

Every state has a Rule of Professional Responsibility which mirrors (in spirit*, if not in exact wording) the ABA's Model Rule of Professional Conduct 1.1, titled "**Competence**," which states (bolding added):

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 5 to ABA Rule 1.1 states (bolding added):

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and **use of methods and procedures meeting the standards of competent practitioners**[.]

Moreover, the ABA, as well as many states, has adopted a specific duty of technology competence, as stated in Comment 8 to ABA Rule 1.1 (bolding added):

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[.]

Finally, it is important to recognize that, per the ABA's Model Rule of Professional Conduct 5.1(c) titled "Responsibilities of a Partner or Supervisory Lawyer," an organization is responsible for the actions of its employee (bolding added):

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved[.]

* California's Rule of Professional Conduct 3-110, titled "Failing to Act Competently" (which is currently being considered for revision and renumbering) states:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Accordingly, legal professionals must be aware the benefits and risks of technology. Even if a state has not adopted the “technology” variation of Comment 8, it is important for legal professionals to understand how technology works.

Without question, ***there are benefits*** to using the Open Web, especially in the area of **Factual Research**. In fact, judges themselves are turning to the Open Web to find information. But numerous risks exist as well when it comes to using the Open Web for either Factual or Legal Research.

Investigative/Factual Research: Considerations When Searching the Open Web

1. **Inaccurate Information**
2. **Link/Reference Rot & Content Drift**
3. **Lack of a Date**
4. **Inconsistent Formatting**
5. **Lack of Comprehensiveness**
6. **Ordering of Results**
7. **Order of Search Terms**
8. **Different Search Engines**
9. **The “Filter Bubble”**

Legal Research: Considerations When Searching the Open Web (aka “Free” Sites)

1. **Coverage of Recent Opinions**
2. **Coverage of Older Opinions**
3. **Citator Insufficiency**
4. **Inconsistent Results Over Time**
5. **Multiple Versions of Same Opinion**
6. **Lack of Editorial Corrections**
7. **Failure to Remove Withdrawn Opinions**
8. **Failure to Remove Sealed Opinions**

What Legal Publishers Do

1. **Gather Opinions (Reported and Unpublished/Unreported)**
2. **Correct Opinions (both Formatting and Substantial “Errors”)**
3. **Add “Enhancements” to Opinions (e.g. Headnotes, Summaries)**
4. **Make Connections Between Opinions (i.e. Citators)**
5. **Continually Update Opinions to Reflect Changes**

Other Considerations

1. **Violation by an Individual Professional May Be a Violation by the Firm (see Rule 5.1)**
2. **Malpractice**
 - a. see <http://www.lacba.org/showpage.cfm?pageid=15158>)
 - b. Conklin v. Owen, 72 A.D.3d 1006 (Supreme Court of NY, April 27, 2010)
 - c. Gardner v. Jacon, 148 A.D.2d 794 (Supreme Court of NY, March 2, 1989)
3. **Reduced Attorneys’ Fees (for sloppy / careless work)**