

**INTERNET: LEGAL RESEARCH, ETHICS,
MALPRACTICE, & LAWYER LIABILITY**

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INTERNET

by

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I. SCOPE OF PAPER

This paper addresses the opportunities afforded attorneys for incorporating into the practice of law the myriad resources available on the Internet, and the concomitant ethics issues that are inherent in practicing law on-line.

II. PRACTICING LAW ON THE INTERNET

Many attorneys practicing law in Texas have discovered the benefits of communicating online with colleagues and clients. Similarly, many attorneys have become intrigued by the "Wild West" nature of the Internet (the "Net") and enjoy having virtually immediate access to the seemingly unlimited resources available. Whether obtaining a diversity of readily available multimedia information throughout the World Wide Web (the "Web"), passively or actively participating in relevant Newsgroups and ListServes, or downloading and uploading files and documents, attorneys have discovered the opportunity to "travel" from their desktops (or laptops or even palmtops) into Cyberspace. Such ventures into Cyberspace bring unique, myriad opportunities for a law firm to become the virtual center of an amorphous, unending informational universe.

To safely enjoy the plethora of fruits that populate the Net, however, law firms must appreciate the several ethical hazards associated with traveling freely in Cyberspace. For example, while attempting to retrieve information relevant to a particular legal matter, lawyers must typically use legal directories to point or link to particular Web sites or search software ("search engines") to navigate throughout an inherently chaotic, disjointed collection of databases. The location of these databases is of no moment: all that matters is that appropriate sources of pertinent information are located, browsed, and then downloaded or otherwise obtained as appropriate. But, if such obtained information is not apropos, e.g., if a directory is incorrectly invoked or if a search strategy is incorrectly defined to one or more search engines, then important information will probably be missed and extraneous information will be obtained. Similarly, mis-identifying suitable Newsgroups and ListServes via directories and search engines is likely to prevent the return of maximal information about legal matters of import to the firm.

As another example, while being a profoundly convenient means for communicating independently of time and geographical limitations, E-mail may introduce significant risks of breaching client confidentiality or inadvertently disclosing proprietary information to third parties. E-mail messages that are prepared in real-time and impromptu may be another vulnerability for lawyers. An attorney's tendency to respond immediately to an E-mail messages may drive the practice of law into unknown, unlicensed territory. Similarly, an attorney's innocent, impromptu transmission of E-mail may elicit a communication that was relied upon as legal advice by a virtual client. While merely being intended to be an off-the-cuff commentary or gratuitous response, such E-mail behavior may cause ethics problems. State Bars are slowly developing guidelines and rules to help lawyers better comprehend and sort out the ethics morass associated with using the Net as a law firm resource and as a means of communication.

Another online ethics hazard is associated with an attorney or a law firm establishing a Web site. To avoid ethics problems, the content of the site must comply with the State Bar's advertising regulations. While there are many other issues relating to committing libel by publishing false information and infringing upon copyrights, an attorney who downloads virus-infected files may cause harm to data stored on law firm networked computers. Just one unscreened download has the potential to annihilate not only proprietary client data, but also entire law firm databases. Thus, simultaneously with exploiting the Net's resources, it is

imperative for attorneys to be keenly aware of the pervasive hazards and virtual ethics stumbling blocks so that necessary and proper precautions may be taken.

III. SAFEGUARDING E-MAIL

The quintessential feature of electronic mail, affectionately referred to as “e-mail,” is clearly convenience. Besides traversing time zone and geographical boundaries, e-mail, unlike normal mail (“snail mail”), does not require a message, letter, or other communication to be printed, placed in an envelope, sealed, stamped, and then deposited with the U.S. Postal Service. Of course, absent mail-servers being “down” or otherwise being unavailable for handling the receipt and forwarding of messages, e-mail travels across broadly networked computers (“file-servers”) at speeds that dwarf the schedule of contemporary overnight delivery services. To encourage e-mail being promptly read, priority may be assigned to a message by the sender and/or the “Subject Line” of the message may contain signal words such as “urgent” or “read now.”

The Internet provides an unlimited conduit for the transmission of any sort of e-mail. That is, it matters not whether a message originates on America On Line (“AOL”), Microsoft Network (“MSN”), or on a firm’s internal system using Lotus Notes, or Novell Netware, or Quickmail. Provided that proper protocol is packaged with a message — proper e-mail address and header information (generated by the e-mail program such as EudoraPro, Netscape Messenger, and Microsoft Outlook Express, or a Web-based e-mail service such as HotMail) — the message will be delivered, typically within an half hour.

The delivery of e-mail across the Internet typically implicates routing of information packets across a plurality of file-servers which may be operated by diverse entities including commercial businesses, academic institutions, non-profit organizations, etc. An attorney sending an e-mail to a client has no control over the routing of the message pursuant to arrival at the specified destination. That is, a typical e-mail message is routed over a sequence of physical file servers that are beyond the attorney’s control. As a particular message engages each file-server of such a server-sequence, there is an opportunity for a hacker and the like to capture information in the information packet. Since communication lines comprising the Net are generally shared by many users, hackers may engage in “sniffing” to capture freely flowing information. Information that traverses file servers throughout the Net routinely are saved on archival media. Accordingly, confidentiality and security are serious concerns associated with practicing law on the Net.

Thus, in view of the possibility of security leaks occurring, sending e-mail messages in encrypted form should be considered as an important precaution for protecting client-confidentiality and preventing inadvertent disclosure. Easy to use encryption software is already available and integrated with Web browsers and e-mail programs. An example is the tight-integration between Qualcomm’s Eudora Pro and Network Associates’ PGP (Pretty Good Privacy); a mere right-button mouse-click makes PGP immediately accessible for encryption and decryption duty.

Clients should be made aware of the risks involved with e-mail communications and should approve use of e-mail, preferably in writing. The use of encryption software that requires assigning passwords to clients on an individual basis should be included in the e-mail security discussion with clients. This procedure should demonstrate that reasonable care is being taken to protect client confidences.

Law firms should establish Internet e-mail policies and procedures to promote safeguarding attorney-client relationships, attorney work product, and to avoid difficulties associated with abuses such as blasphemous language, sexually explicit or implicit language, and other offensive conduct. Firms should consider the merits of reserving the right to review e-mail messages and should reconcile e-mail retention procedures with disclosure problems and discovery rules. Drafts of documents — stored electronically and on hard-copy — should be routinely discarded by shredding. Software is available for performing a shredding function, such as Network Associates’ Dr. Solomon’s, Infracore Shredder, and Jetico’s BCWipe.

Attorneys should become comfortable and conversant with the features and options of the e-mail program being used. It is crucial to invoke the option that delays sending of messages to avoid being sorry for hastily sending a potentially damaging or embarrassing across the Net. Indeed, due to unfettered distribution capabilities of the Net, the sender of an e-mail is clearly wearing the hat of a distributor, and, under proper circumstances, could be deemed to be a publisher. The distinction between being a distributor or a publisher has obvious implications ala the law of defamation and the like.

IV. TRANSMISSION OF E-DOCUMENTS

Electronic documents (“e-documents”) may be attached to e-mail messages or may be downloaded from Web sites or other Net sites. But, before electronic documents are distributed on the Net, careful consideration should be given to specifying the proper recipients, to proper formatting, and to whether encryption should be used. It should be noted that, on the one hand, encryption helps promote a reasonable expectation of privacy achieved using e-mail; on the other hand, a e-document may arrive safe and sound, but in an unreadable form. Obviously, the fundamental basis of communications is defeated if an e-mail message or an e-document cannot be conveniently deciphered by an intended recipient.

There are essentially two intended uses of documents forwarded or downloaded via the Net. First, an e-document may be provided in anticipation of its being edited by a client or perhaps by another attorney. In this case, the document should be forwarded in the preferred editing format, e.g., Microsoft Word or Corel WordPerfect. Second, an e-document may be provided in an unchangeable format. For instance, an e-document may be a pleading or client correspondence, or may be a form designed to be photocopied for subsequent entries either by hand or by typewriter (yes, typewriters still are useful). In this case, it is preferable not to send the document in a conventional word processing format that may readily be edited. The ideal solution is to use Adobe Acrobat which is designed to provide a digital bridge between desktop publishing and the Net.

Acrobat documents are created in so-called portable document format (“PDF”) that enables documents to be electronically published without losing their original textual and design layout. In particular, PDF files may be created directly from word processing software by simply invoking the normal Print function. Instead of specifying the name of the normal printer, the Acrobat Writer is specified. This generates an Acrobat PDF (compressed) file that echoes the appearance of the original document including page layout, font selection, graphics, and images.

On the receiving end, once downloaded, a PDF file may be read regardless of the operating system or platform, and independently of the software applications present. All that is needed is the Acrobat Reader which is freely available on-line or on CD courtesy of Adobe Systems. Besides invoking the Acrobat Reader by simply double-clicking an attached (e-mail) file, PDF files are also seamlessly integrated into the viewing capability of popular Web browsers such as Netscape Navigator and Microsoft Internet Explorer.

Another approach for transmitting e-documents is to create documents specifically intended for being “browsed” (in html) on the Web. That is, unlike Acrobat documents that primarily strive to perfectly reproduce the layout of paper-oriented documents, e-documents may be created specifically for being read in a Web browser. To enable such e-documents to be quickly generated, Trellix software was developed in the latter 1990s. Layout templates and a “wizard” are provided to make creation of Trellix (“TLX”) documents simple and straightforward. Similar to Acrobat, a freely available Trellix Reader is required to read TLX files.

V. DILIGENT SEARCHING

A diversity of information is readily available on the Internet in the form of databases stored on file-

servers physically kept at geographically disjointed locations. The most prevalent source of this information is the Web. Vendors of information products and services generally massage raw data, i.e., select, organize and sequence data into compilations, such that users may obtain immediate value therefrom. This creativity manifest by information vendors enables public or private access by users who are seeking such value-added data.

Online database vendors and electronic publishers, of course, strive to generate recurring uses and enthusiasm for their databases or "knowledgebases." Based upon the originality manifest in knowledgebases, information vendors may be entitled to copyright protection for the presentation of the underlying data.

An attorney seeking specific information on-line, either has prior knowledge of a particular Web site address (the Uniform Resource Locator or "URL"), or will use a directory or search engine to locate the information, if, indeed, such information is available. Obtaining information via Web sites has the potential for providing independent corroboration for otherwise discovered information. Contrariwise, information found on-line may need independent corroboration itself. The integrity of information obtained on-line must always be questioned; if possible, the source of the information should be ascertained and quality control issues addressed.

To diligently seek and obtain a reasonable amount of information available on-line, attorneys should become conversant with Net search strategies and concomitant logistics. Every approach to seeking information — known or unknown — has pros and cons. Accordingly, a viable search strategy should be developed to assure the maximal return of available information. Assuming that the searcher does not have the benefit of prior knowledge where sought-after information is located, then a preferred strategy would typically consist of using each of directories and meta-search engines.

What is the difference between a directory and a search engine? A directory is a database stored on a file-server that contains a compilation of hot-links (direct links) to Web sites. Similar to a table of contents, a directory is usually organized hierarchically for ease of use. The quintessential directory is Yahoo. A search engine, on the other hand, consists of software (that may be underlying a special-purpose Web page) designed to receive search criteria for pursuing sites that satisfy this criteria. Mechanically, a search engine, based upon its pre-programmed procedures, searches through several on-line indexes to find "hits."

Popular search engines such as AltaVista, ExCite, HotBot, and Lycos have their own rules for specifying the proper syntax corresponding to search criteria. If the criteria is incorrectly specified, no hits will be found because the engine won't run. Depending upon the particular criteria specified, different engines produce different results. Indeed, one search engine may return as many as 100 hits, while another search engine returns none. To afford a broad base for searching and to avoid the challenge of properly and repeatedly specifying the same search criteria to multiple search engines, a so-called "metasearch" engine is recommended. A metasearch engine performs "parallel" searching of multiple search engines by invoking one search engine after another until the specified number of hits is obtained. Metasearch engines include WebFerret Pro, Dogpile, Inference Find, and MetaCrawler.

For performing general legal research on the Net, law-specific search engines such as LawFind, LawCrawler, and ForeFront LegalSeeker are recommended. These engines, of course, are designed to peruse a plethora of database indexes focused upon law-related information. There are even more highly focused search engines for searching related to legal matters. As an example, several tools are available for searching patents — both U.S. and foreign. The U.S. Patent and Trademark Office has recently made online searching for U.S. patents freely available to the public; similarly, IBM has provided a free search engine for searching U.S. patents. Both of these patent engines are typically heavily burdened with inquiries, wherein response times are unbearably slow. The same is generally true for searching the Patent and Trademark Office's online trademark database for U.S. registrations and pending applications for registration. More

responsive and profoundly effective search engines for worldwide patents and U.S. trademarks are provided by commercial vendors such as MicroPatent. Besides enabling more versatile search options and a comprehensive “help” facility, the MicroPatent and MarkSearch engines deliver patents and trademark registrations in record time.

Searching case law is now available via the Net, rather than only through proprietary software. For example, WestLaw may be accessed from any Internet-live computer by linking to either the westlaw.com or keycite.com site. WestLaw may then be searched via the plain vanilla “WIN” natural language or via the conventional search-syntax; hotlinks from case-to-case provide the ultimate in search-efficiency. In addition, KeyCite is indicative of the leading edge of multifaceted functionality: comprehensive citation capabilities are packaged in a convenient, graphical interface. Representative of a new genre of Internet-only case law search engine is Versuslaw. Accessed at versuslaw.com, case law is easily searchable with a fill-in-the-blanks interface.

In the course of browsing and downloading information from the Internet, attorneys should be aware of the bundle of rights that are associated with the multimedia presentation of information that populates Web sites. In addition to the right to control copying and distribution of the copies, vendors have the right to control access to and use of the information, and to safeguard the integrity of the underlying data. Accordingly, availing themselves of legal counsel, information vendors now are including Web-wrap licenses on their sites purporting to define the limits of access and use of information obtained from the site. Nevertheless, the act of a vendor placing information on the Net, presumes a high threshold for “fair use” of copyrighted information by users.

VI. ADVERTISING ON-LINE

With the recent passing of the State Bar Referendum, there is now a new Disciplinary Rule 7.07 pertaining to public advertisements and other electronic solicitations. Specifically, for law firm Web sites, 7.07(c) requires the filing of: (1) each “unit” (equivalent to a 8½ x 11 printed page or one minute of audio or audiovisual script) comprising the Web site up to a maximum of 10 units; (2) a lawyer advertising and solicitation communication application form; and (3) the prescribed fee. This filing shall be submitted to the Advertising Review Committee no later than first posting on the Web. Under Subsection d, an attorney may seek an advisory opinion regarding a contemplated communication or a Web site not less than 30 days prior to the anticipated date of first dissemination. It should be noted that a noncompliance advisory opinion is not binding in a disciplinary proceeding, but a finding of compliance is binding to the extent of true and properly presented materials actually submitted for pre-approval.

Subsection d carves out exceptions to the Web site filing requirements for materials constituting, inter alia, other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, and links to other Web sites. Thus, excepted from the filing would be news articles, legal articles, editorial opinions, proposed or enacted rules, regulations, or legislation. Also exempted from the filing, are e-mails that are transmitted to existing or former clients, other lawyers or professionals, and solicitations that are requested by a prospective client or that are not motivated by or concerned with a past event, a client’s specific legal problem (known to the soliciting attorney), or pecuniary gain.

Thus, the State Bar in Texas continues to be at the forefront of dealing with attorney’s conduct on-line.

VII. PROTECTING FIRM & CLIENT DATA

Attorneys that engage in Net-related activities, should be aware of the dangers on virus infection. Suitable anti-virus software should be installed on all surf-worthy computers to assure that there is only a minimal likelihood of a virus breaking through the defenses. Viruses typically will enter a computer during

downloading from the Web or during downloading of e-mail messages (and attached files) from a mail-server. This virus software should be regularly updated to afford the most current protection available.

Generally, as a precautionary measure, e-mails that do not contain a Subject Line should be deleted. It is possible to beg the (infection) question by invoking a message preview option, so that the legitimacy of a message may be surmised from the preview window without having to actually open the message.

Law firm and client data — in electronic form — should, of course, be regularly backed-up. Back-ups should be stored, at least in part, off-site.

VIII. MALPRACTICE

The virtual Malpractice Line may be crossed when an attorney's Internet activity inadvertently creates an attorney-client relationship. This may occur as a result of a Web site visit, or by a posting forwarded for consumption by a ListServe or a Discussion Group, by rendering advice during a "chat" session, or via e-mail.

Similar to the problem with misdirected facsimile transmissions, e-mail may be misdirected, thereby causing confidential information to be disclosed. Since the Internet represents the ultimate in speed and scope of dissemination of information, special care should be taken to avoid waiving the attorney-client relationship or disclosing confidential information.

Based upon the wealth of information available on the Net, with certain factual situations, there is probably a legal duty for an attorney to make reasonable use of the Internet's resources for legal or factual research. Any research obtained via the Net must be validated for accuracy and reasonableness, i.e., must be smell-tested, prior to relying on it to affect client-related decisions. All information retrieved from the Net should be independently corroborated whenever possible.

Suitable Internet access policies should be established to avoid a myriad of ethical problems that have been touched upon herein.