from his client came by an e-mail that referred to his client by a different name than that by which he knew her, he says that he assumed that the other name was just a trade name for his client.⁵⁷

Based upon this failure to investigate details of the somewhat shadowy transaction, and the misappropriating of funds into his operating account, Axam agreed to surrender his license.⁵⁸

The Duty to Google one's client has again extended to social media information, at least to the extent such information is available to the

⁵² McPeak, *supra* note 10, at 877.

⁵³ *Id.*

⁵⁴ *Axam*, 297 Ga., at 786.

⁵⁵ *Id.* at 1.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1-2.

⁵⁸ *Id.* at 2.

attorney.⁵⁹ 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 "an extraordinarily active travel and social life".⁶⁰ In sanctioning the Plaintiff's attorney under Rule 11, relating to an attorney's duty to avoid frivolous filings,⁶¹ the Court stated 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, . . ." ⁶² Here we see an attorney sanctioned under Federal Rule 11 for a failure to Google social media in client intake. Margaret DiBianca

⁵⁹ 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.").

⁶⁰ *Id.*

⁶¹ Fed. R. Civ. P. 11. The text of Rule 11 provides in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...

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).

⁶² *Id.* See also Donna Bader, *Have You Googled Your Clients Lately?*, AN APPEAL TO REASON (Sept. 11, 2012), <http://www.anappealtoareason.com/home/2012/9/11/have-you-googled-your-clients-lately.html>.

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concluded that “Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations.”⁶³

Relatedly, an attorney has a Duty to Google a client she 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.⁶⁴ The Alaska Bar Association issued an ethics opinion stating that attorneys representing a client in a criminal appeal, where the client cannot be contacted,⁶⁵ must make “reasonable efforts” to contact the client, which specifically include an internet search.⁶⁶

d. The Duty to Google the Jury in *Voir Dire*

An attorney may have a Duty to Google jurors. This specific area of law is developed but somewhat unsettled.⁶⁷ 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.”⁶⁸ Googling, obviously, makes this due diligence easy, if

⁶³ Margaret M. DiBianca, *Ethical Risks Arising From Lawyers’ Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179 (2011).

⁶⁴ Garrett (formerly Matisa) v. Matisa, 394 N.J. Super. 468, 927 A.2d 177 (Ch. Div. 2007).

⁶⁵ Perhaps a somewhat common problem on the last frontier.

⁶⁶ Alaska Bar Ass’n Ethics Op. 2011-4, “Duties of an Attorney in a Criminal Appeal when the Client Cannot be Contacted” (2011) (Alaska Op. 2011-4).

⁶⁷ For an excellent discussion of the birth of the Duty to Google as it relates to jurors, see J.C. Lundberg, *Googling Jurors to Conduct Voir Dire*, 8 WASH. J.L. TECH. & ARTS 123 (2012). Lundberg notes that “[t]he 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.

⁶⁸ *Id.* at 130, citing *Mu’Min v. Virginia*, 500 U.S. 415, 415 (1991).

perhaps imprecise. Googling jurors is now common.⁶⁹ 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.⁷⁰

One notable case illustrates the complexity of this practice. In *Johnson v. McCullough*,⁷¹ 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.⁷² The attorney discovered this falsehood by searching for the juror on Missouri’s automated court record system, Case.net.⁷³ The Court bristled at the idea of attorneys searching for juror information after a case to undermine a verdict, and issued a ruling requiring attorneys to affirmatively search for information about jurors on Case.net *before* trial, because such attorneys “now have a free and potentially easy means to search a prospective juror’s litigation experience.”⁷⁴ who fail to perform such a search risk waiving the ability to argue juror nondisclosure in *voir dire* on appeal.⁷⁵ That is to say that attorneys are not just *permitted* to Google jurors. They are *required* to Google jurors to preserve a right on appeal.⁷⁶

⁶⁹ See John G. Browning, *As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn*, 25 THE JURY EXPERT 3 (May 2013).

⁷⁰ 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>.

⁷¹ 306 S.W.3d 551 (Mo. 2010) (en banc).

⁷² 306 S.W.3d at 554.

⁷³ *Id.*

⁷⁴ 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).

⁷⁵ *Johnson*, 306 S.W.3d at 554.

⁷⁶ Lundberg, *supra* note 67, at 132 (“In *Johnson v. McCullough*, the Supreme Court of Missouri created a limited duty for lawyers to research members of the venire.”).

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Similarly, in a personal injury case,⁷⁷ 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. 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.”⁷⁸

In a 2012 case in federal court in New York, the court denied a motion for a new trial where a party’s attorneys “had a suspicion that Juror No. 1 was not the person she represented herself to be during *voir dire*” which “leavened into tangible evidence that [the juror] was a monstrous liar.”⁷⁹ Specifically, the juror in question lied during *voir dire* that she was an attorney with a suspended license based in some part on alcohol dependency. The court concluded that the juror would have been excluded for cause if these facts were known, but that the attorneys “knew—or *with a modicum of diligence* would have known—of [the juror’s] misconduct before the jury rendered its verdict.” (emphasis mine).

The American Bar Association’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).⁸⁰ 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

⁷⁷ *Burden v. CSX Transp., Inc.*, No. 08–cv–04–DRH, 2011 WL 3793664, at 9 (S.D. Ill. Aug. 24, 2011).

⁷⁸ *Id.*

⁷⁹ *U.S. v. Daugerdas*, 867 F.Supp. 2d 445 (2012).

⁸⁰ ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, FORMAL OP. 14-466 “Lawyer Reviewing Jurors’ Internet Presence” (2014); *see also* Jo Dale Carothers, *Are Pins, Posts, Tweets and Likes Appropriate for Use in Selecting Jurors*, THE IP LAW BLOG (Apr. 1, 2016), <http://www.theiplawblog.com/2016/04/articles/privacy/are-pins-posts-tweets-and-likes-appropriate-for-use-in-selecting-jurors/>.

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.’⁸¹

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 with respect to the permissiveness of contact.⁸² A district judge in the Eastern District of Texas has issued a standing order providing for guidelines for the internet research of jurors, prohibiting active communication such as “friending” but allowing for passive communication such a profile viewing, noting that in so doing “[t]he Court recognizes the duty imposed on diligent parties to secure as much useful information as possible about venire members. . . .”⁸³

In the closest formal rule with respect to a Duty to Google to date, shortly after the *Johnson* decision, the Missouri Supreme Court adopted Rule 69.025 (effective January 1, 2011), which addresses juror nondisclosure, which 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.

⁸¹ ABA Formal Op. 14-466, at 2, n.3.

⁸² See NYCLA Formal Opinion No 743 (2011); N. H. Bar Ass’n, Op. 2012-13/05 (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”); Pa. Bar Ass’n, Formal Op. 2014-300 (2014).

⁸³ STANDING ORDER REGARDING RESEARCH AS TO POTENTIAL JURORS IN ALL CASES ASSIGNED TO U.S. DISTRICT JUDGE RODNEY GILSTRAP, at 2 (Jan. 25, 2017), <http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20-%20Juror%20Research%20%28signed%29.pdf>. The order permits an attorney’s passive viewing of a juror’s social media profile even if, because of a privacy setting, the juror can see that an attorney viewed her profile. *Id.*

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...
(e) Waiver. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of 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*, the Missouri Supreme Court stated that “[w]hile 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.” 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. In concluding that the attorney’s reliance on the court was reasonable, the Court in *King* wearily observed that “No Missouri court has addressed the issue of what type of ‘review of Case.net’ will be deemed ‘reasonable investigation’ with regard to Rule 69.025.”⁸⁴

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.”⁸⁵ Instead, Missouri courts seem in agreement with the rather nebulous rule that “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 empaneled — [but] that day has not arrived as of yet.”⁸⁶

⁸⁴ *King v. Sorensen*, 532 S.W.3d 209 (2017).

⁸⁵ *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo.App. 2012).

⁸⁶ *Spence v. BNSF Ry. Co.*, 2016 Mo. App. LEXIS 1338; *Khoury*, 368 S.W.3d at 202.

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 sanctions 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.⁸⁷

e. Conclusion

The Duty to Google is growing as, it seems, a common law duty where an attorney must diligently choose to – and as the *Cannedy* case shows, know how to – use an internet search to obtain facts about a matter. 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 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 part of this Article.

II. THE LOGICAL HOME OF THE DUTY TO GOOGLE

a. The Sources of the Duty to Google

Though it is not at entirely clear from the cases discussed in Part I, it seems as if the attorneys who found themselves in trouble through insufficient digital searches violated a professional duty to investigate the matters on which they worked. A brief discussion of the possible sources of this duty is thus illuminative.

Specifically, the attorney's duty to investigate arises most

⁸⁷ *Id.* at 203-204 (noting that litigators are “arguably” required to use social media as part of *voir dire*).

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prominently in the Model Rules of Professional Conduct. However, it has been most developed in a line of capital criminal defense cases as part of an argument on appeal that a criminal defense attorney's conduct constituted ineffective assistance of counsel. It also arises in the malpractice context, as a potential source of an attorney's failure to adequately represent her client. These sources are discussed below.

i. The Model Rules of Professional Conduct

The Duty to Google perhaps fits most snugly as an outgrowth to commentary language in Rule 1.1 of the Model Rules, dealing with attorney competence.⁸⁸ This rule states that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁸⁹ 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.”⁹⁰ In 2012, the ABA added language a Comment to this Rule requiring that a lawyer stay abreast of “relevant technology,” tying that requirement to the duty of competence.⁹¹

⁸⁸ See, e.g., Perlman, *supra* note 17, 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.”).

⁸⁹ 9 MODEL RULES OF PROF'L CONDUCT R. 1.1 (Am. Bar Assoc. 2016).

⁹⁰ *Id.* at cmt. 5.

⁹¹ *Id.* at cmt. 8 (emphasis added). See also Michael Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36 (2017). For a full discussion of this language, see Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 VILL. L. REV. 159 (2020). There, Johnson notes that “[t]he Commission suggested that a duty of technological competence was already implicitly encompassed in Rule 1.1, but it had now decided to make ‘explicit’ the duty to understand the ‘benefits and risks’ of relevant technology.” *Id.* at 168, citing ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (2012), <https://www.americanbar.org/content/dam/aba/administrative/eth->

Therefore an attorney must have the technological competence to understand modern methods of collecting factual information, and then must employ those methods to discover relevant facts about a matter, her client, any witnesses, and even prospective jurors. To date, 38 states have passed rules requiring attorneys licensed in that state to adhere to these technological competency standards.⁹² Florida and North Carolina now require attorneys to take yearly technology CLE classes in the same way most states require yearly ethics or mental health CLE classes.⁹³

There is obvious breadth in a rule of professional conduct that applies to every aspect of an attorney's work. Further, cases invoking the Duty to Google have generally referenced the attorney's failures in those cases as a failure of "competence."⁹⁴ That being said, caselaw and commentary points to other potential sources of the Duty to Google, which the rest of this section will discuss.

ii. Effective Assistance of Counsel Standards in the Criminal Defense Context

An attorney's duty to investigate matters is has evolved in an instructive way in the capital criminal defense context.⁹⁵ A long and

ics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.pdf.

⁹² Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 CASE W. RES. J.L. TECH. & INTERNET 1, 6 (2019); Johnson, *supra* note 12, at 186.

⁹³ Kuehl, *supra* note 92, at 26 n. 177, citing Bob Ambrogi, *North Carolina Becomes Second State to Mandate Technology Training for Lawyers*, LAWSITES (Dec. 5, 2018),

<https://www.lawsitesblog.com/2018/12/northcarolina-becomes-second-state-mandate-technology-training-lawyers.html>.

⁹⁴ See, e.g., Griffin v. Maryland, 192 Md. App. 518 (2010); Cannedy v. Adams, 2009 WL 3711958 at 280 (C.D. Cal. 2009).

⁹⁵ 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 (2007) (Noting that the duty to

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detailed progression of cases exists interpreting whether an attorney's investigation in a capital case violated the ABA Standards for ineffective assistance of counsel, a standard that has essentially (if debatably) been adopted by courts.⁹⁶ 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."⁹⁷ Subsequently, the issue of adequate investigation by defense counsel in capital cases has received attention in scholarship and by courts.⁹⁸ That attention expanded outside of capital cases and into other criminal cases. Today, the ABA guidelines 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

investigate is "the most heavily scrutinized aspect of defense counsel's representation" in ineffective assistance of counsel cases); Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 153 (2005) (Stating that "[t]he most basic duty that an attorney has in any [capital] case is to conduct an investigation."); Blume & Neumann, *supra* note 95, at 138 ("the attorney who is ineffective in the investigative phase might never be able to rectify her performance and provide her client with an adequate defense.").

⁹⁶ 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 (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.").

⁹⁷ *Id.* at 80-81, citing *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

⁹⁸ 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 case); Rigg, *supra* note 96, at 88 (describing a series of cases in the early 2000s).

sufficiency of the factual basis for the criminal charges their clients face.⁹⁹ One court notes that "[a]n 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."¹⁰⁰

In a later case the Court interpreted the ABA guidelines to include a

⁹⁹ STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard Nos. 4-1.1 (Am. Bar Ass'n, 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/. The relevant sections of the standard read, in their entirety:

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

...

(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

¹⁰⁰ Rigg, *supra* note 96, at 90, n95, citing *Stevens v. Del. Corr. Ctr.*, 152 F. Supp. 2d 561, 576-77 (D. Del. 2001).

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reasonability requirement, stating that "[t]he 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.'"¹⁰¹ Notably, the ABA Guidelines became more specific over time and as courts interpreted them as a standard for the reasonableness of an investigation.¹⁰² Courts then use the ABA Guidelines to help determine and define the "prevailing professional norms" in ineffective assistance cases."¹⁰³ 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."¹⁰⁴

iii. The Federal Rules of Civil Procedure

As the failure of the attorney to investigate his own client's social media in the *Cajamarca* case showed, the Duty to Google may find its way into the Federal Rules of Civil Procedure, at Rule 11. FRCP 11 requires that an attorney make a reasonable inquiry to determine that the arguments in a filed document are not frivolous.¹⁰⁵ Therefore at least a cursory internet search is required for an attorney to sign a pleading motion or other legal paper in good faith that such filing is not being advanced for an improper purpose. There the attorney must make a "reasonable inquiry" to build information and belief of proper purpose.

The Duty to Google could also find its way into the Federal Rules regarding discovery. The Duty to Google is a failure of fact collection, but it is probably not a discovery violation of data collection in that the party failing to Google failed to collect, preserve and produce relevant information within its possession, custody or control, as prescribed by

¹⁰¹ *Id.* at 91, n105, citing *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹⁰² *Id.* at 93 ("Later, and current, ABA Guidelines relating to death penalty defense are even more explicit...").

¹⁰³ *Id.* at 95, citing *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

¹⁰⁴ *Id.* at 96-97, citing *In re Lucas*, 133.94 P.3d 477, 502 (Cal. 2004).

¹⁰⁵ FED. R. CIV. P. 11.

the Rules.¹⁰⁶ This is so because the information is, of course, publicly available, and thus available to the other side as well.¹⁰⁷ The duty is more of a failure of zealous advocacy, of taking advantage of readily available technology to build provide the best possible representation to a client.

At least, that is the takeaway from a survey of cases where the “Duty to Google” has arisen. None of these have taken the formal step to codify the duty. Such rule, however it would be presented, would be a fairly strong reflection of “the concept that the proper use of technological advances is part of an attorney’s duty of competence.”¹⁰⁸

iv. Malpractice or Agency Law

George Cohen notes that “other law may impose on lawyers a duty to investigate,” citing malpractice law and agency law.¹⁰⁹ Cohen observes that these sources of a duty of investigate hinge off of the

¹⁰⁶ See FED. R. CIV. P. 34(a) and R. 45(a), which obligate a party responding to a document request or subpoena to produce “documents, electronically stored information, and tangible things” in that party’s possession, custody, or control.” See also Evan E. North, *Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV., 1279-1309, 1303 (2010) (“In other e-discovery and traditional discovery cases, courts have held that documents are within a party’s control if the party has a legal right to obtain the documents.”).

¹⁰⁷ See, e.g. *Valenzuela v. Smith*, 04 Civ. 0900, 2006 WL 403842 at *2 (E.D. Cal. Feb. 16, 2006) (“Defendants . . . will not be compelled to produce documents that are equally available to plaintiff.”); *Baum v. Village of Chittenango*, 218 F.R.D. 36, 40-41 (N.D.N.Y. 2003) (“[C]ompelling discovery from another is unnecessary when the documents sought are equally accessible to all.”).

¹⁰⁸ See, e.g., Catherine J. Lanctot, *Becoming A Competent 21st Century Legal Ethics Professor: Everything You Always Wanted to Know About Technology (But Were Afraid to Ask)*, 2015 PROF. LAW. 75, 82-83.

¹⁰⁹ George M. Cohen, *The State of Lawyer Knowledge under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 122 (2014), citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. C (2000) and RESTATEMENT (THIRD) OF AGENCY § 8.11(1) (2006).

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professional rules of Rule 11.¹¹⁰ 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.¹¹¹ It is likely, then, that a charge of malpractice for the violation of the Duty to Google would be in addition to, not instead of, a violation of a rule of professional conduct or Rule 11.

III. THE VARIOUS TRIGGERS FOR THE DUTY TO GOOGLE

With the Duty to Google's sources in mind, we can look to *when* an attorney should observe it. Those instances would, of course, shape any rule, even if they are compiled into a nonexclusive example list. The following subsections look to the likely incidences where the Duty to Google should arise, based on the cases discussed previously and other, new examples.

a. Location of Witnesses, Defendants, and Parties

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.¹¹² 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.

b. Facts in Dispute

Googling verifiable facts in dispute in litigation also seems commonsensical.¹¹³ It certainly should be required by attorneys at the beginning of a case as part of their ethical duty to verify the facts

¹¹⁰ *Id.*

¹¹¹ Ellie Margolis, *Surfin' Safari - Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 103 (2007-2008).

¹¹² See *Munster v. Groce*, *Dubois v. Butler*, and *Weatherly v. Optimum Asset Mgmt.*, *supra* note 4 and accompanying text.

¹¹³ See *Cannedy v. Adams* and *Att'y Disciplinary Bd. v. Wright* *supra* notes 5, 6 and accompanying text.

asserted in legal pleadings. With the internet an ever-present tool used by most working professionals, it must be used to check factual assertions. The Duty to Google facts in a pleading could even be included in Rule 11. *How much* googling is a tougher issue. Should an attorney search to verify every fact, or just key facts? 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, including:

...the nature or complexity 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.¹¹⁴

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 or an attorney to use an investigator or research service to conduct an extremely comprehensive search.¹¹⁵ These professional

¹¹⁴ DOUGLAS R. RICHMOND, BRIAN SHANNON FAUGHNAN, & MICHAEL M. MATULA, PROFESSIONAL RESPONSIBILITY IN LITIGATION (ABA 2016) at 4.

¹¹⁵ 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, FOURINER LAW FIRM BLOG (May 29, 2016), <http://fournierlawoffice.com/blog/digital-private-investigators-and-family-law/> ("Digital private investigators used for family law in Tallahassee commonly track websites to determine whether an individual has a presence. It's very common for private investigators to scour personal advertisement sites, escort sites, even dating sites to

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searches can include searching web sites and comments sections, social media, and “reverse image searches,” in which a searcher searches for a picture to find more specific images from a point in time.¹¹⁶ 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.¹¹⁷

This duty should extend through a case, though understandably it should relax over time, as testimony and evidence builds into a *res gestae*. Nevertheless, a prudent attorney would set automatic reminder and perform regular searches to make sure no new material surfaces.

Next, 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.¹¹⁸ 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 ask judges to take judicial notice of facts more often.¹¹⁹

determine whether an individual has an email address associated with a profile. This information can be used in divorces to substantiate other information in suspected adultery cases.”)

¹¹⁶ *Id.*

¹¹⁷ This duty is explicit in an attorney’s duty of technological competence. *See, e.g.*, Cal. State Bar, Formal Op. 2015-193 (2015) at 4. (Addressing attorney technological competence in e-discovery and 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.”).

¹¹⁸ *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 designed to increase cooperation among opposing parties in discovery).

¹¹⁹ Judicial notice is the act of a allows a court ruling on the acceptance of a proposition without presented evidence of that proposition’s veracity. FED. R. EVID. 201; *see, e.g.*, Paul J. Kiernan, *Better Living Through Judicial Notice*, LITIG. (Fall 2009), at 1, 3.

The Duty to Google can be a key tool in that process.¹²⁰

c. Criminal Defendants

It is likely that an attorney has a Duty to Google her own criminal defendant client, as part of her general duty to research aspects of the prosecution of her client.¹²¹ This standard does not, however, go into much detail about the extent of the duty to investigate. It states that “investigation will vary depending on the circumstances” and “should always be shaped by what is in the client’s best interests, after consultation with the client.”¹²² While vague as to extent, this standard does point to an affirmative duty for an attorney to investigate factual aspects of a criminal case. The standard does, however, note certain areas of factual investigation, such as obtaining prosecutorial evidence and law enforcement evidence.¹²³ And of course, there are cases discussed previously that have found instances of ineffective assistance of counsel where the defense attorney did not conduct an electronic investigation.¹²⁴

d. Parties to a Transaction

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.¹²⁵ 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

¹²⁰ The use of Google in particular to make judicial notice more prevalent is well-asserted in a 2014 article. *See* Bellin and Guthrie Ferguson, *supra* note 1, at 1137, citing Richard A. Posner, REFLECTIONS ON JUDGING, 141–142 (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.”).

¹²¹ STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard Nos. 4-1.1, *supra* note 99.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Cannedy, supra* note 5.

¹²⁵ *See Wright, supra* note 6 and accompanying text.

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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.

e. Social Media

Relatedly, this Duty to Google facts should extend to the social media profiles of parties and witnesses (and of course additional parties to a transaction), with the immediate and important caveat that attorneys performing social media searches adhere to the growing body of law that restricts what attorneys can do to collect social media information.¹²⁶

One consideration with respect to social media information is its reliability. While such information is generally treated as admissible, provided it is not hearsay,¹²⁷ a growing sentiment online is that a person's social media profile puts forth self-created (and perhaps

¹²⁶ Saleel V. Sabnis, *Attorney Ethics in the Age of Social Media*, AMERICAN BAR ASSOCIATION (June 8, 2016), <http://apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html>, citing the New York State Bar's Committee on Professional Ethics, Opinion 843 (2010), (Stating that an attorney may research a party's social media profiles provided that the attorney refrains from taking steps to "friend" the party or otherwise view nonpublic pages not accessible to all members in the social media platform); Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (2009) (Stating that an attorney may not use a third party or proxy to "friend" a witness to view private social media information, such a practice is deceptive); Bar Association of the City of New York Committee on Professional Ethics, Formal Opinion 2010-2 (2010), (Contradicting these opinions and stating that it is ethical for an attorney to "friend" a third party as long as the attorney did so without using false pretenses); Oregon State Bar in Formal Opinion 2013-189 (2013) (same).

¹²⁷ Tamara A. O'Connell, *Is that @Social Media Evidence #admissible?*, JOSEPH, GREENWALD & LAKE, LLC (Jan. 24, 2014), <http://www.jgllaw.com/blog/social-media-evidence-admissible>, citing *Griffin v. State*, 419 Md. 343, 351, 19 A.3d 415 (2011).

idealized) picture of that person's life, and for that reason is inherently unreliable.¹²⁸ Therefore the Duty to Google and discover social media information carries with it a duty to evaluate that information's reliability.

f. Professional Opinions

There is, somewhat obviously, a duty to investigate with an attorney is engaged in issuing an opinion, such as an opinion letter, based on underling facts.¹²⁹ 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.¹³⁰ 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.

g. Clients

An attorney has a Duty to Google her own client, particularly to

¹²⁸ R. Kay Green, *The Social Media Effect: Are You Really Who You Portray Online?*, HUFFINGTON POST (Oct. 3, 2013), http://www.huffingtonpost.com/r-kay-green/the-social-media-effect-a_b_3721029.html; Kathleen Burge, *Overblown Facebook Personas Can Leave Friends Deflated*, BOSTON GLOBE (Sept. 29, 2014), <https://www.bostonglobe.com/lifestyle/style/2014/09/29/our-facebook-profiles-create-people-want-ideal-versions-ourselves/rM1vIs9JB2e3OYkKSvGwUM/story.html> (“Facebook and other social media allow users to present a curated self, showing friends or the public a happier or more accomplished version of a person.”). A related issue involves the ability for a user to post a fictitious social media account masquerading as someone else, with relative ease. *See, e.g., Griffin, supra* note 127 at 19 A.3d 415, 421 (2011) (Citing the high “potential for fabricating or tampering with electronically stored information on a social networking site”).

¹²⁹ George M. Cohen, *The State of Lawyer Knowledge under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 128-129 (2014)..

¹³⁰ *Id.* at 129.

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verify the facts represented to her by that Client.¹³¹ Joel Cohen investigated examples of this phenomenon in an article the New York Law Journal and mused:

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...

For example, George Cohen notes that the ABA issued an opinion on "Client Due Diligence, Money Laundering, and Terrorist Financing" in which it stated that "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."¹³² Cohen notes that the duty to investigate arises in many contexts:

Other ethical duties that a lawyer owes to a client may also imply a duty to investigate in certain circumstances. These duties include the duty to communicate with the client, to seek a client's informed consent, to avoid conflicts of interest, to "exercise independent judgment and render candid advice," or to determine a non-frivolous basis in fact and law for bringing or defending against a civil claim.¹³³

The ABA noted that an attorney presenting false information to the tribunal runs afoul of Model Rule 3.3 "Candor Toward the Tribunal," 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

¹³¹ Joel Cohen, *The Lawyer's Duty to Check Facts*, NEW YORK L. J. (Feb. 9, 2015),

<http://www.stroock.com/siteFiles/Publications/NewYorkLawJournal.pdf>.

¹³² George Cohen, *supra* note 129, at 126-127 n. 77, citing ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 13-463 (2013).

¹³³ George Cohen, *supra* note 129, at 127 (footnotes omitted).

clients as to financial transactions.”¹³⁴ It does seem as if attorneys cannot afford to be ostriches with respect to due diligence of their clients’ conduct.

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.¹³⁵ Vendors are already marketing “people search” solutions to attorneys to accomplish this goal.¹³⁶

h. The Jury Pool

As noted above, there is a growing body of law with respect to the appropriateness of Googling jurors in *voir dire*.¹³⁷ 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

¹³⁴ Dennis A. Rendleman, *What to Do When Your Client Lies*, AMERICAN BAR ASSOCIATION ETHICS IN VIEW (Sept. 2019). <https://www.americanbar.org/news/abanews/publications/youraba/2019/september-2019/what-to-do-when-your-client-lies/>, citing 9 MODEL RULES OF PROF’L CONDUCT R. 3.3 (Am. Bar Assoc. 2016) which states at section (a)(3) that “[a] lawyer shall not knowingly [] offer evidence that the lawyer knows to be false.”

¹³⁵ Richmond, et al., *supra* note 114 at 3-4 (“...[L]awyers are obligated to undertake some form of preliminary investigation into clients’ intended claims and contentions.”).

¹³⁶ 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 on Westlaw” solution).

¹³⁷ See, e.g., Patrick Schweih & Eric Pesale, *Common Ethical Issues To Consider When Researching Jurors And Witnesses On Social Media*, Above the Law (March 14, 2017), <http://abovethelaw.com/2017/03/common-ethical-issues-to-consider-when-researching-jurors-and-witnesses-on-social-media/citing>.

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opening the *voir dire* process beyond questioning under oath and raises a host of reliability issues.¹³⁸ This is one of the few areas in which Rule 1.1 has 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."¹³⁹ 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.¹⁴⁰ Kellerhouse continues:

¹³⁸ 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 or potential jury members," *Id.* At 460 n. 13, citing Stephen P. Laitinen & Hilary J. Loynes, *Social Media: A New "Must Use" Tool in Litigation?*, 52 NO. 8 DRI FOR DEF. 16 (Aug. 2010). 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 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 485-486.

¹³⁹ 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).

¹⁴⁰ See Lundberg, *supra* note 67, 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.").

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.¹⁴¹

i. 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 for 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, we here searching for clarity in the Duty to Google may only obtain it a “benchslap” at a time, through the continued misfortunes of attorneys who have been chastised or sanctions for violating it – even if they did not know the duty they were violating until it was too late.

IV. THE NEBULOUS EXTENT OF THE DUTY TO GOOGLE

The Duty to Google does have conceptual limits, rooted historically in the duty to investigate. For example, George 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.¹⁴² As Cohen put it, “[m]ost duties to investigate [] are created by substantive rules, not by the scienter standard.”¹⁴³ Further, the *Strickland* Court, allowed for instances in which an attorney may rely on a client’s statements with respect to

¹⁴¹ Kellerhouse, *supra* note 139, at 298.

¹⁴² George Cohen, *supra* note 129, 125-126.

¹⁴³ *Id.* at 126.

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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."¹⁴⁴

The duty may even be more accurately described as normative. As Emily Olson-Gault noted, the Guidelines "must not be treated by courts as a set of mandatory rules with which counsel must unquestionably comply . . . Rather, according to both the Court and the ABA itself, the Guidelines were written as a codification of already existing, well-defined norms of practice."¹⁴⁵

Rulemakers attempting to provide guidance of these norms face a tension between the clients' deserving of a properly technology-savvy attorney, and the attorney's reasonable requirement of a bright-line rule of what is sufficient savviness. This tension is already apparent in the consideration of the current rules for attorney technological competence, which vaguely require attorneys to keep up with "the benefits and risks associated with relevant technology."¹⁴⁶ Attorneys are left to follow the rule of thumb that whenever they should be searching for information, they should be using the internet. Fine advice, but it raises an alarming aspect of the Duty to Google as one of degree. *How much* Googling is enough, objectively or under the circumstances of a case?

As it stands, an attorney using that rule for guidance must consider when searching for information about a matter ceases to be a "benefit" – at that point, the attorneys should stop. Somewhat helpfully, 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

¹⁴⁴ *Strickland*, 466 U.S. at 691.

¹⁴⁵ Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1292 (2018).

¹⁴⁶ Katy Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853, 867-868 (2017) (Noting that the current Rule 1.1 does not address "anticipated confusion regarding the extent of the duty.").

reason to think further investigation would be a waste."¹⁴⁷ However outside of that dicta, the existing guidance does not address the *extent* of Googling, just that Googling must occur at various points during a representation and more critically, must successfully locate the important information.¹⁴⁸ There is an allure to simply rely 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."¹⁴⁹ But in a sense this is an *ex ante* requirement; to satisfy the Duty to Google the attorney must find the golden nugget of information. To fail to find the nugget is to violate the duty.¹⁵⁰ If no nugget exists, no searching is required. *Strickland* 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."¹⁵¹

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."¹⁵²

¹⁴⁷ *Rompilla*, 545 U.S. at 381-382.

¹⁴⁸ 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/>.

¹⁴⁹ 9 MODEL RULES OF PROF'L CONDUCT R. 1.1 (Am. Bar Assoc. 2016) at cmt. 5.

¹⁵⁰ See Ho, *supra* note 146 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?").

¹⁵¹ Blume & Neumann, *supra* note 95, quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¹⁵² Margolis, *supra* note 111, at 99.

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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.¹⁵³

Attorneys worried that they are not Googling 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 tough to find and vary from state to state.¹⁵⁴ Also, they can lack the dependability of a baseline rule from which deviation invites explanation,¹⁵⁵ if they are followed at all.¹⁵⁶

What current guidance exists mainly in a comment to a model rule

¹⁵³ George Cohen, *supra* note 129, at 128.

¹⁵⁴ 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, 323-324 (1996).

¹⁵⁵ See, e.g., Lawrence K. Hellman, *A Better Way to Make State Legal Ethics Opinions*, 22 OKLA. CITY U. L. REV. 973 (1997) (Discusses the problems with the current scheme of non-authoritative state ethics opinions and offers suggested reforms and value analysis of a controlling form of ethics opinions).

¹⁵⁶ Green, *supra* note 154, at 742 (Noting that a “major criticism of bar association ethics committees is that their opinions can be, and are, ignored, either by courts, by disciplinary agencies, by lawyers, or by some combination of the three.”).

of professional conduct. 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.¹⁵⁷ As Peter A. Joy noted, “even jurisdictions with an identical ethical rule often interpret and apply the rule differently.”¹⁵⁸ Multiple states have made changes to the rule, though none have specifically discussed an attorney’s duty of investigation.¹⁵⁹ 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.”¹⁶⁰

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.¹⁶¹ It is possible

¹⁵⁷ Lori D. Johnson, *Navigating Technology Competence In Transactional Practice*, 65 VILL. L. REV. 159, 173 (2020); Hellman, *Ethics Rules*, *supra* note 154 at 323-324; Hellman, *A Better Way*, *supra* note 155, at 975-976.

¹⁵⁸ Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 330 (2002).

¹⁵⁹ *Id.* at 173.

¹⁶⁰ Ho, *supra* note 146 at 869.

¹⁶¹ Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-communication in the Twenty-First Century*, 12 LEGAL COMMUNICATION & RHETORIC: JAWLD 1, 2 (2015) (“The digital revolution is not limited to law, so it is no surprise that the legal profession’s reaction to change has mirrored the reaction of society at large.”).

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that the cases above reflect some resistance to that change.¹⁶² In fact, legal practice seems even more resistant to adapt to technology than other industries.¹⁶³ Introducing a codified rule would help reduce that resistance, which would result in better, more affordable legal service to clients.

V. TOWARD A CODIFIED DUTY TO GOOGLE

There is ample support for, at least, enhancing 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.¹⁶⁴ Commentators are already calling on the ABA to provide guidance of the contours and extent of attorney's duty to use technology in practice.¹⁶⁵ Even then, it is clear as Katy Ho noted that "scholars 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."¹⁶⁶ An easy solution would be to provide additional guidance to attorneys about when they must use technology to investigate their matters, and how much technology they should use to meet their professional

¹⁶² *Id.* See also Murphy, *Just and Speedy*, *supra* note 91.

¹⁶³ Murphy, *Just and Speedy*, *supra* note 91, at 36-36; Margolis, *Medium*, *supra* note 161 at 2, n.12, borrowing the observation that "many lawyers still practice law 'as if it were 1999.'" (citing Nicole Black, *Lawyers, Technology and a Light at the End of the Tunnel*, THE DAILY RECORD (Nov. 6, 2013), <http://nylawblog.typepad.com/suigeneris/2013/11/lawyerstechnology-and-a-light-at-the-end-of-the-tunnel-.html>).

¹⁶⁴ Johnson, *supra* note 157, 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.").

¹⁶⁵ Ho, *supra* note 146, at 854.

¹⁶⁶ *Id.* at 6.

obligation.¹⁶⁷

a. Contents of 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 part of, or its own, rule of professional conduct. This detailed guideline or practice rule would take general standards of reasonableness and defensibility into account, including: (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) and the availability of and cost to locate the overlooked information at the time of the search.¹⁶⁸ It should also account for the growth and adoption of technology. Attorneys 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.

Importantly, the reasonable standard should take into account the attorney’s professional judgment in evaluating the results of her search,

¹⁶⁷ Ho, *supra* note 146 at 867 (“The ABA should take a disciplined approach to rule-making by explicitly identifying areas in which technology amplifies concerns. By providing guidance and notice of potential ethical breaches concerning the use of technology, the ABA can balance specificity of the new rule with flexibility, allowing judges and bar associations to address new issues that arise from future technological developments. As a normative matter, setting explicit rules will help manage expectations and provide a minimum standard for attorneys to meet.”).

¹⁶⁸ This standard may be similar to the reasonableness standard with respect to a factual inquiry with respect to disclosures made in discovery. See Patrick Oot, Anne Kershaw, & Herbert Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DEN. U. L. REV. 533 (2010), citing *St. Paul Reinsurance Co.*, 198 F.R.D. at 516 n.3 “(1) the number and complexity of the issues; (2) the location, nature, number and availability of potentially relevant 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.”).

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including the reliability of the sources of search results. While this evaluation of reliability is not new to factual investigation, it is far more important of an exercise in professional judgment that it may have been previously. 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?¹⁶⁹ 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.¹⁷⁰ Googling also requires the 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 in the same manner as reliable information.¹⁷¹ It is easy to confuse a misleading source with an “institutional depository of information.”¹⁷²

It should also be clear that the *attorney’s* judgment is subject to the duty, and not the search algorithm’s effectiveness.¹⁷³ This relationship between attorney and algorithm has been aptly described as the attorney

¹⁶⁹ See Jessica Lee, *No. 1 Position in Google Gets 33% of Search Traffic [Study]*, SEARCH ENGINE WATCH (June 20, 2013), <https://searchenginewatch.com/sew/study/2276184/no-1-position-in-google-gets-33-of-search-traffic-study>.

¹⁷⁰ *Id.*

¹⁷¹ Colleen M. Barger, *Accessing the Law: On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROC. 417, 422 (2002) (noting that it is commonly accepted worldwide that “[t]he searcher is assured that she can use the Internet with ease, with confidence, with satisfaction”); Baker, *supra* note 16, 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.”)

¹⁷² Barger, *supra* note 171, at 422.

¹⁷³ Baker, *supra* note 16, at 574. (Noting that “a lawyer, at a minimum, must be aware of the issues surrounding the use of algorithms and use reasonable care”).

acting as a “information fiduciary.”¹⁷⁴ Jamie J. Baker, who first adapted the term, 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.”¹⁷⁵ In this way the attorney’s duty to interpret search results does not differ much for 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”.¹⁷⁶ 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 much understand the technology to make sure it has worked correctly.¹⁷⁷ 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.”¹⁷⁸ Attorneys must then understand search technology enough to critically evaluate its results.

The idea that an attorney must justify her judgment based on search result data does suggest an additional step upon which the adherence to the Duty to Google could be based: recordkeeping. Attorneys should save their internet search results and draft a memo to

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Barger, *supra* note 171, 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/>.

¹⁷⁷ Kellerhouse, *supra* note 139, at 298-300. Predictive coding is a method of machine-aided document review by with a computer algorithm and “machine learning” assist a reviewer in locating relevant information in a set of electronically stored information. *Id.* at 298.

¹⁷⁸ *Id.* at 299.

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file describing their interpretation of the results, along with any potential follow up research or tasks – realizing that the memorialization of this process cuts into the very time- and money-saving benefits of the electronic search. Nevertheless, the existence of the attorney’s rationale for interpreting search results will be helpful in the application of the Duty to Google, as it provides 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* made a telling distinction in finding an inadequate investigation by concluding that “[t]he 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...”¹⁷⁹ 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.

b. Applying the Duty to Google

Applying a Duty to Google takes some finesse. First, any attorney’s adherence to or deviation from the rule should be viewed under a reasonableness standard.¹⁸⁰ 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* that “reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”¹⁸¹

Looking back from an ex ante approach has its dangers. It is important that judges avoid the approach in which the *value* of the

¹⁷⁹ *Wiggins*, 539 U.S. at 526.

¹⁸⁰ See Margolis, *Safari*, *supra* note 111 at 102 (Examining the use of the internet in determining the sufficiency of legal research and noting: “Since 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.”).

¹⁸¹ *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

overlooked information affects the evaluation.¹⁸² 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 Googling occurred, a ruling authority should be very careful to remember that timing is also an issue. Internet searches are ephemeral – taking judicial notice of an internet search that the judge makes during the case creates a temporal problem.¹⁸³ A reality of the internet is that content comes and goes in a

¹⁸² 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 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 County*, 527 U.S. 198 (1999) (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”).

¹⁸³ Jill Lepore, *Can the Internet Be Archived?*, THE COBWEB BLOG, THE NEW YORKER (Jan. 26, 2015), <http://www.newyorker.com/magazine/2015/01/26/cobweb> (Noting that “[t]he average life of a Web page is about a hundred days.” While some technologies exist that can show web site as they existed at a certain point in time, such as the “Wayback Machine,” search results will invariably be different. As Lepore notes, “The Web dwells in a never-ending present. It is—elementally—ethereal, ephemeral, unstable, and unreliable.” *Id.* It is of no small concern to the Author of this Article that Lepore notes that the internet’s ephemeral nature is a particular issue for the legal profession:

For the law and for the courts, link rot and content drift, which are collectively known as “reference rot,” have been disastrous. In providing evidence, legal scholars,

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literal instant, and many links – perhaps even the ones in the footnotes of this Article¹⁸⁴ – will disappear over time, a phenomenon known as “link rot.”¹⁸⁵ If we are to hold attorneys to a standard of internet search competency, 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.

This issue of timing raises the related question: *how often* should an attorney be Googling the parties, facts, witnesses and her own clients? Is it a failure to Google if the attorney runs a cursory search once a month? Once a year? Again, the reasonableness of frequency and intensity of searches should depend on the issues and resources available. An attorney would be well advised to set up automatic “alerts” for certain keywords involving important clients or matters, so that she is automatically notified of potentially important new internet content.¹⁸⁶

lawyers, and judges often cite Web pages in their footnotes; they expect that evidence to remain where they found it as their proof, the way that evidence on paper—in court records and books and law journals—remains where they found it, in libraries and courthouses. But a 2013 survey of law- and policy-related publications found that, at the end of six years, nearly fifty per cent of the URLs cited in those publications no longer worked.

Id.

¹⁸⁴ As much as it pains the author of this Article to note.

¹⁸⁵ See Barger, *supra* note 171, at 438-439. 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.*, citing 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).

¹⁸⁶ For example, Google offers free Google Alerts, in which a user can have a daily, weekly or monthly email sent to them collecting new

Should an attorney Google each and every client, every matter? It is hard to say. There does not appear to be any recent cases that validate an attorney's investigation and make a point that the attorney did not perform an internet search, or that an internet search was unnecessary. However, such cases may exist. An attorney handling a routine matter for a long-standing 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 investigation 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.¹⁸⁷

Is there an externality for the growth of search technology? Is an attorney's investigation now more expensive, because more information is available, even though relevant information is much easier to locate?¹⁸⁸ After all, attorneys often bill by the hour and while internet searches take milliseconds, trolling through search results, reading, digesting and following up on those results can take some time. Given these cost considerations, it may be appropriate for an attorney in many instances to delegate the 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

articles that meet user-defined keywords. *See, e.g.*, GOOGLE ALERTS, <https://www.google.com/alerts>.

¹⁸⁷ In fact, many law firms now exist without a physical location, particularly in a post-pandemic world. *See, e.g.*, Will Boye, *Law Firms Break from Traditional Model*, CHARLOTTE BUSINESS JOURNAL (Oct. 2010); Stephanie Kimbro, *Practicing Law Online: Creating a Web-Based Virtual Law Office*, <http://www.vlotech.com/ebooks/PracticingLawOnline.pdf>.

¹⁸⁸ 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 ADVOCATE (TEXAS) 61 (2016).

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professional responsibilities, under supervision.¹⁸⁹ 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.

c. Incorporating the Next Google

One commentator notes that the Model Rules with respect to technological competence are drafted as “purposefully broad,” such that they can address “technologies that have not yet been conceived.”¹⁹⁰ However, the guidance thus far published about these rules has been extremely narrow, focusing mainly on data security.¹⁹¹ So while these rules *can* adjust to new technologies with respect to internet searching, absent any guidance, clarity, or specificity in the rules, attorneys are on their own to extrapolate the rules to new technologies.¹⁹² 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.¹⁹³ Inherent in that flexibility is the tipping point in which a search technology becomes ubiquitous, in other words, the next “Google”.

¹⁸⁹ See R. Thomas Howell Jr. & Eric G. Orlinsky, *What Paralegals Can Do: And the Light Goes On*, ABA BUSINESS LAW TODAY (Jan./Feb. 2007), <https://apps.americanbar.org/buslaw/blt/2007-01-02/orlinsky.shtml>.

¹⁹⁰ Lori D. Johnson, *Navigating Technology Competence In Transactional Practice*, 65 VILL. L. REV. 159, 170 (2020), citing Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 557 (2018).

¹⁹¹ *Id.*

¹⁹² 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.”).

¹⁹³ Johnson, *supra* note 12, at 189 (noting that a flexible approach to evaluating technological competence in attorneys is essentially inevitable).

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”, and thus part of the “Duty to Google”?

Some parallels can be found in the development of electronic legal research. Ellie Margolis chronicled the evolution of this technology from “luxury” to “necessity”.¹⁹⁴ 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.¹⁹⁵ She notes that certain factors contributed to the “expectation” that a technology would be used for competent legal research: (a) widespread use of the technology among attorneys in legal presentation, (b) attorneys routinely billing clients for use of the technology, (c) whether it is being routinely taught in law schools, and (d) whether it is necessary to access certain sources that are only available by using that technology.¹⁹⁶

With those factors as a guide, the easiest place to see technological innovation where sources of information become ubiquitous (and in

¹⁹⁴ Ellie Margolis, *Surfin' Safari - Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 119 (2007-2008).

¹⁹⁵ *Id.* at 92. Indeed, it is notable that “Shepardizing”, like “Googling,” is a proper noun that has become ubiquitous.

¹⁹⁶ Margolis, *Safari*, *supra* note 111, at 108-109; *Id.* at 113 (“While law librarians and others have raised concerns about the authenticity of official legal materials found only on the internet, today's reality is that the only way to access these materials is by conducting research on the internet, either through Westlaw, Lexis, or individual government websites. A lawyer who fails to use the internet, particularly when researching administrative issues, is likely to miss key sources that a judge would expect to see cited.”).

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some cases, lose ubiquity) is in social media.¹⁹⁷ Margaret DiBianca has noted that as of *ten years ago* “the American Academy of Matrimonial Lawyers reports that 66 percent of divorce attorneys use Facebook as their primary source for online evidence.”¹⁹⁸ Law Schools have offered classes in the law of social media.¹⁹⁹ And of course, the only way to access certain content on a social media site is to access its platform.

d. Teaching the Duty to Google

The bar and legal academia should incorporate internet fact-finding into basic legal training and continuing legal education.²⁰⁰ Several CLEs exist to teach attorneys how to conduct effective internet searches,²⁰¹ but they tend to focus on building on a core competency that each attorney possesses. This assumption is dangerous. Attorney

¹⁹⁷ DiBianca, *supra* note 63, at 182 (Noting that “a lawyer's ethical duties may actually require him to become familiar with, if not make use of, social media.”).

¹⁹⁸ *Id.* at 183, citing *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, ACAD. OF MATRIMONIAL LAWYERS (Feb. 10, 2010), <http://www.aaml.org/go/about-the-academy/press/press-releases/big-surge-in-social-networking-evidence-saysurvey-of-nations-top-divorce-lawyers/>.

¹⁹⁹ Law and Regulation of Social Media, Columbia University Law School, <https://www.law.columbia.edu/academics/courses/25613>; Social Media Law Seminar, Stanford University Law School, <https://law.stanford.edu/courses/social-media-law-seminar/>.

²⁰⁰ See Browning, *supra* note 8 at 196 (“But as a practical matter, how do we go about achieving the goal of technological competence? The key is education.”).

²⁰¹ See, e.g., *Cybersleuth's Guide to the Internet*, *supra* note 2; Mastering Google for Investigative/Due Diligence Research | CLE <https://www.facebook.com/events/1780577795587585/>; 1.0 Ethics & 2.0 General CLE Credits | CLE #2017-017. Ethics: Duty to Google ~ (ABA Model Rules of Professional Conduct, Rule 1.1 comment 8); Carole A. Levitt, Esq. & Mark E. Rosch, King County Bar Association CLE Brochure, *Discover Hidden and Undocumented Google Search Secrets*, KING COUNTY BAR ASSOCIATION (Apr. 17, 2017), <https://www.kcba.org/cle/pdf/278-Brochure.pdf>.

technological competency is famously poor, despite such competency being an ethical requirement.²⁰² There are anecdotal and empirical examples of skilled attorneys who lack technological competency.²⁰³ It may take an outreach program to educate the bar to bring its overall competency up to the appropriate level – if that level is discernable. 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, it is notable, as Margolis pointed out, that 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).²⁰⁴

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.²⁰⁵ While practicing attorneys

²⁰² Britton, *supra* note 13 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.”).

²⁰³ 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 of his, a talented patent lawyer who never used a computer and urging attorneys to take CLEs to become technologically competent).

²⁰⁴ Margolis, *Safari*, *supra* note 111, at 111 (“There is no doubt that the internet has raised the standard for competence in research when it comes to ensuring that a cited case is current and has not been overruled or invalidated.”).

²⁰⁵ See Browning, *supra* note 8, at 196. Indeed, as Browning notes, Suffolk University Law School offers a six-course a Legal Innovations and Technology Certificate designed for practicing attorneys. *Id.*

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

CONCLUSION: LOOKING AHEAD

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, codifying this requirement on its own, as part of the rules governing an attorney’s professional responsibility, makes sense. 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.