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TECHNOLOGY AND PROCESS: HOW CHANGING RULES AND TECHNOLOGY WILL IMPACT THE LEGAL PROFESSION, THE JUSTICE OF DUE PROCESS PROTECTIONS, AND HOW WE JUDGE COMPETENCE

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Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works. Anything that's invented between when you're fifteen and thirty-five is new and exciting and revolutionary and you can probably get a career in it. Anything invented after you're thirty-five is against the natural order of things. – Douglas Adams¹

INTRODUCTION

People throughout history have worried about the implications that new and emerging technology would have on their society: Greek philosopher Socrates criticized the written word as mere imitation of the art of discourse, useless and degrading for a society of critical thinkers;² the Abbot of Sponheim, Johannes Trithemius, argued that monks should continue the virtuous art of copying texts by hand, rather than resorting to the newly invented printing press;³ the Luddites

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** Coppinger served as a law clerk to Chief Judge Bradford from 2020-22.

1. DOUGLAS ADAMS, *THE SALMON OF DOUBT: HITCHHIKING THE GALAXY ONE LAST TIME* (Macmillan, 2002).

2. PLATO, *COMPLETE WORKS* 551-52 (J.M. Cooper ed., Hackett 1997).

3. ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 14 (Cambridge University Press, 1980). It should be noted that many criticisms of blossoming technologies, like

of 19th century England destroyed textile machinery in protest, worried the skills of their craft would be put to waste by the new technology;⁴ modern authors like Neil Postman have lamented the television's commodification and distribution of modern news media, what he considers to be mostly irrelevant and sensationalist information;⁵ and, notably as the most modern example, many are concerned about the supposedly numerous negative societal consequences of social media.⁶ Though some past criticisms of technology may have had merit, or perhaps we will see modern critics of some current technologies vindicated or technological innovations can drastically improve the quality of life for most persons.

Whether those technological innovations are agricultural, in a field of medicine, or some new creation on the internet, technology has the capacity to drastically improve worker efficiency, resource consumption, and safety. The law is no exception. Whether we like it or not, advances in technology will change the way the law is administered and practiced.⁷ While technology changes in all other parts of our lives, it also does so in the legal profession; and although some may have concerns or interesting predictions about the implication of that

Trithemius's, may appear hypocritical given our hindsight of the past. Trithemius's critique of the printing press looks especially insincere when one accounts for the fact that many of his later works were, in fact, able to be published and distributed widely due to his use of the printing press. *Id.* at 15. With any luck, the opinions of those of us with critiques of modern technology will appear sincere and age more gracefully than that of Trithemius who, along with being an Abbot, believed in and practiced numerology and necromancy. *Id.* at 96.

4. Luddite, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Luddite> [<https://perma.cc/67AR-8N3Y>].

5. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* (Penguin, 2010).

6. See Emily Vaughn, *More LOLs, Fewer Zzzs: Teens May Be Losing Sleep Over Social Media*, NPR (Oct. 22, 2019), <https://www.npr.org/sections/health-shots/2019/10/22/772415313/more-lols-fewer-zzzs-teens-may-be-losing-sleep-over-social-media> [<https://perma.cc/4L7D-7SVN>]; Emmet Jones, *Increased use of social media takes mental health toll on teens*, FOX NEWS (Sept. 17, 2021), <https://www.foxnews.com/health/social-media-mental-health-body-image-toll-teens> [<https://perma.cc/7W98-MU6M>].

7. Though governments are not often a place one thinks to look for technological innovation, in 2019 Estonia began work on a pilot program to use an artificial intelligence ("AI") program to decide some small-claims cases in a push to make their government services more efficient. The AI judge, whose decisions could theoretically still be appealed to a human judge (a descriptor which many lawyers probably never thought would be necessary), would adjudicate small claims disputes of less than €7,000.00 (around \$8,000.00 at the time of this writing). Estonia, which uses a national-ID card, is perhaps more suited to the implementation of such a service because its citizens are already very used to using digital government portals to file government forms. However, Stanford University's David Engstrom, who specializes in digital governance, told *Wired* magazine that he doubts an AI driven judge would make an appearance in a U.S. court anytime soon, in part due to the due process rights baked into the Constitution. Eric Niller, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, *WIRED* (Mar. 25, 2019), <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/> [<https://perma.cc/6UTQ-RWQZ>].

technological changes, technological innovation is often a boon for lawyers, clients, and society at large.⁸

Take, for example, the ways in which technology is already playing a new part in the way lawyers perform their duties and the ways justice is administered. For instance, associate professor of computer science and electrical and computer engineering at Duke University Cynthia Rudin deals with complex ethical problems which some courts face in using sentencing algorithms to determine a defendant's risk of recidivism.⁹ Rudin and her collaborators created a method called the Supersparse Linear Integer Model, or "SLIM," as a transparent risk assessment tool that judges may find aides in their sentencing decisions.¹⁰ Rudin developed SLIM, which relies on machine learning and was developed using a public dataset of 33,000 released inmates from fifteen states, in part as an alternative to other "black box" algorithms that are currently in use by some courts around the county.¹¹ Courts have upheld the sentencing decisions which come out of these black box risk assessment models, but Rudin and others working on sentencing algorithms are still working toward popularizing their open-source models, which are transparent as to how they arrive at the risk assessment they arrive at and can be customized based on the values of the court and data from their geographic area of their jurisdiction.¹²

Indiana and many other states also confronted the need for modernizing their institutions in the last year.¹³ As so many can attest, the COVID-19 pandemic required institutions and the persons in them to reevaluate their operating procedures.¹⁴ A disruption of that magnitude is one of a few things that can force institutions to think critically about quickly adopting new technologies and strategies. The Clark County courts, like so many other Indiana county courts, implemented video-conferencing technology, which greatly reduced the need for face-to-face interaction.¹⁵ Clark County Circuit Judge Vicki Carmichael noted that, though the court had previously talked about implementing video conferencing to reduce the security risk of transporting inmates, "now that we've

8. In 2020, approximately 92% of Indiana's court caseload was handled on the Odyssey case management system. Kate Stancombe, *New Strategic Goals Set for Improving State Courts*, THE INDIANA LAWYER (Sept. 30, 2020), <https://www.theindianalawyer.com/articles/new-strategic-goals-set-for-improving-state-courts> [https://perma.cc/44RA-WQF8].

9. Robin A. Smith, *Opening the Lid on Criminal Sentencing Software*, DUKE TODAY (July 19, 2017), <https://today.duke.edu/2017/07/opening-lid-criminal-sentencing-software> [https://perma.cc/5B9B-L8GR].

10. *Id.*

11. *Id.*

12. *Id.*

13. *See, e.g.*, Aprile Rickert, *Southern Indiana Courts Modify Operations Amidst COVID-19*, NEWS & TRIBUNE, (Apr. 19, 2020), https://www.newsandtribune.com/news/southern-indiana-courts-modify-operations-amidst-covid-19/article_aa65aa64-7ff7-11ea-ac65-af9674a10ba7.html [https://perma.cc/ZMD6-XLND].

14. *Id.*

15. *Id.*

had to [] we've realized that 'hey this works pretty well,' you still see the person, you see how they are reacting to things."¹⁶ Instead of bringing inmates to court, inmates are taken to one of seven laptop computers in the jail so that they can be virtually present for the hearing along with their defense attorney, the prosecutor, and the judge, who all have their own computers.¹⁷ Though other counties have handled the problems posed by COVID-19 differently¹⁸ and did not adopt video conferencing completely, the pandemic may be enough of a catalyst that many of these adopted technologies are here to stay and will become ubiquitous with time. "It worked out really well," Judge Carmichael said of the video conferencing solution, "[a]nd I think most of us plan to continue to use it after."¹⁹

As many of us found out as we have had to adapt to the new technology introduced in the last two years, Indiana lawyers cannot simply "go with the flow." In order to fulfill our duty to be competent lawyers we must all be active participants in the way technology changes and its part in the legal profession. It has always been true that it has taken effort and serious work to be a competent attorney. Indiana Rule of Professional Conduct Rule 1.1²⁰ states 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."²¹ However, a young lawyer, fresh out of law school and having just passed the bar, knows that they may not rest on their laurels. Comment 6 to Rule 1.1 goes on to explain that competence throughout one's career is a continual undertaking:

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 the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.²²

While it is impossible to stay up to date with all emerging technologies and successfully predict which ones will have relevance to their practice and clients, legal practitioners must keep abreast of relevant changes as best they can while the legal community as a whole constantly tries to keep pace with technological

16. *Id.*

17. *Id.*

18. "In Floyd County, Circuit Court Judge Terrence Cody said the judicial system has [been] working together with attorneys and the prosecutor's office to get cases handled through phone, email or through attorneys whenever possible[,] avoiding using remote-conferencing software at the time of the quote. *Id.*

19. *Id.*

20. Further, the American Bar Association's Model Rules of Professional Conduct, on which much of the Indiana Rules of Professional Conduct are based, say much the same thing as Rule 1.1 and its subsequent comment on maintaining competence by continuing to understand the benefits and risks of relevant technology. MODEL CODE OF PRO. RESP. R. 1.1 (AM. BAR. ASS'N 2020).

21. IND. R. PRO. CONDUCT 1.1.

22. IND. R. PRO. CONDUCT 1.1 cmt. 6.

progress.²³ Staying fluent with technology is, perhaps, one of the most important and trying parts of maintaining competence as an attorney, especially now that so many courts have made video-conference technology a mandatory part of their proceedings in response to COVID-19. In sum, as attorneys must stay current with changes in law and procedure so must they stay current with technology.

It should not be a surprise that many Indiana counties were able to gracefully continue with some degree of normality despite adverse odds and circumstance. The State of Indiana spells out for lawyers the importance of making use of technology to improve our justice system.²⁴ Indiana Rule of Professional Conduct 6.6 established the Coalition for Court Access (“the Coalition”), with the purpose “to act as a legal aid organization that develops and implements a statewide plan to improve the availability and quality of access to civil legal services for persons of limited means.”²⁵ Rule 6.6(a)(4) goes on to describe that one of the Coalition’s goals in achieving fulfilling that purpose is the “[c]onsideration and utilization of a wide variety of programs and policies to increase the access to courts, such as *strategic use of technology*, community education, public libraries, and other similar resources.”²⁶ With that same value in mind, the Indiana Supreme Court Committee on Rules of Practice and Procedure has proposed a new rule that would dramatically alter service of process by publication in Indiana using modern technology.

I. DUE PROCESS AND PROPOSED RULE 4.13

Due process as required by the laws of the United States can trace its origins back more than 1,000 years to the Magna Carta, which guaranteed that

[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.²⁷

That same idea can be found in the United States Constitution, in the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the

23. It should be noted, though, that many in the legal profession are doing their best to keep pace with technological progress. Take for example the Artificial Lawyer, an online publication devoted to automation and especially AI tools for lawyers and legal practice generally doing its best to keep interested parties up to date on developments in the field. ARTIFICIAL LAW., <https://www.artificiallawyer.com/> [<https://perma.cc/R47S-A2J5>].

24. See IND. R. PRO. CONDUCT 6.6.

25. *Id.*

26. IND. R. PRO CONDUCT 6.6(a)(4) (emphasis added).

27. MAGNA CARTA OF 1215, cl. 39, available at <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/> [<https://perma.cc/YC9P-RSLZ>].

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;²⁸

and in the Fifth Amendment: “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”²⁹ Still, the idea of due process has changed a lot since the Constitution was adopted, and will no doubt continue to change as time, technology, and our county advances.

One essential element of our modern right to due process is the prohibition against courts exercising personal jurisdiction over a defendant unless the defendant has proper notice of the proceedings.³⁰ Therefore, courts require plaintiffs to arrange for defendants to be “served” with a court summons and a copy of the plaintiff’s complaint which together constitute “process.”³¹

Indiana and all other states have specific rules regarding appropriate “service of process,” which again refers to the formal procedure necessary to put another party on notice that there has been a lawsuit filed against them.³² Indiana, like many other jurisdictions, has special rules for the many circumstances that can complicate serving a party, like where the party being served is,³³ whether their location is known,³⁴ or whether they are considered a special class of party requiring different service rules.³⁵ Those unfamiliar with the rules for service of process may imagine it is always performed by process-servers, persons hunting

28. U.S. CONST. amend. XIV, § 1.

29. *Id.* amend. V.

30. *See* F. R. CIV. P. 4(k)(1).

31. *See id.* 4(e)(2)(C).

32. *See* IND. R. TR. P. 4. Indiana Rule of Trial Procedure 4(C) requires that all summons, barring an exception, contain the following:

- (1) the name and address of the person on whom the service is to be effected;
- (2) The name, street address, and telephone number of the court and the cause number assigned to the case;
- (3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties;
- (4) The name, address, and telephone number of the attorney for the person seeking service;
- (5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.

The summons may also contain any additional information which will facilitate proper service.

33. *See id.* 4.5.

34. *Id.*

35. *See id.* 4.2.

down the targets of civil lawsuits to deliver the physical documents necessary to put them on notice that they are being sued. Many nonlawyers may be unaware that parties are usually able to easily serve opposing parties, and only rarely resort to extreme methods when they are unaware of a party's location or cannot use conventional means to execute service.³⁶ Indiana Rule of Trial Procedure 4.1, the rule for service upon individuals, requires simply that:

- (A) In General.** Service may be made upon an individual, or an individual acting in a representative capacity, by:
- (1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or
 - (2) delivering a copy of the summons and complaint to him personally; or
 - (3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or
 - (4) serving his agent as provided by rule, statute or valid agreement.³⁷

However, service of process is not always so simple.³⁸ For one thing, there are exceptions for service when a party wants to serve a type of person that the Indiana Supreme Court has determined to be incapable of receiving service personally for some reason.³⁹ Further, if parties wish to serve process on an

36. One New York woman, married in 2009 and who was attempting to divorce her husband, had to make an unusual request from a Judge in order to satisfy the service requirements necessary to put her husband on notice; specifically, requesting that she be allowed to serve him through a Facebook message. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y.S. 2015). The wife, seeking divorce because her husband had reneged on his promise that they have a traditional Ghanaian wedding ceremony, only had only been able to contact her husband through his phone number and Facebook account in the months preceding her request. Susanna Kim, *New York Woman Allowed to Serve Divorce Papers Via Facebook*, ABC NEWS (Apr. 6, 2015), <https://abcnews.go.com/Business/york-woman-allowed-serve-divorce-papers-facebook/story?id=30119759> [<https://perma.cc/BU3K-X3PZ>]. The Judge, in a unique allowance, permitted the wife to serve the husband by sending him a private Facebook message once a week for three consecutive weeks or until acknowledged by him. *Baidoo*, 5 N.Y.S.3d at 716.

37. IND. TR. R. P. 4.1(A).

38. *See id.* 4.5 (stating the rule for service of summons upon resident who cannot be found or served within the state.).

39. Specifically, Indiana Rule of Trial Procedure 4.2 requires that a party serving an infant or incompetent must comply with the following requirements:

Rule 4.2. Summons: Service upon infant or incompetents

- (1) Service Upon Infants. Service upon an individual known to be an infant shall be made upon his next friend or guardian ad litem, if service is with respect to the same

individual whose whereabouts are unknown or who they have failed to serve personally then they may have to resort to “publication notice,”⁴⁰ which is also suitable for circumstances authorized by statute.⁴¹ A party using publication notice to complete service is required to publish certain information, which will inform the served party that they are being summoned to court should they read it, designed so that there is a likelihood that someone may see it.⁴² However, the party attempting service is not required by the Indiana Trial Rules to ensure that another party *actually receives* service by their publication, following the proper

action in which the infant is so represented. If there is no next friend or guardian ad litem, service shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, service shall be made upon either parent known to have custody of the infant, or if there is no parent, upon a person known to be standing in the position of custodian or parent. The infant shall also be served if he is fourteen [14] years of age or older. In the event that service, as provided above, is not possible, service shall be made on the infant.

- (2) **Service Upon Incompetents.** Service upon an individual who has been adjudged to be of unsound mind, otherwise incompetent or who is believed to be such shall be made upon his next friend or guardian ad litem, if service is with respect to the same action in which the incompetent is so represented. If there is no next friend or guardian ad litem, service shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, then upon the named party and also upon a person known to be standing in the position of custodian of his person.

Further, Indiana Rule of Trial Procedure 4.3 requires the following to properly serve an incarcerated person:

Service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. It shall be the duty of said official to immediately deliver the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

40. Indiana Rule of Trial Procedure 4.5 states that “When the person to be served is a resident of this state who cannot be served personally or by agent in this state and either cannot be found, has concealed his whereabouts or has left the state, summons may be served in the manner provided by Rule 4.9.” Further, Indiana Rule of Trial Procedure 4.9 lists the acceptable manners of service of service for in rem actions as:

- (1) By service of summons upon a person or his agent pursuant to these rules; or
- (2) By service of summons outside this state in a manner provided by Rule 4.1 (service upon individuals) or by publication outside this state in a manner provided by Rule 4.13 (service by publication) or outside this state in any other manner as provided by these rules; or
- (3) By service by publication pursuant to Rule 4.13.

41. IND. R. TR. P. 4.13(A).

42. *See id.* 4.13.

steps will effectuate service upon the desired party.⁴³ Though not stated explicitly in the rule, the publication notice rules requirements below likely serve as a balance between forcing parties to undertake a diligent attempt to actually serve their desired opposing party and providing a cost-effective way to serve a party whose location is unknown. Indiana Rule of Trial Procedure 4.13 (“Rule 4.13”), the rule for service by publication in its current form, reads as follows:

- (A) Praeceptum for summons by publication.** In any action where notice by publication is permitted by these rules or by statute, service may be made by publication. Summons by publication may name all the persons to be served, and separate publications with respect to each party shall not be required. The person seeking such service, or his attorney, shall submit his request therefor upon the praecipe for summons along with supporting affidavits that diligent search has been made that the defendant cannot be found, has concealed his whereabouts, or has left the state, and shall prepare the contents of the summons to be published. The summons shall be signed by the clerk of the court or the sheriff in such manner as to indicate that it is made by his authority.
- (B) Contents of summons by publication.** The summons shall contain the following information:
- (1) The name of the person being sued, and the person to whom the notice is directed, and, if the person’s whereabouts are unknown or some or all of the parties are unknown, a statement to that effect;
 - (2) The name of the court and cause number assigned to the case;
 - (3) The title of the case as shown by the complaint, but if there are multiple parties, the title may be shortened to include only the first named plaintiff and those defendants to be served by publication with an appropriate indication that there are additional parties;
 - (4) The name and address of the attorney representing the person seeking service;
 - (5) A brief statement of the nature of the suit, which need not contain the details and particulars of the claim. A description of any property, relationship, or other res involved in the action, and a statement that the person being sued claims some interest therein;
 - (6) A clear statement that the person being sued must respond within thirty [30] days after the last notice of the action is published, and in case he fails to do so, judgment by default may be entered against him for the relief demanded in the complaint.
- (C) Publication of summons.** The summons shall be published three [3] times by the clerk or person making it, the first publication promptly

43. *See id.*

and each two [2] succeeding publications at least seven [7] and not more than fourteen [14] days after the prior publication, in a newspaper authorized by law to publish notices, and published in the county where the complaint or action is filed, where the res^[44] is located, or where the defendant resides or where he was known last to reside. If no newspaper is published in the county, then the summons shall be published in the county in this state nearest thereto in which any such paper may be printed, or in a place specially ordered by the court. The person seeking the service or his attorney may designate any qualified newspaper, and if he fails to do so, the selection may be made by the clerk.

(D) By whom made or procured. Service of summons by publication shall be made and procured by the clerk, by a person appointed by the court for that purpose, or by the clerk or sheriff of another county where publication is to be made.

(E) Return. The clerk or person making the service shall prepare the return and include the following:

- (1) The clerk or person making the service shall prepare the return and include the following;
- (2) An information or statement that the newspaper and the publication meet all legal requirements applicable to such publication;
- (3) The dates of publication.

The return and affidavits shall be filed with the pleadings and other papers in the case and shall become a part of the record as provided in these rules.

In July of 2021, the Indiana Supreme Court Committee on Rules of Practice and Procedure (“the Rules Committee”)⁴⁵ issued proposed amendments to the

44. “Res is latin for ‘thing’ or ‘matter.’ In the common law, it can refer to an object, interest, or status as opposed to a person. See, for example, *res ipsa loquitur*, *res judicata*, or *res jurisdiction*.” Res, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/res#:~:text=Res%20is%20latin%20for%20%E2%80%9Cthing,res%20judicata%2C%20or%20res%20jurisdiction> [<https://perma.cc/XTC6-F8KH>].

45. The Indiana Supreme Court created the Rules Committee and tasked it with a continuous “study of the Indiana rules of Court, reporting to the Court with recommendations and proposed amendments to promote simplicity in procedure, just determination of litigation, and elimination of unjustified expense and delay.” *Committee on Rules of Practice and Procedure*, IN.GOV, <https://www.in.gov/courts/iocs/committees/rules/> [<https://perma.cc/W2WC-A5AD>]. “Except in emergencies or as directed by the Court, the Rules Committee publishes proposed amendments by January 2, April 1, July 1, October 1, and other necessary times each year for public comment.” *Id.* “Rule amendments take effect on January 1 of the following year unless the Supreme Court orders otherwise.” *Id.* At the time of writing, there was no indication that the proposed changes to Rule 4.13 will not be passed by the time of publication; however, for the purposes of clarity and in case the proposed changes are not adopted, we will simply refer to the Rules Committee’s suggested changes

Indiana Rules of Trial Procedure, which included a change to the Rule 4.13.⁴⁶ The most noteworthy change in proposed Rule 4.13 is the ability for a party to complete service of process against another party through “website publication,” where in the past the only option for service by publication was through publication in newspapers meeting certain requirements.⁴⁷ Proposed Rule 4.13, which relies on the creation of a website to host these service-publications, has many of the same requirements as the current rules for publication via newspaper,⁴⁸ but with some changes that practitioners ought to take note of.⁴⁹ Further, the proposed rule changes increase the responsibility of the party seeking service by publication and remove much of the clerk’s role in the process. Practitioners who use publication to serve parties should be aware of these potential changes and make note of how the potential for increased responsibility in the process will affect their practice.

First, in proposed Rule 4.13(A), practitioners should take note the requirement that “the summons shall be signed by the clerk of the court or the sheriff in such a manner as to indicate that it is made by his authority[.]” has been removed.⁵⁰ This change should be noted as the first sign that the proposed rule change intends that the clerk’s role in helping a party procure service by publication will be largely, if not completely, eliminated.⁵¹

Current Rule 4.13(B), outlines the contents of a summons by publication, grants an exception that “[t]he title of the case as shown by the complaint,” shall be included in the summons “but if there are multiple parties, the title may be shortened to include only the first named plaintiff and those defendants to be served by publication with an appropriate indication that there are additional parties.”⁵² This rule makes sense for publication service in newspapers, where space for additional text comes at a premium. To that point, proposed Rule 4.13(B) would limit the exception allowing a shortened case title to newspaper publication only, requiring those using website publication to include all plaintiffs and defendants.⁵³ Presumably this is because there would be no shortage of space or additional resources expended including by requiring the inclusion of all

as “proposed,” regardless of the fact that, at the time of publication these rules may be rejected or adopted.

46. Proposed amendments to Indiana Rules of Trial Procedure (July 2021), <https://www.in.gov/courts/files/rules-proposed-2021-jul-trial.pdf> [<https://perma.cc/5FFF-YA5Z>] [hereinafter Proposed Ind. R. Tr. P. 4.13].

47. *See id.*

48. *See id.*

49. *See id.*

50. *Id.*

51. Five of the six instances of “Clerk” are to be removed in proposed Rule 4.13, indicating a significant divorce of government involvement from the steps a party must take to serve someone by means of publication, whether that be by newspaper or website. *See* Proposed Ind. R. Tr. P. 4.13, *supra* note 46.

52. IND. R. TR. P. 4.13(B).

53. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(B)).

plaintiffs and defendants on the State's website, as publishing to the website is intended to be free.⁵⁴

Rule 4.13(C), which dictates the amount or length for effective publications, requires that a summons be published “three [3] times by the clerk or person making it, the first publication promptly and each two [2] succeeding publications at least seven [7] and not more than fourteen [14] days after the prior publication, in a newspaper authorized by law to publish notices,” whereas website publication requires that “[t]he summons shall be published by posting for four [4] consecutive weeks if publication is on the Indiana Court Legal Notice Website.”⁵⁵ Though publication by website has a longer minimum publication time at “four [4] consecutive weeks,”⁵⁶ newspaper publication may take six weeks⁵⁷ if a party chooses to wait fourteen days between all three publications. However, it is unclear based solely on a reading of proposed Rule 4.13(C) whether publication by website will require renewing the posting (*e.g.*, requiring reposting the summons daily, weekly, bi-weekly) or whether the summons post will stay up permanently.⁵⁸

Further, proposed Rule 4.13(C) changes the rule for newspaper publication from “[t]he summons shall be published three [3] times by the clerk or person making it,”⁵⁹ to “[t]he summons shall be published by *the party* making it.”⁶⁰ One might assume that the implication of removing the clerk as someone who shall publish the summons is that the onus is now completely on the party to manage newspaper publication.⁶¹ However, proposed Rule 4.13(C)(1) goes on to state that “[t]he party seeking the service or his attorney may designate any qualified newspaper, *and the clerk will select the newspaper if no designation is made.*”⁶² Given that this is the only mention of the clerk left in proposed Rule 4.13, it stands to reason that the Clerk will only be involved in cases where assistance in selection of an appropriate newspaper is involved.⁶³

Proposed Rule 4.13(D)'s change to the subsection's name also signals the removal of the clerk from much of the process,⁶⁴ altering the name of the rule

54. “The court[] is excited to potentially offer this opportunity, especially for the lower-income pro se litigants at no cost.” Katie Stancombe, *Indiana Supreme Court Proposes Rule Change to Publish Public Notices Online, Create Website*, IND. LAW. (Aug. 18, 2021), <https://www.theindianalawyer.com/articles/web-exclusive-indiana-supreme-court-proposes-rule-change-to-publish-public-notices-online-create-website> [<https://perma.cc/XUC3-ERCV>].

55. IND. R. TR. P. 4.13(C).

56. *Id.*

57. *See id.*

58. *Id.*

59. *Id.*

60. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(C)).

61. *See supra* note 51.

62. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(C)).

63. *See supra* note 51.

64. *See supra* note 51.

from the current “By whom made or procured”⁶⁵ to “By whom made.”⁶⁶ While the current Rule 4.13(D) allows that “[s]ervice of summons by publication shall be made and procured by the clerk, by a person appointed by the court for that purpose, or by the clerk or sheriff of another county where publication is to be made,”⁶⁷ the proposed rule states that a party seeking newspaper publication “is responsible for transmitting the request to the newspaper.”⁶⁸ The clerk, again, has been removed from the process in publishing the summons,⁶⁹ putting the onus on the practitioner to contact the newspaper and for publication.⁷⁰ The proposed rule states, in regards to publication on the website, that “[t]he party seeking service by publication to the Indiana Court Legal Notice Website must file the request in the case in the same manner as other electronically or conventionally filed documents.”⁷¹ However, though a party seeking publication via the website is also solely responsible for making that publication,⁷² this alternative would be free⁷³ to a practitioner, whereas publication in a newspaper would have a cost,⁷⁴ regardless of how small.

While current Rule 4.13(E) is titled “Return,”⁷⁵ proposed rule 4.13(E) changes that title to “Return and proof of service.”⁷⁶ Proposed Rule 4.13(E) requires the following:

- (1) For newspaper publication, the party making service shall prepare the return and include the following:
 - (a) Any supporting affidavits of the newspaper containing a copy of the published summons
 - (b) A statement that the newspaper and the publication meet all legal requirements applicable to publication; and
 - (c) The dates of publication.⁷⁷

65. IND. R. TR. P. 4.13(D).

66. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(D)).

67. IND. R. TR. P. 4.13(D).

68. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(D)).

69. *See supra* note 51.

70. *See supra* note 51.

71. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(D)).

72. *Id.*

73. Stancombe, *supra* note 54.

74. “[Hoosier State Press Association (“HSPA”)] information collected from [sixty] newspapers shows the average cost for printing public notices for estate administration to be [\$101.00]; for summons to be [\$186.00]; and for change of name to be [\$126.00].” *Steve Key: Public Notices Should Stay in Newspapers*, DAILY REPORTER (Aug. 5, 2021), https://www.greenfieldreporter.com/2021/08/05/steve_key_public_notices_should_stay_in_newspapers/ [<https://perma.cc/52X6-M9XA>].

75. IND. R. TR. P. 4.13(E).

76. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(E)).

77. IND. R. TR. P. 4.13(E).

In comparison, proposed Rule 4.13(E) would require that “[f]or publication on the Indiana Court Legal Notice Website, the automated entry to the Chronological Case Summary constitutes the return and proof of service.”⁷⁸

The process of arriving at such a rule may have been complicated, and the justifications may be numerous. The purpose of this paper is not to justify the proposed rule or argue against it, but, rather, to keep practitioners up-to-date on potential new requirements and remind them of the requirement that they stay up to date with technological tools available to them in order to remain competent and diligent in their practice.⁷⁹ In her explanation of the rule, and speaking on behalf of the Indiana Supreme Court, Kathryn Dolan was quoted by the Indiana Lawyer as giving at least one justification for the proposed rule change:

There may be some places in the state where there is a high local readership and the newspaper meets that need. But here in Indianapolis, for example, when publication happens in the smaller circulation papers where the cost is lower, that might not reach all of the potentially interested parties⁸⁰

Dolan further added that “[t]he court[] is excited to potentially offer this opportunity, especially for the lower-income pro se litigants at no cost.”⁸¹ There may very well be other justifications for providing such a platform that become clear over time as litigants and those seeking to notify the public work out how best to use the platform; however, there are some who have voiced opposition to the proposed rule and its justifications.

Though there are undoubtedly costs to setting up and maintaining the website required to implement proposed Rule 4.13, which the Indiana taxpayers will pay for, some are worried that claims about cost-effectiveness may be overstated.⁸² Steve Key, executive director of the Hoosier State Press Association (“HSPA”), stated that “[w]e’re opposed with the language as it is,” and that while they “appreciate what the Supreme Court is trying to do in that they are trying to modernize court procedures and make that process more efficient for both users and from a cost perspective,” they are afraid that citizens will miss notices when parties may avoid publishing in the newspaper.⁸³ “People are familiar with getting court actions (in the traditional paper),” Key is quoted by the Indiana Lawyer, arguing that “[o]ften times people will stumble upon the notices in the newspaper not knowing they have been involved,” further explaining that the HSPA believes it is “illogical to think people will get in the habit of checking the new website every two days to find out if it’s in there.”⁸⁴ The HSPA suggests that “if they want to increase and make more effective notices, their trial rule should instead say

78. *Id.*

79. *See generally* ARTIFICIAL LAWYER, *supra* note 23.

80. Stancombe, *supra* note 54.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

‘and’ instead of ‘or.’”⁸⁵ The HSPA argues that this strikes the right balance by requiring the publication of certain notices in local newspapers, where readers expect to see them, and also allowing the notices to be uploaded on the Indiana Supreme Court’s new website, giving attorneys a better chance to stay on top of the notice process.⁸⁶

While this Article will not aim to pass judgment on whether the proposed rule will be an effective or efficient change to modernize service of process in Indiana, it is reassuring that, regardless of the proposed rule’s adoption, that the Rule Committee is diligently examining technological improvements for the courts.⁸⁷ Practitioners who would like to use website publication may use the shortened checklist below as a starting point to determine what they are required to do in order to serve a summons through the new checklist based on proposed Rule 4.13.⁸⁸

II. A PRACTITIONER’S CHECKLIST FOR WEBSITE PUBLICATION

- Does the party you wish to serve meets the requirements to be served by website publication?⁸⁹
- Does your publication contain the required contents?⁹⁰
 - Reminder: website publication has stricter content requirements than newspaper publication.⁹¹
- How long has your website publication been posted?
 - Reminder: “[t]he summons shall be published by posting for four [4] consecutive weeks if publication is on the Indiana Court Legal Notice Website”⁹²
- Who is responsible for making the publication?
 - Reminder: Under the proposed rule, the clerk plays diminished role⁹³ in procuring publication, “The party seeking service by publication to the Indiana Court Legal Notice Website must file the request in

85. *Id.*

86. *Id.*

87. *See generally* IND. R. PRO. CONDUCT 1.1 cmt. 6.

88. Because proposed Rule 4.13 is just that, only proposed, the checklist for practitioners should only be used as a starting point. The rule may not be adopted, is subject to change, and may, if adopted, impose different requirements on the practitioner than what we suggest. *See* Proposed Ind. R. Tr. P. 4.13, *supra* note 46.

89. IND. TR. R. P. 4.9 (“Service under this rule [Summons: In rem actions,] may be made as follows: . . . (3) By service by publication pursuant to Rule 4.13.”); Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing 4.13(A): “In any action where notice by publication is permitted by these rules or by statute, service may be made by publication in newspaper or on the Indiana Court Legal Notice Website.”)

90. Proposed Ind. R. Tr. P. 4.13, *supra* note 46 (addressing proposed rule 4.13(B)).

91. *See id.* (addressing proposed rule 4.13(B)(3)).

92. *Id.* (addressing proposed rule 4.13(C)(2)).

93. *See supra* note 51.

the case in the same manner as other electronically or conventionally filed documents.”⁹⁴

- How will you receive return and Proof of Service?
 - Reminder: “For publication on the Indiana Court Legal Notice Website, the automated entry to the Chronological Case Summary constitutes the return and proof of service.”⁹⁵

III. TECHNOLOGY ON THE HORIZON

Indiana is making changes toward modernizing its justice system through the strategic use of technology,⁹⁶ but it is certainly not alone. Other states, especially after the accelerated changes brought about by COVID-19, have taken to studying the benefits and implications of remote access technology in courts and the legal system as well as looking ahead to technological advancements on the horizon and how such advancements will affect the legal system.⁹⁷ For instance, in the wake of COVID-19, Ohio has suggested permanently instituting remote access options into certain parts of the legal system.⁹⁸ The Ohio Supreme Court’s Task Force on Improving Court Operations Using Remote Technology issued a report on potential legal reforms that would facilitate wider use of technology in judicial operations.⁹⁹ Specifically, the task force recommended studying the use of terms such as “in chambers,” “in person,” “open court,” and “any other term or phrase that could potentially be construed to require an individual to be literally face-to-face with another person in a designated location.”¹⁰⁰ Other states like New York are looking even further ahead, past those issues made clear by COVID-19’s required remote work.¹⁰¹

A New York Commission focused on reimagining the future of their state courts released a report in which they suggest, among other things, that trial courts begin to prepare for the new types of evidence that they will need to be “competent to address novel forms of evidence and evidentiary disputes,” posed by emerging technology, such as geolocational data, facial recognition evidence, and information gathered from the “internet of things.”¹⁰² The commission also recommended, because of the daunting task of crafting standards for novel forms

94. Proposed Ind. R. Tr. P. 4.13(D)(2)

95. Proposed Ind. R. Tr. P. 4.13(E)(2)

96. Stancombe, *supra* note 54.

97. *Report & Recommendations of the Task Force on Improving Court Operations Using Remote Technology*, SUP. CT. OHIO (2021), <https://www.supremecourt.ohio.gov/Boards/iCourt/ReportVolumeI.pdf> [<https://perma.cc/ZEM5-BA64>] [hereinafter Report & Recommendations].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Report and Recommendations of the Future Trials Working Group*, COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK’S COURTS (Apr. 2021), <https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf> [<https://perma.cc/88BG-SHXQ>].

102. *Id.*

of evidence, that New York courts begin to prepare for the introduction of new types of demonstrative evidence, such as 3D printed scans of a particular location relevant to trial, a piece of evidence shrunken in scale for use in the courtroom, or holographic/virtual reality evidence that attorneys submit for use to reproduce entire rooms, locations, or series of events.¹⁰³ The commission believed this so strongly that, to achieve that goal, they recommended that two of the required twenty-four hours of mandatory training judges must undergo should be devoted to basic- and emerging-technological literacy.¹⁰⁴

However, some are more hesitant than others to charge headlong toward changing the way we practice law, lest we unalterably erode constitutional rights and foundational societal values in the process.¹⁰⁵ In 2021, when the Michigan Supreme Court issued an administrative order providing, in part, that “trial courts are required to use remote participation technology . . . to the greatest extent possible,” several justices dissented in part.¹⁰⁶ In his partial dissent, Justice Brian K. Zahra argued regarding whether their court should be held remotely: “The better approach, in my view, is to trust our trial courts.”¹⁰⁷ Justice David Viviano and Justice Richard Bernstein posed concerns about the potential constitutional concerns from holding proceedings remotely¹⁰⁸ and argued in their dissent:

Courthouses hold “symbolic importance” in our society, and their presence “affirm[s] the presence of a community, of a society, by reflecting its values back to itself.” The courthouse itself reinforces the importance of what occurs within its walls. Suffice it to say that this symbolism can be lost during remote hearings.¹⁰⁹

Whether one agrees with a continuing order to work remotely, these justices state important considerations about the value courthouses, judges, and our

103. *Id.*

104. *Id.*

105. Rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, 2020-19, and 2020-21 and Amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17, 12, ADM File No. 2020-08, (Mich.), *available at* https://www.michbar.org/file/localbars/Muskegon/pdfs/MS_C_2020_08.pdf [<https://perma.cc/8BNS-UZDG>].

106. *Id.*

107. *Id.*

108. *Id.* In support of their argument, Justices Viviano and Bernstein point out that the American Bar Association has, in the past, recommended that the use of video hearings “be limited to procedural (as opposed to substantive) hearings and that respondents should be entitled to knowing and consent to proceedings,” by video, given the due process concerns that were raised by the use of such technology. *Id.* (citing American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System*, ABA 18 (March 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [<https://perma.cc/L2Y5-SRC5>]).

109. *Id.*

physical institutions play in our society.¹¹⁰

CONCLUSION

Technology has always had its critics, and some of them have probably been right to be critical. Still, while we may someday find ourselves critical of new technology, lawyers must also remain aware of and fluent in new technologies that might affect the legal field if we hope to remain competent and diligent practitioners.¹¹¹ Personally, I have been extremely proud of the effort and resourcefulness displayed by Indiana attorneys and our justice system in the face of the difficulties posed by COVID-19. Likewise, whether proposed Rule 4.13 is passed in its current form or not, I am grateful that the Rules Committee is actively exploring ways that we can use technology to make Indiana courts and our legal system more accessible by making use of available technology. There are also, without a doubt, technologies of which we are unaware that will affect the practice of law.¹¹² However, as long as Indiana attorneys stay as flexible as they've managed to be in the past, I have no doubt that we, and future generations, will find ways to perform our duties more efficiently than ever and increase public access to justice and the law.

110. *Id.*

111. IND. R. PRO. CONDUCT 1.1 cmt. 6.

112. *See generally* Report & Recommendations, *supra* note 96.