ETHICS OF PRACTICING LAW USING THE INTERNET

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CHAPTER 9

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Ethics of Practicing Law Using the Internet©

by

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I. INTRODUCTION. The Internet brings people in touch with each other to a greater extent than ever before. This presents both opportunities and hazards for lawyers. This article considers the legal ethics of practicing law using the Internet. Areas of concern include: disseminating legal information over the Internet, unauthorized practice of law in other jurisdictions, attorney-client privilege and disqualification resulting from unsolicited emails, negligent referral claims, -communicating with opposing party's website, and vulnerable data and files on websites/computers. The regulation of advertising through the Internet is covered by another article in this coursebook.

An excellent resource for these issues is a WWW site, Legalethics.com, <http://www.legalethics.com>. This WWW site has links to documents on e-mail issues, advertising solicitation, and unauthorized practice of law. <http://www.legalethics.com/issues.htm>. There is also a list of articles covering a broad range of legal considerations regarding the Internet. <http://www.legalethics.com/articles.htm>.

II. DISSEMINATING LEGAL INFORMATION OVER THE INTERNET. Professor Catherine J. Lanctot wrote an article in Duke Law Journal discussing, among other things, attorneys giving legal advice over the Internet. Catherine J. Lanctot, in *Attorney-Client Relationships in Cyberspace: the Peril and the Promise*, 49 DUKE L. J. 147 (1999) <http://www.law.duke.edu/journals/dlj/articles/dlj49p147.htm> She noted that a growing number of lawyers are giving legal advice to lay persons over the Internet. *Id.* at 151. This occurs primarily in (1) chat rooms; (2) newsgroups; (3) responding to emails prompted by the lawyer's web site; (4) lawyers advertising for, and obtaining, on-line clients who receive specific legal advice over the Internet for a fee. Add to that list lawyers who disseminate legal information through their www pages.

I received the following unsolicited email from someone I didn't know:

> I am considering divorcing. If I re-marry within my resident state of Texas, is there a time period that must be followed as to when I could re-marry?
>
> Sincerely,
> A***** @aol.com

This is a non-client asking for some fairly simple legal advice. What should I do? If I answer the question, am I giving legal advice, and establishing an attorney-client relationship with this unknown person? If so, do I have a

duty to make further inquiry before I answer the question? If I give bad advice and this person is damaged, can I be sued for negligence, or negligent misrepresentation?

There are ethical and legal rules that apply to a lawyer giving legal information to the public, and giving legal advice to non-clients, and different rules that apply if an attorney-client relationship is created in the process.

A. Disseminating Legal Information to the Public. The most prominent reaction of legal ethics enforcers to World Wide Web pages created by lawyers is to regulate web pages as a form of advertisement. That subject is covered elsewhere in this courseboo-k.

Another ethical consideration for lawyers with law-related web pages has to do with regulation of giving legal information and legal opinions through mass media. Many of these issues were faced in connection with radio, newspapers, magazines, and television. Regulation also has occurred for toll-free telephone numbers and legal seminars. Regulation is now developing for the World Wide Web.

Professor Lanctot, in her Duke Law Review article, examines the bars' historical regulatory responses to the dissemination of legal information and legal opinions through the various mass media. *Id.* 198-244. She notes that "[i]n each instance, the bar has attempted to distinguish between the transmission of general legal knowledge, which it has viewed as permissible, and the presentation of specific legal advice tailored to an individual's particular problem, which it has treated as impermissible." *Id.* at 162.

The Preamble to the Texas Disciplinary Rules of Professional Conduct [TDRPC], ¶ 5 provides:

> 5. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of legal service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

Is the "work to strengthen legal education" directed at educating only lawyers and their personnel, or does it reach as far as educating the public?

The bars' responses to the dissemination of legal information on the Internet is still developing. South Carolina Bar Ethics Advisory Committee Opinion 94-27 (1995) allowed for on-line legal discussions "solely for the purpose of discussing legal topics generally, without the giving of legal advice or the representation of any particular client." The Oregon State Bar Association Legal Ethics Committee, in Opinion 1994-137 (1994), authorized the creation of an on-line legal database that did not provide live communication, but said that generating legal advice during an on-line session would be the practice of law. The Tennessee Supreme Court Board of Professional Responsibility issued an unpublished Opinion 95-A-576 (1995) indicating that a lawyer could ethically respond to private emails soliciting legal

advice, but that to do so might create an attorney-client relationship. The State Bar of Arizona Committee on Rules of Professional Conduct issued Opinion 97-04 (1997) suggesting that lawyers probably should not answer legal questions raised in on-line chat rooms due to the inability to check conflicts of interest and the risk of disclosing confidential information. The Opinion advises lawyers not to answer specific legal questions from lay persons through the Internet "unless the question presented is of a general nature and the advice given is not fact-specific." These Opinions are discussed in Professor Lanctot's Duke Law Journal article, at page 244.

B. When is an Attorney-Client Relationship Created? The Preamble to the TDRPC, ¶ 12, provides in part:

> 12. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.

The concept of Paragraph 12 is easy to visualize when a lawyer meets with a person in the lawyer's office, and agrees to be employed. The concept of Paragraph 12 is more difficult to visualize when the only contact between the lawyer and the individual is a telephone conversation. The concept behind Paragraph 12 is very difficult to visualize when the only contact between the lawyer and the individual is through email or postings in a chat room or newsgroup.

One of the key issues involving legal ethics and the Internet is the inadvertent creation of an attorney-client relationship or other duties with someone who visits your WWW page, or who reads a posting you leave on a discussion site, or especially with whom you communicate by e-mail.

Professor Catherine J. Lanctot examines these issues in detail, in *Attorney-Client Relationships in Cyberspace: the Peril and the Promise*, 49 DUKE L. J. 147 (1999), <http://www.law.duke.edu/journals/d-lj/articles/dlj49p147.
htm>.

Professor Lanctot cites the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYER, §26 for the proposition that an attorney-client relationship can arise from either express bilateral agreement, or by estoppel. She cites cases in support of that view, as well.

Professor Lanctot observes that "courts traditionally have been willing to infer attorney-client relationships when lawyers give specific legal advice to lay people under circumstances in which it would be reasonable for them to rely on the advice." *Id.* at 160-161. She goes on to note that "there is substantial doubt about whether even a carefully worded disclaimer could defeat a subsequent claim against a lawyer who gave specific legal advice online."

In Texas, a malpractice claim can only be brought where a professional relationship exists between the lawyer and the client. Texas does not recognize a cause of action for legal malpractice asserted by a party not in privity with the offending attorney. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex.1996); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621 (Tex.App.--Houston [1st Dist.] 1993, writ denied).

In *Lopez v. Aziz*, 852 S.W.2d 303, 305 (Tex. App.--San Antonio 1993, no writ), the appellate court held that "a physician is liable for malpractice or negligence only where there is a physician/patient relationship as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill, and there is a breach of professional duty to the patient."

C. Negligent Misrepresentation. Even absent privity, there is a threat of liability for negligent misrepresentation. The Texas Supreme Court has held:

> One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999). A claim for negligent misrepresentation can be brought against a lawyer by a non-client:

> [A]n attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim.

Id. at 791.

D. What Duties Arise If an Attorney-Client Relationship is Established? Professor Lanctot, in her Duke Law Journal article, addressed the question of what duties arise if an attorney-client relationship is created through the Internet. She named three: conflict of interest, competent advice, and confidentiality. Professor Lanctot observed:

> If the bar were explicitly to recognize that giving specific legal advice online creates a traditional attorney-client relationship, what would the ramifications be for lawyers in cyberspace? By giving the advice, the lawyer would incur core obligations to the client that could not be disclaimed. First, the lawyer must ensure that she has no conflict of interest that would preclude furnishing objective advice. Second, the lawyer must give competent advice, obtaining whatever information is necessary from the questioner and doing whatever research is required to provide such advice. Third, the lawyer must inform the questioner about the benefits of confidentiality, even if a question has been posted publicly, and she ordinarily would be expected to keep all communications confidential, unless

> specifically authorized by the recipient to make them public.

Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: the Peril and the Promise*, 49 DUKE L. J. 147, 250-251 (1999).

E. Disclaimers. Many web sites contain disclaimers, to limit potential complaints and liability that might arise from use of the web site. An example is this disclaimer from the State Bar of Texas web site:

> Disclaimer of Liability
>
> Disclaimer of Liability: The State Bar of Texas presents the information on this web site as a service to our members and other Internet users. While the information on this site is about legal issues, it is not legal advice. Moreover, due to the rapidly changing nature of the law and our reliance on information provided by outside sources, we make no warranty or guarantee concerning the accuracy or reliability of the content at this site or at other sites to which we link.

<http://www.texasbar.com/barinfo/disclaim.ht-m>

State Bar of Georgia's web site contains a more elaborate disclaimer:

> The State Bar of Georgia website was founded in June of 1996 as a public resource of general information which is intended, but not promised or guaranteed, to be correct, complete, and up-to-date. This website is not intended be a source of legal advice; thus the reader should not rely on information provided herein, and should always seek the advice of competent counsel in the reader's state.
>
> The State Bar of Georgia will be pleased to provide links to all websites for law resources of interest to Georgia lawyers, law firms, or the public; however, the State Bar of Georgia does not intend such links to be referrals or endorsements of the linked entities, and the State Bar of Georgia does not endorse or approve any lawyer referral service that is not properly registered with the State Bar of Georgia. The State Bar of Georgia can be contacted at 1-800-334-6865 for inquiries regarding whether any lawyer referral service is approved.
>
> The State Bar of Georgia grants link permission to any entity who web material is not in violation with any local, state, or federal law, or any State Bar rule, regulation, or policy, and

> may in its discretion request any entity linking to this site to remove its link. The State Bar of Georgia will gladly remove any link from this website upon request from the linked entity; this website is not sponsored or associated with any particular linked entity unless stated so by that entity; and the existence of any particular link is simply intended to imply potential interest to the reader.

<http://www.gabar.org/ga_bar/disclaim.htm>

An ethics opinion by the New York City Bar Association made the following observation about disclaimers:

> Law Firm has noted that "if specific legal advice is sought, we will indicate that this requires establishment of an attorney-client relationship which cannot be carried out through the use of a web page." While this Committee does not opine on matters of law, we note that this disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications. Caution particularly given the multi-jurisdictional reach of the Internet is again advised in this area. See, e.g., Ethics, Malpractice Concerns Cloud E-Mail, On-Line Advice, 11 ABA/BNA Laws. Man. Prof. Conduct 3 (1996).

The Association of The Bar of The City of New York Committee on Professional And Judicial Ethics, Formal Opinion No. 1998 - 2 <http://www.abcny.org/eth1998.htm>.

Professor Lanctot similarly observed:

> [D]isclaimers are unlikely to provide the blanket protection so many lawyers apparently seek, especially if the legal advice given is particularized to the inquirer's factual situation. Neither courts nor bar counsel is likely to be sympathetic to lawyers who have given negligent advice and then try to rely on boilerplate disclaimers to absolve them of responsibility for harm.

Catherine J. Lanctot, in *Attorney-Client Relationships in Cyberspace: the Peril and the Promise*, 49 DUKE L. J. 147, 248 (1999) .

III. CONFIDENTIALITY AND THE INTERNET. Issues of client confidentiality and the Internet arise in connection with discussion groups and email exchanges, and in connection with misdirected or improperly intercepted e-mail messages.

A. Confidentiality and Non-Clients. The *Preamble* to the TDRPC, ¶ 12, provides in part:

> [T]here are some duties, such as that of confidentiality, that may attach before a client-lawyer relationship has been established.

Tex. R. Evid. 503, *Lawyer-Client Privilege*, applies the privilege not only to someone who is rendered professional legal services by a lawyer, but also persons who consult a lawyer with a view to obtaining professional legal services from that lawyer. Thus, the lawyer-client privilege can apply to non-clients as well as clients.

TDRPC 1.05, *Confidentiality of Information*, by its terms applies to "privileged information" and "unprivileged client information." Collectively these two categories are called "confidential information." The term "client" is not defined in the TDRPC. *See* TDRPC *Terminology*. Thus, at first blush TCRPC 1.05 appears to cover non-client information that falls within the scope of the lawyer-client privilege. However, the body of Rule 1.05 speaks in terms of confidential information of a client or former client, but not confidential information of a non-client.

There doesn't appear to be a clear ethical obligation to preserve confidential information of non-clients. However, receiving privileged information from a non-client creates the potential of a claim for disqualification (see Paragraph IV below).

B. Confidentiality and Clients. When a lawyer posts a notice asking for advice regarding a client's case, even if the names are changed and the facts disguised, a third party, such as the opposing attorney, might read the posting and be able to glean information damaging to the client. This same risk exists for "shop talk" between lawyers, such as at the courthouse or continuing legal education courses.

There is a problem with a mis-addressed e-mail, just like a misaddressed fax or misaddressed letter, as to whether a confidential communication loses its confidentiality by being sent to the wrong recipient.

Additionally, e-mail that travels the Internet is subject to interception at a number of points along its journey. This risk of interception of Internet e-mail is widely discussed, and therefore suggests a possible argument that sending an e-mail by the Internet has no expectation of confidentiality, and thus is not confidential. Initially, several state and local bars suggested that an attorney should not conduct confidential discussions on a cellular telephone because they are so easy to intercept. *E-Mail and the Attorney-Client Privilege*, , p. 1, by Arthur L. Smith: <http://www.abelaw.com/bamsl/lpm/email.htm> [link now dead]. Ethics panels in Massachusetts, New York City, and New Hampshire have said that confidential communications should not occur over a cellular telephone, without informed consent from the client. *Malpractice Concerns Cloud E-mail, On-line Advice*, p. 3, by Joan C. Rogers (Legal Editor of the ABA/BNA Lawyers' Manual on Professional Conduct): <http://www.bna.com/hub/bna/legal/adnew2.html> [link now dead]. Can the same thing be said about Internet e-mail? Apparently the State Bar of Iowa has said so. Iowa Ethics Opinion 95-30 (formal ethics opinion stating that attorneys must encrypt sensitive material

before sending it by e-mail), cited in *E-mail: How Attorneys Are Changing the Way They Communicate*, p. 2, by Susan B. Ross, <http://www.collegehill.com/ilp-news/ross-email.html> [link now dead]. The South Carolina Bar Association reversed its 1994 position and now says that it is not a breach of confidentiality to send unencrypted email. See Ethics Advisory Opinion 97-08, <http://www.scbar.org/ethics_advisory_opinions.htm> (search for "97-08").

Writing in *Communicating with or About Clients on the Internet: Legal, Ethical, and Liability Concerns*, ATTORNEY'S LIABILITY ASSURANCE SOCIETY LOSS PREVENTION JOURNAL 17, 19 (Jan. 1996), William Freivogel, an ALAS attorney who works on loss prevention, wrote that he felt that fear of interception of Internet e-mail was exaggerated. The computers which pass e-mail messages pass thousands if not millions of messages per day, and identifying a particular computer, and trapping a specific message would take time, money, technical proficiency, and a willingness to violate federal law, 18 U.S.C. 2510 et seq. Freivogel concluded that lawyers may ethically communicate with or about clients through the Internet without encryption. He further stated that he did not believe that illegal interception of an e-mail message would waive confidentiality, or that criminal interception of an e-mail message would trigger lawyer liability. *See Malpractice Concerns Cloud E-mail, On-line Advice*, p. 5, by Joan C. Rogers (Legal Editor of the ABA/BNA Lawyers' Manual on Professional Conduct):<http://www.bna.com/hub/bna/legal/adnew2.html> [link now dead].

IV. ATTORNEY-CLIENT PRIVILEGE AND DISQUALIFICATION. Establishing an attorney-client relationship over the Internet, however fleeting, and even when not based on a mutual agreement of employment, can create a conflict of interest that would preclude the attorney representing an adverse party. Since the communications of even non-clients are protected by the Client-Lawyer Privilege, the issue arises of whether a lawyer can be disqualified from representing someone adverse to a person who communicated confidential information to an attorney over the Internet, even though an attorney-client relationship was never formed.

V. UNAUTHORIZED PRACTICE OF LAW IN OTHER JURISDICTIONS. The issue of unauthorized practice of law arises when a lawyer practices law in a jurisdiction where (s)he is not licensed. For example, a lawyer participating in an electronic discussion and giving legal advice to a participant who is in a state in which the lawyer is not licensed to practice may be engaged in the unauthorized practice of law. *The Internet -- Hip Or Hype? Legal Ethics and the Internet*, by Professors Catherine J. Lanctot and James Edward Maule (Villanova University Law School): <http://www.law.vill.edu/vcilp/MacCrate/mcle/lanctot.htm> [link now dead]. When a law firm's WWW site deals with interstate issues, such as federal law, and it draws inquiries from persons or companies located in other states, and those inquiries result in telephone or e-mail communications that constitute legal advice, is the legal service rendered at the lawyer's office, or Internet service provider's location, or at the quasi-client's office? The answers to this question might impact the issue of in what jurisdiction law is being practiced.

Professors Lanctot and Maule suggest that lawyers avoid giving personalized legal advice

over the Internet. You should go no further than you would in talking with a stranger over the telephone. They also suggest that, if the lawyer has a WWW site that includes a discussion group, all participants should be required to register and provide basic identifying information. *Id.* at p. 8.

The Philadelphia Bar Association has issued an ethics opinion touching on the Internet and the unauthorized practice of law. In Opinion 98-6 (March 1998), the Association observed:

> Consideration should be given to the unauthorized practice of law. Although the inquirer is apparently a licensed practitioner in Pennsylvania, there is ambiguity about the ethical rules which would apply to this kind of activity. Some states have taken the position that it is possible that their ethical rules could apply if the Internet "conversation" is taking place with a person located within their boundaries, thereby subjecting lawyers on the Internet to ethical oversight by those states. The inquirer should consider including on any communication a notice that he is a lawyer licensed in Pennsylvania, and he is not purporting to give any kind of advice other than in accordance with that status and that he is not purporting to practice law in any other jurisdiction. (N.B. We offer no assurance this would be recognized by all states.)

<http://www.philadelphiabar.org/public/ethics/displayethics.asp?id=143481312000>. A copy of the entire Opinion is included in Appendix A to this article.

A similar concern was raised by the Arizona Bar Association's Committee on the Rules of Professional Conduct, in Ethics Opinion No. 99-06 (June, 1999), which says in part:

> Responding to questions from non-Arizona potential clients may constitute or give rise to the unauthorized practice of law in another jurisdiction in violation of ER 5.5(a).

<http://www.azbar.org/EthicsOpinions/Data/99-06.pdf>.

VI. NEGLIGENT REFERRAL CLAIMS. When a lawyer receives an email inquiry from a "netizen," and responds by referring this person to another lawyer, is there possible liability for "negligent referral" if the lawyer to whom the matter is referred mishandles the matter? The availability of the tort of "negligent referral" is clouded, in Texas and around the country. The cases set out below are listed by state, in alphabetical order.

In *Harvey v. Farmers Ins. Exchange*, 983 P.2d 34 (Colo. App. 1998), the appellate court upheld a judgment founded partly on negligent referral, where an insurance company referred an insured for examination by a chiropractor who raped the insured, and the insurance company had prior notice of a similar incident with another insured.

In *Noris v. Silver*, 701 So.2d 1238 (Fla. App. 1997), a negligent referral claim was rejected because the plaintiff did not show that the referring lawyer had knowledge of any facts that would indicate that referred lawyer would commit malpractice. Although the language of the court's opinion does not say so, the reasoning suggests that if the referring lawyer had such knowledge, a claim for negligent referral might apply.

In *Weisblatt v. Chicago Bar Ass'n*, 292 Ill. App.3d 48 (1997), the court rejected a negligent referral claim brought against a bar association's lawyer referral service because: (1) a claim for negligent performance of a voluntary undertaking is available only for bodily injury and physical damage; (2) legal malpractice is not available since the bar association is not an attorney and is not vicariously liable for the referred attorney's negligence; and (3) negligent representation does not apply since the referred attorney's single act of negligence did not prove that any representation by the bar association was false.

Sanders v. Wysocki, 631 So.2d 1330 (La. App. 1994), intimates that the tort of negligent referral exists in Louisiana for referral of a person to a lawyer.

A claim of negligent referral was held not to exist in Pennsylvania, by a Pennsylvania Superior Court, in *Burke v. Kazaras*, 2000 Pa. Super 29 (Feb. 4, 2000).

In *Klein v. Solomon*, 713 A.2d 764 (R.I. 1998), the Rhode Island Supreme Court recognized a claim for negligent referral against a university whose employee referred a student for psychological services to an unqualified mental health practitioner.

In *Jennings v. Burgess*, 917 S.W.2d 790 (Tex. 1996), the Texas Supreme Court assumed, without deciding, that a claim for negligent referral exists, since the existence of the tort was not challenged on appeal. In a concurring opinion, Justice Raul Gonzalez noted that:

> The Court assumes without deciding that the plaintiffs have a negligent referral cause of action against the referring physician. I concur in the judgment, but write separately to point out that the bounds of this cause of action, under Texas law, have yet to be fully developed. . . . Although the referring physician bears no responsibility for the tortious acts of a recommended physician, the referring physician can generally be held liable for his own negligence in failing to exercise reasonable care in making the recommendation.

Jennings, 917 S.W.2d at 794. Justice Gonzalez goes on to note that "[s]upport for a negligent referral cause of action is found within the case law of many states." *Id.* at 794. Justice Gonzalez cited *Sturm v. Green*, 398 P.2d 799, 804 (Okla.1965) ("[S]uch duty is violated when a physician selects another doctor to handle a potentially dangerous case and knows, or should know, the selectee lacks familiarity with the problems involved.). *Id.* at 795.

In *Moore v. Lee*, 211 S.W. 214 (Tex. 1919), the Supreme Court said that "[i]f [a referring doctor] acts in good faith and with reasonable

care in the selection of the physician or surgeon, and has no knowledge of the incompetency or lack of skill or want of ability on the part of the person employed, but selects one of good standing in his profession, one authorized under the laws of this state to practice medicine and surgery, he has filled the full measure of his contract, and cannot be held liable in damages for any want of skill or malpractice on the part of the physician or surgeon employed." This suggests that a referring doctor who does not act in good faith, or who does not act with reasonable care in referring a patient to another doctor, can be held liable for negligence.

In *Ross v. Sher*, 483 S.W.2d 297, 301 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.), the court said that "the referring doctor ... cannot be liable for the negligence of that other doctor unless the evidence shows that he failed to exercise reasonable care in recommending the second physician."

In *Golden Spread Council, Inc. No. 562 of the Boy Scouts of America v. Akins*, 926 S.W.2d 287 (Tex. 1996), a Boy Scout sued the Boy Scouts of America and the local boy scout council after the scout was allegedly sexually molested by a scoutmaster. The Supreme Court held that the local boy scout council owed a duty to the potential troop sponsor that asked the council to introduce it to a potential scoutmaster. The Court extended this duty to children and parents involved in the troop who relied on the council's recommendation. The council's affirmative act of recommending the scoutmaster created a duty to use reasonable care in light of information the local council had received about the scoutmaster's alleged prior conduct with other boys. The doctrine has an element of "voluntary undertaking" about it.

In *Desiga v. Scheffey*, 874 S.W.2d 244 (Tex.. App.--Houston [14th Dist.] 1994, no writ), the court held that a negligent referral claim was not brought within the limitations period for a tort, without deciding that a claim for negligent referral is available in Texas.

In *Edwards v. Garcia-Gregory*, 866 S.W.2d 780, 783 (Tex. App.--Houston [14th Dist.] 1993, writ denied), the appellate court held that a referring physician who did not participate in the surgery had no duty to inform the patient of the possible risks and complications involved in an operation.

In *Scoggin v. Henderson, et al.*, No. 05-92-01103-CV (Tex. App.--Dallas 1993, no pet.) (unpublished opinion) [1993 WL 15496], the appellate court affirmed a summary judgment dismissing a negligent referral claim because the defendants proved that they were not negligent in making the referral to a doctor. The court did not say that no such tort existed.

VII. COMMUNICATING WITH OPPOSING PARTY'S WEBSITE. Professors Lanctot and Maule, in their article on *Hip or Hype? Legal Ethics and the Internet* <http://www.law.vill.edu/vcilp/MacCrate/mcle/lanctot.htm> [link now dead] also raise the issue of direct contact with represented parties through the Internet. This can occur when: (i) a lawyer accesses the home page of an opposing party and communicates through e-mail; (ii) when a lawyer e-mails to someone represented by another lawyer, by responding to inquiries on a bulletin board; and (iii) when a lawyer is moderating a listserve or newgroup and an opposing party subscribes. *Id.* at p. 10. Texas Disciplinary Rule of Professional Conduct 4.02 prohibits communications with represented

parties only where the lawyer is doing so "in representing a client." Therefore, communications that are not in the context of representing a client do not violate this standard.

However, what if you are representing a client who is litigating against a corporation, and you access that corporation's WWW site? Since that is a passive communication, it would probably not fit within the proscription. What if the WWW page permits interactive use, which triggers additional information from the Company? Does that constitute communication with the adverse party? Professors Lanctot and Maule cite *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 28 (2nd Cir. 1975), involving a motion to disqualify a law firm whose associate telephoned the order department of the opposing party, without identifying himself as opposing counsel, and obtained information pertaining to jurisdiction and venue. The court denied disqualification, but suggested that the behavior might technically be misconduct, but not sufficiently wrong to warrant disqualification. Lanctot & Maule, p. 11.

VIII. VULNERABLE DATA AND FILES ON WEBSITES/COMPUTERS.

A. Maintaining Confidentiality of Digital Client Information. There are a number of areas of concern regarding confidential digital information. There is the danger of employees compromising confidentiality. There is the problem of computer service technicians accessing confid-ential client information. There is the problem of sending a computer out to a shop for repairs, where the repair facility has access to confidential client information. There is the problem of archiving confidential information at an on-line site. [See North Dakota Ethics Opinion #99-03 (6/21/99): Lawyers may use online data backup service if the lawyer ensures that data transmission is secure and that the information storage system adequately safeguards sensitive records.] There is the problem of portable computers being stolen or lost, and strangers gaining access to information stored in the portable computer. These matters are discussed in greater detail in Emilio Jaksetic, *Computer Security and Professional Responsibility* (June 1998) <http:// www.legalethics.com/articles/jaks.htm>

B. Danger From Internet Intrusion. The following observations are contributed by my son, Stephen Orsinger, an 18-year old student at St. John's College in Santa Fe, N.M.. Stephen worked during the summer of 1999 in tech support for an Internet Service Provider in San Antonio.

> Any security software which allows direct dial-in access to a server via an 800 number (such as Windows NT) is able to be circumvented by a clever computer criminal. Something such as PCAnywhere is not really a feasible program for multiple users accessing the same server, and really the only viable option for a firm who wants remote access but doesn't want to pay someone 80K a year for unix server administration and operation will probably end up using Windows NT, if just for its ease. Although there are inherent components of this software that make it susceptible to unauthorized penetration, generally it is very reliable. Some simple guidelines can be disseminated to everyone who will be given access to a

server which allows remote access (including people who are not given actual remote access permissions) to help cut down on the risk of intrusion:

1) Require that all users with access to any part of the server change their password once every 3 weeks.

2) Require these passwords to be at least 6 characters in length

3) Advise those with access to NEVER write their password down on a piece of paper or speak of their password to anyone. Make punishment for a violation of this edict stiff. NEVER keep any hard copy record of passwords....NEVER NEVER NEVER.

4) Keep a log of all use of the server via remote access. Keep several copies of this log digitally and on paper, and update the log history frequently. Beware of any abnormal usage for abnormal durations of time at abnormal times. Computer criminals typically work late at night.

5) If sensitive files are stored on the server, make sure that remote users are only allowed access to files which are pertinent to the work they are doing.

6) If security is a major issue, devices that remote users carry with them which generate specific access numbers which change every 5 minutes based on a complicated algorithm and must be combined with a valid login and password to grant access are very effective, but very expensive.

7) Do not allow high-level access, or "super-user" accounts, even to partners in a firm. If one of these login names and passwords are compromised, anything stored on the server may be accessed, changed, eliminated, or corrupted. In conjunction with this, create usernames which do not fit a commonly used paradigm, such a "ljohnson@xyz.com" for a user named Larry Johnson. Allowing users to create their own user names which correspond to guidelines such as these make figuring out a username through trial-and-error much more complicated; some guy can't just check the yellow pages for an attorney's name and extrapolate their username from that information. If a record of usernames and passwords must be kept, make sure that it is kept on a computer stripped of all means of remote communication (meaning that it is not connected to the network in any way and has no telecommuncations device present, such as a modem.) Make sure that anyone using this workstation must have many different access codes which change frequently so as to avoid low-level employees being able to access all usernames and passwords for all users.

Following these suggestions will ensure that the chances of an unappealing target -- such as the server for a law firm -- being infiltrated are greatly reduced.

Steve

IX. Appendix A

PHILADELPHIA BAR ASSOCIATION
ETHICS OPINION 98-6
(March 1998)

The inquirer presented a series of questions to the Professional Guidance Committee involving two scenarios and his participation in "on-line chat rooms"; and "bulletin boards" on the Internet.

1) The inquirer has filed a class action suit against ABC Corp., for violation of the securities laws. Thereafter, in an existing on-line chat room (which is real time) or on a bulletin board (which is only postings) created to discuss the stock price of ABC Corp., one of the following occurs: (1) someone asks what happened to the stock price of ABC Corp.; (2) someone provides wrong information about the class action (i.e. avers that only mutual funds are included in the class when in truth all purchasers of ABC Corp.'s stock are included); or (3) generally asks what the litigation is all about. Noting that an attorney representing a putative class has some obligation to protect the rights of the putative class he/she seeks to represent, the inquirer asks if there is any difference in his rights/obligations to respond to the comment or question if it comes from a putative class member.

2) When the inquirer has not filed suit but is still in an existing on-line chat room or on a bulletin board previously created to discuss the stock price of ABC Corp. someone asks: (1) if anyone knows why the stock price of ABC Corp. dropped; (2) specifically if ABC Corp. violated the securities law; or (3) if a lawyer is willing to discuss the situation, the inquirer asks if he can respond to any of these items, and whether the answers in either of the scenarios is different should the question or comment be made in an on-line chat room as opposed to simply a bulletin board.

The Internet is a new phenomenon and poses ethical issues that can be further explored only as specific situations arise. Articles and commentaries appear with frequency on the subject of the interaction of ethical rules with emerging communication technologies, in particular, the Internet. A review of them shows the law in this area is in a sorting-out period.

Nevertheless, we do not believe that the inquirer is prohibited from engaging in any of the conduct that he proposes. A thoughtful practitioner can communicate with persons on the Internet as the inquirer intends and steer clear of ethical violations as long as he or she is mindful of the rules. Set out below are several Pennsylvania Rules of Professional Conduct to which the inquirer should pay particular attention.

The inquirer should be mindful that he must be truthful in all comments made. (See Rule 4.1) The inquirer should also be mindful of the fact that he may not communicate about the subject of a representation with a party he knows to be represented by another lawyer in the matter (see Rule 4.2), and may not deal on behalf of a client with a person who is not represented while the inquirer is stating or implying that he or she is disinterested, or give advice to an unrepresented person whose interests are or have a reasonable possibility of being adverse to the inquirer's client (see Rule 4.3). In view of the anonymity of Internet chat rooms and bulletin boards, it is not possible to know whether or not someone with whom one is communicating is represented. A lawyer could perhaps claim that Rule 4.2 does not prohibit any communication because he would not "know" the other to be represented by a lawyer, but Rule 4.3 seems to presume knowledge one way or another. It is fair to say that the persons whose interests might require representation, that is the owners of stock in the ABC company during the relevant time period, must of necessity either be 1) represented by the inquirer; 2) represented by another lawyer; or 3) represented by no one. (Of course, there may be many more persons with whom the inquirer would be communicating who have no real legal interest in the matter because they did not own stock in ABC at all.) Leaving aside those represented by the inquirer, either Rule 4.3 or 4.2 applies to the communication. Accordingly, we believe that a lawyer communicating should be mindful of this issue and take steps to avoid violating Rules 4.3 and 4.2. These steps could include advising all persons with whom he is communicating exactly who he or she is, asking them not to communicate with him if they are represented, and being mindful, given all of the facts of the matter, if any unrepresented persons could have interests that are or might become adverse to his existing clients. (One could argue that merely by being on the Internet and communicating with some persons, one is "communicating" with all those in that same chat room or visiting the same bulletin board. If that is so, a notice not to communicate with the inquirer, if one is in a group with whom communication would be improper, would be too late. The communication will already have taken place. This view seems to the Committee, however, to go too far. It is not unreasonable for the inquirer to expect that his advice would be heeded and if someone wants to listen in, by viewing the inquirer's proper communications with others, that should not render those legitimate communications improper.)

Consideration should be given to the unauthorized practice of law. Although the inquirer is apparently a licensed practitioner in Pennsylvania, there is ambiguity about the ethical rules which would apply to this kind of activity. Some states have taken the position that it is possible that their ethical rules could apply if the Internet "conversation" is taking place with a person located within their boundaries, thereby subjecting lawyers on the Internet to ethical oversight by those states. The inquirer should consider including on any communication a notice that he is a lawyer licensed in Pennsylvania, and he is not purporting to give any kind of advice other than in accordance with that

status and that he is not purporting to practice law in any other jurisdiction. (N.B. We offer no assurance this would be recognized by all states.)

The inquirer should be careful that he does not engage in any activity which constitutes improper solicitation. In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such. (See Rules 7.1, 7.2, 7.3, 7.4.)

The inquirer should also be mindful that in the course of an interaction with any person on the Internet an attorney/client relationship may begin with all that such a relationship implies including creation of potential conflicts of interest (see Rules 1.7 and 1.9) and expectations of confidentiality (see Rule 1.6). Generally speaking, an attorney/client relationship begins when a person would have a reasonable expectation that such a relationship was formed. That is not necessarily the same time a lawyer might think it is formed and consideration should be given as to how to advise persons with whom one is communicating that it is not one's intent and is not the result.