

## Technology Changes Coming Faster and Faster

By Judge Herbert B. Dixon Jr.

The major discussion topic in this issue of *The Judges' Journal*, whether you like it or not, is TECHNOLOGY. There is no question that technology within the legal profession has been changing at an accelerated pace, faster and faster each year. However, some things remain the same, namely, the phenomenon that I refer to as technology inertia and the need to keep urging our profession to stay up to date. Take, for example, various events in 1994, 2012, and 2014.

In early 1994, Judge Henry DuPont Ridgely of the Delaware Superior Court,<sup>1</sup> then the newly-appointed president judge of the court, was in his chambers when he accepted an appointment request by the sheriff of Kent County. Immediately following their exchange of pleasantries, the smiling sheriff personally served Judge Ridgely with a petition for a writ of prohibition filed by local asbestos lawyers. The petition was seeking to prevent implementation of an order that required electronic filing of pleadings and other documents in asbestos cases using the Complex Litigation Automated Docket (CLAD) system. At that time, the CLAD system had been in successful use in the Delaware Superior Court for nearly three years in environmental insurance coverage cases. Judge Ridgely was expanding electronic filing to the asbestos cases. Obviously, the lawyers were satisfied with the process of paper filings, did not want to venture into the land of electronic filing, and were trying to stop this invasion of technology into their practice of law.

The Supreme Court of Delaware promptly sided with Judge Ridgely, providing as follows in the court's order denying the writ:

The use of computers to access information is a commonplace feature of modern law office operation. If the court system is to be able to respond to the demands of complex litigation, parties and their counsel who

seek the intervention of the judicial system may be required to incur the reasonable expenses of participation in the modern information systems.<sup>2</sup>

Eighteen years after the Delaware Supreme Court's exhortation to the bar to use modern information systems, at the 2012 Annual Meeting, the ABA House of Delegates amended the commentary to Model Rule of Professional Conduct 1.1 on the subject of competence. The amendment added a phrase that maintaining competence included the requirement that lawyers keep abreast of the changes in the law and its practice, "including the benefits and risks associated with relevant technology." Ouch, for those relying on the old cliché that "I went to law school because I didn't like science." The purpose of the amendment was to impress upon lawyers that assessment of their professional competence necessarily included consideration of their familiarity with technology.

Two years later, at the 2014 Annual Meeting, the ABA House of Delegates adopted a new resolution urging development, implementation, and maintenance of appropriate cybersecurity programs that comply with ethical and legal obligations. This resolution was not surprising because, in recent years, the news has been replete with reports of massive hacking efforts; especially efforts directed at law firms, in many cases the weakest point of defense against unauthorized access to the highly valuable intellectual property of the firm's clients. Obviously, the purpose of this resolution related to the lawyer's obligation to preserve a client's confidences.

How different is life now with technology as compared to the recent or more distant past? Think about it! Instantaneous communications by e-mail, texting, blogging, and use of social media have nearly made the practice of letter writing a relic. Digital presentation of evidence in the courtroom is becoming commonplace and

in some instances necessary to keep the attention of jurors that live their everyday lives in a constant state of multitasking. Lawyers are less frequently using poster board to display enlarged exhibits and turning more often to computer programs and tablet apps that easily permit presentation on high-definition monitors of enlarged and annotated images. Discovery practices in civil and criminal cases have changed significantly because, in most instances, the evidence is not found printed on paper in a notebook or a folder in a file cabinet but in digital format on a corporate server, on a computer hard drive, in the cloud, or on someone's cell phone.

In addition, in the vein of evaluating what is and is not good technology for the courtroom, ABA Judicial Division Chair Judge David Waxse is planning a yearlong review of the National Academy of Science exhaustive study Strengthening Forensic Science in the United States: A Path Forward. Remarkably, the study concluded that, other than DNA, forensic sciences being used in the criminal justice system do not have the kind of scientific support that would normally be required to allow their use as evidence.

What will be the next major



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technological advancement concerning the law? I do not know, but this issue of the *Journal* seeks to increase your technology knowledge base about some aspects of technology within our profession with discussions about (1) a day in the life of a judge and his technology, from home, to office to the courtroom; (2) the harvesting, preservation, and authentication of social media evidence; (3) ethical considerations for judges in the age of social media; (4) legislation to govern the use of drones, a technology that has been around for years but is now raising enormous social, privacy, and other constitutional issues; and (5) a court system's online adjudication program for resolving charges relating to violations of local ordinances.

What will be the next major technological advancement concerning the law will be concerned? Once again, I do not know. However, I hope that when the next big thing does hit our profession, you will be prepared to understand it—and even embrace it! ■

## Endnotes

1. In 2004, Judge Ridgely became Justice Ridgely, a member of the Supreme Court of Delaware and chair of the E-Filing Committee that oversaw the Delaware Supreme Court become the first appellate court in the nation to implement electronic filing of appeals.

2. *In re White Lung Ass'n*, No. 21, 1994, Del. LEXIS 95, at \*6 (Mar. 16, 1994).