

John Marshall Law School
LL.M. Program in Information Technology

IT 812

**THE PROFESSIONAL RESPONSIBILITY OF
A TECHNOLOGICAL LAW PRACTICE**

Fall 2008
Thursdays, 6:00 pm to 9:00 pm
September 4, 11, 18, 25
October 9, 16, 23, 30
November 6, 20

SYLLABUS

Purpose of the Course: This course explores emerging developments in the use of the Internet as a vehicle to facilitate, advance and deliver legal services in ways designed to maximize the opportunities and potential of the lawyer, and examines the lawyer's obligations, particularly to the rules of professional responsibility, in the use of these methods. The course examines:

- Opportunities to redefine the delivery of legal services within ethical constraints;
- The application of policies that advance core values to technological innovations in the delivery of legal services;
- Difficulties resulting from the contrasting fast pace of technological capabilities and the deliberate pace of policy-making; and
- The relationship between professional responsibility and moral values in a technological law practice.

Students will study issues that emerge from work of the American Bar Association Standing Committee on the Delivery of Legal Services, as that committee conducts a series of hearings on the delivery of legal services through technology. The hearings are raising critical policy issues that need to be addressed by various stakeholders. Students will have an opportunity to consider the input from the hearings by listening to the audio presentations, examine existing rules and policies and craft new policy recommendations designed to address the issues. Student should consult the web site for the hearings, at <http://www.abanet.org/legalservices/delivery/techhearings.html>.

Class 1: *Real world ethics in a cyber-based practice*. A course overview examining the application of pre-existing ethics rules to technology-based practices. The discussion examines the functions of law and how those functions are delivered outside of and within cyberspace. The discussion also explores Susskind's grid applying technology to legal services.

Suggested readings: Current Developments 2003-2004: Virtual Ethics for a New Age:
The Internet and the Ethical Lawyer, 17 Geo. J. Legal

Ethics 637 (Summer 2004)
Note, Kristine M. Moriarty, 39 Idaho L. Rev. 431 (2003)
[Cyberlawyers: Impact of the Internet on the Law Practice and
Legal Ethics](#), McCauley
[Regulation Cyberspace Won't be Easy](#), Beck
Transforming the Law, Susskind

Class 2: Part 1: *The application of the rules of professional responsibility*. When do we create the attorney-client relationship in cyberspace? Are alternatives to regulation effective?

Assigned readings: [ABA Model Rules of Professional Conduct](#) – Please scan the rules & comments
[Internet Sites Offer Their Visitors Real Sense of Place](#)
[The New Civic Virtue of the Net](#), Post and Johnson

Assigned listening: Bill Tanner/AJ Travares
IV Ashton

Suggested readings: [Attorney-Client Relationship in Cyberspace](#): The Peril and the Promise
[ABA Best Practice Guidelines](#)
[Dispute Resolution in Cyberspace](#): Engineering a Virtual Magistrate System, Post

Part 2: *Jurisdiction and the Unauthorized Practice of Law*. Can an ajurisdictional medium be regulated through a state structure?

Assigned readings: [Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County](#)
[ABA Model Rule 8.5](#)

Assigned listening: Steve Mortinger
Jeff Aresty

Suggested readings: Pennsylvania Inquiry 98-85, Lawyers' Web Pages: Disciplinary Authority, Choice of Law and Jurisdiction (handout)
Iowa Opinion 96-14
[Jurisdiction in a World Without Borders](#), Burke

Class 3: *Unbundled legal services, casual advice, competence and the scope of representation*. What are the professional obligations associated with the use of technology to provide less than full representation?

Assigned readings: [MR 1.1, 1.2, with comments](#), and MR 1.18 and comment 5
[Barton v. US District Court](#)
San Diego Ethics Opinion 2006-1

Assigned websites

Assigned listening: Richard Zorza
Nerino Petra

Suggested readings: [To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients](#)
[Scriveners in Cyberspace: Online Document Preparation And the Unauthorized Practice of Law](#)
[The Use of Internet Website Disclaimers by Attorneys,](#)

Classes 4: Part 1: *Confidentiality and Privacy*: Expectations and Realities. Discussion issues include online client screening and intake, encryption of client communications, metadata, misdirected communications, intra-firm monitoring and the role of disclaimers.

Assigned readings: [MR 1.6 and its comment](#)
[MR 1.18, comment and report's notes](#)
[MR 4.4 and its comment](#)
[ABA Formal Opinion 99-413, Protecting the Confidentiality Of Unencrypted E-mail](#)
[The Transmission and Receipt of Invisible Confidential Information](#)
[Arizona Opinion 02-04](#)
[New York State Opinion 749](#)
Assigned website disclaimers

Suggested readings: [When E-Mail Messages Come With a Tail of Legalese](#)
[Computer Forensics Lab Plumbs the Depths of E-mail Evidence](#)
[Nevada Opinion 33](#)
[Arizona Opinion 05-04](#)

Part 2: *Conflicts of Interest in Cyberspace*: On the Internet, No One Knows You're a Dog

Assigned readings: [MR 1.7 through 1.10 and 1.14, with comments](#)
[LA County Bar Opinion 514](#)
Assigned websites

Required listening: Ken Penokie

Class 5: Part 1: *The Virtual Law Firm, MDP's, VC's and Fees*. Discussion issues include the professional independence of a lawyer, fee-splitting and the resulting limitations on mechanisms to deliver legal services.

Assigned readings: [MR 1.5, 5.5, 5.7 and 7.5, with comments](#)
[UPL Committee v. Parsons](#)
In Re Reynoso (handout)
Assigned websites

Suggested readings: [State MDP Reports](#)

Part 2: *Other Fee Issues*: Examines the use of technology-based alternatives for the delivery of legal services, including database management, document assembly and expert systems, and the dimensions of compensations.

Assigned readings: [Automated Legal Documents](#)
A2J

Assigned listening: Brian Donnelly

Class 6: Part 1: *Client Development*: The doctrine of Commercial Speech

- The origin of the constitutional authority to market legal services
- Definition of Commercial Speech
- Application of Commercial Speech

Assigned reading: *Texans Against Censorship v. State Bar of Texas*, 888 F. Supp. 1328 (ED Texas 1995)

[Stern v. Bluestone](#)

[Nike v. Kasky: The Definition of Commercial Speech](#), pages 70-72

Part 2: State Rules Governing Technology – The two tracks taken

- Application of current rules to current technologies
- Adoption of rules that specifically address technologies

Assigned reading: [In re Canter](#)

ABA Model Rule 7.3

[Florida Rule of Professional Conduct 4-7.6](#)

[New York Code of Professional Responsibility](#), Sec. 1200.1;

1200.6(f) and (g); 1200.7(a), (e) and (f); 1200.8(c) and (h)

Part 3: The Internet-ization of Client Development Tools

- Online Directories
- Online Brochures
- Issues of misleading communications, disclaimers, linkage and imputed obligations

Assigned reading: Review of web sites to be assigned

ABA Model Rule 7.1

State ethics rules to be assigned

Class 7 Part 1 *Client Development*: Issues of law firm web sites

- Client Development sites: First generation sites, Next gen sites, geographic boundaries, specific state limitations
- Online intake; creation of the attorney/client relationship; conflicts of interest
- Sites to influence juries
- Consumer complaint sites – Feeding class action
- Networking sites – Collective thought
- Harvesting data and follow-up
- Issues of search engine optimization

Assigned reading: Review of web sites to be assigned
 State ethics rules to be assigned
 Model Rules 1.6, 1.7 and 7.3
[Barton v. US District Court](#)

Part 2: Technology-dependent Client Development Tools – Commercial Speech Issues

- Blogs: Content; Filing/Screening obligations
- Email: Content; CAN SPAM Act and state counter-parts

Assigned reading: Review of Blogs to be assigned
 Florida, Texas, Kentucky and New York ethics rules to be assigned
 CAN SPAM Act

Part 3: Technology-dependent Client Development Tools and the Flow of Money

- Matching Services: Advertisement or Referral Service
- Pay-per-click: Leads or cases

Assigned reading: Review of matching service web sites to be assigned
 ABA Model Rule 7.1 and 7.2
[FTC Opinion Letter](#)
[Texas State Bar Opinion 573](#)
[South Carolina Informal Advisory Opinion 01-03](#)

Assigned listening: Kathleen Brockel
 Terry Carter

Classes 8: Offering Legal Services in Neverland – the parallel universe of Virtual Worlds – Second Life and Linden dollars

Assigned reading: [Second Life Wikipedia entry](#)
[The Great Debate: Law in the Virtual World](#)

Class 9: Emerging Issues from the ABA Hearings on the Delivery of Legal Services through Technology.

Assigned Listening: TBA

Class 10: *Presentations*. Students will have an opportunity to present their term papers for discussion.

Instructor

William Hornsby
whornsby@staff.abanet.org
whornsby2@comcast.net
Tele: 312/988-5761
Office hours: By appointment

Course Overview

This course examines emerging developments in the use of the Internet as a vehicle to advance the practice of law and maximize the opportunities of lawyers in the delivery of their services, while exploring the issues that pertain to the ethics, professional responsibility and moral values as lawyers use technology to advance their practices. Students are expected to advance the discussion through their participation in class. Several reading assignments are set out which are designed to give you background and insight into the issues to be discussed in each class. A few of these readings are lengthy law review articles, but most are listserv notes, web sites and on-line newspaper-style articles. Most of the materials are online and readily accessible. If you come across any cold links, please report them to me ASAP. Some readings are available only in hard copy and will be passed out prior to the class in which they are discussed.

We will be making frequent reference to the ABA Model Rules of Professional Responsibility. You should have a set of the rules and bring them to class each week.

Grading

Participation: Your class participation will constitute 50 percent of your final grade. Participation involves meaningful contribution and advancement of the discussion. Although you may not participate without attending, you should not assume that attendance is in and of itself satisfactory participation.

Paper: A final paper will account for 50 percent of your grade. It should reflect good research, be current and, above all, advance the scholarship of the subject matter. In other words, you should boldly go where no one has gone before. You will have an opportunity to weigh in on issues being discussed by the ABA and provide insights that will advance that dialogue. Your paper does not need to be lengthy, but should be creative.

The last class period is dedicated to presentations of papers.