GO FORWARD INTO THE 21ST CENTURY, BUT BE CAREFUL OUT THERE – ETHICS, LOSS PREVENTION AND THE INTERNET

Love it or hate it, the Information Technology Revolution has become an integral part of the 21st Century law office. As a result, we must all consider what happens when the information superhighway intersects with our law practices. One of the questions we should therefore ask ourselves is: How should we be incorporating technology into our practices in order to meet our evolving ethical obligations and effectively manage risk? In this article, we will explore how the cornerstone of the Technology Revolution, the Internet, is impacting lawyers' duties of competent representation, undivided loyalty and confidentiality.

The Internet, Competence And The Duty of Care. The Internet has been defined as a supernetwork of computers that links together individual computer networks located at academic, commercial, government and military sites worldwide. (Ill. State Bar Assn. Opn. No. 96-10.) While no reported decision in California addresses the impact of the Internet on an attorney's duty of care, it is only a matter of time before these issues reach the courts. Moreover, because it is easy to imagine clients asserting claims based upon an attorney's failure to use the Internet to achieve the client's objectives, as well as the manner in which an attorney uses the Internet in representing clients, we will explore both scenarios.

The standard of care governing lawyers has been defined as the duty: (1) "to have that degree of learning and skill ordinarily possessed by reputable attorneys practicing in the same or a similar locality and under similar circumstances;" (2) "to use the care and skill ordinarily exercised in like cases by reputable [attorneys];" and (3) "to use reasonable diligence and . . . best judgment in the exercise of skill and in the application of learning." (BAJI 6.37.)

In further defining the scope of an attorney's standard of care, the California Supreme Court has weighed in with several critical observations. First, the quality of a lawyer's services must be examined by the "indicia of the law which were readily available" to the attorney at the time the legal services were performed. Second, attorneys are expected to discover rules of law, that although not commonly known, may be found by standard research. Third, attorneys have an obligation to undertake reasonable research in an effort to ascertain relevant legal principles and to make informed decisions, even with respect to unsettled areas of the law. *(Smith v. Lewis* (1975) 13 Cal.3d 349, 118 Cal.Rptr. 621.)

In attempting to apply these criteria in the context of the Internet's impact on the practice of law, we need to keep in mind that the determination of whether an attorney has

undertaken reasonable research is generally made by a jury based upon the testimony of attorneys acting as expert witnesses. (BAJI 6.37.4.)

In representing lawyers in hundreds of legal malpractice actions over the past twenty-five years, I have learned a lot about lawyers. And, I can safely say that the "conspiracy of silence" often attributed to the medical profession when its members are asked to testify against each other is not readily found in the legal profession. Rather, in my experience, the "standard of care" in the legal profession can be an elusive concept, totally dependent upon the opinions of a single practitioner with experience in a given area of the law.

I recently spoke at two CLE seminars on the role of technology in the legal profession. Given the broad range of practitioners who attend CLE classes, polling of attorneys at those seminars often provides a reasonable barometer of how an "expert" might define the duty of care. Close to 90% of the attorneys at both seminars indicated that they use the Internet to conduct legal research. With those numbers in mind, imagine a situation where there is no case law within California on a given issue, but there is compelling law from other jurisdictions that favors the client's position. Would a malpractice lawyer have a difficult time finding an expert to testify that it was below the standard of care to fail to find out-of-state authorities readily available on the Internet and present them to the court? Most probably not.

Legal research is not the only arena for Internet use by lawyers. In one interesting case, the Seventh Circuit examined the role of the Internet in the context of evaluating whether a plaintiff had been on sufficient notice of *facts* to start the statute of limitations running on a fraud claim. (*Whirlpool Fin. Corp. v. GN Holdings, Inc.* (7th Cir. 1995) 67 F.3d 605.) Noting the wide availability of governmental and business information in the public domain, the court concluded that the plaintiff was presumed to have information readily available on the Internet. The plaintiff was therefore imputed with constructive knowledge of that information dating back to its earliest concerns about the fraud claim, resulting in a finding that the claim was time barred. Needless to say, if a party to litigation can be held to constructive knowledge of information available on the Internet, it is difficult to imagine that expert witnesses will not hold counsel to similar (or even higher) standards of discovering factual information relevant to a client's representation.

It is common knowledge that a breach of the duty to represent clients competently can give rise to civil liability in the context of a legal malpractice action. However, many lawyers overlook the fact that a failure to provide competent representation can also provide a basis

for discipline by the State Bar. Rule 3-110(A) of the California Rules of Professional Conduct states that a lawyer shall not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rule 3-310(B) then defines competence as applying the (1) diligence, (2) learning and skill, and (3) mental, physical and emotional ability, reasonably necessary for the performance of legal services provided. Thus, it is important for all lawyers to consider the nexus between the Internet and attorney competence to protect themselves not only from legal malpractice claims, but from potential State Bar discipline as well.

While the failure to use the Internet for legal research and factual investigation can create risk for lawyers, unwise use of the Internet can create its own set of risks. One significant area of concern arising from lawyers' use of the Internet involves the potential for inadvertently establishing attorney-client relationships with "cyber clients."

The California Supreme Court has recently stated that the fiduciary relationship between an attorney and a client "extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result." (*People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc.*, (1999) 20 Cal. 4th 1135, 86 Cal.Rptr.2d 816.) The Court went on to conclude that an attorney represents a client (at least for conflict of interest purposes) when he or she "knowingly obtains material confidential information from the client and renders legal advice or services as a result." *Id.* at p. 1148.

Most lawyers have heard of colleagues being sued for providing "advice" at cocktail parties. One case that comes to mind is the attorney who casually advised a "cocktail party client" that she had one year to bring her personal injury action from an accident (that occurred at a notoriously dangerous intersection). Based on this conversation, the "client" waited ten months to hire a personal injury lawyer. Thereafter, upon learning her claim against the public entity responsible for maintaining the intersection was time barred, she sued the cocktail party lawyer for legal malpractice.

In the era of the Internet, the risks presented have moved from the real chat rooms of the cocktail party to the virtual chat rooms of the Internet. In fact, the risks have become even greater as lawyers generally have no idea who they are communicating with over the Internet and therefore are less able to get a read on the potential cyber client. Thus, lawyers must exercise great caution in: (1) conversing with prospective clients in chat rooms; (2) making postings to newsgroups answering questions seeking legal advice; and (3) inviting

and responding to inquiries made over law firm web sites.

Because of the serious ramifications that can flow from the inadvertent establishment of attorney-client relationships, lawyers are best served by never giving casual legal advice to anyone – be it at a cocktail party, over the Internet, in the gym, or anywhere else. In addition, as lawyers we should ensure that we are not rushed into giving advice to cyber clients we do not know, about matters where we do not have the necessary facts, and without running a proper conflict of interest check. Instead, we should treat prospective clients met over the Internet, including people contacting us from law firm web sites, the same way that we treat prospective clients who call on the telephone or walk in the door: (1) begin by running a thorough conflict of interest review before taking any confidential information; (2) evaluate and screen both the client and the matter before taking on the mantle of duties owed to clients; and (3) either enter into a written fee agreement outlining the scope and nature of your representation, or send a non-engagement letter. And remember, while the pace of life on the information highway is high-speed, do not let prospective clients, from the Internet or elsewhere, push you into providing instantaneous legal advice before you have followed an appropriate protocol.

The Internet and Duty of Undivided Loyalty. The duty of loyalty (aka the duty to avoid conflicts of interest) stands at the core of a client's sense of trust and security in his or her lawyer. (*Flatt v. Superior* (1995) 9 Cal.4th 275, 36 Cal.Rptr.2d 537.) Hence, a breach of the duty of loyalty can result in an array of disastrous consequences including disqualification, a malpractice claim, disgorgement of fees, forfeiture of fees, sanctions, and disciplinary action.

The primary risks found at the intersection of the Internet and the duty of loyalty derive from the inadvertent establishment of attorney-client relationships discussed above. Thus, in order to prevent breaches of the duty of loyalty lawyers should use the same standards/protocols in responding to Internet inquiries that are used when prospective clients approach by more traditional means.

The most common way for lawyers to receive contacts from cyber clients is through the "contact us" page of a law firm web site. To avoid potential risks, lawyers should seriously consider adding a disclaimer to their web pages concerning contacts with the firm. The disclaimer should contain clear warnings that: (1) the visitor should not impart confidential information through the web site unless and until the attorney confirms in writing that there are no conflicts of interest and that the attorney requests additional

information; and (2) no attorney-client relationship will be formed absent a written retainer agreement that is signed by the lawyer and the client, and that defines the scope of the representation.

The Internet and The Duty to Maintain Client Confidences. Standing together with the fiduciary duty of undivided loyalty is the distinct but related fiduciary obligation to maintain and preserve client confidences. (*People ex rel Department of Corporations v. Speedee Oil Change Systems, Inc., supra.*) In California, the duty to maintain the confidentiality of client communications and information is codified not only in the Evidence Code provisions pertaining to the attorney-client privilege (sections 950, et seq.) but also in Business and Professions Code section 6068(e) which states that it is the duty of an attorney: "To maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client."

The issue of whether confidential client communications can be transmitted over the Internet has been addressed both by the California legislature and the American Bar Association. In an amendment to Evidence Code section 952, the legislature expressly decreed that an attorney-client communication is not deemed lacking in confidentiality solely because it is transmitted by electronic means. Thus, an attorney who otherwise takes reasonable precautions to protect the confidentiality of electronic communications with a client will be deemed to be communicating confidentially.

In formal opinion 99-413, the Standing Committee on Ethics and Professional Responsibility of the ABA concluded that e-mail communications, including those sent unencrypted over the Internet, are confidential as they pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy. However, as noted in the ABA opinion, lawyers should consider with their clients the particular sensitivity of their communications and the relative security of e-mail vs. other modes of communication depending upon the circumstances. Of course, these considerations should be discussed with clients relative to all modes of communication, not merely e-mail transmitted over the Internet. For example, a lawyer should consult with a client about whether the client is in a position to maintain the confidentiality of faxes sent to the client's workplace, or the nature of messages that should be left on voice mail or with a co-worker.

In addition, if you find yourself communicating with clients via e-mail, make certain

that you maintain a correspondence file that is not susceptible to loss with a computer crash or a software failure. The defense of legal malpractice claims or State Bar disciplinary investigations is dramatically more difficult when the lawyer does not have a complete file. Do not assume you can maintain a "paperless" file unless you have a safe method of backing up all of the information you are sending and receiving over the Internet.

Conclusion. Every lawyer practicing in the 21st Century should evaluate how the information superhighway intersects with their own law practices, with close attention paid to the omnipresent duties of due care, undivided loyalty, and confidentiality. Lawyers who are "technologically challenged" and resist the new technology, need to recognize that a failure to use the Internet can adversely affect their ability to provide cost effective or even competent legal representation. On the other hand, lawyers who have embraced the Internet must take great care to avoid developing a class of disgruntled cyber clients, complaining about misunderstandings concerning the existence or scope of the attorney-client relationship. While the Internet can be a source of risk, it also can be a source of tremendous benefit to lawyers and their clients. For the benefits to outweigh the risks, lawyers should incorporate the Internet into their law practices, but should do so thoughtfully, ensuring that ethical duties and risk management are carefully considered throughout the process. In other words: Go forward into the 21st Century; but be careful out there!

Biography. Steven A. Lewis, a principal of Lewis & Bacon, A Prof. Corp., in Sacramento, has been advising and representing lawyers for more than twenty-five years. He is a frequent speaker and author on legal ethics and risk management, and is also an adjunct professor of law at McGeorge School of Law.