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## JUST AND SPEEDY: ON CIVIL DISCOVERY SANCTIONS FOR LUDDITE LAWYERS

*Michael Thomas Murphy\**

### INTRODUCTION

The next twenty years are likely to see greater transformation in how the American (and world) legal professions are organized and ply their services than was true for any comparable period in history. We have two choices. We can try to impede these forces in order to preserve a familiar and comfortable world that seems to be slipping away. Or we can decide that today's rules should adapt to accommodate and direct the forces at bay in order to preserve the values of the American bar, which include the efficient delivery of services at reasonable cost.\*\*

Lawyers have long had a reputation for being technological “luddites.” Junior attorneys routinely complain about “old school” attorneys ordering work done the old-fashioned way, which can be dependable but inefficient. It is this tension, dependability against efficiency, which drives the “luddite lawyer” stereotype. Luddite lawyers using outdated technology have traditionally faced a client relationship or ethical issue; case law shows that luddite lawyering can even be considered unethical conduct, ineffective assistance, and malpractice.<sup>1</sup> Recent rule changes to the Federal Rules of Civil Procedure (“FRCP”) increase the stakes by prescribing a requirement for technical proficiency,<sup>2</sup> raising the question: could luddite lawyering also rise to the level of civil sanctions? This Article explores this question.

Such sanctions would most likely be found in the fertile realm of electronic discovery. Evidentiary information in legal disputes has grown considerably in size and complexity. Managing that information in litigation

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\*\* Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 953 (2012).

<sup>1</sup> *Cf.*, e.g., *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (“Given the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations.”).

<sup>2</sup> *See* FED. R. CIV. P. 37(e) (guiding courts to “order measures no greater than necessary to cure the prejudice” where “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it”).

has greatly increased costs, given rise to sanctions,<sup>3</sup> and made lawyers feel like they must be IT professionals.<sup>4</sup> There is evidence that sanctions for electronic discovery misconduct—often for spoliation, the improper deletion of data relevant to discovery—come as much from lawyers’ struggles with speaking the language of technology as from intentional misrepresentations to the court.<sup>5</sup> This Article thus examines the idea of civil sanctions for luddite lawyers who fail to use technology in the practice of electronic discovery.

Part I examines the formal requirements for lawyers to stay abreast of technology through a survey of recent rule changes to the Model Rules of Ethics (adopted by many states) and academic and practical commentary. It looks to the proliferation of electronic discovery as a cause of this trend, because electronic discovery is an area of law where sophisticated technological knowledge has become a core competency in adequately litigating disputes. It also discusses revised Rule 1 to the FRCP, which charges parties, their attorneys, and judges to take steps to ensure the “just, speedy, and inexpensive” resolution of disputes.<sup>6</sup> This change is seemingly impossible to meet without technological competence.

Part II surveys the practice of sanctioning attorneys. It describes an increasing trend in sanctioning attorneys for misconduct in litigation discovery. It shows that, if one reads Rule 1 of the FRCP together with the Model Rules of Ethics and traditional sanctioning powers, judges can theoretically sanction lawyers under those traditional sanctioning powers for ignoring modern technology or refusing to employ it. This Part finds a plausible hypothetical model for such sanctioning while taking note of courts’ general reluctance to sanction attorney behavior.

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<sup>3</sup> Cf. Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 721 (2012) (“[T]he [modern] controversial heightened pleading standard . . . is expressly designed to protect certain defendants from the ‘burdens of discovery,’ which are said to be ‘sprawling, costly and hugely time-consuming.’”).

<sup>4</sup> See Daniel R. Miller & Bree Kelly, *E-Discovery in 2015: Will You Feel the Earth Move Under Your Feet?*, LEGAL INSIGHT, Jan., 2015 at 2; accord *James v. Nat’l Fin. LLC*, No. 8931-VCL, 2014 WL 6845560, at \*12–13 (Del. Ch. Dec. 5, 2014) (“Professed technological incompetence is not an excuse for discovery misconduct.”).

<sup>5</sup> Entire well-researched law review articles have been written to instruct attorneys on the technology they need to operate their firms. See, e.g., Stacey Blaustein et al., *Digital Direction for the Analog Attorney—Data Protection, E-Discovery, and the Ethics of Technological Competence in Today’s World of Tomorrow*, 22 RICH. J.L. & TECH., May 2016, at 1, 2–3.

<sup>6</sup> See, e.g., *Metro. Opera Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178, 222, 231 (S.D.N.Y. 2003) (awarding sanctions when counsel, among many other things, “delegated document production to a lay-person who . . . did not even understand himself (and was not instructed by counsel) that a document included a draft or other non-identical copy, a computer file and an email”); Robert E. Shapiro, *Advance Sheet: Conclusion Assumed*, 36 LITIGATION 59, 59 (2010) (“Spoliation, in case you haven’t heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country.”); Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 805–07 (2010).

Part III examines three situations in which luddite-related sanctions could occur. It considers (1) the failure to employ accepted technology in document review and production, such as analytics or predictive coding; (2) the failure to produce documents in searchable electronic form; and (3) the failure to search publicly accessible databases to gain information supporting a matter (a “duty to Google” and discover information from third parties).

Part IV ties luddite lawyering to the tendency of attorneys to rely too much on outdated methods, which provide a certain dependability of results. The Article concludes by arguing that sanctioning luddite lawyers may help overcome that obstacle and satisfy revised Rule 1’s charge to participants in the legal system.

## I. THE LEGAL INDUSTRY’S ANTI-LUDDITE TREND

Lawyers are “bad” at technology. It is an axiom and stereotype that has permeated pop culture,<sup>7</sup> academia,<sup>8</sup> and practical publications.<sup>9</sup> Lawyers confused by technology “fail to optimize the tools they have, let alone take advantage of the most appropriate tools available.”<sup>10</sup> This failure is a serious

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<sup>7</sup> Commentators have cheekily cited the classic *Saturday Night Live* character “Unfrozen Caveman Lawyer,” who comically failed to understand modern technology. See Karin S. Jenson, Coleman W. Watson & James A. Sherer, *Ethics, Technology, and Attorney Competence*, BAKER HOSTETLER BLOG 1, 1 n.2 (2014), <http://www.law.georgetown.edu/cle/materials/eDiscovery/2014/frimorndocs/EthicsIneDiscoveryBakerHostetler.pdf> [<https://perma.cc/TFR6-VZNG>] (“Sometimes when I get a message on my fax machine, I wonder: ‘Did little demons get inside and type it?’ I don’t know! My primitive mind can’t grasp these concepts.” (quoting *Unfrozen Caveman Lawyer*, SATURDAY NIGHT LIVE TRANSCRIPTS, <http://snltranscripts.jt.org/91/91gcaveman.phtml> (last visited Oct. 3, 2017))).

<sup>8</sup> See, e.g., Darla W. Jackson, *Lawyers Can’t Be Luddites Anymore: Do Law Librarians Have a Role in Helping Lawyers Adjust to the New Ethics Rules Involving Technology?*, 105 L. LIBR. J. 395, 395–96 (2013); Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 61–62 (2015) (recognizing “technological competence” as essential to modern legal work); Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 175–76 (2013) (examining how increases in technology have made inadvertent disclosures of confidential information far more common).

<sup>9</sup> See Darla Jackson, *Can Lawyers Be Luddites? Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology*, 84 OKLA. B.J. 2637, 2637 (2013); James Podgers, *Lawyers Struggle to Reconcile New Technology with Traditional Ethics Rules*, ABA J. (Nov. 1, 2014, 5:55 AM), [http://www.abajournal.com/magazine/article/the\\_fundamentals\\_lawyers\\_struggle\\_to\\_reconcile\\_new\\_technology\\_with\\_traditio/](http://www.abajournal.com/magazine/article/the_fundamentals_lawyers_struggle_to_reconcile_new_technology_with_traditio/); *Breaking News: Blockbuster Sanctions Order Spotlights the Importance of eDiscovery Competence*, RECOMMIND: MIND OVER MATTERS BLOG (Aug. 12, 2015), <http://www.recommind.com/blog/breaking-news-blockbuster-sanctions-order-spotlights-importance-ediscovery-competence> [hereinafter *Recommind Article*] (discussing *HM Elecs., Inc. v. RF Techs., Inc.*, No. 12cv2884–BAS–MDD, 2015 WL 4714908, at \*8 (S.D. Cal., Aug. 7, 2015)).

<sup>10</sup> Catherine J. Lanctot, *Becoming a Competent 21st Century Legal Ethics Professor: Everything You Always Wanted to Know About Technology (but Were Afraid to Ask)*, 2015. J. PROF. LAW. 75, 82–83

problem in a competitive client-service industry. Some in-house counsels have conducted technological audits of law firms, finding widespread deficiency and stating that “lawyers in general are woefully deficient in using the software tools at their disposal.”<sup>11</sup>

In litigation, the failure to use available technology can cost parties and courts enormous amounts of time and money. One federal magistrate judge, David Waxse, echoed the widelyheld sentiment that “litigation today is a method of resolving disputes that is too costly and time consuming for most parties involved.”<sup>12</sup> Judge Waxse listed the major causes of runaway litigation costs as “(1) the volume of electronically stored information (ESI) involved in litigation, (2) the lack of technical competence by counsel, and (3) the lack of cooperation among counsel in litigation.”<sup>13</sup>

Judge Waxse’s first two points provide the inspiration for this Article, which aims to provide a theoretical basis for judges to use the FRCP to compel lawyers to gain and maintain the technological knowledge necessary to adequately administer electronic discovery. Electronic discovery is easily the most costly and technologically demanding area of litigation,<sup>14</sup> and there is skepticism amongst the bench and bar about attorneys’ ability to stay abreast of the latest technology.<sup>15</sup> In 2016, 63 percent of judges and experienced practitioners responding to a survey disagreed with the statement that “[t]he typical attorney possesses the subject matter knowledge (legal and technical) required to effectively counsel clients on e-discovery

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(2015) (quoting *Report of the Task Force on the Future of the Legal Profession*, 2011 N.Y. ST. BAR ASS’N 99).

<sup>11</sup> D. Casey Flaherty, *Could You Pass This In-House Counsel’s Tech Test? If the Answer Is No, You May Be Losing Business*, ABA J.: LEGAL REBELS (July 17, 2013, 1:30 PM), [http://www.abajournal.com/legalrebels/article/could\\_you\\_pass\\_this\\_in-house\\_counsels\\_tech\\_test](http://www.abajournal.com/legalrebels/article/could_you_pass_this_in-house_counsels_tech_test) (describing an audit of external counsel testing basic computer tasks).

<sup>12</sup> Hon. David J. Waxse, *Advancing the Goals of a “Just, Speedy and Inexpensive” Determination of Every Action: The Recent Changes to the District of Kansas Guidelines for Cases Involving Electronically Stored Information*, 26 REGENT U. L. REV. 111, 111 (2013); see also Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 517–18 (2010) (discussing a tension between broad discovery and just, speedy resolution of disputes).

<sup>13</sup> Waxse, *supra* note 12, at 111.

<sup>14</sup> *Id.* at 118 (“With about one percent of civil cases in federal court going to trial, most of the time and money is being spent in discovery and not trial.”); Yablon & Landsman-Roos, *supra* note 3, at 721 (“[T]he [modern] controversial heightened pleading standard . . . is expressly designed to protect certain defendants from the ‘burdens of discovery,’ which are said to be ‘sprawling, costly and hugely time-consuming.’” (first quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009); then quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007))).

<sup>15</sup> See Aebra Coe, *Judges Lack Faith in Attys’ E-Discovery Skills, Survey Says*, LAW360 (Jan. 28, 2016), <http://www.law360.com/articles/751961/judges-lack-faith-in-attys-e-discovery-skills-survey-says>. The survey in question was by Exterro, an electronic discovery company, of a number of judges and electronic discovery specialists.

matters.”<sup>16</sup> This was actually an improvement (of sorts) from the 65 percent that disagreed with that statement when surveyed in 2015.<sup>17</sup> In 2016, a different sampling of a similar size showed that 72 percent of judges somewhat or completely disagreed with the statement that a typical attorney had sufficient knowledge to litigate electronic discovery, and over 90 percent of practitioners disagreed with that statement.<sup>18</sup> When asked whether they witnessed “significant e-discovery mistakes” among litigants or by other attorneys or parties, 27 percent of attorneys stated “sometimes,” 45 percent “often,” and 18 percent “almost every case”; judges have also seen electronic discovery mistakes from the bench, with 21 percent noting they occurred “often,” and 57 percent noting they occurred “sometimes.”<sup>19</sup> The survey concluded in early 2017 that “[f]or the third year in a row, judges do not feel the typical attorney has the required knowledge to be effectively counseling clients on e-discovery matters.”<sup>20</sup>

Judge Waxse stated bluntly:

A . . . contributing factor to why ESI has made litigation more expensive and time-consuming is the general lack of technical competence by counsel. As a judge responsible for case management, I have observed too many lawyers who do not have the necessary competence with technology to properly represent their clients in litigation that involves e-discovery.<sup>21</sup>

Unfortunately for the bar, “big data” has made its mark on litigation, and most information at play in modern discovery is electronic.<sup>22</sup> Newly-created information is almost entirely digital, and electronically-created and stored information is so ubiquitous in litigation that electronic discovery is no longer a legal specialty; it is just the way of things.<sup>23</sup> In other words, the

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<sup>16</sup> *3<sup>rd</sup> Annual Federal Judges Survey: E-Discovery Advice for Becoming a Better Attorney*, EXTERRO 8 (Jan. 25, 2017), <https://www.exterro.com/judges-survey-17/>.

<sup>17</sup> *Federal Judges and Leading Attorneys Largely Agree on the State of E-Discovery*, EXTERRO 1 (Jan. 27, 2015), <http://www.exterro.com/about/news-events/federal-judges-and-leading-attorneys-largely-agree-on-the-state-of-e-discovery/>.

<sup>18</sup> *2<sup>nd</sup> Annual Federal Judges Survey: Views from Both Sides of the Bench*, EXTERRO 11 (2016), <http://www.exterro.com/judges-survey-16/>.

<sup>19</sup> *Id.* at 13.

<sup>20</sup> *3<sup>rd</sup> Annual Federal Judges Survey*, *supra* note 16, at 3.

<sup>21</sup> Waxse, *supra* note 12, at 113.

<sup>22</sup> See Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. Spring 2007, at 1, 2 (“Discovery of electronic information is now an everyday fact of litigation in the U.S. Advances in computer software and hardware (e.g., e-mail, instant messaging, voicemail, blogs, laptops, .pdfs, PDAs, zip or flash drives, databases, and network servers) have greatly increased the ability to generate, replicate, circulate, and accumulate electronic information.”).

<sup>23</sup> See Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH., Spring 2004, at 67, 69 (“In the world in general, 99.99% of information being generated is in non-printed form . . . 70% of corporate records may be stored in electronic format, and 30% of electronic information is never printed to paper.”) (quoting *The Sedona Principles: Best*

bench and bar will soon drop the “e” from “e-discovery.”<sup>24</sup> In the near future, if not the present, understanding electronic discovery will be as integral to competent lawyering as understanding the standard for a motion to dismiss.<sup>25</sup> As one state bar noted, “[n]ot every litigated case involves electronic discovery. Yet, in today’s technological world, almost every litigation matter *potentially* does.”<sup>26</sup> Understanding electronic discovery in many instances requires a working knowledge of information systems and the various forms of electronic communication.<sup>27</sup> Information systems and communication methods often move faster than legal decisions and rules.<sup>28</sup>

Judges are now experienced and sophisticated in understanding these systems. A recent poll of the experienced practitioners and judges notes that 82 percent of respondents rated the judiciary’s understanding of electronic discovery “Good” or “Ok,” and 5 percent rated it “Strong.”<sup>29</sup> Magistrate Judge John Facciola opined that “[t]he consequences for counsel are obvious. They are facing a bench that knows what it is doing and appreciates how the technology can render the discovery process cheaper and more efficient.”<sup>30</sup>

If lawyers are bad at technology, and capably litigating disputes now requires a professional-grade grasp of technology, the bar faces a systemic

*Practices Recommendations & Principles for Addressing Electronic Document Production*, SEDONA CONF. 3 (Jan. 2004), <http://www.thesedonaconference.org/miscFiles/SedonaPrinciples200401>); Mazza et al., *supra* note 22, at 4 (“It is not infrequent for a terabyte (i.e., 1,000 gigabytes, 1 million megabytes, or 500 billion typewritten pages) of ESI to be at issue in large civil litigation or in government investigations.”). The Mazza article was written in 2007, and it is likely that the average volume of discovery is much higher now.

<sup>24</sup> See, e.g., Stephanie Wilkins Pugsley, *eDiscovery: It’s Time to Drop the “e,”* 27 UTAH B.J., July–Aug. 2014, at 14, 14; Eric Choi & Gregory Leighton, *New Federal Rules Acknowledge It’s Time to Drop the “E,”* LAW360, (Nov. 24, 2015), <http://www.law360.com/articles/730631/new-federal-rules-acknowledge-it-s-time-to-drop-the-e>; John Tredennick, *My Prediction for 2014: E-Discovery Is Dead – Long Live Discovery!*, CATALYST BLOG (Jan. 7, 2014), <http://www.catalystsecure.com/blog/2014/01/my-prediction-for-2014-e-discovery-is-dead-long-live-discovery/>.

<sup>25</sup> See Pugsley, *supra* note 24, at 14 (“Many lawyers claim not to ‘do’ [electronic discovery]. However, the basic information needed to do our jobs was born in an electronic format. Like it or not, attorneys are ‘doing eDiscovery.’ To ignore this fact is to ‘do it’ wrong.”).

<sup>26</sup> Cal. Bar Ass’n Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 193, 3 (2015) [hereinafter Cal. Bar Op.] (laying out extensive ethical obligations for attorneys in electronic discovery cases).

<sup>27</sup> See Mazza et al., *supra* note 22, at 3 (“The explosive growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging.”). The authors elaborated that the difficulty of understanding electronically stored information is compounded by its ephemeral nature. It can be altered easily or deleted without intent, and can also persist after apparent deletion—characteristics not generally found in hard copy. *Id.* It also can require an understanding of translating or operating technology to access. *Id.* at 4.

<sup>28</sup> See *id.* at 31 (“There is a perception that discovery of electronic information is the ‘wild, wild west’ of modern litigation. This largely may be due to the fact that the development of technologies used in the discovery of electronic information far outpaces the developing law of discovery.”).

<sup>29</sup> 3<sup>rd</sup> Annual Federal Judges Survey, *supra* note 16, at 12.

<sup>30</sup> *Id.*

crisis. As such, there is a trend to extinguish the luddite lawyer.<sup>31</sup> The California State Bar Association (“CSBA”) surveyed the state of law and technology and concluded that “[l]egal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent.”<sup>32</sup>

A. *The Inclusion of an Attorney’s Technological Competence in the ABA Model Rules of Professional Conduct*

One such professional challenge, and the best evidence of the trend against luddite lawyering, is that in many states technical incompetence is an ethical violation.<sup>33</sup> Rule 1.1 of the American Bar Association (“ABA”) Model Rules of Professional Conduct describes general attorney competence in simple terms, stating that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>34</sup> In 2009, the ABA created a “Commission on Ethics 20/20” to review the model rules in light of changing technology and globalization.<sup>35</sup> As a result of that review, the ABA added language to Comment 8 of Rule 1.1 in 2012:

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*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>36</sup>

The Commission concluded that technology has changed “how lawyers conduct investigations, engage in legal research, advise their clients, and

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<sup>31</sup> See Christopher C. Popper, *Embracing Technology in the Legal Profession: Technology-Related 2013 Changes to the Delaware Lawyers Rules of Professional Conduct 2* (Apr. 2, 2013) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244451](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244451) (“[A] [] lawyer is now compelled to at least consider implementing certain types of technology, and whether the benefits of such technology outweigh the risks.”).

<sup>32</sup> Cal. Bar Op., *supra* note 26, at 3 (laying out extensive ethical obligations for attorneys in electronic discovery cases). One state supreme court justice even looked inward and noted in dicta that judges must know and understand the distinction between printed information and metadata since that distinction is “critical, both on an ethical and adjudicative basis,” which is a worrisome development as metadata becomes increasingly more common in courts. *State v. Ratliff*, 849 N.W.2d 183, 196 (N.D. 2014) (Crothers, J., concurring).

<sup>33</sup> See, e.g., OHIO RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (2017); PA. RULES OF PROF’L CONDUCT r. 1.1 cmt. 6 (2005); WASH. RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (2016).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2016)

<sup>35</sup> John G. Browning, *Facebook, Twitter, and LinkedIn—Oh My! The ABA Ethics 20/20 Commission and Evolving Ethical Issues in the Use of Social Media*, 40 N. KY. L. REV. 255, 258–59 (2013).

<sup>36</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (emphasis added).



conduct discovery. These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved.<sup>37</sup> This conclusion is akin to Judge Waxse's sentiment that lawyers have an ethical obligation to at least keep up with technology and to be fairly sophisticated when that technology is essential to their practice.<sup>38</sup> Keeping abreast of technology is necessary to be adequate. Excellent lawyers must have an extremely strong grasp of technology.<sup>39</sup>

There is some debate over whether Comment 8 effectuated an increase in a lawyer's ethical duty or a codification of a preexisting duty. Some commentators do not view this rule as "new," stating that technological competence has always been inherent in competent representation.<sup>40</sup> In their view, Comment 8 just made that point as clear as possible.<sup>41</sup> The ABA Commission on Ethics 20/20 stated that the amendment "does not impose any new obligations on lawyers" and instead was a "reminder" of a preexisting ethical obligation.<sup>42</sup> Maybe the best description of the impetus behind this rule-change comes from Professor James Moliterno, who wrote, "[t]he proposed changes do not change. They articulate what change technology has already made."<sup>43</sup> But even if the rule change was a mere "reminder," rule updates and change do not just happen without a reason.<sup>44</sup> In 2012, the ABA felt compelled to speak in formal language about the

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<sup>37</sup> Browning, *supra* note 35, at 258 (quoting *Introduction and Overview*, 2012 A.B.A. COMM'N ON ETHICS 20/20 REP. 16, [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf)).

<sup>38</sup> *See id.* ("[The ABA's] new words mandate that competency mean more than just keeping up with statutory developments or common law changes in one's particular field, but also having sufficient familiarity with and proficiency in technology that may affect both the substantive area of practice itself and how the lawyer delivers these services.").

<sup>39</sup> John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3060 (2014) ("Mastery of technology relevant to providing legal services, including machine intelligence, has therefore become an express duty of a competent lawyer, as well as an essential obligation of the exemplary lawyer.").

<sup>40</sup> *See* Sam Glover, *You Already Have an Ethical Obligation to Be Technologically Competent*, LAWYERIST.COM (Aug. 31, 2015), <https://lawyerist.com/86726/already-ethical-obligation-technologically-competent/>.

<sup>41</sup> *See id.* ("The comment did not create the obligation to be technologically competent. It has always been part and parcel of regular old professional competence.").

<sup>42</sup> *Resolution*, 2012 A.B.A. COMM'N ON ETHICS 20/20 REP. TO HOUSE OF DELEGATES 3, [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf).

<sup>43</sup> James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained,"* 47 AKRON L. REV. 149, 155 (2014).

<sup>44</sup> ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012) (noting that "a change in the language of a prior statute presumably connotes a change in meaning").

importance of technological competence in the hope that the state bars would listen.<sup>45</sup>

The state bars listened. Since 2012, twenty states have adopted an explicit ethical duty of technological competence, and there has been no shortage of coverage in legal news of the extinction of the luddite lawyer.<sup>46</sup> Coverage about the new language highlighted technological competence with respect to electronic discovery, which, according to one influential jurist,

... explicitly recognizes, for the first time, that lawyers must become competent in matters of technology, which undoubtedly includes knowledge of the impact of technology in electronic discovery. Lawyers have a responsibility to educate themselves and their clients about the new and pertinent legal and technical issues that arise in electronic discovery. This is especially true with respect to an attorney's duty to assist the client in the process of identifying, preserving, reviewing, and producing ESI. This includes an obligation to seek, as part of the lawyer's due diligence, all relevant information, positive or otherwise, which may relate to the claims at issue. To do otherwise is an ethical violation.<sup>47</sup>

Further support of this notion comes from the CSBA. The bar association has roundly backed the proposition that a luddite lawyer who fails to grasp electronic discovery principles has violated the state's rules of professional conduct.<sup>48</sup> The CSBA examined a case where an attorney's inattentiveness and lack of knowledge in electronic discovery caused the

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<sup>45</sup> The ABA may have even done so because of an international trend. For example, in 2004, the Canadian Bar Association ("CBA") created a similar rule:

Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which those principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas in which the lawyer practices. The lawyer should also develop and maintain a facility with advances in technology in areas in which the lawyer practices to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances.

CODE OF PROF'L CONDUCT ch. II cmt. 4 (2004).

<sup>46</sup> The states that had formally adopted Comment 8 to Rule 1.1 as of May 2016 were Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Utah, West Virginia, and Wyoming. See Robert Ambrogi, *20 States Have Adopted Ethical Duty of Technology Competence*, LAW SITES BLOG (Mar. 16, 2015), <http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html>; see also David Horrigan, *It's An Ethical Obligation: You Need to "Get" Technology*, N.J.L.J. (Nov. 11, 2015), <http://www.njlawjournal.com/id=1202742190288/Its-an-Ethical-Obligation-You-Need-to-Get-Technology?slreturn=20160405220958>; James Podgers, *You Don't Need Perfect Tech Knowhow for Ethics' Sake—But a Reasonable Grasp Is Essential*, ABA J. (Aug. 9, 2014), [http://www.abajournal.com/news/article/you\\_dont\\_need\\_perfect\\_tech\\_knowhow\\_for\\_ethics\\_sake--but\\_a\\_reasonable\\_grasp/](http://www.abajournal.com/news/article/you_dont_need_perfect_tech_knowhow_for_ethics_sake--but_a_reasonable_grasp/); Megan Zavieh, *Luddite Lawyers Are Ethical Violations Waiting to Happen*, LAWYERIST.COM (July 10, 2015), <https://lawyerist.com/71071/luddite-lawyers-ethical-violations-waiting-happen/>.

<sup>47</sup> SHIRA A. SCHEINDLIN, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE IN A NUTSHELL 327 (2ded. 2016).

<sup>48</sup> See Cal. Bar Op., *supra* note 26, at 3.

client harm.<sup>49</sup> At the end of the examination, the CSBA noted that the failure to perform a knowledgeable assessment of electronically-stored information and potential issues was itself a failure of the duty of competence.<sup>50</sup> In measuring the import of this failure, the CSBA drew parallels to instances in which (1) an attorney failed to notify his clients of taxes due;<sup>51</sup> (2) an attorney failed to take necessary action for clients in bankruptcy;<sup>52</sup> and (3) an attorney “recklessly” delayed administering an estate, including failing to sell and distribute property.<sup>53</sup> The CSBA stated plainly that:

Electronic document creation and/or storage, and electronic communications, have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter.<sup>54</sup>

It cannot be understated that the CSBA made knowledge of electronic discovery a normalized piece of attorney competence, akin to making sure a client knows that his taxes are due.<sup>55</sup>

#### B. *Extending Beyond the Ethical Rules*

The consequence for luddite lawyering can go beyond an ethical violation. In criminal law, attorneys who failed to utilize available technology have been found to have provided ineffective assistance, or at least to have waived key arguments. These examples can include not introducing social media evidence that was readily available,<sup>56</sup> or not timely googling prospective jurors.<sup>57</sup> Ineffective assistance of counsel is counsel that falls “below an objective standard of reasonableness.”<sup>58</sup> As practitioners have noted, “what is ‘reasonable’ in terms of what counsel is expected to know

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<sup>49</sup> *Id.* at 1–2.

<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* at 5 (citing *In re Respondent G.*, 2 Cal. St. Bar Ct. Rptr. 175, 179 (Cal. Review Dep’t 1992)).

<sup>52</sup> *Id.* (citing *In re Matter of Copren*, 4 Cal. St. Bar Ct. Rptr. 861, 864 (Cal. Review Dep’t 2005)).

<sup>53</sup> *Id.* (citing *In re Matter of Layton*, 2 Cal. St. Bar Ct. Rptr. 366, 377–78 (Cal. Review Dep’t 1993)).

<sup>54</sup> See Cal. Bar Op., *supra* note 26, at 7.

<sup>55</sup> *Id.* at 2–5.

<sup>56</sup> See *Cannedy v. Adams*, No. ED CV 08-1230-CFEE, 2009 WL 3711958, at 28–31 (C.D. Cal. Nov. 4, 2009) (holding that failure to introduce evidence of a profile containing a purported molestation victim’s recantations was ineffective assistance of counsel), *aff’d*, 706 F.3d 1148 (9th Cir. 2013); Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 856–58 (2014) (suggesting that searching social media is essential for effective representation).

<sup>57</sup> See *Johnson v. McCullough*, 306 S.W. 3d 551, 558–59 (Mo. 2010) (concluding that failure to object to juror before trial was waived where juror’s bias was available to attorneys upon an internet search).

<sup>58</sup> *Cannedy*, 2009 WL 3711958, at \*15 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

about e-discovery is rapidly changing, and only in the direction of requiring greater knowledge.”<sup>59</sup>

Can luddite lawyering be malpractice? This idea prompted attorneys from a large New York firm to write:

Given all of the resources which have been devoted to educating the bar about the need to preserve electronic information, emails, documents, etc., it is not too hard to imagine a client claiming that the failure to do so in this day and age amounts to malpractice, even though that would not have been the case however many years ago.<sup>60</sup>

Another commentator agrees that “[t]he possibility of a legal malpractice claim or bar discipline for incompetence with respect to technology now poses a real threat.”<sup>61</sup>

### C. *Why Electronic Discovery Is the Flashpoint: Lawyers Are Still Bad at It*

Attorney sanctions occur more often than usual in discovery disputes, where misconduct can result due to counsel’s inattentiveness to required responses,<sup>62</sup> inability to understand technology,<sup>63</sup> or dishonesty.<sup>64</sup> Many of

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<sup>59</sup> Joel Cohen & James L. Bernard, *The ‘Ethic of Getting Up to Speed ‘Technology,’* N.Y.L.J., Dec. 10, 2013.

<sup>60</sup> *Id.*

<sup>61</sup> Lanctot, *supra* note 10, at 83.

<sup>62</sup> See Recommend Article, *supra* note 9 (citing *HM Elecs. Inc. v. R.F. Techs., Inc.*, No. 12cv2884-BAS-MDD, 2015 WL 4714908, at \*1, 31, 34–35 (S.D. Cal. Aug. 7, 2015)) (sanctioning a party for inaccurate and sloppy responses, intentional wrongdoing, and general incompetence, in the form of all attorneys’ fees and costs incurred in seeking discovery, along with an adverse inference based on unavailable information); see also Willoughby et al., *supra* note 6, at 818 (“In all four cases [studied] in which the court sanctioned counsel for negligent conduct, counsel was in possession of client materials but failed to produce them in a timely fashion.” (alteration in original)).

<sup>63</sup> See Michael J. Bauer, *Fail to Plan, Plan to Pay: Ignorance of the E-Discovery Amendments Can Be Costly*, WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P. 1 (last visited Sept. 10, 2017), [http://www.gcila.org/publications/files/pub\\_en\\_141.pdf](http://www.gcila.org/publications/files/pub_en_141.pdf); Paul Devinski, *E-Discovery: Doing It in an ‘Ignorant and Indifferent Fashion’ May Lead to Sanctions*, MCDERMOTT WILL & EMERY (Jan. 21, 2010), <https://www.mwe.com/en/thought-leadership/publications/2010/01/ediscovery--doing-it-in-an-ignorant-and-indiffer>.

<sup>64</sup> It could be argued that the *Qualcomm* case, the gold standard of attorney sanctioning cases, involved inattentiveness, lack of understand of technology, and dishonest behavior. The attorneys in *Qualcomm* were ordered to pay \$8.5 million for intentionally withholding thousands of documents and failing to make a reasonable inquiry that would have made such an omission obvious; the attorneys were also referred to the state bar association for disciplinary action. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at \*20 (S.D. Cal. Jan. 7, 2008). The sanctions were later lifted, but the legendary story remains. See Ashby Jones, *Sanctions Lifted Against Qualcomm Lawyers (After Damage Is Done)*, WALL ST. J.: L. BLOG (Apr. 7, 2010, 9:41 AM), <http://blogs.wsj.com/law/2010/04/07/sanctions-lifted-against-qualcomm-lawyers-after-damage-is-done/>.

these failures by counsel are unintentional and result from a lack of organization or understanding of the complicated discovery process.<sup>65</sup>

Sanctions against counsel for electronic discovery violations steadily increased as information in discovery became more electronic, and technical knowledge became less of a specialty and more of a requirement in litigation.<sup>66</sup> Electronic discovery sanctions against litigants are common, and sanctions against counsel for electronic discovery violations are “rare but . . . increasing.”<sup>67</sup> These sanctions are often monetary, but also can include nonmonetary sanctions, such as ordering counsel to develop a discovery protocol and participate in education,<sup>68</sup> ordering counsel to read certain Federal Rules of Civil Procedure,<sup>69</sup> and ordering counsel to submit an affidavit certifying compliance of cooperation efforts.<sup>70</sup>

Counsel sanctions in discovery disputes are correctional in nature, hoping to make an example of bad behavior to the rest of the bar.<sup>71</sup> Nonmonetary sanctions in particular are as much a message to potential future transgressors as they are punishment to the specific transgressor. Indeed, “[a]n emerging goal in counsel sanctions in the recent electronic discovery cases, when they do occur, is to induce counsel to improve discovery behavior either in the case at hand or, by example, in future litigation.”<sup>72</sup> As one retired judge put it, “[a]s this response suggests, it is a consistent complaint of the bar that judges do not sanction lawyers’ misbehavior in the discovery process.”<sup>73</sup>

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<sup>65</sup> Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with the Resolution of E-Discovery Misconduct*, 15 RICH. J.L. & TECH., Spring 2009, at 1, 30 (noting that the root cause of electronic discovery disputes “is often a lack of dedicated client resources coupled with inadequate internal coordination in the face of overwhelming complexity”).

<sup>66</sup> See Willoughby et al., *supra* note 6, at 816 (“[C]ounsel sanctions for e-discovery have steadily increased since 2004.”).

<sup>67</sup> *Id.* at 815–17 n.119 (listing cases awarding sanctions in e-discovery cases).

<sup>68</sup> See *id.* at 823 n.150 (citing *Qualcomm Inc.*, 2008 WL 66932, at \*18–19).

<sup>69</sup> See *id.* (citing *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016, at \*8 (E.D. Mich. Nov. 9, 2007)).

<sup>70</sup> See *id.* (first citing *Bd. of Regents v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at \*7 (D. Neb. Nov. 5, 2007); then citing *Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 559 (N.D. Cal. 1987)).

<sup>71</sup> See Janet Eve Josselyn, *The Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C. 1927*, 31 B.C. L. REV. 477, 477 (1990) (“Attorneys who abuse the litigation process contribute to rising litigation costs. In an attempt to bring the costs home to those who create them, courts have become more willing to impose sanctions on attorneys who abuse the judicial process.” (footnotes omitted)).

<sup>72</sup> Allman, *supra* note 65, at 3.

<sup>73</sup> 3rd Annual Federal Judges Survey, *supra* note 16, at 14 (providing expert commentary from retired Judge John Facciola).

#### D. *Revised Rule 1 and Its New(ish) Obligation to Attorneys*

So, luddite lawyers must learn to use technology or risk ethical violations, malpractice, and discovery sanctions based on their ignorance. As if luddite lawyers do not have enough problems, a recent change to the very beginning of the Federal Rules is further evidence of an anti-luddite trend and, as this Article suggests, is potentially the source of a rule-based duty of technological competence. Rule 1 of the FRCP has been cited as the “master rule.”<sup>74</sup> The rule affects how all others should be applied, in order that the resolution of disputes is “just, speedy, and inexpensive.”<sup>75</sup> Some have called Rule 1 a value or mission statement.<sup>76</sup> It, as well as the rest of the Federal Rules, must be construed “liberally.”<sup>77</sup> As such, Rule 1 has been cited somewhat inconsistently by courts as a guide to construction,<sup>78</sup> and even as a catch-all exception to following other Rules.<sup>79</sup> As one commentator concluded:

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<sup>74</sup> Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010).

<sup>75</sup> *Id.* at n.7 (“The most important rule of all is the last sentence of [Rule] 1 . . . [that litigation is to be] ‘just, speedy, and inexpensive.’ . . . It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court.” (alteration in original) (quoting *In re Paris Air Crash of Mar. 3, 1974*, 69 F.R.D. 310, 318 (C.D. Cal. 1975))).

<sup>76</sup> Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1325 (1995) (“For over fifty years, Rule 1 of the Federal Rules of Civil Procedure has attempted to guide civil litigation in the United States district courts by associating the Rules with a set of overarching values. Since 1938, the second sentence of Rule 1 has mandated that courts construe the Rules to ‘secure the just, speedy, and inexpensive determination of every action?’ Despite the longevity of Rule 1, we have yet to examine closely the problems presented by a rule that attempts to direct through the recitation of process values.” (footnotes omitted)).

<sup>77</sup> Mazza et al., *supra* note 22, at 7 (quoting *Plant Econ., Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 278 (3d Cir. 1962)).

<sup>78</sup> See Johnston, *supra* note 76, at 1349 (“Not only did the trinity lead the early district courts to pay careful attention to the language in the Rules, it also provided a tool for interpreting the Rules. The trinity literally provided a rule of construction applicable to the remaining rules of civil procedure.”); *id.* at 1373–75 (“For example, district courts continue to present the Rule 1 trinity [Rule 1’s edict that proceedings be “just, speedy, and inexpensive”] in the form of unexplained invocations and benedictions. Some courts continue to include the trinity in separate but unconnected paragraphs. District courts also continue to use the trinity as a rule for construing the language of other Rules. In particular, district courts still assume that the trinity mandates liberal interpretations of the Rules to facilitate resolutions on the merits.” (footnotes omitted)).

<sup>79</sup> See *id.* at 1385 (“Perhaps the most interesting use of the trinity arises when courts view it as authorization to treat lightly or even supersede applicable language in other Rules. In doing so, some district courts have recognized that the trinity can be used to subvert the purposes of other Rules.”). For example, one court cited Rule 1 in a case in which a court created an “early screening” system of prisoner rights cases based on a “common pattern of jurisdictional, substantive, procedural and pragmatic issues” in those cases. *Id.* at 1388 (citing *Feliciano v. Dubois*, 846 F. Supp. 1033, 1038 (D. Mass. 1994)).

[D]istrict courts currently use the Rule 1 trinity to flavor a broad variety of procedural stews. Some courts use the trinity [Rule 1's edit that litigation be "just, speedy, and inexpensive"] to foster liberal interpretations requiring only substantial compliance with the Rules; others use the trinity to justify interpretations that tend to impede adjudication on the merits. Some courts employ the trinity to define their limits by the language of the Rules; others employ it to escape or exceed the limits sets by the Rules' language. Some courts utilize the trinity without reference to precedent; others, to avoid troubling precedent. Finally, some courts invoke the trinity without attempting to explain its meaning or effect; others cite the trinity while admitting the difficulty of explaining how its parts can be fit together. In short, rather than a simple rule of construction, the federal courts seem to have transformed the trinity into a rule of heightened discretion.<sup>80</sup>

Rule 1 has long been considered a "preamble" to the rules and neglected by judges and academics.<sup>81</sup> However, a dramatic increase in citations to Rule 1 in recent years indicates it is experiencing something of a "revival."<sup>82</sup> A survey of reported opinions on attorney misconduct noted that "[o]ne theme that runs consistently through the opinions is that judges believe and communicate, either implicitly or explicitly, that an attorney's primary responsibility is to the proper functioning of the system."<sup>83</sup> In fact, Rule 1 now imposes an affirmative obligation on participants in litigation. As part of recent rule changes that took place in 2015, Rule 1 now mandates that the Rules "should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>84</sup> The italicized text in the preceding sentence is new, as a part of the changes to discovery rules enacted in 2015.<sup>85</sup> The increased onus on the court and the parties to secure just, speedy, and inexpensive determinations of actions and proceedings is meant to be a "game changer."<sup>86</sup> It places all participants in litigation on equal footing to accomplish a task

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<sup>80</sup> *Id.* at 1392 (footnotes omitted).

<sup>81</sup> Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 158, 159 n.182 (2015) ("Only a smattering of scholarly articles squarely address Rule 1 . . .").

<sup>82</sup> Bone, *supra* note 74, at 299.

<sup>83</sup> Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1440 (2004).

<sup>84</sup> FED. R. CIV. P. 1 (emphasis added).

<sup>85</sup> Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES 4 (Dec. 31, 2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> ("Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.").

<sup>86</sup> *Id.* at 6 ("The [italicized] words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.").

that commentators describe as both vastly important and inherently paradoxical.<sup>87</sup>

Rule 1's obligation may be difficult for attorneys to meet because many feel that litigation does not live up to its promise of "just, speedy, and inexpensive" determinations.<sup>88</sup> The perception is that Rule 1's goals are not met in litigation,<sup>89</sup> and especially not in the litigation discovery phase.<sup>90</sup> Further, because the challenge of managing such an enormous volume of information often creates more work than a case is worth, "the typical case presents increasing difficulty in meeting the aspirational goals of Rule 1 with respect to electronic discovery."<sup>91</sup> Increased direct judicial involvement in managing cases, to the extent practicable, is widely seen as the best way to counter this difficulty.<sup>92</sup>

With respect to the information explosion and discovery, it has been noted that the "[c]ost of discovery is a pertinent and appropriate consideration" in the analysis of litigation pursuant to Rule 1's edict.<sup>93</sup> The Supreme Court has cited Rule 1 to reflect its desire to nationally reduce cost

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<sup>87</sup> See Bone, *supra* note 74, at 288 (describing widespread calls for litigation to be more fair and less expensive, but then aptly describing the phrase "just, speedy, and inexpensive" to present three adjectives at odds with each other and other values, noting that it is unrealistic to assume that these objectives can be achieved "without tradeoffs or conflicts and without sacrificing substantive justice for speedier resolution or lower costs").

<sup>88</sup> See Harold Hongju Koh, "The Just, Speedy, and Inexpensive Determination of Every Action?", 162 U. PA. L. REV. 1525, 1527 (2014) ("Is today's civil process just? Sometimes no. Is it speedy? Relatively. Inexpensive? Not really. Are there determinations of every action? Terminations, yes, but not necessarily 'determinations.'").

<sup>89</sup> See Mazza et al., *supra* note 22, at 2 ("In reality, few parties to litigation in federal court receive the prompt and economical resolution that FRCP 1 seems to promise."); see also Waxse, *supra* note 12, at 111 ("As most parties and counsel agree, litigation today is a method of resolving disputes that is too costly and time consuming for most parties involved. I see that on a day-to-day basis in my case management work as a Federal Magistrate Judge.").

<sup>90</sup> See *id.* ("Nowhere is this [excess time and cost] more evident than in cases involving the discovery of large volumes of electronically stored information.").

<sup>91</sup> Roe Frazer & Marc Jenkins, *The Future of eDiscovery in Tennessee*, 1 BELMONT L. REV. 181, 190 (2014) ("For a litigator seeking to find the key documents that will assist with a case, the challenge is to convert raw data into real knowledge."); see also Koh, *supra* note 88, at 1540 ("[T]he Federal Rules have partially achieved—but only partially—their own self-stated goal of the just, speedy, and inexpensive determination of every action. That this goal remains partly unrealized is no one's fault. In good measure, the Rules simply have not evolved fast enough to keep up with grand social change: stunning revolutions in technology, communication, globalization, and human rights.").

<sup>92</sup> See John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 542 (2010) ("One area of substantial agreement [during a conference of judges, practitioners, and academics on Rule 1 and proportional discovery] was the need for active judicial management of litigation. The litigants and parties welcomed this involvement as a way of assuring that proceedings are conducted in such a way that their costs are proportionate to the stakes of the litigation."); Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 4 FED. CTS. L. REV. 1, 7 (2010).

<sup>93</sup> Mazza et al., *supra* note 22, at 5 (alteration in original) (quoting Florida *ex rel.* Butterworth v. Indus. Chems., Inc., 145 F.R.D. 585, 589 (N.D. Fla. 1991)).



in litigation.<sup>94</sup> One commentator noted that “because of its indeterminacy, particularly in the context of its recently increased association with efficiency, Rule 1 provides an internal, text-based anchor for the Roberts Court’s managerial Rules interpretation. If the Court wishes to focus on systemic efficiency, Rule 1’s ‘speedy and efficient’ language provides support for that.”<sup>95</sup>

The key takeaway from revised Rule 1 is that, if it was not obvious before,<sup>96</sup> counsel, parties, and judges *must* work together to provide a smoother, cheaper legal system, primarily in light of Big Data’s large cost.<sup>97</sup> This Article addresses the question that arises when any action is prescribed by law or rule: “or what?” How does one violate this rule and what happens to the transgressor?

The drafters of the revised rule did not provide a clear answer. In fact, the 2015 Committee Notes on Rule 1 stated that “[t]his amendment does not create a new or independent source of sanctions” and “[n]either does it abridge the scope of any other of these rules.”<sup>98</sup> This curious addition came as a result of anticipated confusion that the rule would “serve as a basis for sanctions for a failure to cooperate.”<sup>99</sup> While the drafters’ reticence at giving

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<sup>94</sup> *Id.* at 6 (“The Supreme Court has observed that Rule 1 reflects a ‘national policy . . . to minimize the costs of litigation.’” (alteration in original) (quoting *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964))); *see also* Johnston, *supra* note 76, at 1328–29 (noting that the goal of Rule 1 was “reducing excessive delays and expense in civil litigation; curtailing and eliminating frivolous claims and defenses; reducing burdens on litigants; and preserving scarce judicial resources”).

<sup>95</sup> Porter, *supra* note 81, at 163.

<sup>96</sup> Some commentators argued that it was fairly obvious already that practitioners needed to help cases be administered per Rule 1’s directives. *See, e.g.*, Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 53–54 (2015) (encouraging practitioners to aid judges in administering cases under Rule 1).

<sup>97</sup> *See* Roberts, *supra* note 85, at 9–10 (“The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—‘the just, speedy, and inexpensive determination of every action and proceeding’—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change. . . . It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.”); *see, e.g.*, Waxse, *supra* note 12, at 111–12 (describing the District of Kansas’s revised Guidelines for Cases Involving ESI as a direct response to, *inter alia*, “problems caused by lack of lawyer technical competence”). These Guidelines explicitly state that their purpose is “to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention.” *Id.* at 117 (emphasis added).

<sup>98</sup> FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment.

<sup>99</sup> Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 8–9 (2015) (footnote omitted); Comm. on Rules of Prac. & Proc., Minutes, U.S. Courts 5 (May 1, 2014), <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-may-2014> (“The added language would make it clear that the change was not intended to create a new source for sanctions motions.”); *see also* Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Proc., to Judge Jeffrey Sutton, Chair, Advisory

overzealous litigators an independent option to bring a sanctions motion is understandable, this language creates an issue with the core idea that parties must obey Rule 1's edicts. At first blush, it seems as if the drafters of the revised rule have created an exception that will swallow it. After all, if Rule 1 charges parties to ensure the just, speedy, and inexpensive resolution of disputes, but no sanctions can ensue from a failure to do so, how is this charge to be enforced? Focusing on the language that the Rule cannot be a "new or independent" source of sanctions may be helpful. The change in Rule 1 may not be the direct source of sanctions—that job would fall to existing sanctioning avenues described herein—but those avenues would be justified by a party's failure to meet its obligations under Rule 1. Further, sanctions for luddite attorneys do not so much result from a failure to cooperate but from a failure to meaningfully participate in the just, speedy, and inexpensive resolution of disputes.

Indeed, commentators have already noticed a relationship between the ethical duty a lawyer has to keep abreast of technology and the change in the Federal Rules requiring lawyers to speed litigation along. These commentators have observed that "[a] lawyer's duty of competence under Model Rule 1.1 is necessarily implicated by the lawyer's duties under Federal Rule of Civil Procedure 1."<sup>100</sup> Put succinctly, "[t]o ensure the just, speedy, and inexpensive determination of every action required by Rule 1, an attorney must provide competent representation, which requires a continuous assessment of the risks and benefits of technology."<sup>101</sup>

Increasingly competent judges observe the truth of commentators' findings. Indeed, Judge Facciola, commenting on the increases in technological competency among members of the bench, noted that "counsel is now challenged to have the technological competence that is at least equal to the judges' competency. . . . A technologically competent judge is going to insist that counsel have, at least, technological competence equal to their own."<sup>102</sup>

What if a lawyer fails to provide competent representation with respect to keeping current in technology in civil discovery? Is such conduct sanctionable? Possibly yes. The next Part will discuss the basis for such sanctions.

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Comm. on Rules of Prac. & Proc. B-13 (June 14, 2014) ("Another [concern] was that this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate.").

<sup>100</sup> This idea first surfaced in a brief article in March 2016. See Christopher Skinner & Stephanie McCoy Loquvam, *How Amended Civil Rule 1 Changes the Landscape of Lawyers' Ethical Obligations*, AM. BAR ASS'N (Mar. 31, 2016), <http://apps.americanbar.org/litigation/committees/youngadvocate/articles/spring2016-0316-how-amended-civil-rule-1-changes-landscape-lawyers-ethical-obligations.html> ("[C]ourts are not going to sympathize with attorneys or clients who do not stay abreast of advances in technology.").

<sup>101</sup> *Id.*

<sup>102</sup> *3<sup>rd</sup> Annual Federal Judges Survey*, *supra* note 16, at 13 (quoting Judge Facciola as an expert commentator).

## II. HOW COURTS CAN SANCTION LUDDITES BY USING (IN PART) RULE 1

Recently, courts have shown a general tendency to chastise luddite attorneys. For example, Judges have exhibited public frustration and chastised attorneys for not having an operational email account,<sup>103</sup> not Googling an obvious internet scam involving a client and unknowingly helping the client spread that scam,<sup>104</sup> and not using an electronic search for an absent party.<sup>105</sup> Can leveraging Rule 1 justify sanctions for such conduct?

### A. *Background of Courts' Sanctioning Power Over Attorneys*

To lay the groundwork for sanctioning an attorney whose conduct frustrates Model Rule 1.1 and FRCP Rule 1, because Rule 1 is not a source of sanction in itself, one must briefly consider the source of civil sanctions and how they apply to attorneys. This is an area of law that happens “on the ground” in the trial courts.<sup>106</sup> That being said, when sanctions do come down, they usually stick. Appellate courts are often deferential to trial courts when examining sanctions.<sup>107</sup> This propensity for sanctions to survive appeal places great responsibility on trial courts, and repeat litigants may see a variety of consequences for the same behavior.<sup>108</sup>

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<sup>103</sup> See Nicole Black, *Legal Scoop: S.C. Lawyers Required to Maintain Email Address*, DAILY REC. (Oct. 28, 2013), <http://nydailyrecord.com/2013/10/28/legal-loop-s-c-lawyers-required-to-maintain-email-address>.

<sup>104</sup> See Iowa Sup. Ct. Att’y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301 (Iowa 2013).

<sup>105</sup> See, e.g., Dubois v. Butler, 901 So.2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (criticizing an attorney who only checked directory assistance to find and serve defendant was employing a method that was the modern equivalent of “the horse and buggy and the eight track stereo”); Munster v. Groce, 829 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2005) (“[The court] discovered, upon entering ‘Joe Groce Indiana’ into the Google search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce’s mother that listed numerous surviving relatives who might have known his whereabouts.”).

<sup>106</sup> Willoughby et al., *supra* note 6, at 817 (“[C]ase law involving counsel e-discovery sanctions is predominantly being developed at the trial court level by magistrate judges, bankruptcy judges, and district court judges.”).

<sup>107</sup> Allman, *supra* note 65, at 21 (“U.S. Courts of Appeals are quite reluctant to second guess lower courts, given their ‘intimate familiarity with the details of the discovery dispute’ and the risk of undermining their authority” (quoting *In re Fannie Mac Sec. Litig.*, 552 F.3d 814, 822 (D.C. Cir. 2009))); see also Willoughby et al., *supra* note 6, at 797–98 (“Appellate review of e-discovery sanction cases has been limited, perhaps because many cases settle or are otherwise not appealed.”).

<sup>108</sup> See Jeff Lilly & Fred Raschke, *The Growing Problem of Spoliation Sanctions*, INSIDE COUNSEL MAG. (Mar. 20, 2015), <http://www.insidecounsel.com/2015/03/20/the-growing-problem-of-spoliation-sanctions> (“Today, the spoliation doctrine is so problematic, inconsistently applied and often times a ‘gotcha’ game.”). This inconsistency was a major driver of the revisions to Rule 37, creating a standard for spoliation sanctions and resolving a circuit split. See, e.g., Judge David G. Campbell, *supra* note 99, at app’x. B-17 (“A primary purpose of [revised Rule 37] is to eliminate the circuit split on when a court

## 1. Explicit Powers

A court can sanction attorneys for conduct in litigation through several rules.<sup>109</sup> Most commonly, various sections of Rule 37 permit sanctions against lawyers and law firms for failing to participate in good faith discovery.<sup>110</sup> Specifically, Rule 37(a)(5)(A) enables sanctions for dilatory conduct that results in a successful motion to compel.<sup>111</sup> Also, Rule 37(b)(2)(C) enables sanctions for disobeying a discovery order,<sup>112</sup> and Rule 37(d)(3) enables sanctions for failure to attend depositions, serve answers, or respond to discovery.<sup>113</sup> Essentially, “Rule 37 of the Federal Rules of Civil Procedure requires that counsel advising clients regarding discovery matters must undertake the necessary efforts needed to achieve adequate results.”<sup>114</sup> “Rule 37 is the most frequently used authority” to sanction counsel for e-discovery violations.<sup>115</sup>

In addition to Rule 37 sanctions, sanctions can emanate from a lawyer’s failure to make a “reasonable inquiry” required by Rule 26(g) before signing a discovery disclosure, request, or response.<sup>116</sup> Courts have sanctioned attorneys under Rule 26(g) for signing discovery filings that make an insufficient inquiry into the accuracy of the contents or the purpose behind the filing.<sup>117</sup>

Also, lawyers may run afoul of a duty not to create additional litigation, including discovery disputes. Courts have relied on the statutory authority of 28 U.S.C. § 1927, which prohibits behavior by attorneys that “unreasonably and vexatiously” multiplies proceedings.<sup>118</sup> Such attorneys “may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”<sup>119</sup> Sanctions are rare under this statute because of a circuit split with respect to the applicable

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may give an adverse inference jury instruction for the loss of ESI.”). This is so for attorney sanctions as well. *See* *McMorrow*, *supra* note 83, at 1448–49 (noting deference by appellate courts to trial courts in reviewing sanctions for attorney misconduct).

<sup>109</sup> Allman, *supra* note 65, at 4–5.

<sup>110</sup> *Id.* at 17 (citing FED. R. CIV. P. 37(a)(5)(A), 37(b)(2)(C), 37(d)(3)).

<sup>111</sup> FED. R. CIV. P. 37(a)(5)(A).

<sup>112</sup> FED. R. CIV. P. 37(b)(2)(C).

<sup>113</sup> FED. R. CIV. P. 37(d)(3).

<sup>114</sup> Allman, *supra* note 65, at 5.

<sup>115</sup> Willoughby et al., *supra* note 6, at 817.

<sup>116</sup> FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment, subdiv. (g); Allman, *supra* note 65, at 17.

<sup>117</sup> *See* Willoughby et al., *supra* note 6, at 817 (citing *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at \*13 n.9 (S.D. Cal. Jan. 7, 2008)).

<sup>118</sup> 28 U.S.C. § 1927 (2012); *see In re Veg Liquidation, Inc.*, 516 B.R. 545, 549 n.2 (Bankr. W.D. Ark. 2014).

<sup>119</sup> 28 U.S.C. § 1927; *see* Josselyn, *supra* note 71, at 478–79.

standard, negligence or bad faith,<sup>120</sup> and a general consensus, notwithstanding that split, that the statutory language requires a high degree of culpable conduct.<sup>121</sup>

## 2. Implicit Powers

A court also has the inherent power to sanction litigation misconduct that does not fit neatly into a rule or statutory mechanism for sanctions.<sup>122</sup> In other words, “one of the most common and important roles of inherent powers is to allow courts to craft flexible sticks to sanction contumacious parties.”<sup>123</sup> This power grows out of a court’s ability to, in essence, manage its own affairs without the text of any one rule explicitly binding it.<sup>124</sup> Sanctioning is one of many such powers.<sup>125</sup> Sanctions under this power can take the same forms as they would under federal statutes and rules.<sup>126</sup>

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<sup>120</sup> See *In re Veg Liquidation*, 516 B.R. at 549 n.2 (listing cases and enumerating circuit split, noting uncertainty even within circuits); Josselyn, *supra* note 71, at 478–79 (describing circuit split over standard, with some requiring merely negligent behavior, and others requiring bad faith).

<sup>121</sup> Allman, *supra* note 65, at 18 (“[28 U.S.C. § 1927] requires a showing of bad faith conduct or conduct amounting to bad faith, judged objectively, or ‘recklessness’ (but not mere ‘negligence’) coupled with an improper purpose. A finding of liability [also] requires a high degree of specificity . . .”).

<sup>122</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–45 (1991) (stating that, among other things, courts have the power to “impose silence, respect, and decorum in their presence, and submission to their lawful mandates”; to “punish for contempts”; and to “fashion an appropriate sanction for conduct which abuses the judicial process”); Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-À-Vis 28 U.S.C. § 1927 and the Court’s Inherent Power*, 37 LOY. L.A. L. REV. 645, 653 (2004) (“The federal district court’s sanctioning power . . . is not limited to what is enumerated in statutes or in the rules of civil procedure.”); Jennifer M. Treece, *Finding Limitations on the Federal Courts’ Inherent Power to Sanction: Chambers v. NASCO, Inc.*, 27 TULSA L.J. 717, 727 (1992) (“The purpose of inherent power sanctions is to penalize bad faith litigation abuses.”).

<sup>123</sup> Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 47 (2008).

<sup>124</sup> *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962) (“[Power is governed] not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . .”). This is an oversimplification of the source of the Court’s inherent power, to be sure. See Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 31 (2011).

<sup>125</sup> See Barton, *supra* note 124, at 2 n.1 (quoting *Chambers*, 501 U.S. at 43–45) (“*Chambers v. NASCO, Inc.* offers a more recent and complete list, which includes the powers to ‘impose silence, respect, and decorum in their presence, and submission to their lawful mandates’; to ‘control admission to its bar and to discipline attorneys’; to ‘punish for contempts’; to ‘vacate its own judgment upon proof that a fraud has been perpetrated upon the court’; to ‘dismiss an action on grounds of forum non conveniens’; to ‘act *sua sponte* to dismiss a suit for failure to prosecute’; and to ‘fashion an appropriate sanction for conduct which abuses the judicial process.’”).

<sup>126</sup> See Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195, 200 (1994) (surveying inherent power and concluding that “[p]resumably, any sanction contemplated under federal statutes and rules can be imposed incident to the inherent power as well”).

As one might guess from its very nature, the court's inherent power to sanction is difficult to fully articulate and use consistently. The Supreme Court described this power in *Chambers v. NASCO, Inc.*<sup>127</sup> as “safely” used when “neither the statute nor the Rules are up to the task,”<sup>128</sup> but recommended that courts “ordinarily should” use the Civil Rules as a basis for sanctioning.<sup>129</sup> In that sense, inherent powers are perhaps a catchall—“a flexible tool that enables courts to respond to the changing realities of litigation without requiring a prolix code of procedure.”<sup>130</sup> Put another way, “for cases in which some of the behavior would not be reached by the existing statutes and rules, a court could use its inherent powers to reach all of the behavior at once.”<sup>131</sup> A court's inherent powers are fluid, and exist to help the court manage its schedule and keep cases moving speedily, similar to the edict in Rule 1.<sup>132</sup>

That attorneys, as officers of the court, knowingly submit themselves to the court's authority with respect to decorum and procedure makes attorneys particularly susceptible to sanctions under the court's inherent power. As one commentator observed, “[t]he notion of ‘supervisory powers’—which functions as a special form or subset of inherent powers—appears to give courts greater latitude in imposing sanctions on attorneys who appear before the court.”<sup>133</sup> Courts “are willing to act *sua sponte*, identifying attorney behavior that may have an adverse effect on the proceedings.”<sup>134</sup>

These powers can be robust and are nearly entirely discretionary.<sup>135</sup> This is a power that the Supreme Court has specifically stated courts should use

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<sup>127</sup> 501 U.S. 32 (1991).

<sup>128</sup> *Id.* at 33.

<sup>129</sup> *Id.* at 33. Professor Barton notes, however, that “[t]he Court is hardly crystal clear on this point; it also states that a federal court is not ‘forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules[.]’ assuming the court follows the other due process and factual requirements.” *Barton, supra* note 124, at 55 (alteration in original) (quoting *Chambers*, 501 U.S. at 50).

<sup>130</sup> Anclien, *supra* note 123, at 49.

<sup>131</sup> Barton, *supra* note 124, at 56.

<sup>132</sup> Joseph J. Janatka, Note, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U. L.Q. 429, 431 (1987) (“Speedy trials aid the administration of justice. Under the inherent powers doctrine courts may promulgate rules and procedures to effectuate speedy trials.”); *see also Chambers*, 501 U.S. at 43 (“[Federal courts’ implied] powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962))).

<sup>133</sup> Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 20 (2005).

<sup>134</sup> McMorrow et al., *supra* note 83, at 1442 (alterations in original); *see also Link*, 370 U.S. at 633 (holding that repeated delays and absenteeism warranted sanction by inherent power).

<sup>135</sup> *See Treece, supra* note 122, at 726 (“Federal courts may act solely at their own discretion to determine the need for and amount of sanctions under the theory of inherent power.”).

sparingly given its potential for misuse.<sup>136</sup> Courts primarily use this power to address particularly dilatory, creative, or egregious bad faith conduct in litigation.<sup>137</sup>

Courts can combine inherent powers with existing rules to craft sanctions.<sup>138</sup> Courts have done just that.<sup>139</sup> Appellate courts, however, strongly disfavor the “lazy” approach of using inherent power to sanction a party where a power prescribed by rule will suffice.<sup>140</sup> In fact, the recent 2015 FRCP explicitly disfavor the use of inherent power sanctions for spoliation.<sup>141</sup>

Inherent powers are important to consider in the context of this Article because Rule 1, in particular, has been cited as a rule that “bridges the gap” between expressly stated court power and implicit court power.<sup>142</sup> Some commentators have even suggested revising Rule 1 to make that bridge clear.<sup>143</sup>

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<sup>136</sup> *Chambers*, 501 U.S. at 44 (“Because of their very potency, inherent powers must be exercised with restraint and discretion.”); *see also* Anclien, *supra* note 123, at 49–51 (outlining the lack of clarity in consensus for the use of inherent powers); Treece, *supra* note 122, at 729 (“The inherent power should be exercised in narrowly defined circumstances, not only to prevent judicial abuse, but also to prevent subversion of the Federal Rules. . . . Use of the inherent power is acceptable where no rules are applicable to the conduct, but the Federal Rules will not survive if courts may choose to ignore the restraints of specific rules, relying instead on the ambiguous inherent powers.”).

<sup>137</sup> *See Chambers*, 501 U.S. at 43–45; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765–66 (1980). However, Justice Scalia’s dissent in *Chambers* suggested that “bad faith is not, and should not be, required for the imposition of inherent power sanctions.” Treece, *supra* note 122, at 726. Treece’s exhaustive article also lists cases that suggest that only an inference of bad faith will be sufficient for sanctions. *See id.* at 726 n.81.

<sup>138</sup> *See, e.g.*, David A. Rammelt, Note, “*Inherent Power*” and Rule 16: *How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965, 982 n.90 (1990) (“[T]he Rules are frequently combined with the inherent power (or ‘supervisory power’) doctrine.”); *id.* at 982 n.95 (“When combined with the speed and efficiency mandate of Rule 1, Rule 16 logically invests in the trial judge the ability to participate in pretrial to whatever degree the judge feels necessary to speed the lawsuit to its conclusion.”).

<sup>139</sup> *See* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 313–15 (2010) (noting that inherent power is often used).

<sup>140</sup> Anclien, *supra* note 123, at 39–40 n.9 (citing, *inter alia*, John Papachristos, *Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO*, 59 BROOK. L. REV. 1225, 1265 (1993)) (“[W]here codified sanction provisions provide an adequate means by which to regulate conduct, authority to act under the guise of inherent power is not only unnecessary, but improper.”).

<sup>141</sup> FED. R. CIV. P. 37(e) advisory committee’s notes to 2015 amendment (“New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.”).

<sup>142</sup> Jordan, *supra* note 139, at 323 (noting that “courts routinely cite to [Rule 1] as an interpretive aid” in fashioning the use of inherent power).

<sup>143</sup> *See id.* (“Rule 1 might easily be amended to specify that where rules are present, they are intended to define the permissible scope of behavior by litigants and judges, and are subject to supplementation only where explicitly provided for.”). Indeed, it may be prudent for a newly revised Rule 1 to affirmatively provide a new and independent source of sanctions.

### 3. Judicial Creativity

Sanctions under the rules and inherent power can affect client or counsel and can take myriad forms.<sup>144</sup> Even the occasionally rigid civil rules “place virtually no limits on judicial creativity.”<sup>145</sup> One commentator assembled an impressive list of varied inherent power sanctions, including “fines, award of attorneys’ fees and costs, disqualification, suspension or disbarment of counsel, dismissal of an action, preclusion of claims and defenses, and enjoining litigants from future access to the courts.”<sup>146</sup>

Like party sanctions for discovery violations, counsel sanctions are often monetary, and most are an award of the other side’s fees and costs.<sup>147</sup> Perhaps most noteworthy for the purposes of this Article, judges can issue an informal sanction to attorneys that serves as a message to the bar.<sup>148</sup> These sanctions generally “include a court’s decision to issue an opinion, naming the recalcitrant attorney, outlining his or her misdeeds in detail, and describing the court’s disappointment and outrage.”<sup>149</sup> Informal sanctions “combine the power of the written word with the importance of an attorney’s reputation to impress upon an attorney (and the bar) the gravity of the conduct.”<sup>150</sup> For example, a judge can issue a sanction requiring that counsel submit an affidavit to the court showing a change in behavior from previous bad behavior.<sup>151</sup> Professor Thomas Allman describes even more creative examples, such as:

In *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, counsel [was] ordered to “write an article explaining why it [was] improper” to assert certain unfounded objections. Other courts have published the names of counsel in opinions to create a “permanent record” available to legal researchers. The magistrate judge in *Qualcomm Inc. v. Broadcom Corp.* required retained and in-house counsel to meet under court auspices to “identify the failures in the case management and discovery protocol utilized by Qualcomm and its . . . attorneys [so as to] prevent such failures in the future . . .” This effort was intended to “establish a baseline for other cases. . . [and perhaps] establish a turning point in what the Court perceives as a

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<sup>144</sup> Allman, *supra* note 65, at 18.

<sup>145</sup> *Id.* at 22 (quoting *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990)) (“For example, while Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure lists some types of sanctions for violating an order to provide discovery, the listing ‘is neither exhaustive nor mutually exclusive, and ‘the court may impose [more than one of the enumerated sanctions] at the same time.’” (footnotes omitted)). However, there are some limitations, such as Rule 37 (a)(5) and (b)(2)(C) and Rule 26(g)(3)’s requirement of a monetary sanction absent special circumstances making a monetary sanction unjust. *Id.*

<sup>146</sup> Treece, *supra* note 122, at 727–28.

<sup>147</sup> Willoughby et al., *supra* note 6, at 823.

<sup>148</sup> McMorrow et al., *supra* note 83, at 1453–54.

<sup>149</sup> *Id.* at 1453.

<sup>150</sup> *Id.*

<sup>151</sup> See Willoughby et al., *supra* note 6, at 850 n.150 (citing various cases in which the court did so).



decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena.”<sup>152</sup>

Judges have a wide berth of creative options to fashion or combine sanctions. Rule 1 can focus these options.

B. *The Rules Enabling Act Does Not Prohibit Rule 1 as a Source for Sanctions*

It should be noted at this point that another potential pitfall for Rule 1 sanctions comes from the Rules Enabling Act. This act was passed by Congress in the 1930s, giving the Supreme Court “the power to prescribe general rules of practice and procedure,” including, of course, the FRCP.<sup>153</sup> Specifically problematic for a creative judge’s leveraging of Rule 1 for sanctions, the Rules Enabling Act states that such ability to create rules of practice and procedure “shall not abridge, enlarge or modify any substantive right.”<sup>154</sup> One could argue that a judge cannot use a federal procedural rule to sanction a litigant and that such sanctions would clearly impact a litigant’s substantive right.<sup>155</sup>

In their leading article on the subject, Professor Martin Redish and federal clerk Dennis Murashko harmonize the tension between procedure and substance in the Rules Enabling Act by arguing that it allows for rules of procedure that affect substantive rights if that effect on a substantive right is “incidental,” which they describe as either unintended or necessary.<sup>156</sup> The authors cite Rule 37, mandating compliance with discovery orders, as an example of a procedural rule giving rise to sanctions up to and including default or dismissal.<sup>157</sup> They conclude that Rule 37 is a permissible rule under the Rules Enabling Act because “the primary goal of [Rule 37] is not to provide a substantive basis on which to resolve a suit. Rather, the primary goal is procedural—ensuring litigants comply with discovery orders—because discovery is deemed essential to the fair and accurate performance of the truth-finding function.”<sup>158</sup> They state that “[t]he rule, then, functions very much like a substantive club that judges can wave above litigants’ heads

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<sup>152</sup> Allman, *supra* note 65, at 24 (alterations in original).

<sup>153</sup> 28 U.S.C. § 2072(a) (2012) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”).

<sup>154</sup> *Id.* § 2072(b).

<sup>155</sup> See Martin Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 27–29 (2008), for a thoughtful discussion of the Rules Enabling Act and its effect on sanctions generally.

<sup>156</sup> *Id.* at 29–30.

<sup>157</sup> *Id.* at 30.

<sup>158</sup> *Id.*

to encourage an orderly discovery process.”<sup>159</sup> In other words, the sanction certainly affects substantive rights, but it is necessary to achieve the procedural goal of the rule.<sup>160</sup> One can justify sanctions inspired by Rule 1 using the same logic. If anything, the justification is more pure because the primary goal of Rule 1 is fair procedure. Sanctions inspired by Rule 1 serve the revised rule’s procedural purpose. Without some sort of lever, there is no real way for a judge to ensure that the litigants act in a way that promote the just, speedy, and inexpensive determination of disputes.

### C. *Rule 1 Can Also Be a Source for Sanctions*

Notwithstanding language in the Committee Note, judges often use Rule 1 as a “lever” to justify sanctions under one or more additional federal rules.<sup>161</sup> And, of course, judges can use Rule 1 liberally.<sup>162</sup> The Supreme Court opined that “the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they ‘be construed to secure the just, speedy, and inexpensive determination of every action.’”<sup>163</sup> There is a harmony between the discovery rules and Rule 1. The discovery rules themselves have been “carefully drafted and specific in [their] terms in order that they ‘secure the just, speedy, and inexpensive determination of every action.’”<sup>164</sup> The rapidly changing technology of information management has made discovery rules in particular quite pliable, and in fashioning discovery decisions, courts are encouraged to be creative and flexible with the rules.<sup>165</sup>

Through the lens of Rule 1, a court could conceivably use its explicit and inherent powers to issue an informal sanction to a luddite lawyer for extending litigation using outdated technology. It can do so even if there is no explicit spoliation or prejudice to the opposing party, as the traditional discovery sanction rules require.<sup>166</sup> The sanction would likely be in the form

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<sup>159</sup> *Id.* at 40.

<sup>160</sup> *Id.* at 33.

<sup>161</sup> Rammelt, *supra* note 138, at 982 n.95 (“When combined with the speed and efficiency mandate of Rule 1, Rule 16 logically invests in the trial judge the ability to participate in pretrial to whatever degree the judge feels necessary to speed the lawsuit to its conclusion.”).

<sup>162</sup> See Bone, *supra* note 74, at 288 (“The Federal Rules are purposefully designed to delegate broad discretion to trial judges, and Rule 1 is meant to guide that discretion in socially-productive ways.”).

<sup>163</sup> *Id.* at 297 (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). The *Lando* decision also suggested that Rule 1 could be used with then-Rule 26(b)(1)’s edict that discovery be “‘relevant’” to the underlying matter. *Id.* at 297–98.

<sup>164</sup> Mazza et al., *supra* note 22, at 7 (quoting *Philpot v. Philco-Ford Corp.*, 63 F.R.D. 672, 675 (E.D. Pa. 1974)).

<sup>165</sup> See David K. Isom, *Electronic Discovery Primer for Judges*, 1 FED. CTS. L. REV. 26, 46 (2006).

<sup>166</sup> Recent changes to Rule 37 make sanctions less likely under that rule for failure to preserve information. Specifically, the Rule now requires a showing of “intent to deprive” another party of the information before a court can levy serious sanctions. See FED. R. CIV. P. 37(3)(2) (stipulating that the

of an admonishment rather than an outcome-determinative ruling or even monetary sanctions. Such sanction would be predicated on the luddite party's inability to adhere to Rule 1's edict that all parties assist each other and the court in administering cases in a "just, speedy, and efficient" manner.<sup>167</sup> This sanction would fit squarely within the philosophy of a judge's sanctioning power, which is derived from efficiency.<sup>168</sup>

A notable distinction should be made with respect to using Rule 1 as a lever to sanction a luddite lawyer versus as a means of cost shifting.<sup>169</sup> It is certainly plausible (and scholarship exists) to show that a litigant's failure to employ technology could result in shifting of excess discovery costs to that litigant.<sup>170</sup> Indeed, there are those who would say that cost shifting is just a sanction by a different name.<sup>171</sup> It is one thing, however, to reallocate the costs of a process when a litigant creates waste—for example, requiring a litigant who could have produced paper documents electronically to pay for

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most severe sanctions are reserved for instances where the party acted with intent to deprive another party of the ESI; courts may "presume that the lost information was unfavorable to the party"; "instruct the jury that it may or must presume the information was unfavorable to the party"; or "dismiss the action or enter a default judgment."). While this relaxation of the spoliation sanctions requirement may seem to militate against attorney sanctions for luddite behavior, this is not so. It instead resolved a massive circuit split over the propriety of sanctions when documents went missing (or were deleted) through various levels of negligence or bad faith among counsel and client. Here, a luddite attorney violating Rule 1 may cause spoliation or may not—but certainly will create waste, delay, and inefficiency. *See* McMorrow et al., *supra* note 83, at 1445 n.106 (quoting *Cunningham v. Hamilton County*, 527 U.S. 198, 210–11 (1999) (Kennedy, J., concurring)) ("Delays and abuses in discovery are the source of widespread injustice . . . Trial courts must have the capacity to ensure prompt compliance with their orders, especially when attorneys attempt to abuse the discovery process to gain a tactical advantage."). It is these negative aspects that are the genesis of Rule 1-based sanctions, not spoliation.

<sup>167</sup> FED. R. CIV. P. 1.

<sup>168</sup> Carla R. Pasquale, Note, *Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?*, 77 *FORDHAM L. REV.* 219, 222 (2008) ("In imposing sanctions, judges are primarily concerned with the preservation of the integrity of the judicial system as well as the maintenance of efficient judicial proceedings.").

<sup>169</sup> Though it is interesting to note that in the electronic discovery context, it is not unheard of for a court to consider a client and its law firm as something like a unified entity, at least as far as cost-shifting is concerned. In *Boeynaems v. LA Fitness Int'l, LLC*, the court considered a classic cost shifting dilemma in the class action context, where a case pending class certification carries a hefty price tag for one entity, the defendant. 285 F.R.D. 331, 332 (E.D. Pa. 2012). Often, in such circumstances the defendant seeks cost shifting so that plaintiffs pay for the discovery they seek. The court ordered such costs to be shifted, adding that:

[P]laintiffs were represented by a "very successful and well regarded Philadelphia firm . . . which has had outstanding successes for many years in prosecuting class actions, winning hundreds of millions of dollars for their clients, and undoubtedly and deservedly, substantial fees for themselves. If the . . . firm believes that this case is meritorious, it has the financial ability to make the investment in discovery, to the extent the Court finds that cost sharing is otherwise appropriate."

SCHEINDLIN & CAPRA, *supra* note 47, at 284 (quoting *Boeynaems*, 285 F.R.D. at 335).

<sup>170</sup> *See, e.g.,* Mazza et al., *supra* note 22, at 68–71.

<sup>171</sup> Judge Rodriguez & Julia Wommack Mann, *Cost Shifting*, in *ESSENTIALS OF E-DISCOVERY* 1, 11 (Judge Rodriguez, ed., 2014).

the additional time it takes his adversary to conduct a review.<sup>172</sup> It is another thing to sanction that attorney beyond such compensation under inherent power in an attempt to deter future conduct. The latter method would fit the idea of sanctions as a message to the bar that it will not tolerate certain undesirable behavior.<sup>173</sup> It is a wake-up call to the bar to eliminate such behavior, lest luddite attorneys merely accept cost-shifting as a cost of doing business.

D. *Sanctions Based on Rule 1 Can Overcome a Presumption Against Penalizing Lawyers*

While a sanction inspired by Rule 1 for luddite lawyers is possible under a certain reading of the rules, a strong presumption against imposition would make such sanction rare. This Article does not advocate widespread sanctioning of attorneys or parties under the discovery rules, the inherent power, or Rule 1. Despite the attention they get for being “on the rise,”<sup>174</sup> sanctions against parties for conduct in discovery are relatively rare.<sup>175</sup> They are rarer still against counsel, as “[m]ost courts apply a mild de facto presumption against sanctioning counsel for discovery misconduct, even when the client is relatively blameless,” which Professor Allman notes is based on the principle that clients can choose their counsel and should be ultimately responsible for the actions of their chosen agent.<sup>176</sup> This principle is not absolute; one commentator suggests that it is unfair for clients to be

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<sup>172</sup> See Craig Ball, *Lawyer’s Guide to Forms of Production*, CRAIGBALL.COM 54 (May 2014), [http://www.craigball.com/Lawyers%20Guide%20to%20Forms%20of%20Production\\_Ver.20140512\\_TX.pdf](http://www.craigball.com/Lawyers%20Guide%20to%20Forms%20of%20Production_Ver.20140512_TX.pdf) (interpreting Rules to conclude it “obvious” that “if at the beginning of the litigation the documents existed as ESI, the producing party cannot unilaterally convert the documents into paper or paper-like forms (e.g., images) unless the requesting party stipulates to same”) (emphasis deleted).

<sup>173</sup> See Rodriguez & Mann, *supra* note 173, at 11 (“Discovery sanctions serve . . . (2) to serve as a specific deterrent to achieve compliance with the particular discovery order at issue, and (3) to serve as a general deterrent in the case at hand and in other litigation, provided that the party against whom sanctions are imposed was in some sense at fault.”).

<sup>174</sup> Willoughby et al., *supra* note 6, at 791; see also Ashby Jones, *Study: Lawyer Sanctions over Electronic Discovery on the Rise*, WALL ST. J.: L. BLOG (Jan. 13, 2011, 12:54 PM), <http://blogs.wsj.com/law/2011/01/13/study-lawyer-sanctions-over-electronic-discovery-on-the-rise/>.

<sup>175</sup> See Henry R. Chalmers, *Successful Spoliation Motions Are Rarer than You May Think*, LITIG. NEWS, Fall 2011, <http://www.agg.com/media/interior/publications/Chalmers-Litigation-News-Successful-Spoliation-Motions-are-Rarer-Than-You-May-Think.pdf> (citing Emery G. Lee III, *Motions for Sanctions Based upon Spoliation of Evidence in Civil Cases*, FED. JUDICIAL CTR. (2011), <http://www.uscourts.gov/file/federaljudicialcenterpdf>) (finding that motions for sanctions were only granted in 27 of 153 cases (18 percent)).

<sup>176</sup> Allman, *supra* note 65, at 25; see also *Malloy v. WM Specialty Mortg., LLC*, 512 F.3d 23, 27 (1st Cir. 2008) (affirming sanctions on client, despite the fact that counsel could have been sanctioned, given that the circuit has consistently ignored claims that clients should not be held responsible for counsel’s mistakes).

“punished for the sins of their attorneys.”<sup>177</sup> It may be that counsel sanctions are most appropriate when counsel is more at fault than the client, or where the client is wronged as much as the court or other parties.<sup>178</sup>

Professor Allman is staunchly against counsel sanctions, addressing them as appropriately rare:

Nonetheless, the imposition of sanctions on counsel for discovery misconduct remains a relatively isolated occurrence and properly so. Attorneys are professionals, whether employed by one client or serving as independent litigation counsel retained on an ad hoc basis to render services in specific cases. As such, they can be expected to honor ethical standards of professionalism and by-and-large must do so to maintain their own standing and reputation.<sup>179</sup>

“Counsel only” sanctions are a rarer subset of attorney sanctions.<sup>180</sup> Attorney sanctions are often more indicative of an apportionment of shared blame rather than a shift of it. That is to say, courts do not often sanction the attorney alone without the client.<sup>181</sup> If this statistical representation stays constant, sanctioning a luddite attorney and client will preserve the dynamic of Professor Allman’s concern that clients are ultimately responsible for their attorneys and have the choice to change attorneys if they so choose. Therefore, sanctioning a luddite attorney may be better described as including an attorney in a sanction against a participant in litigation whose failure to utilize technology runs afoul of Rule 1, rather than singling out the advocate as the sole bad actor.

Where severe sanctions are involved, one should examine the propriety of the sanction to “tip the boat” against a case’s objective merits. It is not ideal for a sanction to end a case or tip the balance in a case because such

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<sup>177</sup> Treece, *supra* note 122, at 730–31 (noting that the court in *Chambers* never conclusively proved that the client was the mastermind of any wrongdoing); *see also* SCHEINDLIN & CAPRA, *supra* note 47, at 333–34 (“[A]n attorney will not be held responsible for a client’s misconduct if the lawyer was unaware of the misconduct, did not assist or participate in it, and moved to correct the deception as soon as she learned of it. This is exactly what happened in *Waste Mgmt. of Washington, Inc. v. Kattler*, 776 F.3d 336 (6th Cir. 2015), where the appellate court reversed a contempt finding against a lawyer when a client disobeyed an order to produce a client’s thumb drive and tablet computer.”)

<sup>178</sup> *See* Allman, *supra* note 65, at 26 (citing *Orgler Homes, Inc. v. Chi. Reg’l Council of Carpenters*, No. 06 c 50097, 2008 WL 5082979, at \*3 (N.D. Ill. Nov. 24, 2008)) (assigning responsibility for sanctions only to counsel); *see also* *Cajamarca v. Regal Entm’t Grp.*, 2012 WL 3782437, at \*3 (E.D.N.Y. Aug. 31, 2012) (sanctioning counsel for failing to advise client to preserve social media information); *Willoughby et al.*, *supra* note 6, at 818 n.126 (citing *Brick v. HSBC Bank USA*, No. 04-CV-0129E(F), 2004 WL 1811430, at \*3 n.29 (W.D.N.Y. Aug. 11, 2004)) (sanctioning counsel, but not the client, because counsel’s “disregard of discovery obligations . . . could not have been performed on behalf of his client”).

<sup>179</sup> Allman, *supra* note 65, at 3.

<sup>180</sup> *See* *Willoughby et al.*, *supra* note 6, at 815–16 (noting that counsel sanctions are increasing, but still rare, occurring in only 30 of 401 sanction cases).

<sup>181</sup> *See id.* at 818 n.126 (noting that only 4 of 30 attorney sanctions cases studied involved solely attorney sanctions and not client sanctions).

sanction does not resolve the parties' dispute based on the objective merits.<sup>182</sup> Further, it is not a coincidence that a criticism of using Rule 1 as a lever to promote change in litigation is the risk of deciding a case apart from its merits.<sup>183</sup> Sanctions for the use of outdated technology, like those for other misconduct, may be better described as a forfeiture of a litigant's opportunity to participate in dispute resolution than a declaration regarding the merits of the case.<sup>184</sup>

Such a forfeiture and its corresponding sanction should be rare, but possible. Courts can make an example of litigants in such a way that other attorneys will take notice and shore up deficiencies that they may have with technology.<sup>185</sup>

Retired Judge Facciola summed up the idea of Rule 1 sanctions in the context of a failed meet-and-confer. While noting that counsel sanctions for discovery misconduct are rare, Judge Facciola opined:

[T]he time may have come for the federal judges to be less forgiving . . . . To be blunt, the judge may have to conclude that the carrot of saving time and money by knowing what you are doing is not working with a willfully ignorant lawyer, and it may be time to reach for the stick.<sup>186</sup>

### III. EXAMPLES OF "LUDDITE SANCTIONS" BASED ON RULE 1

This Part describes two examples in which a court might sanction a lawyer for failing to use available technology and creating waste: (1) a failure

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<sup>182</sup> See Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENVER L. REV. 407, 412 (2010), for a thorough analysis of what "on the merits" means: "[Sanctions rules] are excluded from the definition [of "on the merits"] because they are designed to serve a purpose other than assuring the parties a full opportunity to participate in the case."

<sup>183</sup> See, e.g., Mark Meltzer, *Having Fun with Rule 1*, ARIZ. ATT'Y, Nov. 2005, at 24 ("One of the overriding principles of the law—and of Rule 1—is that cases should be decided on the merits rather than on technicalities." (citing *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986), [https://www.myazbar.org/AZAttorney/PDF\\_Articles/1105HavingFun.pdf](https://www.myazbar.org/AZAttorney/PDF_Articles/1105HavingFun.pdf))).

<sup>184</sup> See Tidmarsh, *supra* note 182, at 412. Professor Tidmarsh continued in a footnote:

This fact does not mean that the enforcement of sanctions against those who violate the rules is necessarily precluded. The "on the merits" principle guarantees the opportunity to participate, not the right of actual participation. Parties can forfeit their opportunity. Implementing the sanctions provided in a rule against a violator does not offend the "on the merits" principle unless the court, in enforcing the rule, considers matters other than the nature of, and reasons for, a party's forfeiture of that opportunity (such as the need to clear dockets). In this sense, the "on the merits" principle does not prevent courts from upholding their dignity against violators.

*Id.* at n.21.

<sup>185</sup> See McMorrow et al., *supra* note 83, at 1426 ("While much of the litigation action occurs outside the courtroom, judges set the norms for that out-of-court litigation conduct through the signals that they send and the sanctions they impose for conduct that occurs during pretrial conferences, discovery motions, and other pre- and post-trial activity.").

<sup>186</sup> 3<sup>rd</sup> Annual Federal Judges Survey, *supra* note 29, at 14.

to use predictive coding to review documents and (2) a failure to produce documents in electronic form.

A. *Analytics and Predictive Coding: The Duty to Automate*

Predictive coding is a disruptive technology used by lawyers to identify relevant information in discovery.<sup>187</sup> Predictive coding is technology that uses computer algorithms and machine learning to identify relevant and irrelevant documents in a data set, without the time and expense of human review.<sup>188</sup> Lawyers use this technology by reviewing a sample of a large set of documents, and a computer algorithm determines a larger set of relevant documents based on this sample review.<sup>189</sup> This technology has proven to be faster, more accurate, and less expensive than traditional linear review, where attorneys look at every page of a set of documents from start to finish.<sup>190</sup> A concept search relates documents by ideas and structure, making it more powerful than a simple Boolean keyword search.<sup>191</sup> Concept searching can find relevant documents that don't necessarily contain specific words, making this searching similar to human review.<sup>192</sup>

Many lawyers accept these technologies today. But that was not so until fairly recently. Initially, lawyers were hesitant to risk their reputation and clients' money on a technology that does not have widespread acceptance across the bench.<sup>193</sup> Further, there was a sense that letting a computer program choose relevant documents was like letting the autopilot drive; numbers be damned, turning over that control is scary.<sup>194</sup> Also, while it is less expensive and more accurate than painstaking human review,<sup>195</sup> "even vendors of search

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<sup>187</sup> See McGinnis & Pearce, *supra* note 39, at 3047 ("Predictive coding has fundamentally transformed the prospects for ediscovery.").

<sup>188</sup> See Jackson, *supra* note 8, at 398 n.19 ("Predictive coding and technology-assisted review are terms that are also often used interchangeably, but 'Predictive Coding does not equal Automated Review; it is simply one of several techniques to accomplish it.'" (quoting Sandra E. Serkes, *What's the Difference Between Automated Review and Predictive Coding?*, VALORA TECH. BLOG (Apr. 4, 2012, 3:00 PM), <http://valoratech.blogspot.com/2012/04/whats-difference-between-automated.html>).

<sup>189</sup> See McGinnis & Pearce, *supra* note 39, at 3047.

<sup>190</sup> See Mazza et al., *supra* note 22, at 28.

<sup>191</sup> See *id.* at 29.

<sup>192</sup> See *id.* at 30 ("Concept searching could locate relevant ESI that relates to, rather than contains, specific words.").

<sup>193</sup> See *id.* at 31.

<sup>194</sup> Jackson, *supra* note 8, at 399 ("Although the potential for human error is also present in a manual review, there is the perception that a manual review permits a greater degree of understanding and control by the reviewing attorneys, thereby reducing the risk that complete categories of relevant documents will not be properly identified." (footnote omitted)).

<sup>195</sup> See *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015) ("In the three years since *Da Silva Moore*, the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it."); L. Casey Auttonberry,

technology software are quick to point out that search technology is not a solution in and of itself, and it only is as effective as the imagination and adeptness of the lawyer using it.”<sup>196</sup>

Lawyer imagination and adeptness in using predictive coding should be more prevalent in the future. Encouraging this result is a growing sentiment that first-line document review is not in and of itself legal work that must necessarily be performed by a lawyer, notwithstanding the classic toil of first-year associates.<sup>197</sup> A recognition that document review of that nature is *not* legal work reinforces the idea that contracting or delegating that work to non-lawyers or machine algorithms does not violate any ethical duty to clients.<sup>198</sup> If that delegation does not violate any ethical duty to the client, then a lawyer may violate a different ethical duty—and Rule 1—when she does not delegate the work and instead performs the review at high hourly rates.<sup>199</sup> This tension is the genesis of the old legal phrase, “if I ask you for the time, don’t build me a clock.”

So, could not using computer-assisted review violate Rule 1? Perhaps in certain circumstances. The sentiment already exists that “[c]oncept-based review of documents arguably allows for a speedier review with increased chances of spotting relevant documents in context with one another and the document set as a whole, thereby furthering the directives of FRCP 1.”<sup>200</sup> Given the current expense and lack of understanding of this technology,

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*Predictive Coding: Taking the Devil Out of the Details*, 74 LA. L. REV. 613, 615 (2013); R. Eric Hutz, *E-Discovery: Using Predictive Coding to Manage E-Discovery Costs and Risks*, INSIDE COUNSEL (Feb. 23, 2012), <http://www.insidecounsel.com/2012/02/23/e-discovery-using-predictive-coding-to-manage-e-di?t=e-discovery>.

<sup>196</sup> Mazza et al., *supra* note 22, at 33–34.

<sup>197</sup> See *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App’x 37, 45 (2d Cir. 2015) (holding that document review by contract attorney is not the practice of law where reviewer was under such time constraint that reviewer did not use legal judgment).

<sup>198</sup> This ethical duty is codified in the Model Rules of Professional Conduct at Rule 5.3, but is also a common law duty:

Under common law principles, a court may hold a lawyer responsible for a nonlawyer assistant’s conduct in imposing sanctions or when enforcing deadlines. As an agency law matter, a lawyer may be liable for an assistant’s errors committed in the scope of the assistant’s employment. Liability based on the doctrine of respondeat superior is a settled aspect of tort law. Finally, but critically, Model Rule of Professional Conduct 5.3 and equivalent state rules frequently prohibit lawyers from disavowing responsibility for assistants’ conduct in the context of professional discipline by imposing broad supervisory responsibilities on lawyers. Forty-nine states and the District of Columbia have adopted Model Rule 5.3 in whole or part .

...  
Douglas R. Richmond, *Watching Over, Watching Out: Lawyers’ Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 442 (2012) (citations omitted).

<sup>199</sup> See, e.g., *Jackson*, *supra* note 8, at 398 (“In determining whether the use of predictive coding is consistent with the [ethical] requirement of [Model Ethics] Rule 1.5 that an attorney charge a reasonable fee and not collect an unreasonable amount for expenses, its cost-effective nature would certainly weigh in favor of its use.”).

<sup>200</sup> Mazza et al., *supra* note 22, at 33.



sanctions are unlikely at the moment, but not for long.<sup>201</sup> A leading vendor has already suggested that the use of predictive coding will become an ethical obligation.<sup>202</sup> “Ultimately, the technology may become so cheap and so ubiquitous that litigants may demand” that keyword and concept searching “be adopted as an essential part of most e-discovery.”<sup>203</sup> Commentators predict “firms using some form of predictive coding in essentially all large-scale litigation within the next decade.”<sup>204</sup>

Sanctions for a luddite attorney who fails to use predictive coding, beyond cost shifting, would likely be in the form of a certification that technological processes have been implemented in future cases. Such sanctions are in line with common nonmonetary discovery sanctions on counsel for misconduct.<sup>205</sup> Monetary sanctions can be a weak deterrent. For example, in the *HM Electronics*<sup>206</sup> case, the court imposed monetary sanctions and did not see improvement in discovery conduct, suggesting that sanctions with more “teeth” were necessary.<sup>207</sup>

#### B. *Failure to Produce in Searchable Form: The Duty to OCR*

Another potential luddite sanction area is in the form of production of documents. The Rules require the parties in a case to discuss the form in which they will produce documents.<sup>208</sup> To that end, a requesting party can and should request a certain form of production. If the parties do not reach an agreement, the Rules prescribe that documents be produced in one of two ways: either in the form in which they are “ordinarily maintained,” or in “reasonably useable form.”<sup>209</sup> It is widely understood that electronic

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<sup>201</sup> See Jackson, *supra* note 9, at 399 n.25 (citing Matt Miller, *Order Highlights Potential Costs of Predictive Coding*, DISCOVER READY (Mar. 19, 2013), <http://discoverready.com/blog/order-highlights-potential-costs-of-predictive-coding/>).

<sup>202</sup> See Debra Cassens Weiss, *Lawyer for E-discovery Company Predicts Predictive Coding Will Become an Ethical Obligation*, ABA J. L. NEWS NOW (Dec. 6, 2012, 12:15 PM), [http://www.abajournal.com/news/article/lawyer\\_for\\_e-discovery\\_company\\_predicts\\_predictive\\_coding/](http://www.abajournal.com/news/article/lawyer_for_e-discovery_company_predicts_predictive_coding/).

<sup>203</sup> Steven C. Bennett, *E-Discovery by Keyword Search*, PRAC. LITIGATOR, May 2004, at 7, 16.

<sup>204</sup> McGinnis & Pearce, *supra* note 39, at 3048.

<sup>205</sup> See, e.g., Willoughby et al., *supra* note 6, at 823 n.150.

<sup>206</sup> No. 12cv2884–BAS–MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015).

<sup>207</sup> *Id.* at \*32 (“The imposition of [cost shifting] monetary sanctions had, at best, a fleeting effect on Defendants and their attorneys.”).

<sup>208</sup> FED. R. CIV. P. 34(b)(1)(C).

<sup>209</sup> See *10.0 Form or Forms of Production*, SEDONA CONF., <https://thesedonaconference.org/node/4314> (“FRCP 34(b)(2)(E)(i) directs that a ‘party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the request . . .’ []. However, FRCP 34(a)(1)(A) also permits the discovery of ‘any documents or electronically stored information . . . after translation by the responding party into a reasonably usable form . . .’ []. Thus, the default form of production should be the form in which the ESI

information must be produced in an electronically searchable form for it to be “reasonably useable” under the Rules.<sup>210</sup> “Searchable” means that the set of documents is either produced in native application format or with metadata that allows the receiving party to run text and Boolean searches against it, providing accurate results.<sup>211</sup>

This requirement sounds simple enough, but becomes trickier when information is stored in multiple forms. A responding party generally cannot permissibly take information that is searchable and remove that capability, producing it in non-searchable form.<sup>212</sup> What, then, of the party that stores information in multiple forms and intentionally produces it in the least convenient form? Or the party who takes non-searchable documents, makes them searchable for her own use, but then produces them in non-searchable form to “avoid doing work for the other side”? Is such conduct sanctionable?

Maybe. Searchable electronic data is standard, and has been for a while. It would be easy to see a court requiring production of any electronically stored information in searchable form absent special circumstances, and sanctioning any party who fails to comply.

#### IV. LOOKING FORWARD: BUILDING AN INCENTIVE TO INNOVATE

With so much effort expended to prescribe technological competence, one should consider the question: why is it so hard for lawyers to stay abreast of technology? Because to get by, they have not had to, and it is in some senses easier for market leaders to stifle innovation rather than to upgrade to innovative processes.<sup>213</sup> There is a lack of incentive to innovate that is fairly simple. The risks of innovation outweigh the costs, at least in the present state.<sup>214</sup> Sanctions may change that, and this Part describes how they might.

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is kept in the ‘usual course of business’ or, alternatively, in a ‘reasonably usable form.’” (alterations in original)).

<sup>210</sup> *Id.*

<sup>211</sup> Ball, *supra* note 172, at 5–7 (adding that, when production is made in an image-based form, “[s]earchable text is obtained either by extraction from an electronic source or, in the case of scanned paper documents, by use of optical character recognition (OCR)”).

<sup>212</sup> *See, e.g., In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 665 (M.D. Fla. 2007) (“It is undisputed that the production ‘completed’ on June 30, 2007 had load file, metadata, page break and key word search problems, making the 10 million pages of documents inaccessible, unsearchable, and unusable as contemplated under the Rules.”).

<sup>213</sup> *See McGinnis & Pearce, supra* note 39, at 3042 (“The surest way for lawyers to retain the market power of old is to use bar regulation to delay and obstruct the use of machine intelligence.”)

<sup>214</sup> *See, e.g., id.* at 3064–65 (discussing the propensity for machine intelligence to face a backlash because it challenges a “lawyers’ monopoly” of attorneys providing legal services without the use of the latest technology).

## 1. The Fallacy of Outcome Certainty

There is a prevailing sense in the legal industry that incorporating new technology is expensive,<sup>215</sup> difficult,<sup>216</sup> and time consuming.<sup>217</sup> But it is also scary; lawyers do not want to change what works when the consequences for errors while a process “works out the kinks” can be extremely severe.<sup>218</sup> The basis for this reluctance is a fallacy that the old, tried, and true method, though inefficient, is better than a newer, sleeker method that is less familiar. This is a common fallacy that appears in other businesses that have had varying degrees of difficulty innovating.<sup>219</sup> Disruptive technology can be a negative for those lagging in technology, as taxi drivers may attest.<sup>220</sup> Legal services are by no means immune from disruption and change.<sup>221</sup>

Luddite lawyers would argue that their practice is different; litigation is not a mere cab ride but an incredibly risky and nuanced professional service, and attorneys have a legitimate concern about providing excellent service to clients—a concern that may necessarily slow innovation. One commentator, Blair Janis, sympathetically describes this view:

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<sup>215</sup> See Casey Flaherty, *Lawyers and Technology: A Bad Marriage Gets Worse*, 90 FLA. BAR J. 24, 24 (Jan. 2016), <https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/43731f223ca0883f85257f2900501f00!OpenDocument> (“Studies find that for every dollar spent on new technology, enterprises must invest an additional \$10 in organizational capital—training and process redesign — to capture the technology’s full benefits.” (citing Erik Brynjolfsson & Lorin M. Hitt, *Computing Productivity: Firm-Level Evidence*, MIT SLOAN SCH. OF MGMT. (June 2003), <http://dspace.mit.edu/bitstream/handle/1721.1/5417/4210-01.pdf?sequence=2>)).

<sup>216</sup> ABA Commission on Ethics 20/20 Introduction and Overview, *supra* note 37, at 8 (2012) (“[T]echnology is such an integral – and yet at times invisible – aspect of contemporary law practice.”).

<sup>217</sup> See Flaherty, *supra* note 215 (“Related studies find that it, therefore, typically requires five to seven years for an enterprise to properly integrate new technology.” (citing Timothy F. Bresnahan et al., *Information Technology, Workplace Organization, and the Demand for Skilled Labor: Firm-Level Evidence*, 117 Q.J. ECON. 339, 346 (2002))).

<sup>218</sup> This is a difficult reality, especially for attorneys who practice fairly routine legal tasks. See McGinnis & Pearce, *supra* note 39, at 3054 (noting that superstar lawyers will embrace machine intelligence to further their capability, but “average lawyers will be disadvantaged”).

<sup>219</sup> See Clayton Christensen, *Disruptive Innovation*, CLAYTON CHRISTENSEN, <http://www.claytonchristensen.com/key-concepts/> (last visited July 12, 2016); Henry C. Lucas, Jr., *Eight Hard Lessons from Disruption*, SMITH BRAIN TRUST (Sept. 23, 2015), <http://www.rhsmith.umd.edu/news/eight-hard-lessons-disruption> (citing eight traps for organizations facing disruptive technology).

<sup>220</sup> See Michele R. Pistone & Michael B. Horn, *Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World*, CLAYTON CHRISTENSEN (Mar. 2016), <http://www.christenseninstitute.org/publications/disrupting-law-school/>, for a great example of comparing the rise of ride-sharing services as a disruptive technology to traditional taxi services, and that change’s relationship to legal education.

<sup>221</sup> This is not necessarily a bad thing. See Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALA. L. REV. 553, 597–98 (2014/2015).

While the technology around the legal world advances at an exponential rate, the technology within the legal world, especially as it relates to lawyering (i.e., providing legal services as opposed to running a law business), is much slower. There are good reasons for this. Lawyers in general are risk averse. We need to be. One of the primary benefits of using a lawyer for legal services is to obtain some level of guarantee that the advice or outcome of our services will actually accomplish the purpose for which the services were provided. This places a heavy burden of responsibility on lawyers to ensure not only that the actual services they provide but also the manner in which they provide these services will not in some way increase the risk of breaching this important obligation.

For each new technological advance, a high level of analysis and review is needed before lawyers can implement it. Our professional obligations demand that we not take risks, so we tend to stick with what we know works. This creates tension between the risk aversion in the legal profession and the ever-changing expectations and demands of legal service consumers.

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Mr. Janis's driving point is that law firms will traditionally lag behind non-firm legal service providers due to the ethical and practical considerations stymieing innovation. But his points about outcome certainty are not lost. The issue with such reasoning is that it creates a conflict with the attorney's ethical, practical, and rules-prescribed duty to employ technology capably so as to keep costs down and cases moving.

A broader point raised by Mr. Janis's article should be considered: namely, that a luddite attorney may have at least a subjectively (if not objectively) legitimate concern with new technology, and may consider that concern heavier than the pressure to innovate. Indeed, any judge weighing Rule 1 sanctions for luddite lawyering is likely to see this argument and should weigh it carefully. While such an argument may be persuasive in the face of brand-new technology (such as the predictive coding of ten years ago), that argument is generally unpersuasive for technology that has achieved general acceptance (such as the cloud storage of documents, e-mail, and predictive coding of today). Technology that is safe, efficient, and accepted must be used by attorneys, unless its use is inappropriate for the matter involved. A distinction thus should be made between a prudent attorney who may object to predictive coding because it costs too much and an imprudent luddite attorney who objects to predictive coding because it is not safe, does not work, or cannot be understood. The increased emphasis on and requirement of technological competence makes even well-reasoned obstinacy to new methods more akin to pushing against a current than remaining in a safe harbor. There comes a point at which attorneys can no longer afford to delay innovation.

Not adopting technology appears to be doing nothing, but is also itself a decision with risk and benefit.<sup>223</sup> Sanctioning luddite attorneys increases the

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<sup>222</sup> Blair Janis, *How Technology Is Changing the Practice of Law*, 31 GP SOLO, May/June 2014, [http://www.americanbar.org/publications/gp\\_solo/2014/may\\_june/how\\_technology\\_changing\\_practice\\_law.html](http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html).

<sup>223</sup> *Id.*

risk of doing nothing, which makes the avoidance of innovation less of a reasonable choice.

## 2. The Interia of Law Firm Structure

Another reason why lawyers struggle with innovation is structural. Law firms focus their professional development on substantive knowledge and experiential learning, treating technology as a means to an end. For example, one commentator with experience in the technology side of law firms noted that large firms often keep the professional development and technology teams separate.<sup>224</sup> This is a curious choice because “[b]oth perform learning and development functions, and yet they are usually in two different departments that work alone . . . [t]hey frequently even have two different systems that contain learning resources and perform analysis of its use.”<sup>225</sup> The result of this split is that technology training teams often lack a voice in attorney development.<sup>226</sup> As the ABA pointed out, changing technology can be “invisible” to professionals who are not constantly monitoring trends and developments.<sup>227</sup> Keeping technology separate from attorney training makes it harder for the law firm to “see” changing technology.

This “siloeing” cannot continue. If attorneys are held responsible for staying abreast of technology, then increased technological competence is an essential part of practice development. It is as important as substantive legal knowledge. Law firms must therefore embrace the concept that they, like other large businesses, must to some extent become a technology business.<sup>228</sup> Every attorney is now a technology professional.

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<sup>224</sup> See Michelle Spencer, *Want to Improve Attorney Technology Use? Start by Breaking Down the L&D Silos in Law Firms*, LEGAL LEARNING DEV. NETWORK (Nov. 9, 2015), <https://legallearningnetwork.com/improve-attorney-technology-use-breaking-silos-law-firms/>.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *Introduction and Overview*, *supra* note 37, at 8.

<sup>228</sup> See, e.g., Joe McKendrick, *Every Company Now a Technology Company: Latest Round of Mergers and Acquisitions Confirms It*, FORBES (Apr. 30, 2015), <http://www.forbes.com/sites/joemckendrick/2015/04/30/every-company-now-a-technology-company-latest-round-of-mergers-and-aquisitions-confirms-it/#3e60f98a6d17> (“With the rise of cloud, Software as a Service, and now, the Internet of Things (IoT), more organizations—in all types of businesses—recognize they are evolving into technology and data companies. So they are creating both strategic and tactical partnerships to try to make the most of this evolution.”). Examples abound. See, e.g., Pat Burke, *What Going Digital Means to IT and the Bottom Line*, CIO INSIGHT (Apr. 7, 2016), <http://www.cioinsight.com/it-management/expert-voices/what-going-digital-means-to-it-and-the-bottom-line.html> (discussing the breakdown of boundaries between technology department and every other department); *McLaren Group Becomes McLaren Technology Group*, MCLAREN TECH. GROUP (Jan. 13, 2015), <http://www.mclaren.com/technologygroup/news/articles/mclaren-group-becomes-mclaren-technology-group/> (noting name change for racing company as reflective of its development into “a diversified high-technology company”).

A. *Sanctions Will Add Sufficient Risk to Overcome the Stubbornness*

Luddite lawyers face a number of potential stubborn choices with respect to advancing technology in litigation. They can ignore it, and “do things the old-fashioned way,” hoping that the client will not mind, the other party will not object, and that an overworked court will not notice. Or they can adopt an ostrich approach, over-delegating tasks and lacking the proper knowledge to effectively support their associates.<sup>229</sup> Or, perhaps most insidiously, they can attack the new technology as unreliable, thus creating extra work for everyone involved in the suit—but work that they actually know how to perform.

How do we limit the attractiveness of these choices? The easiest solution to the luddite lawyer problem is for lawyers to spend more time learning technology. In discussing the revised Rule 1 and its effect on attorney behavior, one commentator theorized that attorneys’ adoption of Rule 1’s directives requires what Alexis de Tocqueville called an “enlightened regard for themselves.”<sup>230</sup> It could be described as a situation where two parties exchange a short-term negative outcome for themselves for a greater positive outcome for all.<sup>231</sup> However, not all attorneys have the capacity or desire to be so enlightened.<sup>232</sup> Some attorneys will intentionally or unintentionally slow technological progress under the guise that zealous advocacy dictates a slow and steady approach. This approach helps attorneys avoid an efficiency that might provide an adversary with an easier time building an opposing case.<sup>233</sup>

A sanctioned attorney is one who risks a client relationship. It is the pressure of unhappy clients that truly will drive change.<sup>234</sup> Some

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<sup>229</sup> See *Brown v. Tellerate Holdings Ltd.*, No. 2:11-cv-1122, WL 2985051 at \*2, \*26 (S.D. Ohio July 1, 2014), *modified*, 2015 WL 4742686 (S.D. Ohio Aug. 11, 2015) (sanctioning attorneys for failure to monitor vendor and client in discovery and ignorance of discovery process); *Metro. Opera Assoc. Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178, 222, 231 (S.D.N.Y. 2003) (sanctioning improper delegation); *Introduction and Overview*, *supra* note 37, at 5.

<sup>230</sup> II ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 149 (Francis Bowen ed., Henry Reeve trans., 1862).

<sup>231</sup> See Jana Landon, *Can Amended Federal Rules Effective Mandate Cooperation?*, LEGAL INTELLIGENCER (Sept. 4, 2015), <http://www.stradley.com/~media/Files/Publications/2015/The%20Legal%20Intelligencer%20-%20Landon%20FRCP.pdf>.

<sup>232</sup> See *id.* (“We are, unfortunately, in an imperfect system with counsel who may be unwilling or unable to meet this goal. “Just, speedy, and inexpensive determination” of every civil action in the federal courts is not always a party’s goal, and neither will be sharing information that has historically been treated as attorney work product, such as search terms, custodian interviews for collection, and review protocols.”).

<sup>233</sup> See *id.*

<sup>234</sup> See *id.* (“Any increase in cooperation will necessarily be client-driven. There will, of course, always be situations where clients are interested solely in tenacious counsel who will fight every point for an advantage, strategic or otherwise. Corporate clients, however, are increasingly demanding that their

commentators note that predictive coding may become a business requirement long before it becomes a legal requirement.<sup>235</sup> Sanctions will also drive a stake into any set of clients and lawyers who collude to avoid adopting technology, and others might be too comfortable with their own methods, instead “sticking with what works.” A sanction would provide the bar with the clearest signal that lawyers can, and should, lose clients because of a failure to adopt technology.<sup>236</sup> Litigation, however, is almost never a one-party activity, and as much as one would want, one cannot easily fire an adversary’s attorney.

Further, the Model Rules of Professional Responsibility that prescribe technological competence do not have enough “teeth” to provide adequate incentives for lawyers to innovate.<sup>237</sup> Ethical violations are hard to pin on attorneys and involve state authorities, meaning that a judge can only refer the attorney to the state bar, where the lawyer may face no action. As one commentator notes, “the reality regarding reputation information suggests that professional rules . . . are archaic because they are too easily circumvented and do not impose sufficient sanctions to provide real deterrence.”<sup>238</sup>

Rule 1 can help with the challenges of electronic discovery. Rule 1 was designed to make litigation more efficient and reduce costs. As one commentator aptly put it:

[L]itigants should be aggressive in invoking FRCP 1 as a basis for the innovative use of search strategies and cost-shifting to increase efficiency and reduce costs across the board in

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counsel engage cooperatively to reduce discovery costs and minimize disputes. Companies have long realized that the waste associated with a ‘scorched earth’ approach may not be in their best interest.”). To be fair, the decreased overall cost that technology brings will create similar market pressures to innovate. But as has been shown herein, that innovation is not happening fast enough.

<sup>235</sup> See Jackson, *supra* note 8, at 398 (opining that predictive coding may not be codified as an ethical rule because it will become the norm “as a business requirement long before ethics rule-making bodies have a chance to consider it” (quoting Jim Calloway, *Will Predictive Coding in E-discovery Become an Ethical Requirement?*, JIM CALLOWAY’S L. PRAC. TIPS BLOG (Dec. 19, 2012, 11:57 AM), <http://www.lawpracticetipsblog.com/2012/12/will-predictive-coding-in-e-discovery-become-an-ethical-requirement.html>)).

<sup>236</sup> See Lanctot, *supra* note 10, at 11 (referring to a lawyer’s lack of technological knowledge as a “distinct competitive disadvantage” (quoting Joe Dysart, *Catch Up with Tech or Lose Your Career, Judges Warn Lawyers*, A.B.A. J. NEWS NOW (Apr 1, 2014), [http://www.abajournal.com/magazine/article/catch\\_up\\_with\\_tech\\_or\\_lose\\_your\\_career\\_judges\\_warn\\_lawyers](http://www.abajournal.com/magazine/article/catch_up_with_tech_or_lose_your_career_judges_warn_lawyers))).

<sup>237</sup> Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 209 (2008) (“We have already noted that some rules—particularly permissive rules and those that place control of choices in lawyers’ hands—might need to be rewritten to take more realistic account of lawyers’ incentives.”).

<sup>238</sup> *Id.* at 209–10.

discovery. It is only in this way that the mandate of a just, speedy, and inexpensive determination of every action will become a reality in discovery.<sup>239</sup>

This is true, but the inference therein is that the only way that Rule 1 will become such a basis is for judges to use it to require the use of such technology. Sanctioning luddite lawyers through the lens of Rule 1 and the discovery rules is a means to that end.

#### B. *Sanctions Will Help Bring Faster Technological Change to Lawyering*

If the anti-luddite regime is still trending, it is trending towards greater importance. Looking forward, lawyers and ethics boards speculate that more sanctions lurk in the fertile digital minefield of data security,<sup>240</sup> social media misconduct,<sup>241</sup> and, of course, the duty to preserve evidence.<sup>242</sup>

If changing technology really is an “invisible” threat, as the ABA noted,<sup>243</sup> then the sleeping law firms truly need a “wake up call.”<sup>244</sup> The firms

<sup>239</sup> Mazza et al., *supra* note 22, at 87.

<sup>240</sup> See *The Ethical Adventures of Luddite Lawyers*, Podcast, LEGAL TALK NETWORK (Feb. 18, 2015), <https://lawyerist.com/80711/podcast-the-ethical-misadventures-of-luddite-lawyers/>. Sam Glover’s podcast aptly notes and supports the following premises:

1. Without a certain amount of tech knowledge, [a lawyer] cannot adequately hire a security consultant.
2. Basic technology competency is not taught in law school or college, and is not self-explanatory.
3. Amateur hackers can easily access [a lawyer’s] client data in in public places like coffee shops through open, unsecure networks.
4. Whether they like it or not, all lawyers are in the cloud, so they need to learn about encryption and secure servers.

See also *Safeguarding Your Firm from Cyber Attacks*, PRICEWATERHOUSECOOPERS LLP (2012), <http://www.pwc.com/us/en/law-firms/assets/pwc-safeguarding-your-firm-from-cyber-attacks.pdf> (noting that private attorneys and firms are prime targets for unauthorized intrusion by hackers). Additionally, the California State Bar found in an opinion that an attorney doing client work on an unsecured wireless network (say, at a coffee shop) “risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.” Cal. Bar Ass’n Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 179 7 (2010).

<sup>241</sup> See, e.g., John G. Browning, *Ethics and the Use of Technology*, ST. BAR OF TEX. 8–10 (2014), [http://www.texasbarcle.com/Materials/Events/13099/164279\\_01.pdf](http://www.texasbarcle.com/Materials/Events/13099/164279_01.pdf) (first citing *In re Peshek*, No. 6201779 (Ill. Atty. Reg. & Disc. Comm’n 2009) (suspending attorney for blog posts); then citing *In re Carpenter*, 95 P.3d 203, 206, 210 (Or. 2004) (en banc) (reprimanding attorney for online social media prank); and then citing *In re Hursey*, 719 S.E.2d 670, 672, 675 (S.C. 2011) (factoring social media posts in disbarment proceeding)).

<sup>242</sup> See *id.* at 13 (citing *Lester v. Allied Concrete*, 736 S.E.2d 699, 702 (Va. 2013)) (suspending lawyer for five years for advising client to “clean up” his Facebook page).

<sup>243</sup> *Introduction and Overview*, *supra* note 37, at 8.

<sup>244</sup> Lanctot, *supra* note 10, at 10 (quoting Matt Nelson, *New Changes to Model Rules A Wake-Up Call For Technologically Challenged Lawyers*, INSIDE COUNS. (Mar. 28, 2013), <http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech>).



lagging far enough behind in technological competence may not even know they are lagging behind.<sup>245</sup> Sanctions will send that message, as their purpose is “to serve as a specific deterrent to achieve compliance with the particular discovery order at issue, and . . . to serve as a general deterrent in the case at hand and in other litigation, provided that the party against whom sanctions are imposed was in some sense at fault.”<sup>246</sup>

The *HM Electronics* case cited previously provides an example. There, the court sanctioned client and counsel where they failed to issue a litigation hold, failed to produce relevant documents, and counsel made numerous misrepresentations to the court.<sup>247</sup> Among other misconduct, the defendants produced very little and realized too late they should have produced much more.<sup>248</sup> Notably, the court cited counsel’s simplistic description of ESI collection and production efforts:

In the court-ordered meet and confer [] in response to Plaintiff’s question about the methodology used to collect documents in light of the small amount of responsive documents produced, [defendant’s attorney] explained simply “I didn’t conduct the ESI search, so I don’t know the methodology. They were told to look for documents on their computer.”<sup>249</sup>

The court found this response to be wholly inadequate, and stated that counsel should have understood the technological challenges of an adequate response and sought an extension of time from the court to respond.<sup>250</sup> In this case, it appears that counsel was in some sense willingly ignorant of electronic discovery technology.<sup>251</sup> The sanctions in the *HM* case were described in legal circles as “stunning,”<sup>252</sup> a “remind[er]” to “take e-discovery

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<sup>245</sup> The author of this Article can provide one anecdotal example from his time in practice: In 2015 he heard from another attorney’s client that the cost to the client of comparing an old electronic version of a document to the new electronic version would be enormous, given its size and length. The author recommended “running a blackline” on the document, and was told that if the other attorney had to perform such a process, it would take hours. The process takes seconds with a “Compare” option present in Microsoft Word.

<sup>246</sup> Rodriguez & Mann, *supra* note 171, at 11.

<sup>247</sup> *HM Elecs. v. R.F. Techs., Inc.*, No. 12-cv-2884-BAS-MDD, 2015 WL 4714908, at \*35 (S.D. Cal. Aug. 7, 2015).

<sup>248</sup> *Id.* at \*8.

<sup>249</sup> *Id.* at \*14.

<sup>250</sup> *Id.* at \*18.

<sup>251</sup> *See id.* at \*14.

<sup>252</sup> Recommind Article, *supra* note 9.

responsibility seriously,”<sup>253</sup> and, especially, a “wake up call.”<sup>254</sup> More sanctions like those in the *HM* case will start a current that luddite lawyers can only push against for a certain amount of time. While it seems draconian to expose luddite attorneys for their failure to adopt technology, the technology is not slowing down; it is speeding up. The legal industry should consider sanctions as a method to further encourage innovation and minimize disruption.

## CONCLUSION

The quotation from Professor Stephen Gillers at the beginning of this article aptly laid out the two choices the legal industry faces with respect to changing technology: the industry can impede technology or adapt to use it. That is no choice, really, from a systemic perspective. Lawyers must not impede, but must adapt. No lawyer in modern times should be ignorant of her ethical and practical duty to keep abreast of new practice technology. Extreme increases in the cost of discovery have made that duty more pronounced and difficult, to the point where lawyers need to obtain an objectively advanced understanding of information systems to do their jobs adequately. This point can be lost on attorneys who overvalue the dependability of tested and true processes. In an hourly billing system, those processes are simply too inefficient to be acceptable. Losing clients for inefficiency is not a sufficient result where, in litigation, a luddite’s obstinacy can create system inefficiency and unnecessary cost for all parties and the court. Sanctioning lawyers who refuse to keep up with technology will force luddites to operate at a professional level that will meet Rule 1’s edict that lawyers ensure that litigation be “just, speedy, and inexpensive.”

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<sup>253</sup> Christopher Benning & Daniel Toal, *E-Discovery Competence of Counsel Criticized in Sanctions Decision*, N.Y. L. J. (Oct. 6, 2015), [https://www.paulweiss.com/media/3184760/boehning\\_toal\\_e-discovery\\_competence\\_of\\_counsel\\_criticized\\_in\\_sanctions\\_decision\\_\\_10\\_6\\_2015.pdf](https://www.paulweiss.com/media/3184760/boehning_toal_e-discovery_competence_of_counsel_criticized_in_sanctions_decision__10_6_2015.pdf). The authors noted:

HM Electronics and the California ethics opinion should remind practitioners and their clients that judges may very well, and should, take e-discovery responsibilities seriously. Whether during the initial triage of litigation hold and preservation notifications, during the post-discovery clean-up phase, or anywhere in between, counsel owe their clients, their adversaries, the courts, and themselves a certain level of e-discovery competence and responsibility. . . . Serious consequences may lie in wait for counsel and clients alike who fail to take seriously judges’ expectations for how they conduct themselves throughout the discovery process. A lack of competence, reasonable inquiry, supervision, or cooperation may, as it did in HM Electronics, land a party—and its counsel—in hot water.

Id.

<sup>254</sup> *Judge Issues Sanctions Order as ‘Wake-up Call’ to Attorneys*, ARMA NEWSWIRE (Sept. 23, 2015), <http://www.arma.org/r1/news/newswire/2015/09/23/judge-issues-sanctions-order-as-wake-up-call-to-attorneys> (“The order, which included monetary sanctions as well as a recommendation that sanctions and an adverse inference instruction be imposed on the defendants, is being described as a ‘wake-up call’ to attorneys to become competent in e-discovery.”).