

# Ethical Issues on Appeal in a Technological World



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*“Because things are the way  
they are, things will not stay  
the way they are.”*

— Bertolt Brecht

# OVERVIEW

- The State of the Courts
- Turning to Technology
- Technology and Ethics

# TURNING TO TECHNOLOGY

Before a Luxury...

- Technology Now a Survival Mechanism

- [State Court Budgets](#): Reductions and Technology

- Results of the 2009 NCSC Survey:

“With court hours and staff time on the chopping block, an overwhelming number of courts said they are turning to advanced technology as a means to protect the public’s access to courts.”

# TURNING TO TECHNOLOGY

- Impact of Technology on the Court
  - [A Word from the Future](#)
  - [E-Filing in State Appellate Courts](#)
  - [Minnesota Judicial Branch Annual Report](#)

# TECHNOLOGY AND ETHICAL ISSUES FOR LAWYERS

- Client Representation:
  - [The Duty of Competence](#) – Generally
  - Rule 1.1 Competence: Amendment to Comment

## Maintaining Competence

[6] 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. . . .

- [Changing Times Means Changing Ethical Issues For Lawyers](#)

# JUDICIAL ETHICS & INTERNET RESEARCH

- May a judge conduct independent internet research?
  - ABA Model Code of Judicial Conduct Rule 2.9(C): “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”
  - Comment [6]: “The prohibition ... extends to information available in all mediums, including electronic.”
  - No provision in Code of Conduct for United States Judges parallels the prohibition in ABA Model Code

# JUDICIAL INTERNET RESEARCH & ETHICS

- **Fed. R. Evid. 201(c)(1)**: The court ... may take judicial notice on its own.”
- **Rule 201(d)**: “The court may take judicial notice at any stage of the proceeding.”
- **[Ashcroft v. Iqbal, 556 U.S. 662, 679 \(2009\)](#)**
  - “Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- ***Matthews v. National Football League Mgmt. Council*, 688 F.3d 1107, 1113 (9<sup>th</sup> Cir. 2012)**
  - “We take judicial notice of the fact that Matthews' teams played 13 games in California during Matthews' 19–year career. See Tennessee Titans Team Page, NFL.COM, <http://www.nfl.com/teams/profile?team=TEN> (last visited July 19, 2012)”
- ***State v. Peck*, 773 N.W.2d 768, 775 n.3 (Minn. 2009) (Anderson, P. dissenting)**
  - “A quick and rudimentary Internet search suggests that bong water is commonly altered using fruity flavors in an effort to mask the chemical flavor common to methamphetamine.

# JUDICIAL ETHICS & INTERNET RESEARCH

- ***United States v. Bari*, 599 F.3d 176, 180 (2d Cir. 2010)**
  - “The District Court’s independent internet research served only to confirm [its] common sense supposition.... 20 years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store. Today, ... a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.”
- ***M.P. v. M.P.*, 54 a.3D 950, 955 (PA. Super. 2012)**
  - “The trial court here abused its discretion by relying on information it obtained through its own internet search that took place after the hearing had been concluded and while under advisement by the court.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Judicial Notice
  - **Rule 201(e): “Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Government Websites: Self-Authentication
  - **Rule 902(5): “Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.”
  - ***McGaha v. Baily*, 2011 U.S. Dist. LEXIS 73389 (D.S.C. July 7, 2011):** The “court may take judicial notice of factual information located in postings on governmental websites....”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Newspaper/Periodical Websites:  
Self-Authenticating as of 12/1/11
  - **Rule 101(b)(6):** “[A] reference to any kind of written material or any other medium *includes electronically stored information.*”
  - **Rule 902(6):** “**Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.”
  - **Rule 803(16):** “A statement in a document that is at least 20 years old and whose authenticity is established.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Ethics:

- [Appellate Courts Use of Internet Materials](#)
- [Link Rot](#)
- [The Curious Appellate Judge](#)

“A judge who takes it upon herself to do fact research departs from her normal role and from the parties’ expectations about the sources of information on which the court will depend. The rules governing independent judicial research should therefore make it clear to both judges and litigants when research is and is not permitted, and should subject judge-supplied information to the same adversarial testing as any other kind of evidence.”

# JUDICIAL ETHICS & INTERNET RESEARCH

## ■ Ethics:

- [Independent Judicial Research in the \*Daubert\* Age](#)
- [When Judges Google](#)
- [Confronting Supreme Court Fact Finding](#)
- [The Lure of the Internet and the Limits on Judicial Fact Research](#)
- [Judicial Ethics and The Internet: May Judges Search The Internet in Evaluating and Deciding a Case? \(16 No. 2 prof. Law.2\)](#)
- [Attorneys Must Relitigate Cases for Free](#)

# IMPACT ON DECISION MAKING

- Impact on Decision Making:
  - [The Unblinking Eye Turns Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law](#)
  - [Thawing Out the Cold Record](#)
  - [Deference in a Digital Age](#)