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The Information Polity – Connectivity and Community Part 1

We've reached a new level of connectedness in this wireless age. The new practices entailed warrant a continuous review of the benefits, risks, and regulatory conflicts the new always present. Many of problems facing the new data connectivity might have been avoided with early consideration. But such is life.

Connectivity

Smartphones, netbooks, and tablet computers easily hook us all together wherever we go. Databases and online systems for research, litigation management, and work with the courts are pervasive, as are web services, data communications, and social networking sites. Information is always at our fingertips for a relatively small price of admission. For information professionals, pure and mixed, it enhances efficiency and power. The motion docket may be changed forever...

It offers that same power to civilians that, in the past, might defer to the "professionals."

Is this a good thing? Does it make for better communities, whether of professionals, guildsmen, common interests, or neighbors? This would seem to be a self-evident "yes!" But do we really know? Is this a romantic notion from the benefits of knowledge and understanding? Is it anecdotal analysis from the experiences of ourselves or others? Is there evidence-based analysis to support this conclusion and the public policies that might follow from it?

Consider the doomsday headline of the moment, "Is Google Making Us Stupid?"

Is this mere hyperbole?

Lawyers in the Lead

Lawyers as information professionals were some of the first significant beneficiaries of highly distributed and networked information services, whether word processing or Lexis legal research. The information-intensive nature of our work, our unique training in information practices and the highly-distributed, privatized nature of legal practice in the U.S. have contributed to this. It makes us a key, *avant-garde* case study for what will come next.

Beginning with the risks.

The legal profession is fortunate to have clear guidelines of professional conduct that have a focus on information. An issue, though, is that these guidelines are conservatively developed based on historical practices with traditional technologies. For example, the propriety of lawyers using email was an early issue that some feel has been only partially addressed.

There may even be the general question as to whether there is any general pedagogy on the right use of these information technologies but rather an *ad hoc*, self-teaching practice we adopt. From that not-so-firm ground we find the flaws and fix them on an *ad hoc* basis.

This looks a lot like the current state of technical information security generally, itself the focus of criticism as a losing battle against increasingly motivated cyber thieves. But perhaps it can build a foundation for good practice. Where to begin?

Given the fifty-state systems of lawyer regulation, surprising conclusions by bar disciplinary authorities keep cropping up. The rules regarding meta-data radically vary from one state

to the next, creating a minefield for multi-state practice. Any conduct in these areas should be considered in light of the rules of professional responsibility, particularly the advertising rules.

A primer on new issues has been written by David Hrick of Mercer University School of Law. He discusses particular areas of concern, new and recurring:

- Webpage Links and Comments relating to lawyers or their websites
- Lawyer and Judge activities with social networking sites
- Unsolicited emails
- Mis-sent emails
- Online investigative practices, and
- Covert tracking and monitoring of lawyer's online activities

It is worth a read. See Hrick, David C., *Communications and the Internet: Facebook, E-Mail, and Beyond* (January 1, 2010). Available at SSRN: <http://ssrn.com/abstract=1557033> last visited June 28, 2010.

Yet this all still shows an evolving set of practices that may still conflict with the professional rules.

City of Ontario, California v. Quon, 560 U.S. ___ (2010)

The U.S. Supreme Court recently addressed certain privacy issues relating to electronic information in *City of Ontario v. Quon*. *Quon's* holding narrowly focused on the privacy expectations of a governmental employee and reasonableness of a search by a governmental employer of electronic data. The Supreme Court and the concurring opinions discussed issues of reasonable expectations of privacy in electronic systems that may impact priv-


ilege and electronic discovery. And, citing *Olmstead* and *Katz*, it noted the risks inherent in analysis relating to evolving technologies:

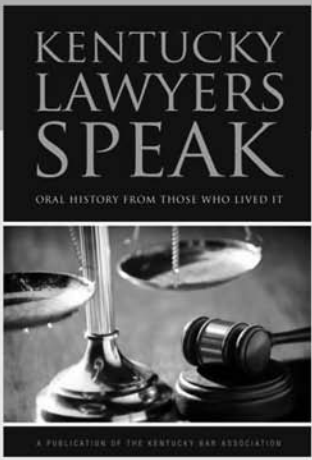
The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, e.g., *Olmstead v. United States*, 277

U. S. 438 (1928), overruled by *Katz v. United States*, 389 U. S. 347, 353 (1967). In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.*, at 360–361 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided

communication devices. *Quon*, at 10 <http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf> , last visited June 28, 2010.

Prudent advice for review of the use of these technologies that have been so useful in the administration of justice and will continue to be so.

In Part II, we'll examine these technologies as part of community-creation, including the role of the lawyer in the community. If you've thoughts on this, please send them on to losavio@win.net. 



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