

2009

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Recommended Citation

Nelson P. Miller & Derek S. Witte, *Helping Law Firm Luddites Cross the Digital Divide - Arguments for Mastering Law Practice Technology*, 12 SMU SCI. & TECH. L. REV. 113 (2009)
<https://scholar.smu.edu/scitech/vol12/iss2/2>

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Helping Law Firm Luddites Cross the Digital Divide—Arguments for Mastering Law Practice Technology

Nelson P. Miller¹ and Derek S. Witte²

Lud•dite (lud'ît) n.

1. Any of a group of British workers who between 1811 and 1816 rioted and destroyed laborsaving textile machinery in the belief that such machinery would diminish employment.

2. One who opposes technical or technological change.

[After Ned Ludd, an English laborer who was supposed to have destroyed weaving machinery around 1779.]³

I. LAW-FIRM LUDDITES

A lawyer looked up over her bifocals from the pencil-marked pile of paper in front of her, to the secretary standing in her office door. Staring at the secretary like a hunter holding fast to flighty game, the lawyer asked "How late can you stay?" with what she hoped was just the right mixture of authority and obeisance. When the secretary looked at her watch in response, the lawyer quickly tried adding, "I've got to get this draft finished and over to corporate counsel." The secretary simply shrugged and turned away while mumbling something that sounded to the lawyer like a resigned profanity—good enough for the lawyer to return to her penciled work. "It's the last draft," the lawyer called out toward the secretarial station when she heard what sounded like a drawer slamming.

Everyone knows the type: the technophobe lawyer who was either born on the wrong side of the digital-divide or just never developed the facility for a productive use of office technology. Their computer skills are rudimentary at best. They dictate rather than draft using a keyboard. They sort through

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1. Associate Dean Miller met and practiced with many Luddites in his 16 years of civil litigation before, five years ago, coming to teach and administer at Thomas M. Cooley Law School.
 2. Assistant Professor Witte, who teaches at Thomas M. Cooley Law School and is a frequent speaker and presenter on electronic discovery and related issues, is a reformed Luddite. Having argued in favor of paper deeds and against the adoption of the Uniform Electronic Transactions Act during law school, Prof. Witte has since concluded that resisting change is not only futile, but may actually limit an attorney's ability to practice effectively. See Derek S. Witte, *Avoiding The Un-Real Estate Deal*, 35 J. MARSHALL L. REV. 311 (2002).
 3. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006).

piles of pink telephone-message slips. Their e-mail and instant messaging, if any, comes all in lower case, and further, they are incensed when the virtual environment they encounter (whether in communication, presentation, document preparation, or data analysis and storage) presents any kind of obstacle. In the event of an outright computer crash, they believe that the computer gods (or the firm's I.T. personnel) are conspiring against them.

Others believe that the skill of a lawyer is exhibited in something other than the use of technology. They believe it to be beneath them or an inappropriate use of their legal knowledge and skill to employ technical means of approaching traditional lawyer tasks. They see themselves instead, at their core, as giving opening statements or closing arguments without document cameras, bar-coded exhibits, PowerPoints, or Trial Director—with at most a few foam-core mounted enlargements. What's more, they will defend their tripod and clunky exhibits as “more flexible,” “less prone to failure,” and “pure lawyering.”

II. TECHNOLOGY'S DOMINION

During a layover at the airport, a young associate logs into her firm's secure network at an Internet café and checks her e-mail. Her first e-mail is from a client in Chicago who wants to know whether it would be reasonable to bind one of her salespeople to a three-year non-compete. Before moving on, the associate searches both Westlaw and Lexis, finding half a dozen cases, each holding that Illinois courts disfavor non-compete agreements that extend beyond two years. She sends a succinct response to her client with a brief summary of the research and promises to send a more formal answer when she returns to the office.

Her next e-mail is from a judge's clerk whom she plans to meet the following day. He is confirming that she will arrive at 8:00 a.m. to test her laptop and trial presentation software in the judge's courtroom to make sure that the following day's opening arguments run smoothly.

Her third e-mail is from a computer forensics expert retained by her firm. The expert has reviewed the electronic evidence produced by the associate's opponent for the upcoming trial and believes that she may be able to exclude it from evidence, because it was tampered with only a few days earlier.

It is an understatement to say that technology has asserted its dominion within the practice of law. Technology has infiltrated the lawyer's practice in nearly every area—communication with clients and colleagues, legal research, discovery and handling of electronic evidence, and even courtroom presentation and trial practice. Attorneys who ignore technology's dominion do so at their peril.

A. Communication

“Although legal advice was once sent via snail mail and communicated through traditional memoranda, informal memoranda and substantive e-mails appear to have supplanted them.”⁴ Gone are the days of the paper letter, the hand-written message slip, or even the facsimile. Attorneys are now bombarded with e-mails, voicemails and instant messages. In 2003, the United States Post Office processed less than two billion pieces of mail, while during the same time period, nearly 200 billion e-mail messages were sent and received.⁵

In the past, when a letter arrived or a pleading was served on a lawyer, he or she could take the time to read the letter, contemplate an appropriate response, draft and re-draft a return letter, and then still post his or her reply promptly. Now, attorneys are required to respond within hours and sometimes minutes to urgent e-mails from co-workers and clients. Likewise, lawyers must wade through dozens or even hundreds of e-mails each day, while still maintaining their productivity and sticking to the tasks at hand. Indeed, the technology firms behind the creation of this digital “onslaught” have even admitted that “e-mail and instant messages [are] fracturing attention spans and hurting productivity.”⁶

As a result, attorneys have no choice but to master the new skills and norms that e-mail and other instant electronic communications have introduced to the practice of law. However, with that mastery comes the need for an increased ability to demonstrate their responsiveness to and care for their clients, for an increased flexibility to work from remote locations or from home, and for an even greater poise when faced with immediate demands and answers. The digital onslaught may also teach those attorneys, who are willing to learn, that not every question requires an immediate answer. In that way, technology can push us to refine not only our skills, but also our judgment.

B. Research

Gone are the days of concordances, reporters and paper-cuts.⁷ Although most law schools require their students to learn legal research the old-fashioned way, almost every published case (and many unpublished ones) are

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4. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 48 (2008).
 5. The Sedona Conference, *The Sedona Principles Addressing Electronic Document Production*, http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf (last visited May 25, 2009).
 6. Matt Richtel, *Lost in E-Mail, Tech Firms Face Self-Made Beast*, N.Y. TIMES, June 14, 2008 at A1.
 7. For a discussion of the challenges faced by law librarians who wonder if the computer will replace the book completely, See Thomas R. French, *Law Li-*

online and only a Boolean search away. Assuming they or their employer have paid for access, all lawyers, with very little training and some practice, can have the equivalent of a world-class law library in their homes, offices, or hotel rooms. Cases that would have taken days or weeks to find—and cases that were locked away in obscure reporters previously inaccessible to most attorneys—are now online and searchable. What's more, an attorney can now research the law of almost any jurisdiction from any location with Internet access.

With this unlimited library at their fingertips, attorneys must also learn to be discerning, to remember the constraints of *stare decisis*, and to avoid citing unpublished opinions when such opinions are disfavored or not compelling. Attorneys must also not forget the power of finding the correct authority and arguing it well, as opposed to flooding the court, colleagues or clients with a pile of related but ultimately unhelpful cases from Westlaw and Lexis.

Again, technology provides an opportunity and poses a challenge. Those attorneys who do not shy from online research will grow as professionals.

C. Electronic Evidence

Gone (or soon to be gone) are the days of paper discovery, exchanging banker's boxes, reviewing documents for litigation, or due diligence in dank warehouses and jam-packed war rooms. With the increased use of e-mail and the adoption of the revised Federal Rules of Civil Procedure relating to the discovery and production of electronically stored information, the practice of law has undergone a world of changes in recent years.

Any lawyer who fails to recognize the realities of preserving and producing electronic documents, or who still refuses to search through an opponent's or client's e-mail databases for key documents, is not only behind the times but may also be committing malpractice. It is no longer an excuse for a litigator to defend a motion for spoliation sanctions by claiming that he or she is not comfortable with technology. In a recent United States District Court case from the Southern District of California, a party tried to avoid discovery sanctions based on its failure to produce electronically stored evidence by arguing that its failure was an "honest mistake" and that it "did not associate Plaintiff's document request with the electronically-stored records which [were] maintained on [the client's] computer rather than in hard-copy, paper form."⁸ The court rejected this argument, holding that the attorney's failure to make reasonable attempts to search for relevant electronic evidence in his client's control was not an honest mistake, and therefore subjected him

brarians & Library Design, Constr. & Renovation: An Annotated Bibliography of the Literature, 98 L. LIB. J. 114 (Winter 2006).

8. R&R Sails, Inc. v. Ins. Co. of State of Pa., 251 F.R.D. 520, 524 (S.D. Cal. 2008).

to sanctions.⁹ For the attorney in that case, the Luddite defense did not prevail.¹⁰

Although the challenges of electronic discovery may seem daunting, attorneys who learn how to properly handle e-discovery will not only avoid malpractice and potential sanctions but will also be better-equipped to find and use the key documents that will decide their cases and protect their clients.

D. Trial Presentation

Michael Phillips, a trial attorney and partner in a mid-size New Orleans law firm, says that, despite his grey hair, he has been forced to learn new trial presentation technology because he cannot imagine a more effective way to master a practice in which “you live or die with documents.”¹¹ He observes that electronic trial software “helps you display documents, video-tape depositions, and present other images at a trial or hearing . . . [and] is very effective before juries.”¹² Indeed, he credits his many trial victories, in part, to his ability to learn and adapt to new document-presentation technology, kindly ridiculing his contemporaries who refuse to learn about these new technologies and rejecting their excuses that the technology is too “big” or “expensive.”¹³

André Stuart, a member of the American Association of Trial Lawyers, told his fellow members at their 2005 annual convention that “[m]any courtrooms have incorporated sophisticated electronics to facilitate the presentation of today’s digital trial.”¹⁴ He also observed that because “[t]he current jury pool has a younger profile and has been raised on television,” trial attorneys are using electronic trial-presentation methods with greater frequency to appeal to this new technology-based age group.¹⁵

Technology has asserted its dominion over the most sacred of legal sanctuaries: the court-room. Although many attorneys cling to their foam-core exhibits and paper tablets, it seems problematic for an attorney to argue about his small exhibit, which he holds several feet from the jury, when it could easily be coded, digitized, and then displayed on the blank plasma-

9. *Id.* at 525.

10. *Id.* at 526-27.

11. Michael Phillips, *Organizations Sans Binders: Today’s Trial Presentation Packages Help You Manage Your Case*, LAW TECHNOLOGY NEWS Dec. 2006, at col. 1.

12. *Id.*

13. *Id.*

14. André Stuart, *Forensic Animation in Practice*, Advocacy Track: Discovery and Demonstrative Evidence, Association of Trial Lawyers of America, 2 Ann. 2005-CLE 1541, available at Westlaw, ATLA-CLE database (July 2005).

15. *Id.*

screen televisions in the jury box and around the courtroom. This problem is even more evident when his opponent presents a closing argument which utilizes the full technological capacity of the twenty-first century courtroom and weaves together digital images of key exhibits, deposition video and even audio recordings to argue her client's case. The trial attorney who embraces new courtroom technology may not look like Clarence Darrow, but he will be doing everything possible to advocate on behalf of the client, just as Clarence Darrow surely would have advocated.

III. TECHNOLOGY AS MORE THAN TOOL

"Let's use the conference room," the older lawyer greets the young visitor, "I've got some things I want to show you." Entering the room, the older lawyer motions toward the far end of a conference table, opposite a mammoth screen already brightly lit with information. The older lawyer sits lightly on the edge of a plush leather chair and immediately begins working a wireless keyboard on the conference table in front of him. His hands seem to call up magically screen after screen of information. "Here's the expert's c.v. Oh, and look at her website," the lawyer says, quickly and almost excitedly. "She just sent us a clip of the animation she is having done. Tell me what you think of it." On his way back to the office after the meeting, which the two lawyers had ended by drafting a demand letter on the huge screen and e-mailing it to their common client for review, the young visitor cannot help smiling in satisfaction, not only at the progress of the case, but also at the excitement of the practice.

Embracing technology is more than just accepting the realities of modern legal practice. A deeper philosophical basis for this curious divide exists in the minds of many between the tool and its user, between technology and the professional who employs it. Tools are thought to be separate from the thinking that guides the hand that uses them. Similarly, technology and the thinking of the lawyer that uses it are thought to be separate and apart, when in fact they are not. Technology is not simply a newer or better tool, like substituting a bow saw for an ax or a chain saw for a bow saw. Technology does not simply get the job done faster or slower, more or less expensively, or even differently. Rather, technology is an encounter, an integration, and an expression of the thought itself. Technology becomes an essential part of the context for thought. The essence of technology is to integrate the meaning of the professional doing the work. This unity of technology and thinking is true for all technology, but is especially true for the kinds of communication technologies with which lawyers habitually work. The lawyer encountering and employing technology is thinking differently than the lawyer who is not.

German philosopher Martin Heidegger said that "[a]ll the work of the hand is rooted in thinking," for "[t]hinking guides and sustains every gesture

of the hand.”¹⁶ It is the professional’s relatedness to the material, whether it is paper and pen, keyboard and computer, or projector and document camera, that “maintains the whole craft.”¹⁷ When carrying out professional tasks, the lawyer is not distinct from the technologies she is employing. The lawyer’s thoughts are not separate and apart from the means by which they are captured, stored, represented, and communicated. Those thoughts would not have been formed, or would have been formed differently, if it was not for the technological means within and through which they are captured and expressed.

Put another way, thoughts are not limited to the double-spaced twelve-point Times New Roman font through which lawyers often express them. Thoughts like “due process is vital to a free and just society” or “you should have compassion for my client” are richer and more complex when examined at their source. When lawyers can match those thoughts with a technology or medium that opens rather than confines them, they will not only be forced to fully understand their thoughts before communicating them in this new and robust way, but they will also be freed to communicate those thoughts in a more effective and compelling manner, once they are fully formed.

Knowledge, whether professional or not, is so closely linked to the active shaping of experience that the method by which experience is shaped becomes an essential aspect of the thought. As Hungarian-British physicist-philosopher Michael Polanyi suggested, shaping reality is “the great and indispensable tacit power by which all knowledge is discovered and, once discovered, is held to be true.”¹⁸ Polanyi believed that “[t]hought can live only on grounds which we adopt in the service of a reality to which we submit.”¹⁹ Experts, like lawyers, pour themselves into their tools in such a way as to assimilate them as part of their own existence, “dwelling in them.”²⁰ The lawyer’s tools become a part of the lawyer like “an external thing is given a meaning by being made to form an extension of” the expert whose “active intentions” then draw on the expert’s “whole person.”²¹

Heidegger says that, “[t]he essence of technology lies in what from the beginning and before all else gives food for thought.”²² The technology itself withdraws as the lawyer acts to employ it as the context through which the

16. MARTIN HEIDEGGER, *WHAT IS CALLED THINKING?* 16, 25 (Fred D. Wieck & J. Glenn Gray trans., Harper & Row 1968).

17. *Id.* at 14-15.

18. MICHAEL POLANYI, *THE TACIT DIMENSION* 6 (Doubleday 1966).

19. *Id.* at xi.

20. MICHAEL POLANYI, *PERSONAL KNOWLEDGE TOWARDS A POST-CRITICAL PHILOSOPHY* 59-60 (Harper & Row 1964).

21. *Id.* at 60.

22. HEIDEGGER, *supra* note 16 at 22.

thought is formed and expressed. Heidegger illustrated these understandings with the examples of a cobbler using a hammer and a cabinetmaker working wood.²³ The tools and materials of either craftsman cannot be meaningfully understood apart from the function to which they are put, just as the work cannot be executed without the tools and materials.

The lawyer's use of sophisticated technological tools is no less clearly understood. The technologies themselves withdraw as objects just to the extent that they are employed more intuitively and purposefully in the consummation of the work. The work is not understood apart from the technologies, nor are the technologies understood apart from the work. In other words, when a lawyer masters technology, her audience does not see the technology but only her finely expressed thoughts. Heidegger leads us to a new philosophy of technology, uniting what the Luddite would have us hold asunder.²⁴

IV. TECHNOLOGY'S CHALLENGE

I am a cyberphobe and proud to admit it. I have no use for laptops, powerbooks or any other type of computer (except LEXIS, which I grudgingly use about twice a month). For all the palaver about "the revolution in legal technology that is transforming practices across the country," yadda, yadda, yadda, I still stick to the basics: a Lanier Dictaphone, a battered hand-set telephone with a primitive conference feature, and (gulp) voicemail. I am now the only lawyer in my office without a PC - a distinction that I wear as a badge of honor. What follows are my reasons for my once and future aversion to technolaw.²⁵

The myth persists that technology eases thought, when in fact it requires even more creative thinking. Perhaps one reason why so many lawyers resist technology is because technology forces us to form our thoughts more fully and to work harder.

When a lawyer plans on writing a ten page brief in support of a summary judgment motion followed by an oral argument that will only regurgitate the arguments in that brief, the lawyer need only cite the appropriate authority and then argue that the Court should apply that authority to the client's circumstances in a favorable way. However, if the lawyer were freed to file an electronic brief with live hyperlinks to authorities and case law, followed by an oral argument using Trial Director, Power Point, or the next piece of revolutionary electronic presentation software, then the lawyer may be required to do much more. First, the lawyer must analyze which exhibits

23. *Id.*

24. See John R. Thomas, *The Question Concerning Patent Law and Pioneer Inventions*, 10 HIGH TECH. L.J. 35, 81 (1995).

25. Vernon R. Proctor, *Reality Bytes: A Luddite Lawyer Looks at Legal Technology*, 20 SPG DEL. LAW 24 (1996).

and case citations are worthy of a link. Then, the lawyer might reconsider the form and depth of some arguments, given that the court can check the facts and reasoning in the supporting authority with the click of the mouse. On one hand the lawyer can cite additional authority. On the other hand, the attorney must use a critical eye to evaluate the cases chosen to support the argument knowing that the court has such ready access. Second, the lawyer must consider what visual cues will actually assist the judge during oral argument. Rather than regurgitating the case brief, the lawyer will be forced to consider the core ideas, key words, and images that will best communicate the argument to the court. Perhaps, the lawyer will even be pushed to find exhibits and images from some of the cases cited as authority in order to illustrate the similarities or differences between the facts of the client's case and the facts in the cited case on which the client's case depends. By accepting technology, the lawyer will be reshaping and refining the very thoughts that comprise a compelling argument, even if it will take more work and a different kind of work in doing so.

Luddite-lawyer resistance to technology has other rationales. Vernon Proctor's essay lists four excuses, including: (1) "if anything can go wrong, it will;" (2) "I can't type, so why bother;" (3) "technology is too damned expensive;" and (4) "I like old stuff anyway."²⁶ These reasons may be little more than resistance to change. As Harold Wilson, former Prime Minister of the United Kingdom said, "[h]e who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery."²⁷ Perhaps a better expression of the reality of change comes in the form of a tip, not an aphorism; in 1958, Edward Perlman, former President of the New York Central Railroad and successful businessman, sagely advised readers of the New York Times, "[a]fter you've done a thing the same way for two years, look it over carefully. After five years, look at it with suspicion. And after ten years, throw it away and start all over."²⁸

By clinging to one way of doing things (dictating all documents, refusing to type and rejecting all forms of courtroom technology), not only does the Luddite-lawyer miss the opportunity to express and develop her thoughts in new and powerful ways, but she also risks the very thing that the Luddites feared the most—obsolescence. With electronic filing now the norm, younger audiences expect those around them to communicate with them through different media. The Luddite-lawyer should learn from history and embrace change. The Luddites did not successfully prevent technology from infiltrating the weaving industry, but instead took part in a sad and quixotic

26. *Id.* at 24-25.

27. Holly Doremus, *Takings & Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003).

28. LARRY CHANG, *WISDOM FOR THE SOUL: FIVE MILLENNIA OF PRESCRIPTIONS FOR SPIRITUAL HEALING* 611 (Gnosphia Publishers 2006).

battle against the inevitability of change. The lesson is not to fight the inevitable, as the Luddites did, but to adapt and to grow.

V. CONCLUSION

The practice of law does not occur in a technology vacuum into which a practitioner is free to decide whether technology should or should not be permitted. The nature of the legal practice increasingly requires encountering technology. As a result, it seems unfitting for lawyers to wear proudly the badge of Ned Ludd, whose legend inspired a group of nineteenth-century workers to break weaving machines and looms out of protest and fear that these symbols of the industrial revolution would replace the artisans and weavers of their time.²⁹ Unlike some of the machines invented at the beginning of the industrial revolution, new legal technology does not threaten to replace but rather promises to enrich the worker. Legal technology, if embraced, will allow lawyers to do their jobs more effectively, not to lose them. With technology, lawyers can tell richer stories, more effectively drill for the truth, and more compellingly push to resolve disputes.

To invoke the history of the Luddites may be to underestimate what technology presents to lawyers. Technology is not a threat, but rather an opportunity to practice at an even higher level. Technology presents lawyers with a chance to display their thoughts to clients, co-workers, judges, and juries in their full glory, rather than trapping the thoughts in Times New Roman font and foam-core exhibits.

The practice of law requires lawyers to assimilate use-dependent knowledge for truth-seeking and resolution-generating purposes. Lawyers engage in authentic and universal story-telling, consistent with the profession's intellectual norms. Lawyers reduce uncertainty by employing complex verbal frameworks through which they articulate passionate commitments to reality. Thus, when technology emerges that allows lawyers to tell stories more effectively and to integrate words, pictures, and sound into a more authentic communication of thoughts, they should embrace these technologies, not fear them.

Lawyers develop expertise by a process of continual growth, and that growth's amorphous nature accounts for its vastness. Professional growth is aided by the lawyer's confidence that what lies beyond is greater than that already mastered. This professional-identity imperative enervates the lawyer's growing sensitivity, generality, specificity, and judgment, along with promising immanence and purpose.

When a nation loses legal professionals whose members are willing to use the best of skills and intentions, it loses its own prosperity and redemption. "The technique of our redemption is to lose ourselves in the perform-

29. See ADRIAN RANDALL, *BEFORE THE LUDDITES: CUSTOM, COMMUNITY AND MACHINERY IN THE ENGLISH WOOLEN INDUSTRY 1776-1809* 1-4 (Cambridge University Press 1991).

ance of an obligation which we accept,” as Polanyi noted, “in spite of its appearing on reflection impossible.”³⁰ Lawyers must continue to reinterpret the world as its truths are revealed at ever deeper levels.³¹ This reinterpretation places the human mind on “the ultimate stage in the awakening of the world” and progresses it “towards an unthinkable consummation.”³² Lawyers submit to technology, even as it refuses to submit to us. As lawyers choose allegiance to technology, they benefit themselves and their clients.

30. POLANYI, *PERSONAL KNOWLEDGE*, *supra* note 20, at 324.

31. *Id.* at 381.

32. *Id.* at 405.

