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Contents

FEATURE ARTICLE

Do Lawyers Have a "Duty to Google" 3

NEW AUTHORITY

Pronoun Redux 7

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals* 10

A BLAST FROM THE PAST

Excerpt from *The Moral, Social, and Professional Duties of Attorneys and Solicitors* (1870) 11

FEATURE ARTICLE

Do Lawyers Have a "Duty to Google"?

Over the past several years, we have discussed in this column several ethical challenges Google poses for lawyers. Google and its software and devices have become ubiquitous in our society. It is difficult to imagine an American lawyer who does not use Google routinely in her personal and/or professional life. But the many conveniences and economic advantages of Google also come with certain ethical considerations for lawyers.

In an earlier column, we discussed the danger of using Google for confidential searches. Software is now available that permits the user to backtrack search results to discover the search questions. If not phrased properly, a search question might, in fact, reveal client confidential information to someone who gains access to search results and then uses software to reconstruct the search questions. Such a scenario might well expose the searching attorney to a charge of violating Rule 1.6 that requires maintaining client confidences.

Recently, a new issue has arisen: what some courts and commentators have referred to a lawyer's obligation to use Google as an investigation tool.[1] Law Professor Michael Murphy provides a thorough review of this issue in a brilliant article titled, "The Search for Clarity in an Attorney's Duty to Google."[2]

Murphy and others who address this issue begin with the foundational premise that lawyers have some obligation to investigate facts. The courts continue working to define the full extent of this obligation. The obligation arises from several sections of the *Rules of Professional Conduct*. KRPC Rule 1.1 requires that a lawyer act competently in her practice. KRPC Rule 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 5 states:

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1 The phrase seems to have been coined by Megan Zavieh, "Lawyers' Duty to Google: Not Changing Anytime Soon," Att'y at Work (July 7, 2020) (also available online).

2 Michael Thomas Murphy, The Search for Clarity in an Attorney's Duty to Google, 18 Legal Comm. & Rhetoric: JALWD 133 (2021).

> 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. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Comment 8 states:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.[3]

Taken together, the two comments to Rule 1.1 would indicate that lawyers are obligated to thoroughly prepare their cases, including doing whatever factual investigation might be relevant and necessary. When one adds in Comment 8 (Comment 6 in Missouri), that obligation includes the use of new technologies when reasonable. As Murphy points out, this means that lawyers have an ethical obligation to use ubiquitous technologies (like Google) when it is reasonable and assists their factual investigations. Hence, the notion of a lawyer's ethical "duty to Google" in certain circumstances.

What are some types of factual investigations in which a "duty to Google" may arise? First, of course, are the very basic factual investigations that lawyers must conduct to assure that they are not submitting pleadings to the court containing false statements. KCPR 3.1(a) states:

> (a) A lawyer shall not knowingly:
>
> > (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> >
> > (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> >
> > (3) offer evidence that the lawyer knows to be false. If a lawyer,

3 In Missouri, the relevant comment is Comment 6.

> the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Comment 3 to KRPC 3.1 reads:

> An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

MRPC 4-3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment 2 to MRPC 4-3.1 reads:

> [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases

> and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

Considering the requirements of Rule 1.1 and 3.1 together, it is quite easy to see that courts can decide that lawyers have an obligation to use easily available digital tools such as Google or social media to conduct factual investigation to assure that courts are not misled. Murphy's article provides an excellent survey of cases in which courts have endorsed the "duty to Google" under the right circumstances.

In the past few years, the question of lawyer honesty in litigation has come to the forefront in our national discourse. Lawyers who make factual claims that are easily disproved and who have not made reasonable efforts to investigate those facts run the risk of angering judges and being charged with violating Rule 1.1 and 3.1. Certainly, it is hard to imagine that any court will be satisfied by a plea of reasonable ignorance of the truth or falsity of a fact presented by a lawyer when the lawyer has not undertaken a simple Google search.

Of increasing interest is the obligation that the combination of Rules 1.1 and 1.3 to use other digital tools to conduct investigations. Will there develop a broad obligation to search social media, for instance? This type of search may be less simple because of the large number of social media platforms currently in use. How much searching in the social media context is "reasonable"?

The lesson we should learn from this is that lawyers need to review their investigational protocols and be sure that the tools they use are sufficient to meet the changing ethical requirements being imposed by courts. A good starting place is Murphy's excellent article and the sources he cites therein.

NEW AUTHORITY

Pronoun Redux

The discussion as to the use of personal pronouns to reflect gender identities is one that is ongoing in the United States. It has also become an issue for law firms and courts.

As we discussed in an earlier column, the question of whether lawyers and litigants may choose the pronouns by which they will be addressed in court documents and proceedings has already been addressed, to some extent, in New York. Now the Michigan Supreme Court has entered the discussion.

On January 13, 2023, the Michigan Supreme Court issued a proposed amendment to the *Michigan Court Rules* for public comment. The substance of the amendment reads:

> Parties and attorneys may also include any personal pronouns in the name section of the caption, and courts are required to use those personal pronouns when referring to or identifying the party or attorney, either verbally or in writing. Nothing in this subrule prohibits the court from using the individual's name or other respectful means of addressing the individual if doing so will help ensure a clear record.

The Staff comment to the proposed Rule is:

> The proposed amendment of MCR 1.109(D)(1)(b) would allow attorneys to provide personal pronouns in document captions and require courts to use those personal pronouns when addressing the party or attorney, either verbally or in writing, unless doing so would result in an unclear record. The Court is interested in receiving comments addressing the constitutional implications of this proposal.

There are a number of interesting points in this brief proposed Rule.

- First, it includes both lawyers and their clients.
- Second, the inclusion of preferred pronouns is voluntary and rests with the individuals.
- Third, not only does the proposed rule permit lawyers and litigants to specify by what pronoun they should be referred to in written court documents,

but, also, verbally. Presumably, this would mean that once an individual indicated preferred pronouns, all persons in the courtroom would use these declared preferred pronouns.

- Finally, once a lawyer or litigant indicated preferred pronouns in conformance with the rule, the court would be required to address that individual in the preferred way.

The proposed rule provides an exception to a court adopting an individual's preferred pronouns when to do so might affect the "clarity" of the record. What the rule means by this notion of a clear record is itself unclear. If the rule is adopted as proposed, this exception may well need to be better defined.

The reaction to Michigan's proposed new court rule remains to be seen (the comment period runs through May 1, 2023). The use of preferred pronouns has been widely adopted in some contexts, such as universities, but resisted in others. Michigan courts have already shown some resistance. The proposed rule follows opinions issued in the case of *People v. Gobrick*. On December 21, 2021, the Michigan Court of Appeals issued an opinion in which it referred to a defendant using nonbinary pronouns and included a footnote stating:

> Although the parties referred to defendant as "Mr. Gobrick" during the trial court proceedings, defendant's appellate brief indicates that defendant identifies as female and prefers to be referred to using the nonbinary pronouns they and them. The prosecution respectfully obliged defendant's request by using the they/them pronouns in its appellee brief and at oral argument. Although this Court does not yet have an official policy in regard to the use of preferred pronouns, the Merriam-Webster Dictionary accepts the use of "they" to refer to a single person whose gender identity is nonbinary. Merriam-Webster Dictionary, they (accessed November 23, 2021). This usage is also now accepted by the APA style guide and other style manuals. . . . Like the prosecution, we choose to honor defendant's request as well. Thus, apart from references to the record that use the pronouns he/him, we use the they/them pronouns where applicable. All individuals deserve to be treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic. Our use of nonbinary pronouns respects defendant's request and has no effect on the outcome of the proceedings.

Judge Mark Boonstra, who concurred in the majority's legal analysis and in its decision to affirm defendant's conviction and sentence, wrote separately to state:

> [T]his Court should not be altering its lexicon whenever an individual

> prefers to be identified in a manner contrary to what society, throughout all of human history, has understood to be immutable truth…. While I respect the right of every person to self-identify however he or she may wish, it frankly should not be of interest or concern to the Court unless it somehow impacts the resolution of the case before us.

People v. Gobrick, No. 352180, 2021 WL 6062732, at *9 (Mich. Ct. App. Dec. 21, 2021). On November 10, 2022, following a one-sentence opinion denying Gobrick's application for leave to appeal the judgment of the Court of Appeals, Michigan Supreme Court Justice Elizabeth Welch wrote her own concurrence in response to Boonstra:

> As society evolves so does its language. While there might be instances where adoption of a novel change in the English lexicon could cause confusion, this was not such a situation. The Court of Appeals majority provided a detailed explanation in a footnote as to how and why it was using a gender-neutral pronoun in its opinion. The Court of Appeals' simple use of a footnote and gender-neutral pronoun demonstrates that words matter and that a small change to an opinion, even if unrelated to the merits, can go a long way toward ensuring our courts are viewed as open and fair to all who appear before them.

People v. Gobrick, 981 N.W.2d 59, 60 (Mich. 2022). Only time will tell whether this proposal by the Supreme Court of Michigan will become the next battlefield in the culture wars.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals*

Google is not the only ubiquitous technology that virtually all practicing lawyers have adopted in their practices. Over the past several decades, lawyers have moved from record and file storage in hard copies to digital devices like compact discs to cloud computing (i.e., storing information on offsite servers). However, the use of cloud computing for record and file storage is not without its ethical pitfalls. It may implicate a number of the *Rules of Professional Conduct*, including Rule 1.6 on confidentiality and Rule 1.15 on safekeeping client property. Kansas lawyers are fortunate to have a basic guide to these issues in Nick Badgerow's, "The Move to Cloud City: The Benefits and Risks of Cloud Computing," Vol. 84 J. Kan. Bar Assn 1, 22 (2015) (also available online).

We also have a convenient online list of United States ethics opinions issued by various authorities in "A List of All the Ethics Opinions on Cloud Computing for Lawyers," published online by Clio.com. It is an extremely useful resource, and every lawyer should have it bookmarked on his or her computer.

A BLAST FROM THE PAST

Excerpt from *The Moral, Social, and Professional Duties of Attorneys and Solicitors (1870)*

> Do not precipitately act upon your client's statements as to such and such being facts, but ascertain for yourselves whether they be facts. It is your bounden duty to do so — and it will not afterward avail you as a defense when your professional conduct is challenged by a disappointed client, that you had relied on his statements, if you had the means of ascertaining the correctness of them, but neglected to do so. It will, when challenged, be for you to prove your searches — your inquiries — that you went to this person, wrote to that, and were duly in attendance at the proper time and place. How intolerably mortifying for you to have your duties delineated, with cruel precision, by the judge summing up against you, in an action for negligence brought by your client, or by yourself against him, for your bill — but unsuccessfully!

—Samuel Warren, The Moral, Social, and Professional Duties of Attorneys and Solicitors, 238-239 (Albany, N.Y.: J.D. Parsons, Jr. 1870).

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