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background, possess excellent communication skills, and have a minimum of ten years of litigation experience. Dispute resolution skills are a plus. The position offers a competitive compensation package with benefits. Applicants should forward a confidential resume and minimum salary request by September 1, 2002, to Lawyers Mutual Insurance Company of Kentucky, 455 S. Fourth Ave., Suite 990, Louisville, KY 40202-9705. For additional information about our company, visit our web site at www.lmick.com.

Cyberspace, Malpractice, And You

By Ruth H. Baxter, Crawford & Baxter, P.S.C., Member, Board of Directors, Lawyers Mutual Insurance Company of Kentucky

Lawyers are turning to cyberspace in increasing numbers not only for the routine operation of their law offices through e-mail, legal research, video conferencing and electronic filings with the courts, but also for the marketing of their practices through web sites, participation in chat rooms and electronic client newsletters. These cyber-activities raise questions about exposure for potential malpractice claims. At the same time, ethics issues arise when the Internet is used as an advertising and marketing tool to solicit potential clients.

Cyberlaw Liability Concerns

In plain terms, the issues of any legal malpractice case are: 1) Was there an attorney-client relationship? 2) Was an error made by the attorney or law firm? and, 3) Was the client damaged as a result of the error? Cyberspace muddies the waters of whether an attorney-client relationship was established. Does visiting a lawyer's web site or contacting an attorney via e-mail for information about a legal problem create such a legal relationship? Does an attorney who sends electronic newsletters to potential clients, or participates in chat rooms and discussion groups about legal issues inadvertently create an attorney-client relationship? While no reported decisions on these areas of liability exist, more than likely the courts will follow the rule of thumb that if it "looks, tastes and smells like legal advice," then you have a client!

But do you really know who the "client" is that has come to you via the Internet? With the ability to disguise an

inquirer's true identity, a lawyer responding to e-mail can be blindsided by potential conflicts of interest. Can you confirm the identity of this "new client" to your satisfaction so that you can check for conflicts within the law firm?

And where does this "client" come from? With the capabilities for an Internet user to be located outside of the jurisdiction for which an attorney is admitted to practice law, we must ask ourselves if we're giving incorrect legal advice based upon the law applicable to where the person lives or was injured.

Researching the law through informational services such as Westlaw or Lexis has become popular because of the speed and alleged accuracy for legal decisions. But if an attorney relies upon these sites and the information is outdated, inaccurate or in error, then an attorney could be liable for errors or omissions in his practice.

Electronic filing is also being adopted by both state and federal court systems. If the attorney or a staff member files a document incorrectly, or it is not docketed with the proper court due to computer error, then the attorney will remain liable for the error.

Minimizing Your Exposure To Cyberliability

Lawyers can minimize exposure to cyberliability by following a few practical suggestions in their internal practices:

❑ **Review your web site** to confirm that bold and fully-explanatory

disclaimers announce that no attorney-client relationship is being created through a visit to the Web site. Current technology allows users to confirm that understanding once the site is accessed.

❑ **Establish policies and procedures** to ensure confidentiality within your office for electronic communications, and to assign responsibility for an individual within the law firm to respond to all inquiries generated by the Web site to be consistent in your responses.

❑ **Discourage participation in chat rooms and discussion groups**, and limit responses to generic statements about the law, avoiding specifics about a particular problem or complaint.

❑ **Avoid accepting clients whose identity you cannot confirm** via a source independent from the Internet. Make sure your law firm database will allow you to identify all potential sources of conflicts.

❑ **Limit your responses** to Internet inquiries by stating that all information disseminated is in accordance with the law of the jurisdiction in which you practice.

❑ **Review your "techno-research" abilities** to confirm that you understand fully the operation of your legal research sites. Stay current in methods of legal research by attending CLE programs on the subject. Review your contracts with the research sites as to what liability, if any, the site has for inaccurate or outdated information, and ask the company what steps it takes to ensure errors do not occur.

✔ **Train yourself and your staff** to know how to electronically file in your court system, and what safeguards can be imposed to assure that the filing is correct and accurate. Establish a procedure to “double check” a filing, and document in writing what steps were taken with each filing to ensure accuracy.

Ethics Issues In Cyberspace

Since the 1977 U.S. Supreme Court’s *Bates* decision opened the door for lawyers to advertise in the marketplace, the use of “lawyer advertising” has exploded. From traditional yellow page advertisements, lawyers have moved to radio and television media, commercial billboards, and now Internet-based marketing tools. E-mails, electronic newsletters, participation in discussion groups and chat rooms are now examples of the “cutting edge” use of technology to promote a lawyer’s practice.

But with the use of the Internet as a marketing tool, come ethical issues about the role of professional responsibilities in these communications. State bar associations and supreme courts are continually re-examining existing ethical standards with an eye toward their application to developing technology.

Kentucky Supreme Court rules are clear that the use of the Internet for soliciting clients falls within the definition of “advertising” subject to its regulation. Written and recorded communications through the web are no different than

published legal directories, newspaper ads, and radio or television promotions specifically discussed in the rules. While law firm home pages and web sites may present a more passive contact between an attorney and a potential client, e-mail, chat rooms and discussion group participation are more akin to “direct contacts with prospective clients” subject to SCR 3.130 (7.09). Similarly, the content of the materials transmitted through the Internet are subject to the prohibitions about making false, deceptive or misleading communications, or creating unjustified expectations about the results you can achieve as a lawyer in your search for new clientele.

Lawyers can reduce potential ethical problems and protect themselves from possible disciplinary action by taking the following steps:

✔ **Read the Kentucky Supreme Court Rules on lawyer advertising**, as recently revised in 2001, to confirm your understanding of the rules and their use in your current marketing efforts.

✔ **Review your marketing materials** to assure that you have complied with these rules. Make sure you have obtained prior approval from the Attorneys’ Advertising Commission for the publication of these materials, or that you have filed “simultaneous” with publication as required by the Rules.

✔ **Submit any questionable Internet-based marketing devices to the KBA Attorneys’ Advertising Commission** for assurance that you are in compliance with the Rules before you utilize them.

✔ **Avoid making statements about your qualifications**, abilities and “successes” that cannot be factually substantiated.

✔ **Consult state rules** for every jurisdiction in which you are advertising as rules vary from one jurisdiction to another.

✔ **Keep abreast of ethical opinions** about the application of current advertising rules to emerging technology. Read *Marketing and Legal Ethics* by William E. Hornsby, Jr., 3rd Edition, published by the Law Practice Management Section of the American Bar Association for an excellent discussion of ethical trends in this area.

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