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### Should Judges Have a Duty of Tech Competence?

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# ARTICLE

*John G. Browning*

## Should Judges Have a Duty of Tech Competence?

**Abstract.** In an era in which lawyers are increasingly held to a higher standard of “tech competence” in their representation of clients, shouldn’t we similarly require judges to be conversant in relevant technology? Using real-world examples of judicial missteps with or refusal to use technology, and drawn from actual cases and judicial disciplinary proceedings, this Article argues that in today’s Digital Age, judicial technological competence is necessary. At a time when courts themselves have proven vulnerable to cyberattacks, and when courts routinely tackle technology-related issues like data privacy and the admissibility of digital evidence, Luddite judges are relics that the future—not to mention the present—can ill afford.

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### I. INTRODUCTION

During a conference of state supreme court chief justices, after hearing a discussion of how judges cannot be told what to do, a guest (counsel for a large corporation) is reported to have said, “I’ve listened to you people talk. I’ve got to tell you, you just don’t get it. You don’t have a clue what’s going on out in this world today.”<sup>1</sup> He then explained how slow, incremental changes would not stave off the exodus to alternative dispute resolution and arbitration “because the economy’s moving too fast, and you are moving too slow.”<sup>2</sup>

Yet, despite this warning, judges across the country regularly exhibit ignorance of or unwillingness to educate themselves about the technologies around which modern life revolves. And it’s not simply a matter of the

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1. *An Interview with Thomas Zlaket*, CT. REV., Fall 2000, at 4, 11.

2. *Id.*

occasional snickering over a judge not understanding how texting or cloud storage works; court operations from docket management to courtrooms, themselves, are increasingly driven by technology, and, indeed, judges must frequently rule on issues implicating matters of technology.<sup>3</sup> A judge's role demands tech competence in a wide range of matters from overseeing technology used in courtroom presentations, ruling on discovery and evidentiary issues involving digital sources, to their ethical use of technology like social media.<sup>4</sup> As the executive director of the Alaska Commission on Judicial Conduct observed in 2014, “[b]oth the effectiveness of an individual judge and the imperative to promote confidence in the judiciary require technological literacy.”<sup>5</sup>

Judges themselves are aware of the problem of insufficient tech competence. In 2019, technology vendor, Exterro, and Duke Law's EDRM<sup>6</sup> conducted a survey of federal judges, which showed that, while fifty-six percent agreed that lawyers' tech competence in e-discovery matters was adequate, only thirty percent of those surveyed were satisfied with their own level of tech training or education.<sup>7</sup> Seventy percent said federal judges should receive more training and education on e-discovery technology and practices, while an additional five percent called for “extensive increases” in such training.<sup>8</sup>

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3. See, e.g., Marla N. Greenstein, *Judges Must Keep Up with Technology: It's Not Just for Lawyers*, JUDGES' J., Fall 2014, at 40, 40 (“[J]udges increasingly are asked to issue search warrants for electronic data with changing privacy implications.”).

4. John G. Browning & Don Willett, *Rules of Engagement: Exploring Judicial Use of Social Media*, 79 TEX. B.J. 100, 101 (2016) (exploring how a judge's misuse of technology can give “at least the appearance of a lack of impartiality” potentially resulting in overturned cases); Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1230 (2018) (determining the meaning of emojis is an area of technology which judges are actively navigating). Additionally, although the COVID-19 global pandemic struck after the deadline for this Article and the Symposium at which it was presented, the rush by courts all over the country to conduct hearings and other proceedings via videoconferencing platforms, like Zoom, underscores the importance of tech competence in times of crisis. On April 8, 2020, the Supreme Court of Texas made history when, for the first time, it held oral arguments via Zoom. Amy Howe, *Courtroom Access: Faced with a Pandemic, the Supreme Court Pivots*, SCOTUSBLOG (Apr. 16, 2020, 2:58 PM), <https://www.scotusblog.com/2020/04/courtroom-access-faced-with-a-pandemic-the-supreme-court-pivots/> [<https://perma.cc/4CEJ-L6PR>].

5. Greenstein, *supra* note 3, at 40.

6. EDRM is the Electronic Discovery Reference Model, an organization that sets the standards for e-discovery practice. *EDRM*, DUKE LAW CTR. JUD. STUD., <https://web.law.duke.edu/judicial-studies/edrm/> [<https://perma.cc/849X-5P22>].

7. *5th Annual Federal Judges Survey: E-Discovery Advice for Becoming a Better Attorney*, EXTERRO 2, 14 (Feb. 15, 2019), <https://www.exterro.com/2019-judges-survey-ediscovery/> [<https://perma.cc/Q7S2-RHX6>].

8. *Id.* at 14.

Recently, much has been written regarding the revision to Comment 8 of ABA Model Rule of Professional Conduct 1.1, which states that lawyers have a responsibility to not only “keep abreast of changes in the law and its practice,” but also remain conversant in “the benefits and risks associated with relevant technology.”<sup>9</sup> To date, thirty-eight states have adopted this language or a variation of it.<sup>10</sup> Yet, while judges have their own model code of conduct, this code does not contain a counterpart duty of tech competence, and neither does any individual state’s judicial code of conduct.

Perhaps the closest that the Model Code of Judicial Conduct comes to supporting such a duty can be found in two provisions. A comment to Rule 2.5 broadly defines judicial competence as requiring not only legal knowledge, but also the “skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.”<sup>11</sup> In the Digital Age, this could encompass everything from an awareness of cybersecurity risks, such as ransomware and how court systems might be affected, to the competence needed to assess the quality of counsel’s Internet legal research<sup>12</sup> and knowing how to ethically use social media in one’s professional and personal capacities.<sup>13</sup> And in an age of escalating use of technology by bad actors for everything from revenge porn to cyberstalking, cyberbullying, and adopting false Internet personas, it has become critical for judges to have a working knowledge of the technology underlying such causes of action.<sup>14</sup> As studies of the admissibility and evidentiary significance of emojis have demonstrated, means of

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9. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2020); *see, e.g.*, 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, 183 (2019) (“[T]he California Bar made it clear that it requires attorneys who represent clients in litigation to either be competent in e-discovery or to get help from those who are competent.”).

10. Robert Ambrogi, *38 States Have Adopted the Duty of Technology Competence*, LAW SITES, <https://www.lawsitesblog.com/tech-competence> [<https://perma.cc/4XMJ-D8FD>] (listing the states that have adopted a duty to remain competent in technology).

11. MODEL CODE OF JUD. CONDUCT r. 2.5 cmt. 1 (AM. BAR ASS'N 2020).

12. *See* Cass v. 1410088 Ontario, Inc., [2018] O.J. No. 6148 (Can. Ont. Super. Ct.) (QL) (questioning why CanLII was not used for legal research to keep costs down).

13. *See* John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 533 (2014) (“[A] judge’s misuse of social media can certainly violate canons of ethics and negatively impact public perception of the judiciary . . .”); Browning & Willett, *supra* note 4, at 100 (suggesting when more judges start to use social media, it “often translates to more judges using social media badly”).

14. *See* Fredric I. Lederer, *Judging in the Age of Technology*, JUDGES’ J., Fall 2014, at 6, 8 (“As technology permeates our lives, it also affects the types of cases that courts must resolve, the procedural and evidentiary law to be applied, and the court’s culture.”).

communicating online have led to a new language of sorts, one which judges are increasingly called upon to interpret.<sup>15</sup>

## II. CAUTIONARY TALES

### A. Judge Michael Bitney

The second provision in the Model Code of Judicial Conduct is Rule 1.2, which mandates that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”<sup>16</sup> Unfortunately, there is an abundance of examples of judges whose misuse of technology—or refusal to use it—tends to undermine public confidence in the integrity and impartiality of the judiciary.

Consider the recent case of Wisconsin Judge Michael Bitney, for example. Judge Bitney was presiding over a family court matter in 2017, in which Angela Carroll filed a motion to modify a joint custody order and shared physical placement of her son on the grounds that the boy’s father, Timothy Miller, “had engaged in a pattern of domestic abuse against her.”<sup>17</sup> After the parties had submitted their written arguments, Judge Bitney accepted Carroll’s Facebook friend request.<sup>18</sup> Not long after, Carroll “liked” eighteen of Judge Bitney’s Facebook posts and commented on two of them.<sup>19</sup> None of these likes or comments related to the pending litigation, and Judge Bitney replied to neither Carroll’s comments nor “likes.”<sup>20</sup> However, Carroll “liked” and shared various third-party posts, including one on domestic violence; this “activity could have appeared on [Judge Bitney’s] Facebook ‘newsfeed.’”<sup>21</sup>

After Bitney issued a ruling granting Carroll’s motion to modify, Miller learned of the Facebook friendship between his ex and the judge.<sup>22</sup> When Miller’s motion to reconsider the ruling was denied, he appealed the issue to

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15. See John G. Browning & Gwendolyn Seale, *More Than Words: The Evidentiary Value of Emoji*, FOR THE DEF., Oct. 2015, at 34, 35–36 (highlighting a United States District Court judge’s decision to allow emojis to be shown to the jury as “they are meant to be read”); Goldman, *supra* note 4, at 1230 (“[E]mojis contribute to misunderstandings that will require judicial interpretation.”).

16. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2020).

17. *Miller v. Carroll (In re Paternity of B.J.M.)*, 925 N.W.2d 580, 582 (Wis. Ct. App. 2019).

18. *Id.*

19. *Id.*

20. *Id.* at 582–83.

21. *Id.* at 583.

22. See *id.* (“Miller confirmed the Facebook connection between Carroll and Judge Bitney. He then moved the circuit court for reconsideration . . .”).

the Wisconsin Court of Appeals.<sup>23</sup> The appellate court vacated the ruling and, in what it acknowledged as a case of first impression, held that the establishment of an undisclosed Facebook connection between a judge and a litigant appearing in ongoing litigation before that judge “created a great risk of actual bias, resulting in the appearance of partiality.”<sup>24</sup> Although declining to adopt a bright-line rule governing judicial use of social media, the court recognized that, while a Facebook friendship does not necessarily denote a more traditional friendship, the fact that the connection was not disclosed and that Carroll was a current litigant before Judge Bitney heightened the appearance of partiality.<sup>25</sup> The court also concluded that Carroll’s “liking” and “sharing” of posts concerning domestic violence was a form of ex parte communication that held at least the possibility of affecting Judge Bitney’s decision-making.<sup>26</sup>

#### B. *Judge Edward Bearse*

Judge Bitney, sadly, is far from an isolated cautionary tale. Judges around the country have found themselves facing recusal motions, disciplinary proceedings, or have been forced to resign from office due to their ethical lapses in judicial use of social media.<sup>27</sup> For a number of these judges, a lack of understanding of the relevant technology and its functionality was at least partially to blame for the judge’s lapse in judgment.

Consider, for example, Senior Judge Edward W. Bearse of Minnesota. In November 2015, Judge Bearse was publicly reprimanded by the Minnesota Board on Judicial Standards for his Facebook posts about cases he was presiding over—including one that resulted in a vacated verdict.<sup>28</sup> Bearse (who had served on the bench for thirty-two years, retired in 2006, and was sitting statewide by appointment) referred to Hennepin County District Court in one post as “a zoo.”<sup>29</sup> In another, he

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23. *See id.* (“[Judge Bitney] concluded that ‘even given the timing of his and Carroll’s Facebook connection, the circumstances did not ‘rise to the level of objective bias . . . .’”).

24. *Id.* at 582.

25. *Id.*

26. *Id.* at 587 (“[An] erosion of public confidence and appearance of impropriety occurred here.”).

27. For a broader discussion, see generally Browning, *supra* note 13, at 489, which “examines both the positive aspects of judges participating in social media as well as the ethical pitfalls.”

28. *See generally In re Bearse*, File No. 15-17 (Minn. Bd. Jud. Standards Nov. 20, 2015) (amended public reprimand) (providing multiple instances of Judge Bearse’s inappropriate actions resulting in the Board’s investigation and eventual public reprimand).

29. *Id.* at ¶¶ 1, 9.

reflected on a case in which the defense counsel had to be taken away by an ambulance mid-trial, likely to result “in chaos because defendant has to hire a new lawyer who will most likely want to start over and a very vulnerable woman will have to spend another day on the witness stand . . . .”<sup>30</sup>

During *State v. Weaver*, a sex trafficking trial, Bearse posted the following:

Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.<sup>31</sup>

After a guilty verdict, the prosecutor discovered Bearse’s Facebook post and disclosed it to the defense counsel, who successfully moved for a new trial because of the prejudice implied by the post.<sup>32</sup> In the disciplinary proceeding, Bearse explained that he was new to Facebook,<sup>33</sup> was unaware of privacy settings, and did not realize his posts were publicly viewable.<sup>34</sup> The Board concluded that he had put his “personal communications preferences above his judicial responsibilities,” given at least the appearance of a lack of impartiality, and had engaged in “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”<sup>35</sup>

### C. Judge William Shubb

Another cautionary tale about judicial use of social media almost made it to the United States Supreme Court. The case of *United States v. Sierra Pacific Industries, Inc.*<sup>36</sup> arose out of a two week wildfire in September 2007—dubbed the “Moonlight Fire” due to its proximity to Moonlight Peak—that devastated nearly 46,000 acres of forest in northern California.<sup>37</sup> The California Attorney General filed suit in August 2009 against Sierra Pacific Industries, blaming the lumber giant for the blaze.<sup>38</sup> A federal

30. *Id.* at ¶ 5.

31. *Id.* at ¶ 3.

32. *Id.* at ¶ 4.

33. *See id.* (stating Bearse had been using Facebook to communicate with his grandchildren for only two years).

34. *In re* Bearse, File No. 15-17 at 5 (Minn. Bd. Jud. Standards Nov. 20, 2015) (mem.).

35. *In re* Bearse, File No. 15-17 at ¶ 12 (Minn. Bd. Jud. Standards Nov. 20, 2015) (amended public reprimand).

36. *United States v. Sierra Pac. Indus.*, 862 F.3d 1157 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2675 (2018).

37. *Id.* at 1163.

38. *Id.* at 1163–64.



lawsuit paralleling the state court action was soon filed as well, and in July 2012, a settlement was reached by the parties to the federal court case, in which the defendants denied liability.<sup>39</sup>

In February 2014, the state court lawsuit was dismissed with prejudice because the plaintiff failed to establish a prima facie case against any of the defendants.<sup>40</sup> The state court judge also awarded sanctions against the plaintiffs and plaintiffs' counsel for extensive discovery abuses.<sup>41</sup> Armed with these favorable rulings and the results of an independent investigation, Sierra Pacific moved to vacate the settlement, alleging "fraud on the court."<sup>42</sup> United States District Court Judge William B. Shubb denied that motion.<sup>43</sup>

Sierra Pacific appealed, pointing out that on the same day of the ruling, the United States Attorney's office for the Eastern District of California had posted several tweets about the outcome of the case.<sup>44</sup> Judge Shubb followed the Eastern District of California on Twitter (@EDCAnews) "and had purportedly received tweets about the merits of the case."<sup>45</sup> According to Sierra Pacific's lawyers, Judge Shubb "tweeted about the case from his then-public Twitter account (@Nostalgist1)," using the headline "Sierra Pacific still liable for Moonlight Fire damages," and providing a link to an article concerning the case.<sup>46</sup> Sierra Pacific's lawyer underscored how not only was the tweet inaccurate, "it also increased the appearance of bias and 'prejudice[d] Sierra Pacific'" in the then-pending state court appeal.<sup>47</sup> During the appeal of Judge Shubb's ruling, federal prosecutors advised him that his Twitter usage had become an appellate issue, prompting Judge Shubb to change his account's privacy settings to "protected," allowing only authorized followers to see his tweets.<sup>48</sup>

In July 2017, the United States Court of Appeals for the Ninth Circuit affirmed Judge Shubb's ruling denying the defendants' motion to set aside

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39. *Id.* at 1164.

40. *Id.* at 1165.

41. *Id.*

42. *Id.* at 1165–66.

43. *Id.* at 1166.

44. *Id.*

45. Browning & Willett, *supra* note 4, at 101.

46. *Id.*

47. *Id.*

48. Appellants' Motion for Judicial Notice or, In the Alternative, Motion to Supplement the Record on Appeal; Memorandum of Points and Authorities; Declaration of William R. Warne at 5, *Sierra Pac. Indus.*, 862 F.3d 1157 (9th Cir. 2017) (No. 15-15799).

the federal settlement.<sup>49</sup> However, the court also took the opportunity to recognize the important issues raised by the trial judge's use of social media, stating "this case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance of propriety both on and off the bench."<sup>50</sup>

With respect to Judge Shubb's Twitter activities, the Ninth Circuit panel felt that they did not warrant his retroactive recusal for two reasons. First, with Twitter's status as a service used by news organizations, government officials, and others "as an official means of communication," the mere fact of the federal judge "following" the federal prosecution's Twitter account did not constitute evidence of the kind of personal relationship needed for recusal.<sup>51</sup> Second, under the Ninth Circuit's plain error standard of review, the mere tweeting of a title and link to a publicly available article about the case, without any commentary or other indicia of partiality, would not rise to the level of error by Judge Shubb in failing to recuse himself retroactively.<sup>52</sup>

While the Ninth Circuit may have missed the opportunity for a teachable moment for judges venturing onto social media, and despite the United States Supreme Court ultimately denying the defendants' petition for writ of certiorari, this case still serves as the cautionary tale to which the Ninth Circuit alluded.<sup>53</sup> A more sophisticated, technologically proficient user would have realized the publicly accessible, non-private nature of his Twitter account—not to mention the numerous identifying features tying Judge Shubb to the account.<sup>54</sup> Putting aside the troubling ethical issue of whether Judge Shubb's Twitter activity violated Canon 2<sup>55</sup> and

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49. *Sierra Pac. Indus.*, 862 F.3d at 1175–76.

50. *Id.*

51. *Id.* at 1174.

52. *Id.* at 1175.

53. *See id.* at 1176 n.17 ("In making this decision, we do not express any opinion as to the veracity of either party's factual assertions, attempt to decide any of the underlying issues, or express any opinion as to the troubling issues discussed in the state court opinion. Nor do we make any findings as to the alleged use of the judge's Twitter account, which was an issue undeveloped in the district court. Those questions must be resolved, if at all, in another forum.").

54. Appellants' Reply in Support of Motion for Judicial Notice or, In the Alternative, Motion to Supplement the Record on Appeal at 5–8, *Sierra Pac. Indus.*, 862 F.3d 1157 (9th Cir. 2017) (No. 15-15799).

55. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (Jud. Conf. 2019) (requiring judges to "avoid impropriety and the appearance of impropriety in all activities").

Canon 3A(6)<sup>56</sup> of the Code of Conduct for United States Judges, this entire situation could have been avoided if the judge had a greater degree of technological competence.

Not everyone agrees with the Ninth Circuit's ruling or the United States Supreme Court's decision to deny certiorari. The results of a 2015 online poll showed eighty-five percent of respondents agreed that "(1) the judge's tweet was improper and (2) judges should not tweet about cases before them."<sup>57</sup> Further, in his article *Judicial Ethics and the Internet (Revisited)*, retired Judge Herbert B. Dixon Jr. argued that judicial competence necessarily encompasses an understanding of how new and emerging technologies impact a jurist's ethical obligations.<sup>58</sup> As Judge Dixon sagely observed:

The technologies of the Internet are new and still developing, but our principles of fairness are well established. . . . Any appearance of partiality resulting from a judge's conduct on the Internet or any social media platform toward or against any party is a result our justice system cannot tolerate.<sup>59</sup>

There are, sadly, many other examples of judicial misuse of social media, ranging from judges disciplined for impermissibly endorsing a political candidate through "likes" and posts; posting controversial content on social networking platforms; to questionable Facebook "friendships" and ex parte communications online.<sup>60</sup> However, to the extent that they stem not from a lack of tech competence but from ethical lapses are beyond the scope of this paper.

#### D. *Judge Bruce Scolton*

While misusing technology can undermine public confidence in the impartiality of the judiciary, refusal to use technology can undermine confidence in the integrity of the judiciary. In December 2018, Judge Bruce Scolton resigned his position as court justice for the town of Harmony, New York—a position he had held for twenty-eight years—and

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56. *Id.* Canon 3A(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

57. Herbert B. Dixon Jr., *Judicial Ethics and the Internet (Revisited)*, JUDGES' J., Fall 2018, at 37, 38.

58. *Id.*

59. *Id.*

60. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (discussing judicial participation in electronic social networking).

“agreed to never seek judicial office again.”<sup>61</sup> The reason? According to a complaint filed with the New York State Commission on Judicial Conduct, Judge Scolton “did not use his court email account for more than three years[,] . . . had not activated or used a computer provided to him by a grant from the Office of Court Administration[,] . . . [and] had failed to install certain court-related software on the computer,” rendering the Harmony Town Court unable to receive electronically-filed traffic citations.<sup>62</sup> In a news release from the Commission, it noted that Judge Scolton had “failed to make timely reports and deposits of court funds to the State Comptroller,” and to give notice to the Department of Motor Vehicles regarding deficient drivers.<sup>63</sup> The release went on to note that “public confidence” required local justices like Scolton “to account scrupulously for, and timely remit, all fines” owed to make “prompt and accurate reports of dispositions, so that a judge in a later case, for example, may properly adjudicate and fine a repeat traffic offender.”<sup>64</sup> Judge Scolton had been using paper forms of his own design to notify the Department of Motor Vehicles about dispositions—even though the department did not accept the paper forms he had been filing since 1991.<sup>65</sup>

### III. OTHER REASONS WHY JUDICIAL TECHNOLOGICAL COMPETENCE IS NECESSARY

#### A. *Holding Lawyers, Court Staff, and Jurors Accountable*

One key reason for requiring judges to be conversant in relevant technology has less to do with the judges themselves than with those appearing in their courtrooms, such as lawyers, courtroom staff, and even jurors. Maintaining courtroom decorum and protecting the integrity of the justice system is part of the judicial role.<sup>66</sup> And while judges necessarily

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61. Dan M. Clark, *Western NY Judge Resigns Over Administrative, Tech Failures After 28 Years on Bench*, N.Y. L.J. (Dec. 13, 2018), <https://www.law.com/newyorklawjournal/2018/12/13/western-ny-judge-resigns-over-administrative-tch-failures-after-28-years-on-bench> [https://perma.cc/C69V-W8JK].

62. *Id.*

63. News Release, N.Y. State Comm'n on Judicial Conduct, *Town Court Justice in Chautauqua County Resigns After Being Charged with Administrative Deficiencies* (Dec. 13, 2018), <http://cjc.ny.gov/Press.Releases/2018.Releases/Scolton.Bruce.S.Release.2018-12-13.pdf> [https://perma.cc/5BRV-TBJD].

64. *Id.*

65. Clark, *supra* note 61.

66. MODEL CODE OF JUD. CONDUCT Canon 1, r. 2.8 (AM. BAR ASS'N 2020).

depend upon counsel appearing before them to help achieve these goals by reminding litigants and witnesses to adhere to the court's instructions, the fact remains that technology misuse can threaten the integrity of the system. From jurors tweeting or commenting online about the cases before them—such as “researching” the parties and issues online<sup>67</sup>—to lawyers failing to uphold their duty of candor to the tribunal,<sup>68</sup> the sanctity of the trial process can be undermined by the online misconduct of those participating in the process. Judges must not only be aware of the potential for such misbehavior by those in their courtrooms; they should also have at least a basic grasp of the technology that could enable such undermining of the court's authority.

Take, for example, a lawyer's duty of candor to the tribunal.<sup>69</sup> While there have been several anecdotal examples of lawyers who have obtained a continuance from a judge only to later face a reckoning when their Facebook activities betray the false grounds for delays, the simple fact is that using technological means to verify a lawyer's story can help a judge.<sup>70</sup> For example, in 2018 a Texas lawyer received a probated suspension for testifying falsely in a probation review hearing.<sup>71</sup> The attorney's involvement in the proceeding began innocently enough: he took a friend out to a bar for drinks, and memorialized their night out celebrating with photos on Facebook.<sup>72</sup> Unfortunately, the friend in question was on probation and barred from drinking alcohol, frequenting establishments serving alcohol, or violating a curfew.<sup>73</sup> The lawyer testified at the probation hearing that the friend was not with him, only to have his lack of

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67. See Michael R. Sisak, *Weinstein Lawyers: 'Circus' Atmosphere, Juror Tweets Unfair*, ASSOCIATED PRESS, (Jan. 15, 2020, 7:52 AM), <https://apnews.com/3828f1b0f398724cd7cee3b543185366> [<https://perma.cc/TC53-V8N8>] (“As if picking a jury for Harvey Weinstein's rape trial wasn't complicated enough, some potential jurors have been posting on social media about their involvement in the case, violating court rules that could land them behind bars . . .”).

68. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

69. *Id.* r. 3.03.

70. See Charles Toutant, *Late-Filing Lawyer's Excuse Undone by Vacation Photos on Instagram*, N.J. L.J. (Apr. 27, 2018, 5:44 PM), <https://www.law.com/njlawjournal/2018/04/27/late-filing-lawyers-excuse-undone-by-vacation-photos-on-instagram/?slreturn=20200023015227> [<https://perma.cc/UYB3-5K6B>] (sanctioning attorney who falsified justification for requesting extension after missing a filing deadline).

71. Comm'n for Law. Discipline v. Giovannini, File No. 201705757 (State Bar of Tex. Evid. Panel 11-1 June 12, 2018) (on file with author).

72. *Id.*

73. *Id.*

candor revealed when the probation officer brought the Facebook posts (as well as surveillance video from the bar) to the court's attention.<sup>74</sup>

An even more egregious example is New York lawyer, Lina Franco. Franco, a labor and employment solo practitioner, was representing a group of restaurant workers in a wage-and-hour violation case, *Ha v. Baumgart Café*.<sup>75</sup> Having missed a filing deadline pursuant to the Fair Labor Standards Act, Franco filed a request for an extension of time sixteen days after the fact.<sup>76</sup> As good cause for the extension, Franco represented to the court that she had missed her deadline due to a family emergency in Mexico City, attaching what appeared to be a travel website itinerary showing her flights to and from New York and Mexico City.<sup>77</sup>

Unfortunately for Franco, her opposing counsel owned a calendar and was social media savvy.<sup>78</sup> Defense attorney Benjamin Xue responded with exhibits of screenshots from Franco's Instagram account during the period of time she was supposedly in Mexico City caring for her ailing mother, which showed Franco enjoying a Thanksgiving dinner in New York, visiting a bar in Miami, attending an art exhibit in Miami, and sitting poolside in Miami (note: enjoying a poolside margarita does not count as "visiting Mexico").<sup>79</sup>

Caught red-handed, Franco admitted her lack of candor to the court, stated she was "not honest," and claimed she had experienced so much emotional distress from caring for her mother at an earlier juncture that it caused her to miss the filing deadline and provide the fake itinerary.<sup>80</sup> Further falling on her sword, Franco withdrew as counsel for the three restaurant worker plaintiffs.<sup>81</sup> However, lawyers for the restaurant owners sought sanctions against Franco. United States Magistrate Judge Michael A. Hammer agreed with the defense, finding that Franco had

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74. *Id.*

75. Toutant, *supra* note 70.

76. *Id.*

77. *Id.*

78. *See id.* ("Her purported flight itinerary showed her taking a flight to Mexico City on Thursday, Nov. 21, but defense lawyer Benjamin Xue pointed out that Nov. 21 was a Monday, not a Thursday.").

79. *Id.*

80. *Id.*

81. Motion for Leave to Withdraw as Counsel Pursuant to L. Civ. R. 102.1, *Ha v. Baumgart Café*, Case 2:15-cv-05530-ES-MAH, 2018 WL 1981478 (D.N.J. Dec. 23, 2016), ECF No. 61.

“deliberately misled the Court and the other attorneys in this case.”<sup>82</sup> Judge Hammer imposed sanctions of \$10,000 against Franco.<sup>83</sup>

Of course, it is not just lawyers’ use of technology that judges need to be aware of; courtroom staff’s misuse of social media platforms can also endanger public confidence in the fairness and impartiality of the justice system. Consider, for example, the case of April C. Shepard, a Kansas court reporter at the Wyandotte County District Court, who had previously served in the same capacity for the Shawnee County District Court. In December 2019, the Kansas Supreme Court entered a public reprimand against Shepard for comments she had made on social media that the court and the Kansas State Board of Examiners of Court Reporters found had undermined public confidence in the “*independence, integrity, and impartiality* of the judiciary.”<sup>84</sup>

In 2012, Shepard was the court reporter for a highly publicized murder trial, *State v. Chandler*.<sup>85</sup> In late October 2017, while the case was on appeal, the *Topeka Capitol Journal* published an article that included a number of comments that Shepard made on Facebook concerning the trial:

- “Oh, stop. Dana Chandler is not innocent. She may get a new trial but the outcome will be the same.”
- “No one else would’ve done this but Dana Chandler.”
- “I’m confident they got the right perpetrator in this case. Look, I was there, I reported that whole case. I saw firsthand this case. I do agree, though, a lot of times they have prosecuted the wrong person and I believe those people should be exonerated however it happens. This case however is very different.”<sup>86</sup>

Chandler’s appeal was successful, and in April 2018, her conviction was overturned.<sup>87</sup> Although Shepard acknowledged making the Facebook posts, she insisted that “she handled herself in an impartial and objective

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82. Toutant, *supra* note 70.

83. A total of \$44,283 in attorney’s fees were sought by the three defense firms, but Judge Hammer rejected the requests as “unreasonably high.” *Id.*

84. *In re Shepard*, 453 P.3d 288, 294 (Kan. 2019) (quoting KAN. S. CT. R. 441).

85. *State v. Chandler*, 414 P.3d 713 (Kan. 2018). The defendant, Dana Chandler, had been convicted of killing her ex-husband and his girlfriend. *Id.* at 717–18.

86. *In re Shepard*, 453 P.3d at 290.

87. *See Chandler*, 414 P.3d at 716 (reversing Chandler’s murder convictions and remanding “this case to the district court for further proceedings”).

manner” during the trial.<sup>88</sup> However, despite her claim that the online comments in question were made more than four years after the trial, she admitted that “in hindsight, perhaps that was not the appropriate thing to do.”<sup>89</sup>

The Kansas Supreme Court ordered that Shepard receive a public reprimand, noting her status as an officer of the court and stating that “courts and officers of the court must maintain an image of fairness and impartiality in the administration of justice.”<sup>90</sup> Going further, the court observed that

Respondent knew the case she was discussing was on appeal because her Facebook comment acknowledged the possibility that the defendant may get a new trial but opined the defendant would be found guilty again. This comment, along with her other comments that spanned almost a year and a half, completely ignores the presumption of innocence that defendant carries throughout a trial. Respondent’s comments are concrete and classic examples of bias or prejudice against a party.<sup>91</sup>

A judge who is tech competent will not only be aware of the potential for lawyers and staff to engage in online misconduct but will also be vigilant in detecting the disruptive effects of jurors who threaten the integrity of the justice system through various forms of online misconduct. Such misconduct consists of jurors “researching” the parties and issues online and communicating with third parties—or even litigants themselves—via social media platforms.<sup>92</sup> This is a persistent issue that has been the subject of considerable attention, including scholarly articles.<sup>93</sup> It has also led to many jurisdictions revising or updating their jury instructions and admonishments to address this threat from inside the jury box.<sup>94</sup>

It is sufficient to note that it is important in this Digital Age for a judge to be aware of how damaging jurors’ online activities can be to the integrity

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88. *In re Shepard*, 453 P.3d at 290.

89. *Id.* at 291.

90. *Id.* at 293.

91. *Id.* at 294.

92. See *Sisak*, *supra* note 67 (discussing a judge’s warnings to jurors involving the use of social media and its potentially prejudicial affects).

93. See, e.g., Browning, *supra* note 9, at 183 (addressing issues involving tech competence and ethics within the judiciary and legal profession).

94. See Amy J. St. Eve et al., *More From the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 86–89 (2014) (“[T]he best way to ensure an impartial jury in the age of social media is through carefully crafted jury instructions.”).



of judicial proceedings and the presumption of those proceedings' fairness and impartiality. To illustrate how this continues to be a concern, one need look no further than the most recent high-profile trial in the media's glare: the sexual assault trial in New York of former movie mogul Harvey Weinstein.<sup>95</sup> As jury selection got underway, presiding Judge James Burke commented about the tendency of prospective jurors to venture onto social media despite the court's warnings: "The court was alerted recently that a few prospective jurors from last week went on Facebook and Twitter as if I hadn't just said not to, what was it, a hundred times? A thousand times? Was anything I said ambiguous?"<sup>96</sup>

Among the potential jurors who had been dismissed, was a man who had "tweeted about leveraging 'serving on the jury of a high-profile case' to promote a novel" he had written.<sup>97</sup> The would-be juror narrowly avoided jail time for violating Judge Burke's orders not to tweet about the trial.<sup>98</sup> As this latest case illustrates, part of a judge's technological competence involves being aware of and proactive about the dangers of impermissible online activities by jurors.

#### B. *Cyberthreats: Courts Under Siege*

Yet, another reason for requiring some degree of tech competence on the part of judges is that the environment in which courts exist is one that is increasingly under attack from cyberthreats, such as ransomware attacks or distributed denial of service (DDoS) attacks.<sup>99</sup> In December 2015, and again in June 2016, the Minnesota Judicial Branch suffered coupling cyberattacks, the second of which disrupted its website functionality for

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95. Sisak, *supra* note 67; see also J. Clara Chan, *Prospective Harvey Weinstein Juror Who Tweeted About Trial Could Face Jail Time*, WRAP (Jan. 16, 2020, 1:22 PM), <https://www.thewrap.com/harvey-weinstein-trial-prospective-jurors-tweet-jail-time/> [<https://perma.cc/36LF-6URF>] (outlining possible repercussions faced by a juror whose use of social media violated a judge's order).

96. Sisak, *supra* note 67.

97. *Id.*

98. Elizabeth Wagmeister, *Weinstein Judge Lectures Would-be Juror Over Bad Tweet*, VARIETY (Mar. 10, 2020, 8:42 AM), <https://variety.com/2020/biz/news/harvey-weinstein-juror-howard-mittelmark-tweet-court-judge-1203528690/> [<https://perma.cc/L87F-PWM3>].

99. See Herbert B. Dixon Jr., *Cyberattacks on Courts and Other Government Institutions*, JUDGES' J., Summer 2018, at 37, 38 ("[T]he purpose of [a DDoS attack] is to deny access to the website by legitimate users."); Victoria Hudgins, *When Local Courts Get Hit by Cyberattacks, Who's Liable?*, LEGALTECH NEWS (June 3, 2019, 11:00 AM), <https://www.law.com/legaltechnews/2019/06/03/w-hen-local-courts-get-hit-by-cyberattacks-whos-liable/?slreturn=20200115145226> [<https://perma.cc/GA8D-SYE6>] ("The growing number of local governments targeted by cyberattacks highlights that data breaches are not just the problem of private entities but a threat to the public sector, too.").

ten days.<sup>100</sup> This “DDoS attack overwhelmed the Minnesota Judicial Branch’s website with network traffic that blocked out typical users.”<sup>101</sup> In January 2014, cyberterrorists launched cyberattacks on the federal court system that led to a brief outage of some court websites as well as the PACER system.<sup>102</sup> For hours, these attacks disrupted bankruptcy courts, district courts, and circuit appellate courts nationwide. As one observer described the risks if such attacks had been successful: “Personal data of court patrons is at risk—compromising their identities and inviting fraud. Intrusion into the court systems could sabotage the workings of the judiciary—even introduce subversive information that could throw the outcome of a case.”<sup>103</sup>

Cyberattacks have unfortunately become a part of the new reality that courts have to cope with in the Digital Age. In March 2018, the municipal courts of the City of Atlanta were hit with a ransomware attack that rendered its systems unable to process ticket payments or validate outstanding warrants.<sup>104</sup> In May 2019, “the First Judicial District of Pennsylvania shut down Philadelphia’s court website, including its docket tracking and litigation filing features,” due to a “virus intrusion” found on court computers.<sup>105</sup> In late April 2019, Potter County, Texas, was victimized by a ransomware attack that shut down its entire network of 550 computers and reduced all of its court employees to the use of pencils and paper.<sup>106</sup> That event pales in comparison to the coordinated ransomware attack in August 2019 that struck at least twenty-three small Texas cities, paralyzing the computer systems of police, courts, and other entities.<sup>107</sup>

Since courts, like most governmental entities, usually possess sensitive information concerning both individuals and companies, they are a tempting

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100. Dixon, *supra* note 99, at 38.

101. *Id.*

102. *Id.* at 39.

103. Donna Rogers, *Gone Phishing*, CTS.TODAY, Aug.–Sept. 2017, at 34, 40.

104. Dixon, *supra* note 99, at 37.

105. Hudgins, *supra* note 99.

106. Tiffany Lester, *Three Viruses Attack Potter Co. Computer System, Employees Anxious to Return to Work*, ABC7 NEWS (Apr. 26, 2019), <https://abc7amarillo.com/news/local/three-viruses-attack-potter-co-computer-system-employees-anxious-to-return-to-work> [<https://perma.cc/VC8B-KHNY>].

107. Antonio Villas-Boas, *23 Towns in Texas Were Hit by Possibly the Largest-Ever Ransomware Attack, in What Could Be the First Coordinated Cyberattack of Its Kind*, BUS. INSIDER (Aug. 20, 2019, 12:34 PM), <https://www.businessinsider.com/texas-ransomware-attack-affects-23-towns-single-attacker-2019-8> [<https://perma.cc/6XEA-EM9U>].

target for cyberattacks, regardless of whether the motive is ransom, theft of data, or simply disruption.<sup>108</sup> An increasing number of courts are realizing the growing necessity to educate court personnel on how to prevent or mitigate the risks of cyberattacks, just as more courts are formulating response plans in the event of such attacks.<sup>109</sup> Because the greatest areas of vulnerability for any institution is its human personnel, who can fall prey to phishing emails and other means for bad actors to gain access, it is vital that judges appreciate the risk of cyberattacks. It is essential for judges and other individuals to practice good digital hygiene. And in an environment in which court systems find themselves in the crosshairs of cyberterrorists, the stakes are much higher than the fleeting embarrassment of an inadvertent “reply all” email or other electronic misstep.

### C. *Technology In, and Before, the Courts*

Perhaps the most obvious reason for requiring judges to be tech competent is the fact that, as society has become more technologically-obsessed, more of the disputes making their way to the judicial arena involve technology issues or the presentation of evidence from less traditional sources.<sup>110</sup> And in the era of e-discovery, digital filing, lawyers presenting their cases using tablets or laptops, and a dizzying array of trial presentation software, the very nature of how a case is initiated, worked up, and put before a judge and jury has fundamentally changed. We live and practice in a world where the evidence may come from a tweet or Facebook post; the emoji in an email or text may be subject to different interpretations with varying legal significance; digital evidence from a Fitbit or Amazon Echo could alter the course of a case; and a judge’s decision-making on everything from bail consideration to sentencing or probation guidelines may be impacted by an algorithm.<sup>111</sup> At least one writer (herself a former federal judge) has written about the potential for

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108. See Dixon, *supra* note 99, at 39 (listing motives behind cyberhacking incidents).

109. See *id.* (“[C]ourts and other government institutions have a responsibility to protect the information and data they hold.”).

110. See Sheila Jasanoff & Dorothy Nelkin, *Science, Technology, and the Limits of Judicial Competence*, 68 A.B.A.J. 1094, 1094 (1982) (“The resulting surge of science-related disputes into the judicial arena has produced a set of difficult and highly visible problems for the courts . . .”).

111. See generally Goldman, *supra* note 4 (surveying multiple challenges courts face when dealing with new technologies in courtrooms).

artificial intelligence holographic judges to shoulder some of a court's caseload.<sup>112</sup>

A related issue concerns not just how evidence comes before a judge in the twenty-first century, but the substance of the disputes themselves becoming more technology-oriented.<sup>113</sup> Some legal scholars have noted the need for judges who are more conversant in technology, since “[r]esolution of scientific and technological controversies occupies an increasingly important position in the agenda of the federal courts.”<sup>114</sup> Technology writers and legal scholars alike have never been shy about criticizing courts that “get it wrong” about the technological issues that come before them. One prime example is the Eleventh Circuit Court of Appeals sentencing Eric Lundgren to fifteen months in prison and fining him \$500,000 for “counterfeiting” software recovery disks that Microsoft gives away for free, a result that one writer said betrayed the judge’s “near total ignorance of technology.”<sup>115</sup> Some observers, however, point to the fact that “judges everywhere rely on lawyers to explain the nuances of the cases before them,” and that cases involving technology are no different—therefore, the stereotype of the Luddite judge is just that, a stereotype.<sup>116</sup>

#### IV. CONCLUSION

Justices on the United States Supreme Court have, on multiple occasions, prompted chuckles during oral argument at their lack of understanding of everyday technology “such as email, pagers, cloud storage, social media,” and streaming services like Netflix (or, as Justice Sonia Sotomayor described it, “Netflix”).<sup>117</sup> However, in cases like *South Dakota v. Wayfair*

112. Katherine B. Forrest, *The Holographic Judge*, N.Y. L.J. (Dec. 30, 2019, 12:15 AM), <https://www.law.com/newyorklawjournal/2019/12/30/the-holographic-judge/> [https://perma.cc/KA8Y-34HZ] (suggesting artificial intelligence as a way to alleviate heavy court caseloads).

113. See Jasanoff & Nelkin, *supra* note 110, at 1094 (“Science itself has become a focus of litigation . . .”).

114. *Id.*

115. Mike Masnick, *How Microsoft Convinced Clueless Judges to Send a Man to Jail for Copying Software It Gives Out for Free*, TECHDIRT (Apr. 17, 2018, 6:22 AM), <https://www.techdirt.com/articles/20180426/00051939718/how-microsoft-convinced-clueless-judges-to-send-man-to-jail-copying-software-it-gives-out-free.shtml> [https://perma.cc/K7FV-VY3V].

116. Tad Simons, *Are Luddite Judges Really a Problem?*, THOMSON REUTERS LEGAL EXEC. INST. (July 17, 2018), <http://www.legalexecutiveinstitute.com/justice-ecosystem-luddite-judges/> [https://perma.cc/PTM2-W4XM].

117. *Id.*

*Inc.*<sup>118</sup> or *Carpenter v. United States*,<sup>119</sup> the Court recognized that digital technologies have irrevocably altered relationships between the government and the governed, and so adjusted constitutional jurisprudence accordingly.<sup>120</sup> Few observers would demand that judges follow in the footsteps of United States District Judge William H. Alsup of the Northern District of California, a longtime coder who taught himself Java in order to better grasp some of the technology at issue in the landmark *Oracle v. Google* litigation.<sup>121</sup>

However, at the same time, our system cannot afford Luddite judges either, and requiring some basic degree of tech competence on the part of judges (akin to what is already required of lawyers in most jurisdictions) is hardly an outrageous or burdensome proposal. Not only is tech competence needed to simply remain conversant in overseeing the daily operations of a court, but issues like e-discovery, data privacy, and the admissibility of digital evidence also permeate many of the matters that come before the courts. The world in which judges exercise their responsibilities is no longer just a physical, but a digital one as well. Judges would be wise to be mindful of the observations made by New York Supreme Court Judge Matthew F. Cooper when authorizing service of process via social media in his 2015 opinion in the *Baidoo v. Blood-Dzraku*<sup>122</sup> case:

[A] concept should not be rejected simply because it is novel or nontraditional. This is especially so where technology and the law intersect. In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé. And because legislatures have often been slow to react

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118. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (holding that state governments can tax Internet commerce).

119. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (holding law enforcement's collection of cell-site data was a search requiring a warrant under the Fourth Amendment).

120. David P. Fidler, *The Supreme Court Adapts Constitutional Law to Address Technological Change*, COUNCIL ON FOREIGN REL. (July 11, 2018), <https://www.cfr.org/blog/supreme-court-adapts-constitutional-law-address-technological-change> [<https://perma.cc/43GF-JTBE>].

121. Sarah Jeong, *The Judge's Code*, VERGE (Oct. 19, 2017, 10:57 AM), <https://www.theverge.com/2017/10/19/16503076/oracle-vs-google-judge-william-alsup-interview-waymo-uber> [<https://perma.cc/4FRV-KAWF>].

122. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (N.Y. 2015).

to these changes, it has fallen on courts to insure that our legal procedures keep pace with current technology.<sup>123</sup>

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123. *Id.* at 713–14 (citing *New England Merchs. Nat. Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980)).