

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

IT 812

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

Fall 2010
Wednesdays, 6:00 pm to 9:00 pm
Sept 15, 22, 29
Oct 13; Saturday, Oct 16; Oct 20
Nov 3, 10, 17
Dec 1

SYLLABUS

Purpose of the Course: Technology and legal ethics have an uneasy relationship. While technology moves exponentially, policy-making moves incrementally. Consequently, policies to govern a lawyer's use of technology always lag. This course explores emerging Internet developments, including Web 2.0, post-Web 2.0 and virtual realities, as vehicles 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:

- Thoughts on the future of legal services and the impact of regulations on those changes;
- The application of policies that advance core values to technological innovations in the delivery of legal services;
- Difficulties resulting from the contrasting dynamics of technological capabilities and the deliberate pace of policy-making; and
- The relationship between professional responsibility and moral values in a technological law practice.

This semester, the course is being taught at the same time the American Bar Association is undertaking a project known as Ethics 20/20. Students will be assigned a research project related to the Ethics 20/20 agenda and will have an opportunity to address emerging issues and craft policy solutions that pertain to this work.

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.
- Examination of the functions of law and how those functions are delivered outside of and within cyberspace.
- Exploration of Richard Susskind's grid applying technology to legal services

Assigned readings: [ABA Model Rules of Professional Conduct](#) – Please scan the rules & comments

[ABA Ethics 20/20](#)

[The New Civic Virtue of the Net](#), Post and Johnson

Suggested readings: The End of Lawyers? Richard Susskind, or [The Susskind Extracts](#)
Current Developments 2003-2004: Virtual Ethics for a New Age:
The Internet and the Ethical Lawyer, 17 Geo. J. Legal
Ethics 637 (Summer 2004)

[Dispute Resolution in Cyberspace](#): Engineering a Virtual
Magistrate System, Post

[ABA Best Practice Guidelines](#)

[Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board](#)

Class 2: Part 1: *The application of the rules of professional responsibility.*

- Creating the attorney-client relationship in cyberspace
- Duties to prospective clients
- The effectiveness of alternatives to regulation.

Assigned readings: [ABA Model Rule 1.18 with the comment](#) – note particularly
Comment 5

[Massachusetts Opinion 2007-1](#)

[Barton v. US District Court](#)

[San Diego Ethics Opinion 2006-1](#)

[A2J](#)

[LawGuru.com](#)

[Online Dispute Resolution Models](#)

Web sites as assigned

Suggested readings: [Attorney-Client Relationship in Cyberspace](#): The Peril and the
Promise

Part 2: *Jurisdiction and the Unauthorized Practice of Law.*

- Regulating an a jurisdictional medium through a state structure
- Applying jurisdictional limitations to Web 2.0 and Web Squared
- Risks of social networking

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

[ABA Model Rule 8.5](#)

[Web Squared: Web 2.0 Five Years On](#)

Suggested readings: [The Ethical Boundaries of Selling Legal Services in Cyberspace](#)
Pennsylvania Inquiry 98-85, Lawyers' Web Pages: Disciplinary
Authority, Choice of Law and Jurisdiction (handout)
Iowa Opinion 96-14

Backer, Note, *Choice of Law in Online Legal Ethics: Creating A Vague Standard for Attorney Advertising on the Internet*, 70 Fordham L. Rev. 2409 (2002)

Class 3: Part 1: *Unbundled legal services, casual advice, and competence*

- Overview of professional obligations associated with the use of technology to provide less than full representation
- Participating in advice sites
- Online document preparation
- Advice within social networking

Assigned readings: [MR 1.1, 1.2, and 1.3, with comments](#)
Nichols v. Keller, 19 Cal.Rptr.2d 601 (1993)
Assigned websites

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

Part 2: *Confidentiality and Privacy*:

- Online client screening and intake
- Encryption of client communications
- Metadata and misdirected communications
- Intra-firm monitoring, social networking 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
[Illinois State Bar Assoc. Advisory Opinion 96-10](#) (handout)
[ABA Formal Opinion 92-368](#), Misdirected Communications
[Arizona Opinion 02-04](#)
[New York State Opinion 749](#)
Assigned website disclaimers

Suggested readings: [Nevada Opinion 33](#)
[Arizona Opinion 05-04](#)
Maine Opinion 194 (12-11-07)
Maine Opinion 196 (11-21-08)

NYS Bar Opinion 749 (2001)
NYS Bar Opinion 782 (2004)

Part 3: *Conflicts of Interest in Cyberspace*

- Anonymity

Assigned readings: [MR 1.7 through 1.10 and 1.14, with comments](#)
[MR 6.5](#)
[LA County Bar Opinion 514](#)
[ABA Technology Hearings – Penokie presentation](#)

Class 4: Part 1: *The Virtual Law Firm and the flow of money*

- Professional independence of a lawyer
- Fee-splitting
- Law-related/ancillary businesses

Assigned readings: [MR 1.5, 5.5, 5.7 and 7.5, with comments](#)
[Kimbrow and Granat presentations to ABA Ethics 20/20](#)
[Axiomlaw.com](#)
Assigned websites

Suggested readings: Practicing Law Online
[<http://www.vlotech.com/ebooks/PracticingLawOnline.pdf>]

Part 2: *Other Fee Issues*

- Commoditization

Assigned readings: [UPL Committee v. Parsons](#)
[In Re Reynoso](#)
[Automated Legal Documents](#)

Class 5: Attendance at hearings of Ethics 20/20

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 [MR 7.3](#)
[Florida Rule of Professional Conduct 4-7.6](#)
[New York Rules of Professional Conduct 7.2\(f\), \(g\), 7.3\(a\) & \(f\)](#)

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
[MR 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](#)

Suggested readings: J. Clayton Athey, *The Ethics of Attorney Websites: Updating the Model Rules to Better Deal with Emerging Technologies*, 13 Geo. J. Legal Ethics 505 (2000)

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

- Ratings, rankings and consumer feedback
- Blogs: Content; Filing/Screening obligations
- Email: Content; CAN SPAM Act and state counter-parts

Assigned reading: [South Carolina Advisory Opinion 09-10](#)
Review of Blogs to be assigned
Florida, Texas, Kentucky and New York ethics rules to be assigned
CAN SPAM Act

Suggesting reading: Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 Loyola U. Chi. L. Rev. 221 (2009)
Helen W. Gunnarsson, *Blogging and Legal Ethics*, 94 Ill. B. J. 225 (2006)
Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising And if so, How Should it be Regulated*, 20 Geo J. Legal Ethics 669 (2007)

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

- Matching Services and Group Advertising Models: Advertisement or Referral Service?
- Pay-per-click: Leads or cases

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

Suggested reading: Arizona Opinion 99-06
Arizona Opinion 05-08
Iowa Opinion 00-07
NYS Bar Opinion 799 (2006)

Class 8: Special features of Web Squared and Virtual Realities

- Practicing law in online communities
- Practicing law in virtual realities

Assigned reading: [ABA Technology hearings: Mortinger presentation](#)
[ABA Technology hearings: Duranske presentation](#)
[Second Life Wikipedia entry](#)
[The Great Debate: Law in the Virtual World](#)

Suggested reading: Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 Alb. L. Rev. 113 (2009)
Susan Corts Hill, *Living in a Virtual World: Ethical Considerations for Attorneys Recruiting New Clients in Online Virtual Communities*, 21 Geo. J. Legal Ethics (2008)

Classes 9 and 10: *Presentations*. Students will lead discussions on their research topics.

Instructor

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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. Most of the materials are online and readily accessible. If you come across any cold links, please report them to me ASAP.

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.

Evaluations

Participation: Your class participation will constitute 60 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 40 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.