

By Robert F. Chapski

Technological progress can aid your law practice in numerous ways.

Embracing New Technology and Avoiding Its Pitfalls®

I take some pride in the fact that I owned an Apple® computer years before Apple's resurgence in the consumer marketplace. Sure, I somehow conned my parents into spending thousands of dollars on a computer

that had no hard drive to store anything—although it sure had nice *color*VGA graphics—which eventually became a large paperweight in the basement. But in my defense, it was a good investment at the time. Thankfully, technology has since come a long way.

I think most lawyers would agree that technology has been both a blessing and a curse for their law practices. If I took a poll, would most lawyers say that PDA devices have made us happier, more satisfied lawyers? I doubt it. Also, I'm not certain lawyers are much better off now that we have instant access to every published and unpublished decision in the United States. There is such a thing as too much of a good thing. Many of us find it a challenge to relinquish the PDA on the weekends or on vacation, and even in the bathroom: "According to a recent Solutions Research Group study of nearly 5,000 Americans, more than 63 percent of BlackBerry users take the device into the bathroom. And 37 percent of laptop owners

'frequently' use their computers in the bedroom." Diane Mapes, "Get Your BlackBerry Out of Our Bed!," www.cnn.com/2008/LIVING/personal/05/12/blackberries.bed/index.html.

Technological progress, despite the additional burdens it imposes, does not have to be mostly painful with little gain. Technology can aid your law practice in numerous ways. Technology can present new pitfalls as well. The informed lawyer needs to be cognizant of both.

Lesson #1—Why I Don't Have to Be Killed by My PDA: Learn to Locate and Exploit Free Stuff

I have a confession to make: I have driven a car along the interstate highway while typing on my PDA. This is not a good idea, particularly in the hills of Tennessee. Fortunately, such a harrowing practice is unnecessary. You can find numerous, free, software products in the marketplace and new products appear every day to aid your law practice. Some separating of the wheat from the chaff is involved in finding these



■ Robert F. Chapski is a DRI member and an associate with the law firm of Waller Lansden Dortch & Davis, LLP, headquartered in Nashville, Tennessee. Mr. Chapski practices on a regional and national basis in the area of trial and appellate law, with a focus on product liability, tort and commercial litigation. He is also an active member of the Technology, Product Liability, and Young Lawyers Committees of DRI.

products, but it pays to take the time to search for new software applications.

Voice-to-Text Software

One product I like falls in the category of voice-to-text software. With one such product as an example, Jott™, I can call a toll-free number, say the name of a person to whom I want to send a message, and leave a voice message that will be instantly transcribed and sent in e-mail form to the recipient. Like any voice-to-text software, it is imperfect, but it works in a pinch. This software also works if I simply want to dictate a short message or reminder to myself. Instead of typing one letter at a time as I slalom along the interstate highway—again, not a good idea—I can “jott” an e-mail message to my boss, coworker, client or self.

On-line Data Storage/File-sharing

I have also found on-line data storage and file-sharing services to be extremely helpful. While some features of these services involve fees, many routine tasks are free. I signed up for one such service called Xdrive® last year. Another option is Box.net®. For no charge, I was able to obtain 5 GB, or roughly the equivalent of one DVD, of free, electronic data storage on-line. Why, you might ask, would I need or want 5 GB of free on-line storage when I have a computer, CDs and DVDs to burn, and numerous portable USB drives?

First, on-line storage provides a great way to safely back up important documents and instant access to data wherever the Internet is available. Second, lawyers frequently work with digital photographs, video clips, PowerPoint presentations and other electronic media. Many, if not most, e-mail servers do not allow e-mail users to send and receive outside e-mails with attachments larger than 5 or 10 MB. E-mailing more than a couple of high-res photographs is next to impossible. When time is essential, burning a DVD and mailing it via overnight mail is the only costly, cumbersome option. With an on-line data storage account, however, you can upload a large amount of media to the account and send an e-mail message with a hyperlink to your recipient, from which he or she can download the media.

Freeware

If you are cheap, copyright conscious and/or

both, you should also become familiar with freeware and open source software. “Open source” is a buzzword in the software community. It stands for a set of principles on how to produce software; the basic idea is that the source code is openly available to the public. Briefly, the “open source” movement has resulted in some interesting products. OpenOffice.org, for example, is a productivity suite designed to compete with other office suite products such as Microsoft® Office. It is available as a free download, and it works well and is compatible with widely used products like Microsoft® Word.

Free Productivity Suites

Some free productivity suites, such as Google™ Docs allow you to collaborate on documents on-line live with others at remote locations. Simultaneous users can make changes to documents at the same time, which has some interesting potential uses. For instance, it could be used in the drafting of expert disclosures or affidavits. Creating and reviewing expert disclosures and affidavits has always seemed cumbersome to me. Should the expert and myself fax or e-mail drafts to each other? Must those drafts be saved for discovery? Case law authority in the last few years suggests that anything shared between an expert and an attorney during the course of a lawsuit is fair game for discovery. *See, e.g., Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) (“[W]e now join the ‘overwhelming majority’ of courts... in holding that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.”) Google™ Docs, akin to other more expensive live meeting software, minimizes the need for multiple drafts and allows for live collaboration on projects over the Internet.

More Ways to Use Free Products

Here are some more suggested ways to use free products available on the Internet in your practice: (1) open a free e-mail account (besides your work account) such as Yahoo!® Mail or Gmail™ (Google mail) for all of your nonwork-related e-mail to reduce spam at work. *See also* Chris Anderson, “Why \$0.00 Is The Future of Business”, *Wired*, March 2008, for an interesting take on how Yahoo! and Google can now cost ef-

fectively offer free, unlimited data storage to email account users; (2) purchase an iPod if you do not already own one and download free podcasts at iTunes. Podcasts are entertaining, informative and free. “Quick and Dirty Tips: Grammar Girl” is one of the better podcasts, and it may make you a better writer; (3) print color satellite images and maps from Google Maps or Mapquest® that can be used and authenticated by witnesses during depositions and at trial. This is especially useful when the site of an incident has changed but the satellite image, perhaps a little outdated, still shows the site as it existed at the pertinent time; and, (4) for the latest and greatest technological developments, gadgets, and software, *Wired Magazine*, *Cnet.com* and *Webware.com* are great sources of information.

Lesson #2—I Love MySpace.com®: Use Nontraditional Discovery Methods As Much As Formal Methods

As a matter of practice, I routinely search Google or MySpace for information about the cast of characters involved in a new case. There is little that is sanitized about what someone puts on his or her “social networking” account. MySpace, Facebook®, and numerous other social networking sites are the communication medium of the present and future. If you do not believe me, ask your teenage or college-age son or daughter about their MySpace profile. They are sure to have one. (By the way, you can try to view your child’s MySpace profile, but, as the child of an educated person such as yourself, they are probably cagey enough to require a password to view it.)

There is nothing inherently wrong with interrogatories or requests for production. Yet I find that I hardly ever get much, good substantive information from individual parties via formal written discovery requests. The responses are routinely served late and have been thoroughly sanitized by the lawyers.

MySpace and Facebook currently have nearly 200 million user accounts combined. For some perspective, the population of the United States is about 300 million. Let’s not even delve into a discussion of Second Life®, an astronomically popular on-line virtual community on which a multitude of international companies and law firms have set up shop. In 2007, at least a couple

of law firms from the U.K. set up virtual law offices on Second Life.

MySpace and similar sites allow an individual to post videos, photos, and favorite music as well as information about his or her friends. Conversations among friends are often easily discerned by navigating links to the profile pages of a collection of friends in a social network. To my ini-

Individual plaintiffs are known to have kept blogs documenting their injuries and recovery process.

tial astonishment, people freely reveal on MySpace their feelings, goals and aspirations, likes and dislikes. They also post photos and videos of compromising events. For example, one MySpace user titled his profile with the caption “my favorite activity is illegal drag racing” and included a video clip appearing to back up the statement. Even more astonishing, an individual’s “friends” are free to publish their own uncensored comments on the MySpace profile page of another friend.

Recently, a random MySpace search of a plaintiff whose social life was said to have been “over” following injuries he sustained in a car wreck revealed that he still retained enough post-accident “executive functioning” to seduce the local preacher’s daughter. The search led to a host of other information calling into question the full extent of the plaintiff’s damages—information that would have unlikely been discovered through traditional discovery methods.

On May 8, 2008, MySpace, in conjunction with Yahoo, eBay®, Photobucket© and Twitter, announced the formation of the “Data Availability” initiative. This project will allow subscribers to share profile data across social networking platforms. Presumably, the project will streamline upkeep and posting to social networking accounts, which, in turn, will no doubt encourage more individuals to join. The partnership is said to give MySpace access to more than 150 million U.S. Internet users, with an 85

percent reach in the U.S. web-user market. Without question, data availability or exporting capabilities among platforms will yield ever more discovery fodder.

Google has also proved to be a valuable discovery tool, particularly for researching expert witnesses. Google searches can reveal other cases in which experts have been involved, through press releases and published decisions posted on the web, and many expert witnesses have their own websites. A simple search of the expert’s name with his or her resident city or specialty can often easily locate information about an expert via Google. In several cases against automotive manufacturers involving claims of unintended acceleration and the same testifying expert witness, the expert’s website had a statement to the effect that most cases of unintended acceleration were caused by driver “pedal misapplication.” “Pedal misapplication” is kryptonite for an unintended acceleration plaintiff. The website was repeatedly used against him on cross-examination. He eventually “updated” his website to include a disclaimer regarding the statement. Removing the ill-advised statement entirely would have only made matters worse.

It is just as important to “Google” your own expert witnesses as the opposing parties’ experts. It’s best if most established career expert witnesses do not have websites at all.

Finally, blogs are also good sources for informal discovery. Blogs now exist for every topic. I cringed recently when a popular tech blog, “Crave” on CNET, ran a story with the title, “[well known auto manufacturer] working on ‘the uncrashable car.’” Even lawyers and law firms have now jumped into the blog fray. Individual plaintiffs are known to have kept blogs documenting their injuries and recovery process. Blog searches do not necessarily have to reveal “smoking gun” evidence to be useful. A blog can give you the general flavor of and expert witness’ background, interests and personality—as with an expert witness’ blog on sports economics.

Lesson #3—Be Careful What You Send and to Whom You Send It: Avoid Inadvertent Communication

Technology has vastly improved communi-

cation, but new communication media have also greatly increased the risk of inadvertent communication. Inadvertent communication can involve either an unintended *message* or unintended *recipient* or both. If a sender does not have an adequate understanding of the communication medium he or she is employing, inadvertent communication can result

Most of us have probably heard anecdotes something like this: Joe intended to e-mail Steve Smith, co-counsel at the Great Defense Firm, with a copy of his case status summary and, in his haste, instead sent it to Steve Smithe, an opposing lawyer from a prior case Joe handled. This scenario is not only embarrassing to Joe but potentially damaging to his client. How does it happen?

One way inadvertent communication can happen is through the AutoComplete feature in certain e-mail programs that automatically generates a previously used e-mail address after the sender types in only the first few letters of an address or name. The AutoComplete feature, while convenient, may pull up an address or name other than the one intended by the sender. The ultimate nightmare scenario evolved earlier in 2008 when it was reported that a lawyer representing a pharmaceutical company mistakenly e-mailed a national newspaper reporter, instead of a lawyer colleague with the same last name, some details of a potential settlement with federal prosecutors. Later reports indicated that the reporter may have already had the story details before receiving the e-mail, but I doubt that really assuaged the sender’s concern.

What happens if you do send a privileged or confidential communication to an unintended recipient? Hopefully, if the recipient is a lawyer, he or she will be cognizant of the Model Rules, kindly notify you and promptly destroy the communication. (*See Model Rules of Prof’l Conduct* R. 4.4(b) (2007) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”) Without question, it’s best to avoid inadvertent communication at the front end. The easiest, most practical solution is to turn off the “AutoComplete” feature of your e-mail program, which is fairly easy.

Metadata

You have probably heard of metadata—or data about data. Metadata is important because electronic documents that you send to opposing lawyers may contain hidden information about anyone who worked on your document, such as your company or organization name, your computer's name, the network server or hard disk name to which the document was saved, file properties, document revisions, “hidden text” and comments. A lingering ethical question is whether it is appropriate for an attorney to attempt to examine file metadata if it was sent by opposing counsel. (See ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-422 (2006) (minimizing the recipient's obligations with respect to metadata). *But see* Florida Bar Opinion 06-02 (2006) (noting, “It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit.”))

I avoid the ethics of examining or challenging opposing counsel's examination of metadata by either (1) using a metadata scrubber that removes metadata from a file, which is the best option; or, (2) only sending electronic documents to opposing counsel in portable data format or .pdfs. A metadata scrubber is a worthwhile firm investment. Several are on the market. It may not always be possible to send documents only in .pdf format. For example, most federal courts require electronic submission of draft orders in Word format.

Lesson #4—Why Five Days of Video Deposition Is a Bad Idea: Don't Let Tech Get the Best of You, or Avoid Shiny Object Syndrome

Shiny object syndrome involves succumbing to the thrill of using new technological gadgets or gimmicks at the expense of old-fashioned, common sense. Below are some tips to avoid the shiny object syndrome trap.

Use Videotaped Depositions Judiciously

I hesitated before deciding in this article to say that making a jury watch hours upon hours of a videotaped deposition is a bad idea, but I have watched multiple-hour video depositions at every trial in which I have participated. In one five-week trial, opposing counsel used a video deposition of a company electrical engineer as “filler” when he did not have a live witness to call. I was invested in the case and was still bored out of my mind, so I knew the jurors were bored as well. All told, the deposition was probably 10–20 hours. After watching about eight hours broken up over several days, the amiable judge announced, “I think we have all enjoyed about as much of that as we can possibly stand for the day.” The deposition viewing was a phenomenal waste of the jury's time; it never resurfaced during the trial.

A mentor shared the following anecdote with me about a legendary, now-deceased federal jurist, Robert L. Taylor of the Eastern District of Tennessee in Knoxville. In a pre-trial conference, Judge Taylor asked the opposing lawyer, “How many exhibits do you intend to offer?” The lawyer, from out-of-state and obviously unfamiliar with local practice, said something like, “I'm not sure exactly, maybe around a thousand.” Judge Taylor said, “Oh no, oh no, you pick your best ten.” Panic-stricken, the lawyer quickly rummaged through his exhibits to pick his “best ten” while mumbling that the trial was to last several weeks. Judge Taylor also is rumored to have had an unwritten rule that an attorney could offer no more than seven photographs to any one witness. The trial lasted about one and one-half days. Perhaps lawyers offering video depositions at trial should be told, “Pick your best 20 minutes.”

Studies have shown that the human attention span is about 20 minutes. *See, e.g.*, Joan Middendorf and Alan Kalish, “The ‘Change-Up’ in Lectures,” *The National Teaching & Learning Forum* Vol. 5, No. 2 (1996). The research validates common sense. Television shows are only about 30 minutes long, and I daresay, closer to 20 minutes with commercial interruption. If potential jurors struggle to watch an overly produced television show with Hollywood actors, what makes you think they can watch your expert or treating physician talk for hours at a time? One article sug-

gests that Internet browsing has decreased the attention spans further: “The addictive nature of web browsing can leave you with an attention span of nine seconds—the same as a goldfish.” (“Turning into a Digital Goldfish,” BBC News, Feb. 22, 2002.) I hope we are better off than goldfish but a multiple-hour doctor's deposition will render anyone batty.

Use Depositions with Synchronized Text Sparingly

Synchronized depositions allow you to watch the witness speak and see the words on the screen at the same time. Here's an analogy: My wife and I have a young child. We try to watch movies on occasion at home. We keep the volume down so we won't wake her. We often resort to the subtitles feature. While subtitles help somewhat, I also find them distracting because I'm never sure whether I should try harder to listen to the dialogue or just read the subtitles. Instead, I struggle to do both and miss much of the movie's underlying story, which I believe can also be said for synchronized depositions. Do you want the juror to watch every word on the screen or to watch the deponent and his or her body language? Unless the audio is poor quality, your case presentation may better served by the jury's focus on the witness.

On the other hand, a synchronized deposition is a great trial preparation research tool. It can also be effectively used at trial under the right circumstances. In one recent trial, during his videotaped deposition, an expert witness kept referring to a box of Hyundai documents that he indicated were important in developing his opinions. He said something to the effect that they helped him understand the company's history in developing the product at issue. He did not have very nice things to say about the company. Unfortunately for him, the case involved a *Honda* vehicle, not a *Hyundai*. The Hyundai documents were for another case and were mistakenly produced by the attorneys who hired him. In that case, I think the synchronized deposition highlighted the mistake for the jury making an indelible impression.

PowerPoint May Be the Biggest Trap of the Shiny Object Syndrome

While it is tempting to fill your PowerPoint

slides with your entire closing argument outline, I suggest that showing slide after slide of lists of bulleted text is less effective than showing a slide of a single, poignant photograph. Let the exhibits and photographs tell your story. Studies of effective PowerPoint presentations show that less really is more. One authority suggests that effective PowerPoint presentations can be given *without bullet points*. Cliff Atkinson, *Beyond Bullet Points: Using Microsoft® Office PowerPoint® 2007 to Create Presentations That Inform, Motivate, and Inspire* (2007).

Know the Technology!

Above all else, make sure you are thoroughly familiar with the technology you intend to use at trial. In one trial, our team had painstakingly scanned every exhibit into TrialDirector so that any exhibit could be scanned by bar code with a supermarket style hand scanner and displayed on a video projector. Photographs, videos and documents could be shown instantaneously to the jury. This was great, except we had hundreds of exhibits and were forced to bring the “notebooks” of exhibits to trial every day because each exhibit had a particular barcode that needed to be scanned for the exhibit to be displayed. Later, I sheepishly posed the query, “Can’t we just type in the exhibit number to pull up the exhibit?” The trial went well, but we never figured out how to pull up the exhibit by number.

Ignorance about technology can result in not just a minor inconvenience but a total loss of the ability to use the evidence at trial. For instance, DVDs can be recorded in multiple formats: DVD+R, DVD+RW, DVD-RAM, DVD-R, DVD-RW, DVD-ROM. In addition, a DVD recorded in a certain format may not be compatible with certain computers or DVD players. Tip: DVD-R is the most widely compatible format, and most DVD players manufactured after 2003 read multiple formats. Just because the DVD of the video deposi-

tion or vehicle inspection worked on your computer in your office, don’t count on it working on the courtroom’s DVD player. Be sure to visit the courtroom prior to test anything you intend to use.

Don’t Necessarily Abandon Tried and True Techniques

Jurors will surely expect some use of technology at trial, partly because of the “CSI effect” in the civil arena, but prevent it from obscuring your message. After a recent trial, I spoke to a juror about the use of video recordings and photographs displayed via a video projector during the trial. She indicated that she enjoyed the trial presentation but often preferred it when the lawyers and witnesses approached the jury box with actual pictures and exhibits where the jurors could examine them closely. Of course, not every judge will allow close juror contact, but to the extent allowed, jurors seem to pay more attention when they are closer to the action. The key is keeping the jurors engaged.

Lesson #5—Have Fun with Tech to Enjoy Your Life More

I would feel remiss if I did not mention that technology can be fun. Lawyers are miserable. According to a recent study, nearly 75 percent of the attorneys studied were at risk for “burnout” and 45 percent suffered from “high levels of acute stress.” Ellen Moran, Lyle Miller and Alma Dell Smith, “Are You As Stressed As Other Attorneys? It’s never too early to start reducing stress”, *The Complete Lawyer*, Vol. 4, No. 3. Pick up a law journal and you will likely find an article about how lawyers are unhappy, stressed and in need of better work/life balance.

Technology has not alleviated a lawyer’s stress in general—hence the use of the BlackBerry in the bathroom—but technology has improved leisure time in a lot of ways. So, to wrap-up, here are a few ways to use technology to find that work/balance.

- **Use a digital video recorder (DVR).** The digital video recorder, TIVO or similar products available for rent from DirecTV, Comcast and Dish Network is the working lawyer’s best friend. A DVR allows you to come home after a long day to watch your favorite shows, movies and sporting events without commercials and in brilliant high definition. Go buy an HDTV while you are at it if you don’t already have one.
- **Get some sports tech gear.** Exercise is universally known as one of the best ways to fend off stress. Sports tech gear makes exercise that much more enjoyable and sustainable. iPods and GPS personal training devices for runners, such as the Garmin Forerunner 205, are great devices. Also, if you have not been to the gym in a while, many local gyms have “cardio theaters” and treadmills, stationary bikes, elliptical machines and other cardio machines that have individual, built-in TVs.
- **Surf travel websites.** Vacations are indispensable to relieving stress and maintaining familial bliss. Sorry, but combining your “family vacation” with the next DRI seminar is not sufficient. With rising fuel costs and the falling value of the U.S. dollar overseas, the cost of vacations has risen, making it difficult for families to travel. Numerous websites, however, routinely publish deals, including deals of the week, travel auctions and vacation packages. For instance, try Travelzoo (“Top 20® Deals”), Luxurylink, ShermansTravel (“Sherman’s Top 25”) or Travel+Leisure (“Hot Deals”). Other websites, such as Tripadvisor.com, do an excellent job of compiling and consolidating information from multiple sources regarding destinations and hotels to simplify and improve your travel plans.

Now, go surprise your family and book a trip somewhere nice. 