

PRACTICING LAW OVER THE INTERNET:  
SOMETIMES PRACTICE DOESN'T MAKE PERFECT

Joel Michael Schwarz\*

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\* This article is based upon a speech given by Mr. Schwarz to the New York State Association of Disciplinary Attorneys on May 18, 2000, while he served as an Assistant Attorney General in the New York State Attorney General's Internet Bureau and Special Counsel for Internet Matters for the Attorney General's Investor Protection & Securities Bureau. Mr. Schwarz is currently Counsel on E-Commerce for MetLife in New York City.

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## I. INTRODUCTION

Although courts have been slow to adapt to advances in technology, the legal profession as a whole has not. Indeed, the rapid expansion of the Internet has resulted in an explosion of legal “dot-coms.”<sup>1</sup> While the growth of the Internet has made available various legal resources to the lay-person, the pervasiveness of law-related websites and the interaction between lawyers and consumers on the Internet lends itself to numerous concerns that the legal community must address. For example:

When an individual communicates with a lawyer over the Internet, at what point does the communication constitute the practice of law?

Are attorneys who communicate electronically with persons in jurisdictions in which they are not admitted engaging in the unauthorized practice of law?

How do we regulate attorneys who advertise, solicit business, or provide legal advice via a medium that, unlike radio or television, is not restricted to a particular jurisdiction?

On the precipice of the 21st century, this Article aims to provide a road map through the jurisdictional quagmire associated with determining whether a particular lawyer’s activities on the Internet constitute the unauthorized practice of law, and, if so, where that attorney may be prosecuted. In conducting this analysis, this Article examines a variety of Internet venues in which lawyers participate — websites, e-mail, chat rooms, forums, bulletin boards, listservs, and newsgroups — against the backdrop of statutes and case law that define the practice of law and regulate unauthorized practice in traditional settings.

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1. Although the past year has witnessed the demise of many “dot-coms,” there are still numerous legal bulletin boards and websites offering legal information, guidance, and advice to consumers. *See, e.g.*, Law Office Live, at <http://www.lawofficelive.com> (last visited June 4, 2001); FreeAdvice.com, at <http://www.freeadvice.com> (last visited June 4, 2001); Nolo: Law for All, at <http://www.nolo.com> (last visited June 4, 2001).



Part II of this Article begins by reviewing traditional concepts of legal practice, tracing the activities that have been deemed, pursuant to statute or case law, to constitute the practice of law in various jurisdictions. Part II then goes on to examine traditional attempts by various jurisdictions to regulate the unauthorized practice of law within their borders.

Part III explores the different methods through which an attorney may practice law in the virtual world. First, utilizing the developing body of Internet jurisdictional case law, this Article examines whether the use of a website or spam e-mail to advertise an attorney's services might be deemed soliciting within a given state, which under some statutes is prosecutable as the unauthorized practice of law. The Article next proceeds to probe the unique issues that can arise from an attorney's participation in an Internet chat room. Included in this discussion is the application of the more traditional distinction drawn between the provision of general legal information and specific legal advice. Next, this Article attempts to place the physical location of an unauthorized practice of law violation in the online world, utilizing case law and statutes pertaining to the use of computer servers as a basis for jurisdiction.

The focus then shifts to an examination of attorney participation in moderated discussion forums and the liabilities that might arise by virtue of the third party moderator's interaction with the attorney. A discussion of electronic bulletin board, listserv, and newsgroup postings by attorneys follows. After reviewing the scant ethics opinions on this issue, the Article then analyzes the time at which electronically posted legal advice may be deemed to have been given.

The Article then continues by assessing the potential liability of an entity that operates a bulletin board, listserv, or newsgroup on which legal advice has been posted. Reviewing the Communications Decency Act and several cases that have upheld the Act's provision of immunity to Internet Service Providers ("ISPs"), the Article concludes that such immunity would likely not be available to a law firm or other entity operating a site through which specific legal advice is imparted.

Having assessed the various methods through which an attorney may provide legal advice in the online world, the Article then examines the practice of law in the context of legal self-help software designed to provide legal advice through the use of pre-programmed logic. Finally, the Article takes a brief look at the use of e-mail as a means of providing legal advice to individuals in states in which the attorney may not necessarily be admitted.

While the Internet may require state ethics regulators to update some ethics principles, this Article concludes that by thinking "out-of-

the-box," many of our current ethical tenets can and should continue to foster healthy online growth of the legal profession while maintaining necessary client protections.

## II. TRADITIONAL CONCEPTS OF PRACTICING LAW

### *A. Defining the Practice of Law*

Determining whether one is engaged in the practice of law in the real or virtual world is deceptively complicated because it is largely dependent upon each state's own statutes and case law. Moreover, due to an apparent legislative bias towards drafting broadly worded statutes, and because few cases are brought on this issue, guidance is limited. Instead, in a number of states the determination of whether an act constitutes the practice of law is made on a case by case factual analysis.

At the outset, it seems obvious that appearing in court as the representative of another implicates the practice of law.<sup>2</sup> However, as numerous courts have noted, the practice of law involves a much broader spectrum of activities. It is these other activities which have direct implications for attorneys who conduct business over the Internet. In *Gemayel v. Seaman*,<sup>3</sup> the New York Court of Appeals held that the practice of law includes the rendering of legal advice. Additionally, the practice of law in New York has been found to encompass the preparation of legal instruments and contracts by which legal rights are secured,<sup>4</sup> the holding out of oneself as engaged in the preparation of legal instruments, and the advising of people with regard to the execution of those instruments.<sup>5</sup>

Similarly under Texas law, the practice of law has been defined as

the preparation of a pleading or other document incident to an action or special proceeding . . . as well as service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of

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2. See, e.g., *Boykin v. Hopkins*, 162 S.E. 796, 798-801 (Ga. 1932); *State Bar of California v. Super. Ct. of Los Angeles County*, 278 P. 432, 436-37 (Cal. 1929).

3. 72 N.Y.2d 701 (1988).

4. *People v. Alfani*, 125 N.E. 671, 673 (N.Y. 1919), *rev'd*, *People v. Alfani*, 174 N.Y.S. 527 (N.Y. App. Div. 1919).

5. *People v. Title Guarantee & Trust Co.*, 125 N.E. 666, 668 (N.Y. 1919), *reh'g denied*, 127 N.E. 919 (N.Y. 1920).



which under the facts and conclusions involved must be carefully determined.<sup>6</sup>

As qualified by the statute, however, the definition is not exclusive and “does not deprive the judicial branch of the power and authority . . . to determine whether other services and acts not enumerated may constitute the practice of law.”<sup>7</sup> Toward this end, Texas case law has established that any act which requires “the exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument,” constitutes the practice of law.<sup>8</sup> In extending this rationale, another Texas case held that even advising a person as to whether or not to file a form requires legal skill and knowledge which would constitute the practice of law.<sup>9</sup>

In *Boykin v. Hopkins*,<sup>10</sup> the Georgia Supreme Court concluded that the practice of law is not limited merely to practice in the state’s courts, but includes “the preparation of legal instruments of all kinds whereby a legal right is secured, the rendering of opinions, . . . the giving of legal advice, and any action taken for others in any matter connected with the law.”<sup>11</sup> Tracking the language of this 1932 court decision, the Georgia legislature later codified these guidelines into a statute.<sup>12</sup>

In recognition of the growing use of the Internet by attorneys, and the confusion pertaining to what might constitute the practice of law in Georgia, a suggested amendment to Georgia’s “practice of law” statute was as follows:

A person furnishes legal advice within the meaning of O.C.G.A. § 15-19-51 if the person provides legal

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6. TEX. GOV’T CODE ANN., § 81.101(a) (1999).

7. TEX. GOV’T CODE ANN. § 81.101(b) (1999).

8. *Palmer v. Unauthorized Practice of Law Comm. of State Bar of Tex.*, 438 S.W.2d 374, 377 (Tex. Civ. App. 1969) (quoting *Cape May County Bar Ass’n v. Ludlam*, 211 A.2d 780, 782 (N.J. 1965)).

9. *Unauthorized Practice of Law Comm. of State Bar of Tex. v. Cortez*, 692 S.W.2d 47, 49 (Tex. 1985).

10. *Boykin v. Hopkins*, 162 S.E. 796 (Ga. 1932).

11. *Id.* at 800.

12. The practice of law in this state is defined as: . . .

(3) The preparation of legal instruments of all kinds whereby a legal right is secured;

(4) The rendering of opinions as to the validity or invalidity of titles to real or personal property;

(5) The giving of any legal advice; and

(6) Any action taken for others in any matter connected with the law.

GA. CODE ANN. § 15-19-50 (2000).

information to a resident of Georgia about an issue generally covered at least in part by state law unless it is clearly stated that the information may not apply to Georgia, and no course of action is recommended other than contacting a Georgia licensed attorney. It is the responsibility of the person giving advice to ascertain the residence of the person receiving the advice . . . .<sup>13</sup>

By contrast, the California legislature has not adopted an official definition of the "practice of law," choosing instead to leave that work to the courts. This was first accomplished in a 1929 decision, *State Bar of California v. Superior Court of Los Angeles County*,<sup>14</sup> wherein the California Supreme Court adopted the definition of the practice of law established in an Indiana case:

As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter pending therein, . . . [b]ut in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.<sup>15</sup>

A recent, and somewhat controversial, California case helped to shed more light on what might constitute the practice of law within California. In *Birbrower v. Superior Court of Santa Clara County*,<sup>16</sup> a California client that had retained the services of a New York law firm refused to pay the firm's fees, alleging that the firm had engaged in the unauthorized practice of law in California. In assessing this allegation, the *Birbrower* court attempted to determine what would constitute the practice of law under California law. Answering this query, the court stated:

In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. . . . *The primary inquiry is whether the*

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13. Lori Christman et al., Ethical Considerations of Legal Netvertising, Computer Law Section of the State Bar of Georgia, at <http://www.computerbar.org/netethics/brandy.htm> (Aug. 1995) (unpublished student paper).

14. 278 P. 432, 437 (Cal. 1929).

15. *Id.* at 437 (quoting *Eley v. Miller*, 34 N.E. 836, 837 (Ind. Ct. App. 1893)).

16. 949 P.2d 1 (Cal. 1998).



*unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.*<sup>17</sup>

In essence, the demarcating line for practicing law in California would appear to be rendering legal advice, guidance, or services to a California client, not on general matters, but rather on matters specific to that jurisdiction. As the *Birbrower* court explained, physical presence in the state is *not* necessary to practice law in the state: “[f]or example, one may practice law in the state . . . although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.”<sup>18</sup> The court did, however, “reject the notion that a person *automatically* practices law ‘in California’ whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, e-mail, or satellite.”<sup>19</sup>

It is interesting to observe that the *Birbrower* court qualified its ruling by recognizing the need to “accommodate the multi-state nature of law practice.”<sup>20</sup> The court noted that strict adherence to a rule barring out-of-state attorneys from representing in-state residents on in-state matters might be against the public interest when those matters are inseparably intertwined with multi-state transactions.<sup>21</sup> Such a concern likely would not affect the assessment of the practice of law in the Internet context, however, because the offering of legal advice online will generally not involve the handling of ongoing multi-state matters, but rather the provision of legal advice to unknown clients on an ad hoc basis.<sup>22</sup>

### *B. Regulating the Unauthorized Practice of Law*

It is axiomatic that the practice of law in a particular jurisdiction is restricted to those attorneys who are admitted to practice by state licensure or *pro hac vice*. That having been said, the conduct of attorneys within the jurisdiction is governed by the application of ethical standards. In states that have adopted the Model Rules of Professional Conduct, Rule 5.5 cautions that “[a] lawyer shall not . . . practice law in

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17. *Id.* at 5 (emphasis added).

18. *Id.* at 5–6.

19. *Id.* at 6.

20. *Id.* at 10.

21. *Id.*

22. See *infra* Part III.

a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”<sup>23</sup> Similarly, in states governed by the Model Code of Professional Responsibility, Disciplinary Rule (“DR”) 3-101(b) warns that “[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.”<sup>24</sup>

Applying the precepts discussed earlier, if an Iowa attorney not admitted in New York were to go online and advise a New York resident how to execute a real property deed in New York, that attorney could conceivably be charged by New York with unauthorized practice of law because New York has defined the practice of law to include “advising people with regard to the execution of . . . [legal] instruments.”<sup>25</sup> That attorney could also be in violation of Iowa’s ethics rules, which prohibit engaging in conduct that violates the regulation of the legal profession in another jurisdiction.<sup>26</sup> Similarly, if a Kansas lawyer not admitted in Texas were to go online and discuss the drafting of a document with a Texas resident, or even recommend the proper form to be used by that resident, under Texas law he could potentially be accused of the unauthorized practice of law because Texas has defined the practice of law to include “the exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument.”<sup>27</sup> Moreover, that attorney would concurrently be infracting Kansas’ prohibition against engaging in conduct that violates the regulation of the legal profession in another jurisdiction.<sup>28</sup>

Such risks are not, however, confined solely to activities that have traditionally been defined by a state to constitute the practice of law. Even services that non-attorneys are permitted to perform without licensure potentially become problematic when undertaken by an attorney.

Responding to an inquiry by a law firm about the legality of offering trademark and copyright services via its website, the Association of the Bar of the City of New York opined that a lawyer may not offer advice, guidance, or services in an area in which non-lawyers are also engaged, such as placing a form on a website that performs a trademark search,

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23. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (1983).

24. MODEL CODE OF PROF’L RESPONSIBILITY DR 3-101(b) (1980).

25. *People v. Title Guarantee & Trust Co.*, 125 N.E. 666, 668 (N.Y. 1919).

26. IOWA CODE OF PROF’L RESPONSIBILITY DR 3-101(b) (1998).

27. *Palmer v. Unauthorized Practice of Law Comm. of State Bar of Tex.*, 438 S.W.2d 374, 377 (Tex. Civ. App. 1969) (quoting *Cape May County Bar Ass’n v. Ludlam*, 211 A.2d 780, 782 (N.J. 1965)).

28. KAN. RULES OF PROF’L CONDUCT R. 5.5(a) (1988).



unless the lawyer is admitted in the jurisdiction.<sup>29</sup> Although non-lawyers can permissibly perform such activities, it constitutes the provision of legal services when performed by an attorney. Thus, if the attorney is not admitted to practice law in the jurisdiction in which those services are performed, he may be engaging in the unauthorized practice of law.

In order to maintain an adequate deterrent against the unauthorized practice of law, a number of states, including Florida, Texas, and Alabama, have criminalized such activities within their borders.<sup>30</sup> To prevent further the unauthorized practice of law within their borders, some states have even created an "Unauthorized Practice of Law Committee" ("UPL Committee") for the express purpose of prosecuting the unauthorized practice of law. For example, in *People v. Love*,<sup>31</sup> the UPL Committee of the Colorado Supreme Court secured an injunction against the respondent for his unauthorized practice of law by virtue of his having engaged in "preparing a will[,] . . . preparing a 'power of attorney-in-fact'[,] . . . preparing a 'durable general power of attorney'[,] . . . and preparing a quit claim deed . . . ."<sup>32</sup>

Similarly, in *Florida Bar v. Brumbaugh*,<sup>33</sup> the Standing UPL Committee sought an injunction against the respondent because she had

advertised in various local newspapers as 'Marilyn's Secretarial Service' offering to perform typing services for 'Do-It-Yourself' divorces, wills, resumes, and bankruptcies. The Florida Bar charge[d] that she [had] performed unauthorized legal services by preparing for her customers those legal documents necessary in an uncontested dissolution of marriage proceeding and by advising her customers as to the costs involved and the procedures which should be followed . . . .<sup>34</sup>

Although in this case the Florida Supreme Court dissolved the order to show cause seeking an injunction, the court did seize the opportunity to clarify the bounds of what would and would not constitute the practice of law in the context of the preparation of legal forms and instructions on how to complete those forms.

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29. N.Y. Ethics Op. 1998-2 (1998) [hereinafter 1998-2]

30. See FLA. STAT. ch. 454.23 (2000); Tex. Penal Code, § 38.123 (2000); ALA. CODE § 34-3-7 (2000).

31. 775 P.2d 26 (Colo. 1989).

32. *Id.*

33. 355 So. 2d 1186 (Fla. 1978).

34. *Id.* at 1189.

Finally, in *Coffee County Abstract and Title Co v. State ex. rel. Norwood*,<sup>35</sup> Coffee County Abstract and Title Co. ("Coffee County Abstract") and Frank Hearn appealed from a judgment granted on a petition for a writ of quo warranto that was brought by the UPL Committee of the Alabama State Bar.<sup>36</sup> Despite having been previously enjoined from the practice of law, Coffee County Abstract and Hearn provided legal advice to two individuals on a number of occasions pertaining to "the effect of the manner of taking title" to a piece of real property, the closing of which was conducted by Hearn.<sup>37</sup> Based upon Hearn's provision of legal advice and counseling, which, ironically, as the court noted, was actually incorrect, the court affirmed the trial court's grant of the UPL Committee's motion for an injunction.

### III. APPLYING TRADITIONAL CONCEPTS OF PRACTICING LAW AND REGULATION OF UNAUTHORIZED PRACTICE OF LAW TO A MODERN, BORDERLESS MEDIUM

#### *A. Attorney Advertising and Solicitation Over the Internet*

Some states have taken the position that when lawyers advertise their legal services, they imply that they are authorized to practice law in the state in which the advertisement appears. As such, when an attorney advertises or solicits clients in such a state, although he is not admitted to practice law in that state, the state may bring an action against the out-of-state attorney for unauthorized practice of law.<sup>38</sup> For example, in *Sterns v. Lundberg*,<sup>39</sup> the U.S. District Court of Indiana upheld the use of Indiana's disciplinary rules prohibiting the unauthorized practice of law as a means of sanctioning unlicensed out-of-state attorneys who sent letters into the state soliciting the business of accident victims within the state.

#### 1. Websites

As early as 1995, practitioners recognized the jurisdictional distinction between traditional methods of advertising and legal information posted on the Internet:

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35. 445 So. 2d 852 (Ala. 1983).

36. *Id.*

37. *Id.* at 854-55.

38. See Joan C. Rogers, *How Do Advertising Rules Apply to Lawyers on the 'Net?*, 12 LAW. MANUAL ON PROF'L CONDUCT 37 (1996) [hereinafter *Rogers, Advertising*].

39. 922 F. Supp. 164 (S.D. Ind. 1996).



Most current advertising mediums such as newspaper, radio and television have a limited jurisdiction or limited receiving audience of the advertisement. In comparison, the Internet has no such jurisdictional boundaries. Once a lawyer or law firm posts an advertisement on the Internet in the form of a website, home page, or discussion contribution, the netvertisement is there to solicit clients from all over the world.<sup>40</sup>

Proceeding from the premise that advertising in a state implies that the attorney is admitted to practice in that state, the question arises as to whether a website accessible by a state's residents constitutes solicitation of those residents such that the attorney could be charged with the unauthorized practice of law if not admitted to practice law in that state. New York's unauthorized practice of law statute, Judiciary Law § 476-a, makes it unlawful for a person

to advertise the title of lawyer, or attorney and counselor-at-law . . . in such a manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he . . . has, owns, conducts, or maintains a law office or law and collection office, or office of any kind for the practice of law, without first having been duly and regularly licensed and admitted to practice law in the courts of record of this state . . . .<sup>41</sup>

Since a web page can be considered an advertisement that can be accessed in *any* state, including those in which the attorney is not admitted to practice, an out-of-state attorney hosting a web page viewed in New York State could technically violate Judiciary Law § 478, and thus be charged with the unauthorized practice of law under Judiciary Law § 476-a. Such a result was raised as a distinct possibility in a publication by the Georgia Bar in 1995: "given the global nature of the Web, it is not inconceivable that an attorney advertising via a Web page could find him/her self charged with practicing law without a license . . . ."<sup>42</sup>

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40. Christman et al., *supra* note 13.

41. N.Y. JUD. LAW § 476-a (2001).

42. Christman et al., *supra* note 13 (quoting T.K. Read, *Pushing the Advertising Envelope: Building Billboards in the Sky Along the Information Superhighway*, 23 W. ST. U. L. REV. 73 (1995)).

In *The Florida Bar v. Kaiser*,<sup>43</sup> a Florida court found a New York attorney liable for unauthorized practice of law when his interstate firm advertised and gave the impression that he was authorized to practice in Florida:

The unauthorized law practice with which Kaiser is charged is the advertisement in the Miami telephone books . . . and on television and in newspapers, of his availability as an attorney the implication being that he is authorized to practice law in Florida. Although presented with evidence that the placement of listings in the telephone books was the responsibility of the telephone company and not Kaiser's, the referee determined, nonetheless, that Kaiser was responsible for advertisements suggesting he is a Florida attorney, with no distinguishing limitations as to his membership in the New York bar or his limited area of practice.<sup>44</sup>

In California, the legislature has defined the unlawful practice of law, a misdemeanor offense, to include "[a]ny person advertising or holding himself or herself out as practicing or entitled to practice law . . . who is not an active member of the State Bar . . . ."<sup>45</sup> As such, akin to the other states discussed previously, an attorney who advertises his practice via a web page accessed in California by a California resident without providing any limitations as to the geographic areas in which he practices arguably could be found to violate this California statute.

In order to gain a better understanding of the jurisdictional issues implicated by an attorney's advertisement of legal services on a web page accessible in states where he is not admitted to practice, a review of the general jurisdictional case law pertaining to the hosting of a website may be helpful.

While Internet jurisdictional case law began as a disjointed patchwork of decisions, over time a "sliding scale" test has developed for purposes of assessing jurisdiction.<sup>46</sup> In essence, there are three points on this "sliding scale" spectrum.<sup>47</sup> At one end of the scale is the passive

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43. 397 So. 2d 1132 (Fla. 1981).

44. *Id.* at 1133.

45. CAL. BUS. & PROF. CODE § 6126 (2000).

46. *See* *Am. Homecare Fed'n v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109 (D. Conn. 1998); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

47. *Am. Homecare Fed'n*, 27 F. Supp. 2d at 113.



website that contains only information and offers no interaction with the visitor.<sup>48</sup> At this end of the scale, the assertion of jurisdiction will likely be declined.<sup>49</sup> In the middle of the scale are interactive websites where information is communicated and exchanged between the site operator and visitors to the site, including downloadable files or links to other websites.<sup>50</sup> It is in this middle area of the spectrum where it is the hardest to determine whether the assertion of jurisdiction will be appropriate. Typically, in this area courts have relied on a case-by-case factual analysis.<sup>51</sup> At the other end of the spectrum are sites that conduct business over the Internet by engaging in substantial activity within a forum state, such as 1) sales; 2) solicitations; 3) acceptance of orders; 4) links to other sites; 5) product lists; and 6) the transmission of files.<sup>52</sup> It is these sites that will most likely provide a court with ample reason to assert jurisdiction.

Based upon this sliding scale test, it would appear that merely hosting a passive website, in and of itself, with nothing more, will generally not be sufficient to subject the website owner to personal jurisdiction in a state in which the website is viewed.<sup>53</sup> Proceeding from this premise, one could argue that the attorney is not actually directing solicitations to a specific state, but is instead posting a passive web page that individuals must affirmatively seek out. Therefore, the attorney cannot be said to have "purposefully directed" his activities toward a specific state, thus fitting into the passive end of the sliding scale

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48. *Id.*

49. *Id.*

50. *Id.*

51. For example, in *People Solutions, Inc. v. People Solutions, Inc.*, No. 3:99-CV-2339-L, 2000 U.S. Dist. LEXIS 10444 (N.D. Tex. Jul. 25, 2000), the Northern District of Texas found that the defendant's website fell into the middle, interactive category of websites because "the website contains several interactive pages which allow customers to take and score performance tests, download product demos, and order products online," as well as "provide[] a registration form whereby customers may obtain product brochures, test demonstration diskettes, or answers to questions." *Id.* at \*10. Nonetheless, in what some commentators have touted to be the addition of a new element to the interactive part of the sliding scale spectrum, the Texas court refused to assert jurisdiction, holding that the defendant had not engaged in "repeated" contacts with Texas residents over the Internet. *Id.* at \*10-11. In *Neogen Corp. v. Neo Gen Screening, Inc.*, 109 F. Supp. 2d 724 (W.D. Mich. 2000), the defendant's website provided visitors with a directory listing of all employee e-mail addresses, the capability to print forms, and the capability to provide customer test results via password access. Nonetheless, the court refused to find jurisdiction, reasoning that the site fell within the passive end of the spectrum because it merely advertised the defendant's services and was thus generally passive in nature and not specifically targeted to Michigan residents. *See id.*

52. *Am. Homecare Fed'n v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109, 114 (D. Conn 1998).

53. *People Solutions*, 2000 U.S. Dist. LEXIS 10444, at \*9.

spectrum where courts have generally been reticent to assert jurisdiction.<sup>54</sup> The passive web page could be distinguished from both *Kaiser* and *Sterns* because in those cases the attorneys engaged in an affirmative action that manifested itself through the placement of an ad in a physical real-world publication, which had a limited, and predictable, circulation area. The placement of an ad on the Internet, by contrast, is completely unpredictable because a web page may be viewed either across the street or across the globe, without purposeful solicitation by the attorney engaging in the advertising. As the Michigan court noted in *Winfield Collection, Ltd. v. McCauley*,<sup>55</sup> “without . . . indications of active (or perhaps ‘interactive’) efforts to secure customers in the forum state through her website, the use of the Internet alone is no more indicative of local jurisdictional contacts than an isolated advertisement in a nationally-distributed magazine.”<sup>56</sup>

An unpublished Tennessee Ethics Opinion<sup>57</sup> supports this theory, stating that websites are not deemed to be solicitations or advertisements within Tennessee “because the information is not indiscriminately distributed to Internet users, who themselves must choose to read the posting before it can appear on the screen.”<sup>58</sup> The Illinois Bar similarly noted in an ethics opinion that “[a]n Internet user who has gained access to a lawyer’s home page, like a yellow page user, has chosen to view the lawyer’s message from all the messages available in the medium.”<sup>59</sup> Interestingly, this point of view has also been adopted by bar associations in other parts of the world. A recent decision by the Milan Bar Association, for example, permitted attorneys to set up a website and advertise their services online.<sup>60</sup> Distinguishing a website from a newspaper or television advertisement, the Milan bar reasoned that “[t]he offer made on the Internet is considered different from an offer made by any other media . . . because Internet users have to actively perform a search to find the lawyer’s web site and are not forced to receive the message.”<sup>61</sup>

Of course, the wiser route for an attorney creating a legal website would be for the attorney to place a disclaimer on his or her website stating exactly what states he or she may practice in, so that individuals

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54. See, e.g., *Neogen Corp.*, 109 F. Supp. 2d at 731.

55. 105 F. Supp. 2d 746 (E.D. Mich. 2000).

56. *Id.* at 750.

57. Tenn. Advisory Ethics Op. 95-A-570 (1995).

58. *Rogers, Advertising*, *supra* note 38, at 13 (citing Tenn. Advisory Ethics Op. 95-A-570 (1995)).

59. Ill. Ethics Op. 96-10 (1997).

60. See *IT—Lawyers Can Offer Advice Online*, Baker & McKenzie Global E-Law Alert, Dec. 12, 2000, at <http://www.bakerinfo.com/elaw>.

61. *Id.*



viewing the web page in other states would have no reason to believe that the attorney was soliciting their business in their state. One disclaimer suggested in a *National Law Journal* article suggests the following:

This Web page is not intended to be a source of advertising, solicitation or legal advice; thus the reader should not consider this information to be an invitation for an Attorney/Client relationship, should not rely on information provided herein and should always seek the advice of competent counsel in the reader's state. . . . Furthermore, the owner of this Web page does not wish to represent anyone desiring representation based upon viewing this Web page in a state where this Web page fails to comply with all laws and ethical rules of the state.<sup>62</sup>

The primary problem with such a disclaimer, however, is that it is somewhat ineffective because a reader, especially an unsophisticated reader, has no way of knowing when a "Web page fails to comply with all laws and ethical rules" of a given state.<sup>63</sup> Thus, an even more restrictive disclaimer specifically setting forth in what states the lawyer is admitted to practice may be necessary to comply fully with the ethical requirements in states that subscribe to the *Kaiser* line of thinking.

## 2. Electronic Mail

Akin to attorney web pages, the potential for being charged with the unauthorized practice of law also exists when attorneys send out unsolicited e-mail (also known as "spam"). Recall that the *Sterns* court deemed the sending of solicitation letters to accident victims within the state, by an attorney not admitted in the state, to be the unauthorized practice of law.<sup>64</sup> Similarly, in *In re Schwarz*,<sup>65</sup> an attorney was disbarred for making intentional misrepresentations about where he could practice law when he mailed out cards and letterhead that implied he was authorized to practice law in states where the mail was received. Since e-mail is often treated the same as written correspondence in

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62. Jeffrey R. Kuester, *Attorney Sites Can Avoid Violations of Ethics Rules*, NAT'L L.J., Aug. 12, 1996, at B11.

63. *Id.*

64. *See Sterns v. Lundberg*, 922 F. Supp. 164 (S.D. Ind. 1996).

65. 186 N.Y.S. 535 (N.Y. App. Div. 1921).

procedural areas such as discovery and evidence,<sup>66</sup> as well as in substantive legal areas such as employment law, the question arises as to whether sending an e-mail solicitation into a state constitutes solicitation in that state, such that the attorney sending the e-mail could be accused of unauthorized practice of law in the state if he is not admitted to practice there.

Aside from differences in the method of transmission and delivery, e-mail is essentially the same as a hand-written or type-written letter. Thus, the sending of an e-mail could be deemed a solicitation, which according to the *Sterns* court, might constitute the unauthorized practice of law if the attorney is not admitted to practice in the state in which the e-mail is received. Moreover, unlike a web page that is not purposefully directed to any particular person within any particular state, e-mail is directed to a specific individual in a specific state.

A potentially more complicated question, however, involves the use of spam by attorneys. Since a bulk e-mailer, or spammer, generally possesses only the e-mail addresses of the recipients, which often do not reveal the physical locus of the recipients, the argument could be raised that the e-mail was not purposefully directed to any specific state, and thus should not be deemed purposeful solicitation in the recipients' states. Recall, however, that even the unintentional advertising of a law firm's services in phone books within a state, without any disclaimers or limitations as to the geographic area of practice, was still deemed inexcusable in *Kaiser*. Utilizing *Kaiser* as a backdrop, one could conclude that an even stronger case exists for holding an attorney liable for unauthorized practice of the law when he utilizes spam as a means of soliciting clients, since spam involves the intentional e-mailing of multiple e-mail messages into a state, albeit without the knowledge of exactly which state the spam will enter at the time of transmittal.<sup>67</sup> As such, it could be argued that since the spamming attorney is essentially directing e-mail to mass quantities of individuals, it would be wrong to permit the spammer to blind himself to the location of the recipients and then escape liability by arguing that he did not know in which states the e-mail would be received.

Washington's Unsolicited Electronic Mail Act ("UEMA")<sup>68</sup> supports this proposition because it was passed specifically to combat

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66. See Samuel A. Thumma and Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (1999).

67. *But see* *In re Laurence A. Canter*, No. 95-831-OH (Judgment of the Hearing Committee, Feb. 25, 1997). Although *In re Laurence A. Canter* did not involve a charge of unauthorized practice of law, the Tennessee ethics board did vote to disbar an attorney based in part on his use of spam to solicit immigration clients. *See id.*

68. WASH. REV. CODE § 19.190.020 (1999).



the use of fraudulent e-mail headers in spam sent into, and from, Washington. Pursuant to UEMA, a person, corporation, partnership, or association is deemed to know the physical location of a recipient of an e-mail, even if the sender possesses only the recipient's e-mail address, "if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address."<sup>69</sup> Utilizing this framework, one could argue that since the attorney is deemed to have known the states into which he sent the spam solicitations, any spam received in a state in which the attorney is not admitted to practice exposes the attorney to charges of the unauthorized practice of law if the attorney fails to list his states of bar licensure or otherwise advise spam recipients of his jurisdictional practice limitations.

This same rationale could also be applied to the use of listservs and newsgroups. Unlike a passive web page that sits on a server waiting for a user to request the page, listservs and newsgroups actively forward postings, via e-mail, to all of their subscribing members. Thus, the use of a listserv or newsgroup by an attorney to distribute an advertisement equally implicates unauthorized practice of law issues.

### *B. Chat Rooms*

Internet Relay Chat ("IRC") and chat rooms offer individuals the opportunity to interact through the Internet in real-time.<sup>70</sup> The conversation is live, interactive, and generally open to the public. Thus, chat rooms present the opportunity for lawyers willing to provide legal advice and individuals seeking that advice to interact from various locations around the country or globe. Questions therefore arise as to 1) whether a lawyer may disseminate legal information in chat rooms and 2) at what point does legal information disseminated in chat rooms rise to the level of legal advice constituting the practice of law?

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69. *Id.* at § 19.190.020(2). Although this statute was challenged under the dormant Commerce Clause, it was recently upheld by the Washington Supreme Court. See *State v. Heckel*, 24 P.3d 404 (Wash. 2001).

70. Although the technology used to implement IRC in chat rooms is somewhat different, in that IRC normally employs a software client and chat rooms utilize the native browser environment, the functionality is roughly parallel. Both allow real-time interaction between the parties. Accordingly, they are collectively referred to in this Article as "chat rooms."

## 1. Chat Rooms and Legal Advice

In assessing the propriety of providing legal information in chat rooms, one may look for guidance in ethics opinions pertaining to the provision of advice on radio call-in shows, pre-recorded audio tapes, and "900 number" call-in lines. Almost uniformly, these opinions have approved the giving of *general* legal guidance and information, while prohibiting specific, targeted advice to individual persons.

For example, the New York State Bar permitted an attorney to record a message to be played on a 900 number line that provided the caller with *general* information about the law of a particular subject matter.<sup>71</sup> As the Bar noted, "[t]he Code of Professional Responsibility permits lawyers to speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice (DR 2-104(E))."<sup>72</sup> Of particular import to the instant discussion, the Bar noted that "*[t]he choice of media to convey the message is irrelevant.*"<sup>73</sup>

The New York State Bar also considered whether a lawyer admitted to practice in New York could offer legal advice to callers by telephone on certain legal topics.<sup>74</sup> In its response, the Bar cautioned that, even when attorneys handling these calls are competent in their fields of practice, "it will often be inappropriate to give more than general legal advice in the course of a single telephone call," because competent representation may require a conflict check, legal research, review of documents or evidence, and consideration of the issues raised, most of which cannot be done by a single phone conversation.<sup>75</sup> Nonetheless, in a lukewarm approval of the practice, the Bar noted that attorneys may restrict themselves to general advice of a limited nature. An attorney who purports to give advice over a telephone may do so after providing proper disclosure as to the extent of the advice being offered and the limits of the attorney/client relationship. Additionally, the limited advice must *not* be prejudicial to the client or the administration of justice.

Other states have likewise permitted the provision of *general* information by attorneys while scorning individualized legal advice. In a North Carolina ethics opinion, the Bar was asked to consider the provision of free, pre-recorded legal information by an attorney made available through a local dial-in number by a for-profit organization.<sup>76</sup> In permitting the attorney's participation in this program, the Bar

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71. N.Y. Ethics Op. 625 (1992).

72. *Id.*

73. *Id.* (emphasis added).

74. N.Y. Ethics Op. 664 (1994).

75. *Id.*

76. N.C. Ethics Op. RPC 115 (1991).



reviewed the North Carolina statute pertaining to aiding a person, in this case the for-profit organization, in the unauthorized practice of the law. The Bar observed that “[s]ince the recorded legal information contains legal information describing the law in *general*, it is not ‘a legal service’” and, thus, not the practice of law.<sup>77</sup> As such, the attorney’s participation in the organization was not deemed to be aiding the unauthorized practice of law. Similarly, the Oregon Bar approved of the production and marketing of audio and video tapes about legal subjects, so long as they provided only *general* legal information.<sup>78</sup>

To date, only a few isolated ethics opinions have specifically tackled the provision of legal information and advice in the electronic environment. In an Arizona ethics opinion, the Bar of that state prohibited attorneys from answering questions from lay people in chat rooms “unless the question presented is of a general nature and the advice given is not fact-specific.”<sup>79</sup> Likewise, in a South Carolina ethics opinion, the Bar opined that participation in general discussions on legal topics via electronic media is permissible, so long as the attorney avoids the “giving of advice or the representation of any particular client.”<sup>80</sup>

Reading all of the foregoing opinions as a whole, a theme becomes readily apparent: whether in the context of the more traditional real-world or in the cutting edge cyber-world, state ethics regulators have generally permitted attorneys to provide general information to the public so long as it is not specifically tailored to an individual person and is not in response to a specific factual legal question.

In the context of a chat room, however, the delineating line becomes more distorted. Since chat rooms generally involve one on one communications, any response to a question posed in a chat room, even one intended to be a general informational response, could theoretically be deemed a response to an individual and thus the provision of individualized legal advice.<sup>81</sup> Moreover, since a chat room participant will most likely pose a question to an attorney based upon a specific legal difficulty, the conversation may begin, from the outset, as a request for specific legal advice. Under such circumstances, no matter how

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77. *Id.* (emphasis added).

78. Or. Formal Op. 1991-107 (1991); *cf.* *Rosenthal v. Shephard Broad. Serv.*, 12 N.E.2d 819, 821 (Mass. 1938) (holding that two for-profit public radio programs, during which legal questions were submitted by the audience and answered by a panel on-air, constituted the practice of law, despite the use of on-air disclaimers to the contrary, because the panel was in fact answering specific legal questions.)

79. Ariz. Ethics Op. 97-04 (1997).

80. S.C. Ethics Advisory Op. 94-27 (1994).

81. See Joan C. Rogers, *Cyberlawyers Must Chart Uncertain Course in World of Online Advice*, 52 DAILY REP. FOR EXECUTIVES C-1 (2000) [hereinafter *Rogers, Special Report*].

broadly the attorney attempts to draft his response, the attorney may nonetheless be found to have offered specific legal advice which could constitute the practice of law over the Internet. For example, in an Illinois ethics opinion, the Bar stated that when a lawyer participates in a chat group or other online service that permits the offering of personalized legal advice, the attorney is engaged in the practice of law and the recipient of the advice becomes a client.<sup>82</sup>

The question therefore arises as to how the perceptions of the recipient of the legal information affects the assessment of the propriety of the attorney's actions in providing that information. In other words, despite an attorney's best attempts online to provide only general legal information, there are a number of unique considerations implicated by communication over the Internet that pose a risk that the recipient of the information might attribute greater weight to it than the attorney intended, believing that the information was meant to be individualized advice. As the Association of the Bar of the City of New York cautioned in Opinion 1998-2, "[t]he dynamics of written legal discussion on the Internet are different from those of oral public discussions, in part because the written word is generally given more weight, and may benefit from longer retention and study, than the oral word."<sup>83</sup> Similarly, as attorney Anthony E. Davis observed, "if a lawyer enters into a dialogue about a legal question online, the individual is very likely to form the reasonable belief that the lawyer is his attorney."<sup>84</sup> A review of the questions posted by individuals on the Internet likewise demonstrates that Internet-based inquiries do not raise "mere 'general questions,' nor do they seem to be prompted by mere idle curiosity or academic interest."<sup>85</sup> Instead, the people raising these questions are making specific inquiries for which they are seeking specific legal advice and guidance.<sup>86</sup>

The test for whether the provision of advice forms an attorney/client relationship "is a subjective one that focuses on the client's belief that the relationship exists, and evaluation of the reasonableness of the client's subjective belief depends on the facts and circumstances of each case."<sup>87</sup> One might therefore surmise that a disclaimer would resolve this problem. However, even the use of disclaimers might be futile if the subjective belief of the recipient is that the advice was offered specifically for his situation, especially if the recipient of the online

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82. Ill. Ethics Op. 96-10 (1997).

83. 1998-2, *supra* note 29.

84. Rogers, *Special Report*, *supra* note 81.

85. *Id.*

86. *Id.*

87. *Id.*; see also ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 31:102-03 (1989).



advice acts on that advice. In a Kansas ethics opinion, for example, the Bar prohibited the operation of a "1-900 pay-for-information service" because even the use of disclaimers to the effect that the information being provided was only legal information *and not* legal advice would not be enough to prevent the formation of an attorney/client relationship.<sup>88</sup> As one lawyer observed, "[i]t seems hard to believe that a disclaimer stating 'this is not legal advice' would carry the day against an unsophisticated consumer when the website itself touts its role in providing legal services."<sup>89</sup>

As such, even if the attorney attempts to avoid the practice of law by providing only general information, when that information is provided in the online environment, such communication might nonetheless be perceived as specific legal advice, thus triggering an attorney/client relationship and potentially implicating the unauthorized practice of law.

While it may be somewhat disconcerting that the provision of even general information online could qualify as the practice of law, if attorneys wish to utilize the Internet to facilitate their practice, they must accept the unique considerations that are attendant with its use.<sup>90</sup>

## 2. Location of Practice

Having established that the provision of even general legal information online may constitute the practice of law, the next question to arise is where does this practice of law take place? Does it take place where the attorney is located, where the recipient of the information is located, or where the computer servers that facilitate the chat are located? Looking to the recently decided *Birbrower* case,<sup>91</sup> the practice could arguably occur in the location of the recipient of the information, giving rise to a charge of unauthorized practice in the recipient's jurisdiction should the attorney not be admitted there.

In Georgia, one proposal apparently designed to obviate the need to determine where the practice of law over the Internet occurs, and to facilitate the prosecution of the unauthorized practice of law, explicitly makes the physical locus of the parties irrelevant: "[i]t is the responsibility of the person giving advice to ascertain the residence of

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88. Kan. Ethics Op. 93-8 (1993).

89. *Rogers, Special Report*, *supra* note 81.

90. This includes the fact that the type-written word on the Internet is generally given more credence by readers and may benefit from longer periods of retention than other media. See 1998-2, *supra* note 29.

91. *Birbrower v. Super. Ct. Santa Clara County*, 949 P.2d 1 (Cal. 1998).

*the person receiving the advice. The physical location of either person at the time the advice is given is immaterial.*"<sup>92</sup>

But what about the location where the computer servers are housed? Cyberspace is somewhat of a misnomer because anything that takes place in cyberspace generally occurs on a computer server, somewhere in real-space. Thus, a conversation in a chat room actually occurs on a computer server somewhere in the real-world that has been set up to host the chat. As such, the unauthorized practice of law could arguably occur in the location where the servers are housed.

One of the first cases to consider utilizing the locus of a computer server as the basis for placing the locus of online activity was *Krantz v. Air Line Pilots Association International*.<sup>93</sup> In *Krantz*, a pilot's name was placed on a "scab" list of Eastern Airline pilots who withdrew from a strike conducted by the Airline Pilot's Association ("ALPA"). The pilot's name was in turn posted on various bulletin boards on a computer center electronic switchboard system called "ACCESS" operated by ALPA from its office in Virginia.<sup>94</sup> After plaintiff Krantz's successful job interview with another airline, a union member, Nottke, found out that the plaintiff was a scab and urged fellow union members to pass the word, transmitting this request electronically to bulletin boards hosted on ACCESS. Consequently, after receiving 300 adverse comments about plaintiff, the other airline terminated negotiations with Krantz.<sup>95</sup> Krantz then sued ALPA and Nottke for "intentional interference with a prospective employment contract . . . ." <sup>96</sup> Since the case was brought in Virginia, the court was asked to decide whether they had long-arm jurisdiction over Nottke, a New York resident whose only contact with Virginia was the transmission of the communication from New York to the bulletin board which was hosted on computer servers in Virginia.<sup>97</sup> As the court observed, the allegation of tortious interference could not have been completed until Nottke's communication had been communicated to fellow ALPA members, which meant that the ACCESS bulletin board was vital to establishing the tort. As such, the court held that since the ACCESS bulletin board was housed on computer servers in Virginia and was used as a means of furthering Nottke's plan to block Krantz's employment, an act had occurred within the commonwealth.<sup>98</sup>

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92. Christman et al., *supra* note 13 (emphasis added).

93. 427 S.E.2d 326 (Va. 1993).

94. *Id.* at 327.

95. *See id.*

96. *Id.* at 326.

97. *See id.* at 328.

98. *See id.*



Six years later, in *Bochan v. La Fontaine*,<sup>99</sup> the plaintiff Bochan attempted to assert jurisdiction over the out-of-state defendants, the La Fontaines, because the La Fontaines had posted allegedly defamatory messages through an America Online ("AOL") account hosted in Virginia and had advertised and sold their books in Virginia.<sup>100</sup> In upholding jurisdiction over the La Fontaines, the court reasoned:

[A] *prima facie* showing of a sufficient act by the La Fontaines in Virginia follows from their use of the AOL account, a Virginia-based service, to publish the allegedly defamatory statements. . . . [B]ecause the postings were accomplished through defendant's AOL account, they were transmitted first to AOL's USENET server hardware, located in Loudon County, Virginia. There, the messages were apparently both stored temporarily and transmitted to other USENET servers around the world. Thus, as to the La Fontaines, because publication is a required element of defamation, and a *prima facie* showing has been made that the use of a USENET server in Virginia was integral to that publication, there is a sufficient act in Virginia . . . .<sup>101</sup>

Analogously, since the practice of law online necessarily involves the provision of advice, which is received by a computer server and displayed to other chat room participants, it could be argued that the servers are integral to the offense, and thus, the offense occurs where the servers are located.

In contrast to these Virginia cases, however, in *Jewish Defense Organization v. Superior Court*,<sup>102</sup> a California court ruled that the mere presence of a computer server in a state would not be sufficient to warrant jurisdiction in that state. Specifically, the *Jewish Defense* court was asked to assert jurisdiction over an out-of-state defendant whose only contacts with the state were sending some documents into California in another court matter and contracting with one or more California-based ISPs through which defendants operated a website from their residence in New York. In arguing against jurisdiction, the petitioners asserted:

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99. 68 F. Supp. 2d 692 (E.D. Va. 1999).

100. *Id.* at 697.

101. *Id.* at 699.

102. 72 Cal. App. 4th 1045 (Cal. Ct. App. 1999).

Engaging an Internet service is as simple as a few keystrokes while sitting at one's computer . . . . If the [court] found personal jurisdiction, based on the happenstance of the physical location of the Internet server, every complaint arising out of the alleged tort on the Internet would automatically result in personal jurisdiction wherever the Internet server is located.<sup>103</sup>

Apparently endorsing this argument, the court refused to assert jurisdiction, reasoning that allowing users of online services to be haled into court where their ISP is located, or where a database happens to be housed, would be "wildly beyond the reasonable expectations of such computer information users," and would offend traditional notions of fair play and substantial justice.<sup>104</sup>

More recently, the United States District Court for the District of New Jersey considered the use of servers as a basis for finding jurisdiction in *Amberson Holdings v. Westside Story Newspaper*.<sup>105</sup> In *Westside Story*, the plaintiffs alleged that the defendants had infringed their trademark, "West Side Story," by incorporating the name into their newspaper, registering the domain name "westsidestory.com" with Network Solutions, and then assigning that domain name to a "host server" owned and operated by a New Jersey corporation.<sup>106</sup> In favor of the assertion of jurisdiction in New Jersey, plaintiffs argued that the court had specific jurisdiction:

[D]efendants have: (1) maintained a contractual relationship with a New Jersey company that provides "hosting services" for defendants' website on its Internet servers in New Jersey; (2) on at least two occasions represented to Network Solutions, Inc. that the data making up defendants' website is physically located on servers belonging to a New Jersey corporation and operated and maintained in New Jersey; (3) on those same two occasions, affirmatively instructed Network Solutions, Inc. to arrange for all Internet requests for access to defendants' website be directed to Internet servers physically located in New Jersey; (4) continuously communicated and interacted

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103. *Id.* at 1057 n.1.

104. *Id.* at 1061.

105. 110 F. Supp. 2d 332 (D.N.J. 2000).

106. *Id.* at 333.



with visitors to their website via Internet servers physically located in New Jersey; and (5) regularly transmitted files into New Jersey for storage and operation on Internet servers located in New Jersey . . . .<sup>107</sup>

In responding to the plaintiffs' arguments, the court initially noted that the act of entering into a contract with a New Jersey web hosting corporation, with nothing more, would not serve as an adequate basis for jurisdiction.<sup>108</sup> In response, plaintiffs argued that the defendants' use of New Jersey servers to host their website added to a finding of the requisite "minimum contacts" necessary for the assertion of jurisdiction by the court. Nonetheless, the court reasoned that mere access to a website hosted in New Jersey was insufficient, analogizing the use of the servers to "a telephone call by a district resident to the defendant's computer servers."<sup>109</sup> Therefore, the court "refuse[d] to hold that inter-computer transfers of information, which are analogous to forwarding calls to a desired phone number through a switchboard, should somehow establish sufficient contacts that would subject a defendant to personal jurisdiction."<sup>110</sup> Referring to the emerging "spectrum of activity" within a forum analysis, the court noted that the "westsidestory.com" website did not sell, or offer for sale, any products, and thus, defendants could not be said to have engaged in "commercial activity" within New Jersey adequate to subject the defendants to the court's jurisdiction.<sup>111</sup> Finally, the court also observed that "the administration, maintenance, and upkeep of defendants' website is all based out of California where the alleged infringement occurred. It is undoubtedly in the interest of California to decide how to control issues surrounding Internet use that is derived from its business community."<sup>112</sup>

The concept of utilizing the physical location of a computer server accessed by a party as a means of placing the locus of a party's acts, and thus imposing obligations on a party, was also considered and rejected by Congress when it enacted the Internet Tax Freedom Act ("ITFA").<sup>113</sup> In refusing to permit a state to impose a tax on a remote seller based solely upon its residents' ability to access the remote seller's computer servers, ITFA defines a prohibited "Discriminatory Tax" as:

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107. *Id.* at 335.

108. *Id.*

109. *Id.*

110. *Id.* at 336.

111. *Id.* at 337.

112. *Id.*

113. 47 U.S.C. § 151 (2000).

[A]ny tax imposed by a State or political subdivision thereof, if — (i) . . . *the sole ability to access a site on a remote seller's out-of-State computer server* is considered a factor in determining a remote seller's tax collection obligation; or (ii) a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of — (I) *the display of a remote seller's information on the out-of-State computer server* of a provider of Internet access service or online services; or (II) *the processing of orders through the out-of-State computer server* of a provider of Internet access service or online services.<sup>114</sup>

Following this rationale, a private letter ruling in Virginia,<sup>115</sup> based in part on an interpretation of the ITFA, concluded that a "Web site, hosted on a server in Virginia, does not by itself result in sales tax nexus in that state."<sup>116</sup> The website owner in that case was an out-of-state seller of auto parts whose website was hosted in Virginia. Despite the physical location of the servers, the letter stated that the necessary nexus had not been created for purposes of taxation.<sup>117</sup>

Recent changes to the Commentary on Article 5 of the OECD Model Tax Convention<sup>118</sup> further demonstrate the widespread international acceptance of the proposition that the location in a given state of a computer server on which a website is hosted should not, in itself, lead to jurisdiction in that state. These changes, which included the addition of a heading entitled "Electronic Commerce," examined the distinction between a website and the server on which the site is hosted when the hosting entity is an ISP. Specifically, the Commentary notes:

Although the fees paid to the ISP under such arrangements may be based on the amount of disk space used to store the software and data required by the web site, these contracts typically do not result in the server and its location being at the disposal of the enterprise . . . even if the enterprise has been able to

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114. *Id.* (emphasis added).

115. Va. Ruling of Comm'r PD 00-53 (2000).

116. David Hardesty, *Web Server Does Not Create Nexus in Virginia*, EcommerceTax.com, Jul. 30, 2000, at <http://www.ecommercetax.com/docs/073000.htm>.

117. *Id.*

118. OECD Model Tax Convention, art. 5, Commentary 42.1–10 (Dec. 22, 2000), available at [http://www.oecd.org/daf/fa/treaties/Clarif\\_e.pdf](http://www.oecd.org/daf/fa/treaties/Clarif_e.pdf).



determine that its web site should be hosted on a particular server at a particular location . . . . In these cases, the enterprise cannot be considered to have acquired a place of business by virtue of that hosting arrangement.<sup>119</sup>

The law is still unsettled as to whether the location of a computer server within a state's borders would be sufficient to maintain an unauthorized practice of law action in that state. Looking to the passive/active distinction used by courts in determining jurisdiction in website litigation, however, including, most recently, *Westside Story*, it could be surmised that bringing an unauthorized practice of law action based solely upon the use of a computer server within a given state, with nothing more, would face a strenuous Due Process challenge. Since the hosting of a chat room, listserv, newsgroup, or bulletin board on a given computer server is out of the attorney's control, the attorney cannot be said to have purposefully directed his activities toward that state. Thus, the assertion of jurisdiction by a state based solely upon the fact that a computer server is physically housed in that state would likely not survive a Due Process challenge. As such, the more practical course of conduct would be for the prosecuting agency to look first for additional real-world contacts before filing an unauthorized practice of law action.

### *C. Forums*

Akin to chat rooms, Internet discussion forums ("forums") also offer individuals the opportunity to interact in real-time or with a minor delay. Thus, the distinction between the provision of general legal information versus specific legal advice likewise could be applicable to attorneys participating in forums. The primary difference between a chat room and a forum is that, unlike a chat room, where the participants interact directly with each other, a forum generally involves a third party moderator who acts as an intermediary, moderating the discussion, the topics, and even entering the responses for the forum's guest speaker. Thus, if an attorney is a guest speaker in a forum, the attorney might not directly provide advice to the room participants, but instead might use a third party moderator as a conduit to provide the advice. Based on this variation, two questions come to mind.

First, since the moderator is reviewing the responses before making them available to the forum participants, and indeed, in some cases, actually typing in the responses, it could be argued that the lawyer is not

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119. *Id.* at 42.3.

directly providing advice to the participants, but rather that the legal advice is coming from the third party moderator. In such an instance, is the third party engaged in the practice of law? And, if the third party is a non-attorney, can the attorney then be held responsible for aiding the unauthorized practice of law based upon the activities of the third party?

Looking to Model Rule 5.4(b), it appears that the intervention of the third party moderator may indeed create an ethical dilemma for the attorney because the Rule cautions that "a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."<sup>120</sup> Similarly, DR 3-101(a) clearly states that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."<sup>121</sup>

A North Carolina ethics opinion considered an attorney's provision of free, pre-recorded legal information made available through a local dial-in number by a local for-profit organization.<sup>122</sup> In that instance, the Bar was asked to consider whether the attorney's participation in the organization could be deemed the aiding of a non-lawyer, the for-profit organization, in the unauthorized practice of law. Although the Bar eventually permitted the attorney's participation in the program because the legal information provided was general, and thus not the practice of law, the logical conclusion from this opinion is that if an attorney did in fact provide specific legal advice through a third party non-attorney, then the attorney could be charged with aiding the unauthorized practice of law.

In fact, the concept of lawyers and non-lawyers teaming up to offer online legal advice services as a joint business venture has already been explicitly rejected by the Ohio Supreme Court.<sup>123</sup> As such, it appears that while an attorney may potentially escape a direct charge of engaging in the unauthorized practice of law if the third party forum moderator is the one actually conveying the advice, the attorney would still be engaged in ethical violations, namely aiding the unauthorized practice of law by a non-attorney.

A second question implicated by the use of third party moderated forums is whether the presence of the third party moderator, presumably coupled with the presence of computer servers of the company with which the third party is affiliated, provides a sufficient nexus for a state

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120. MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (1983); *see also* ABA Ethics 2000 Commission, Ethics 2000 Commission Report (2000), at 14.

121. MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101(a) (1980).

122. N.C. Ethics Op. RPC 115 (1991).

123. Ohio Advisory Op. 99-9 (1999) (permitting the exchange of legal advice via e-mail provided, in part, that the service "cannot be a joint business effort between an attorney and a non-attorney").



to prosecute for unauthorized practice of law. Previously, we considered the possibility of prosecuting an individual for the unauthorized practice of law in the state in which the computer servers are located, even if the only contact with that forum is the physical presence of the computer servers themselves. We concluded that although the law is by no means settled, it appears that the assertion of jurisdiction based solely upon the presence of a passive computer server, with nothing more, could potentially be deemed violative of an entity's Due Process rights. In the context of a moderated forum, however, we have an added element of contact with the state; namely, in addition to the presence of the computer servers, there is also a third party actively facilitating, if not engaged in, the unauthorized practice of law within the forum. In such an instance, it could be argued that the unauthorized practice of law is also taking place in the state where the moderator is located, thus providing yet another state with a sufficient nexus to warrant prosecution for unauthorized practice of law within its borders.

#### *D. Bulletin Boards, Listservs, and Newsgroups*

Unlike chat rooms and moderated forums, bulletin boards, listservs, and newsgroups do not involve real-time, live interaction between individuals. Instead, much like their pre-Internet counterparts, Internet bulletin boards offer individuals the opportunity to communicate with each other by posting and responding to messages in a non-interactive environment. The primary difference between cork-board and virtual bulletin boards is that instead of hanging on a wall, Internet bulletin boards exist in cyberspace and are hosted on servers somewhere in real space. Thus the potential geographic reach of an Internet bulletin board is much greater than that of its real-world cousin. A listserv, on the other hand, also known as a "mail-exploder," "basically consists of a list of e-mail addresses maintained such that a single posting . . . sent via e-mail to the listserv group, is forwarded, or exploded, to all of the subscribers of the group."<sup>124</sup> Newsgroups are quite similar to listservs in that they, too, explode information to all members, the only difference being that newsgroups are primarily discussion groups on specific topics, with the discussion groups cumulatively known as USENET.

#### 1. Providing Legal Advice

As with chat rooms and moderated forums, there is a dearth of opinions and case law on the parameters for providing legal advice on

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124. 1998-2, *supra* note 29.

bulletin boards, listservs or newsgroups. However, ethical opinions that distinguish between providing general legal information and specific legal advice in other contexts would appear to be applicable in the context of bulletin boards, listservs or newsgroups. In fact, the opinions pertaining to an attorney's participation in pre-recorded "1-900 pay-for-information services" might be especially applicable in this context since bulletin board, listserv and newsgroup postings are in reality nothing more than a digital form of a pre-recorded message.

It can therefore be theorized that an attorney may post general legal information on a bulletin board, listserv or newsgroup, but could potentially be deemed to have engaged in the unauthorized practice of law if he posts specific legal advice on one of the foregoing media. Indeed, the South Carolina Bar opined that an attorney's participation in general discussions on legal topics via electronic media is permissible only so long as the attorney avoids the "giving of advice or the representation of any particular client."<sup>125</sup> To limit the expectations of individuals consulting bulletin boards, listservs and newsgroups, some websites utilize disclaimers. *Prairielaw.com* for instance, carries the following disclaimer:

Prairielaw.com does not offer legal advice. . . . No attorney-client or other professional relationship of any nature is created by participation in any area or offering at *Prairielaw.com*. Do not act on or rely on any information from *Prairielaw.com* without consulting with a licensed attorney as this site is not a substitute for obtaining appropriate legal advice from competent, independent legal counsel in the relevant jurisdiction. All communications to *Prairielaw.com*, including postings at message boards, email forums, or participation chats or *PrairieTalk Live Events*, are done publicly and no information provided is privileged or confidential . . . .<sup>126</sup>

At the same time, however, because bulletin boards, listservs, and newsgroups involve the posting of material, rather than real-time communication, several unique questions arise with regard to the practice of law over the Internet.

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125. S.C. Ethics Advisory Op. 94-27 (1994).

126. *Terms of Service*, *Prairielaw on Lawyers.com*, at <http://www.prairielaw.com/company/terms.asp> (last visited Apr. 11, 2001).



First, at least one state's ethics board has looked into the technology behind the use of bulletin boards, listservs, and newsgroups, drawing a distinction between bulletin boards and the latter two posting methods. In a Tennessee ethics opinion, the Bar distinguished between general postings on the Internet, which would include an Internet bulletin board, and postings on newsgroups.<sup>127</sup> Specifically, the Bar permitted a general legal posting on an Internet bulletin board because "users themselves must choose to read this posting before it can appear on their screen."<sup>128</sup> By contrast, the Tennessee Bar explicitly prohibited a posting on a newsgroup because this types of posting is sent, or exploded, to the user's computer unsolicited, thus requiring the user to bear all costs associated with such receipt, including Internet access charges. In fact, in *In Re Laurence A. Canter*,<sup>129</sup> the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee disbarred Mr. Canter, in part, for utilizing spam e-mails and postings to various pay-for-use Internet bulletin boards because these emails and postings shifted the costs of the advertisements to the recipients by necessitating the downloading of messages.<sup>130</sup> Although this opinion did not pertain specifically to the "practice of law" over the Internet, but rather to attorney advertisements over the Internet, this astute conceptualization of the different technologies involved in bulletin boards, listservs, and newsgroups is a consideration for attorneys to bear in mind when assessing the potential uses of each of these media.

Second, since advice posted on a bulletin board, listserv, or newsgroup is not communicated instantaneously to the recipient, but remains stored on a server waiting to be read at a later point in time, it is not entirely clear at what point the practice of law occurs. For example, does it occur at the time the attorney posts the information or at the time the information is read? Or does the practice of law occur when the advice is actually received in electronic form by the computer server hosting the bulletin board, listserv, or newsgroup?

## 2. Libel and Defamation

In order to answer this question, it may be helpful to review case law pertaining to libel and defamation because libel and defamation, like the

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127. Tenn. Advisory Ethics Op. 95-A-570 (1995).

128. *Id.*

129. *In re Laurence A. Canter*, No. 95-831-OH (Judgment of the Hearing Committee, Feb. 25, 1997).

130. *Excerpt from the Judgment of the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee*, LAW JOURNAL EXTRA!, at <http://www.ljx.com/LJXfiles/canter/decision.html> (last visited Mar. 1, 2001).

practice of law over the Internet, is effectuated through the communication of ideas.

In *Sorge v. Parade Publications, Inc.*,<sup>131</sup> the Appellate Division of the New York State Supreme Court held that publication in a libel case occurs not at the time the information is provided to a mass distributor, but rather at the "time of such release and communication to a third person, either by sale or by actual reading."<sup>132</sup> As the *Sorge* Court noted:

[P]ublication, as the word itself indicates, involves the act of disseminating or communicating information to third persons. "There can be no actionable libel unless the defamatory writing, through some act or the carelessness of the defendant, is read by or otherwise communicated to someone other than the person defamed who understood its meaning and knew to whom it referred."<sup>133</sup>

The Appellate Division in *Sorge* further observed:

[T]he releasing of control by defendant, by shipment of bundles of a publication designed to be an insert for a newspaper, would not constitute publication. The information therein contained is not communicated to third persons. The bundles . . . were intended for the general public and until the time of such release and communication to a third person, either by sale or by actual reading, no injury could be suffered and no claim would exist. Also, there remained *locus penitentiae* for those composing and writing the offending language. The injury in fact might never occur.<sup>134</sup>

Other states have also held that the time of publication in libel and defamation cases occurs when the information is communicated or published to a third party. For example, in *Jones v. Pinkerton's, Inc.*,<sup>135</sup> the Missouri Court of Appeals found that "[a]n essential element of the tort [of defamation] is that *the alleged defamatory material or statement*

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131. 247 N.Y.S.2d 317 (N.Y. App. Div. 1964).

132. *Id.* at 320.

133. *Id.* at 321 (quoting *Weidman v. Ketcham*, 278 N.Y. 129, 131 (N.Y. 1938)); see also 50 AM. JUR. 2D *Libel and Slander* § 7 (1995).

134. *Sorge*, 247 N.Y.S.2d at 321.

135. 700 S.W.2d 456 (Mo. Ct. App. 1985).



*be communicated or published to a third person.*"<sup>136</sup> In *Wildmon v. Hustler Magazine, Inc.*,<sup>137</sup> the Northern District of Mississippi observed:

In defamation, the assault is not directly upon the plaintiff but upon his public esteem. The impact is upon those who are custodians of his reputation. Such reputation . . . is injured as soon as a destructive fire of criticism ignites the edifices in which such prestige is housed. . . . Since the gravamen of the offense is not the knowledge by the plaintiff nor the injury of his feelings but the degrading of reputation, *the right accrued as soon as the paper was exhibited to third persons in whom alone such repute is resident.*<sup>138</sup>

Similarly, in cases involving the practice of law, the gravamen of the offense would appear to be the receipt of legal advice by a third person, because until a third party receives the advice, the "practice" cannot be said to have been completed. As the *Sorge* court noted, merely releasing control of the information to a mass distributor does not in itself constitute the publication of the information because the publication of the information to third parties may never occur. However, while *Sorge*, *Hustler Magazine*, and the other cases cited above are helpful for understanding that a cause of action based upon the distribution of information accrues at the time the information is published or communicated to a third party, these cases beg the question as to the point at which a communication to a third party occurs when the information is distributed in electronic form.

The standard analysis conducted in *Sorge* poses a wrinkle for Internet-based communications. Because the Internet is a means of mass distribution, the posting of legal advice could be deemed mere delivery to a mass distributor, an act which the *Sorge* Court ruled insufficient for liability to attach. Conversely, a legal posting on the Internet also could be deemed actual communication to a third party because the posted material is published and made available for viewing and printing in the same act. To an extent, the moment of communication also depends on the type of Internet-based communication. Information passively hosted on a website, for example, seems more akin to delivery to a mass distributor because it cannot be viewed by a third party until it is requested and downloaded to an individual's computer. Information

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136. *Id.* at 458 (emphasis added).

137. 508 F. Supp. 87 (N.D. Miss. 1980)

138. *Id.* at 88-89 (emphasis added).

delivered through newsgroups and listservs, however, can be likened to material that is both published and distributed to a third party because it is automatically sent to an individual's computer once posted. While unresolved, these challenges illustrate that Internet postings are a hybrid of the types of communications that lie at the heart of real-world libel and defamation cases. Furthermore, the question remains as to whether one must prove actual viewing of the posting by a third party.

In *Firth v. State of New York*,<sup>139</sup> the New York Court of Claims was asked to decide this very question. The claimant in *Firth* sought damages for libel allegedly contained in a report issued by the Office of the State Inspector General "which was highly critical of claimant's management style."<sup>140</sup> In moving to dismiss the claim, the defendant in *Firth*, the State of New York, alleged that the claim was time barred due to the fact that the report about which claimant complained had been issued on December 16, 1996, while the claim was not filed until March 18, 1998, well outside the one year statute of limitations. In support of his position that the claim was in fact timely, the claimant argued that "subsequent to the release of the report at the press conference on December 16, 1996 the Inspector General caused the report to be placed upon the Internet where to this day it remains available to the public."<sup>141</sup> As such, claimant argued that the continuing availability of the report on the Internet constituted a continuing republication "each and every day" and thus, a continuing and ongoing wrong.<sup>142</sup> Rejecting claimant's argument, the court adjudicated the motion based upon the traditional single publication rule, observing that there is "no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means by making a copy of the text of the Report available via the Internet."<sup>143</sup> Applying the single publication rule, the court found:

[T]he defendant's allegedly wrongful acts consisted of the issuance of the Report on December 16, 1996 and its initial publication upon the Internet on the same date. Any continuing damage to the claimant arising from its availability upon the Internet would simply be a continuing effect of an earlier wrongful act.<sup>144</sup>

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139. 184 Misc. 2d 105 (N.Y. Ct. Cl. 2000).

140. *Id.* at 107-08.

141. *Id.* at 110.

142. *Id.* at 110-11.

143. *Id.* at 115.

144. *Id.* at 112.



As such, publication sufficient for liability to attach was deemed to have occurred at the time the information was posted. Most probative to our question of when the practice of law occurs over the Internet, the *Firth* court observed that “[u]nder the single publication rule, publication occurs at the time the defamatory article is made available to the public and actual sales of the article (the equivalent of ‘hits’ on the Internet) are unnecessary.”<sup>145</sup> Applying the *Firth* Court’s reasoning, it could be argued that the practice of law over the Internet occurs at the time the posting is made, regardless of whether someone actually reads that posting, because “actual . . . ‘hits’ on the Internet are unnecessary.”<sup>146</sup>

The issue of defamation via publication over the Internet was also considered by the United States District Court for the Southern District of New York in *Van Buskirk v. New York Times*.<sup>147</sup> In *Van Buskirk*, the plaintiff, Robert Van Buskirk, sued the defendants, the New York Times and John L. Plaster, for defamation and the infliction of emotional distress. The precipitating factor for Van Buskirk’s action was a letter written by Plaster which “described Van Buskirk as the ‘sole source’ for a CNN report that [a 1970 U.S. military] operation’s ‘major objective’ was to kill American defectors present in [a Laotian] village and that Van Buskirk had participated in the killing.”<sup>148</sup> This letter was first published on an Internet website hosted by the Special Operations Association (“SOA”) on June 8, 1998, and was subsequently utilized as the basis for an article published in the New York Times.<sup>149</sup> Defendants moved to dismiss the action, asserting that it was time barred by New York’s one year statute of limitations for libel cases because the letter was first published on the Internet on June 8, 1998 and the claim was not raised by plaintiff until January 14, 2000.<sup>150</sup>

To assess defendant’s motion to dismiss, the court necessarily examined prior case law pertaining to the method for judging the time of publication of allegedly defamatory materials. Citing *Firth*, the court approved of applying the single publication rule to the Internet. The court also examined the transient nature of Internet postings, which can be read or removed at any time, noting that just because a defendant can withdraw an Internet publication by removing the posting does not toll the statute of limitations.<sup>151</sup> In arguing against dismissal of his action,

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145. *Id.* at 113 (emphasis added).

146. *Id.*

147. No. 99 Civ. 4265, 2000 U.S. Dist. LEXIS 12150 (S.D.N.Y. Aug. 24, 2000).

148. *Id.* at \*2.

149. *Id.*

150. *See id.* at \*3.

151. *See id.* at \*6.

Van Buskirk also asserted that the single publication rule only applied to publications by commercial entities. The court likewise found this argument to be unconvincing:

Before the advent of the Internet, it was largely commercial entities that could afford the expense of widespread publication. Today, the Internet has made widespread publication affordable even for noncommercial users. The policy underlying the statute of limitations will require applying the single publication rule to both commercial and non-commercial publishers.<sup>152</sup>

Clarifying what is meant by the time of communication or publication to a third party, *Firth* and *Van Buskirk* appear to indicate that communication or publication in the electronic world occurs at the time the information is posted to the Internet. In neither *Firth* nor *Van Buskirk* did the courts require proof that the posting actually had been read by a third party to begin the running of the statute of limitations. In fact, the *Firth* court specifically noted that it would be unnecessary to prove "hits" on a website. Moreover, the *Van Buskirk* court's observation that the transient nature of Internet postings does not affect the date that the article is deemed first published further bolsters the proposition that a posting does not need to actually be read for publication to occur.

Based on these cases, it could be argued that the practice of law occurs at the time information is posted to the bulletin board, listserv, or newsgroup, and proof of actual receipt or viewing by a third party would appear to be unnecessary. To a great extent, this rationale also presents a practical solution. For example, in the case of bulletin boards, it would be almost impossible to prove that a message was actually read by a third party absent subpoenaing the log files of the host of the bulletin board. Even in the case of listservs and newsgroups, which automatically explode messages to all of their subscribing members, proof of actual receipt would still be difficult. Specifically, there would be no way to prove actual receipt of the legal advice absent the filing of a complaint by an individual recipient, or the issuance of a subpoena for log files demonstrating receipt of the message in an individual recipient's mailbox. The transmission of e-mail is by no means an exact science — e-mail can be misdirected, filtered out at the ISP or individual recipient level, or dropped altogether due to connectivity problems. While there

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152. *Id.* at \*5–6.



is always the issue of *locus penitentiae* because the posted advice might never be read by a third party (i.e., the bulletin board is archived or the hosting server is taken offline before someone accesses the site), the anonymity and accessibility of the Internet necessitate a practical approach to judging the moment when the practice of law occurs.

One problem with such an approach, however, is ascertaining where the practice of law occurs. If we cannot prove whether the posting was actually read by a third party or where that third party was located, it would seem difficult to ascertain whether the attorney did in fact practice law in a particular state, especially one in which he is unlicensed, and by necessity, unauthorized. Recall from *Birbrower* that unlawful practice is deemed to occur when "the unlicensed lawyer engage[s] in sufficient activities in the state, or create[s] a continuing relationship with the . . . client that include[s] legal duties and obligations."<sup>153</sup> Thus, while the practice of law over the Internet might occur at the time the attorney, or non-attorney as the case may be, posts the information to a bulletin board, listserv, or newsgroup, prosecution for unauthorized practice of law over the Internet might not realistically occur unless the prosecuting agency can identify a third party that actually read the legal advice.

### 3. Liability for Third Party Postings

A third question that arises with regard to bulletin boards, listservs, and newsgroups is whether the hosts of these media can be held liable for the content of postings by third parties, assuming the postings are found to impart specific legal advice.

Although this issue was not directly answered by the Association of the Bar of the City of New York in Ethics Opinion 1998-2,<sup>154</sup> the Association's discussion does highlight some of the relevant considerations. Specifically, a law firm asked the Bar for an opinion on the ethical implications of establishing a listserv-type discussion area. In responding to this request, the Association noted that there are different types of listservs: some permit automatic subscription, while others permit subscriptions only at the discretion of the listserv administrator.<sup>155</sup> The Association also noted that control over a listserv's content can vary. Specifically, some listservs are moderated by an administrator who reads each proposed posting and subjectively determines whether its content and tone are appropriate for the group, rejecting those deemed

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153. *Birbrower v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 5 (Cal. 1998).

154. 1998-2, *supra* note 29.

155. *Id.* at 4.

unsuitable.<sup>156</sup> Other listservs are unmoderated, automatically posting all responses to the entire listserv group.<sup>157</sup>

Because the law firm raising the question did not specify what type of listserv it was considering, moderated or unmoderated, the Association of the Bar did not provide a specific answer regarding the permissibility of, and liability for, listservs operated by law firms. The Bar did, however, provide some general cautionary considerations. Specifically, it pointed to three different paragraphs in DR 2-104, paragraphs A, C and E, that the firm should consider.<sup>158</sup> All three of these paragraphs deal with accepting legal employment. Most relevant, New York's version of DR 2-104 (E) states that "[w]ithout affecting the right to accept employment, a lawyer may speak publicly or write for a publication on legal topics so long as the lawyer does not undertake to give individual advice."<sup>159</sup> Once again, we return to the premise that a lawyer may engage in a general discussion about a legal topic so long as he does not provide specific legal advice.

The Association also reviewed Ethical Consideration 2-5.<sup>160</sup> While the Ethical Considerations are not binding on New York courts, they do function as aspirational tenets, and are thus helpful in resolving ethical questions that arise. In this specific case, the Association noted that Ethical Consideration 2-5 is relevant to "an Internet discussion area":

[A] lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice.<sup>161</sup>

Finally, the Association cautioned that "[t]he dynamics of legal discussions on the Internet are different from those of oral public discussion, in part because the written word is generally given more

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156. *See id.*

157. *See id.*

158. *See id.*

159. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) & (b) (1983).

160. 1998-2, *supra* note 29 (quoting N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-104 (1996)), available at <http://www.nysba.org/opinions/codes/canon2.html> (last visited Jul. 31, 2001)).

161. *Id.*



weight, and may benefit from longer retention and study, than the oral word."<sup>162</sup>

To mitigate any potential problems, the law firm seeking the ethics opinion offered to use a disclaimer to the effect that if specific legal advice were sought, the law firm would indicate that such advice required the establishment of an attorney/client relationship that cannot occur through a web page.<sup>163</sup> Without resolving whether this would be adequate to comply with the ethics rules, the Association did note that such a disclaimer might not shield the law firm from responsibility for establishing an attorney/client relationship with regard to "specific on-line communications."<sup>164</sup> Additionally, the Association cautioned that "almost any question and answer may in fact constitute legal advice, even if the questioner does not appear to be seeking 'specific' legal advice."<sup>165</sup> Recall from our previous discussion that the Lawyer's Manual on Professional Conduct suggests that we look to the subjective belief and actions of the recipient of the communication to ascertain whether the communication constitutes general legal information or specifically tailored individual legal advice.<sup>166</sup>

Although New York Ethics Opinion 1998-2 did not directly answer the question of whether the host of a bulletin board, listserv, or newsgroup can be held liable for third party postings, it does provide a few pieces of helpful guidance. First, it calls our attention to the fact that the ethics rules regarding liability for these postings might differ based upon whether the postings are moderated or unmoderated. We will discuss this issue again when we address the possibility of attributing vicarious liability for postings to the "publisher" of the posting, even if the posting itself is by a third party.

Second, the opinion would appear to support the proposition that postings to bulletin boards, listservs, and newsgroups are permitted in the abstract so long as they are generalized and do not answer specific legal questions. As the Association of the Bar cautioned, "the written word is given more weight than the spoken word," and thus "substantial caution and vigilance are advised."<sup>167</sup> At the same time, however, we should bear in mind that the Tennessee Bar specifically differentiated between a bulletin board posting, of which it approved, and a listserv and newsgroup posting, of which it disapproved because the costs are

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162. *Id.*

163. *See id.*

164. *Id.*

165. *Id.* at 4-5.

166. *See supra* note 87 and accompanying text.

167. *Id.*

borne by the recipient of the posting (when that posting is automatically exploded to the recipient's individual e-mail account).<sup>168</sup>

Finally, New York Opinion 1998-2,<sup>169</sup> like the Kansas Bar Association's Opinion 93-08,<sup>170</sup> illustrates that even the use of disclaimers on a bulletin board, listserv, or newsgroup may not be enough to prevent the formation of an attorney/client relationship and the practice of law.

#### 4. Internet Service Providers ("ISPs")

In order to better gain some insight into the potential liability of a bulletin board, listserv or newsgroup host for third party postings, it may be useful to look to case law pertaining to an ISP's liability for these postings.

Pursuant to the 1996 Communications Decency Act ("CDA"),<sup>171</sup> under a provision known as the "Good Samaritan" provision, interactive computer services may not be held liable based upon the content of communications posted by third parties.<sup>172</sup> Specifically, the Good Samaritan provision states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>173</sup> An interactive computer service is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."<sup>174</sup> Thus, arguably, even if the ISP has *knowledge* of the contents of a posting by a third party, liability still would not attach. In fact, in *Blumenthal v. Drudge*<sup>175</sup> the United States District Court for the District of Columbia observed that "Congress has made a different policy choice

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168. See Tenn. Bar Ethics Op., 95-A-570 (1995) (unpublished advisory opinion).

169. 1998-2, *supra* note 29.

170. Kan. Bar Op. 93-08 (1993).

171. 47 U.S.C. § 230 (1994 & Supp. II 1996).

172. *Id.* at § 230(c) (entitled the "Protection of 'good samaritan' blocking and screening of offensive material"); see also *Doe v. Oliver*, 755 A.2d 1000 (Conn. Super. 2000) (holding that a claim against AOL was barred by the CDA).

173. 47 U.S.C. § 230(c)(1). It is important to note that despite the striking of certain provisions of the CDA by the Supreme Court in *ACLU v. Reno*, 521 U.S. 844 (1997), the Good Samaritan provision currently remains in full force and effect. See *id.* (holding that the parts of the CDA regarding knowing transmission of obscene or indecent messages and the "patently offensive display" provisions abridged First Amendment freedoms).

174. 47 U.S.C. § 230(e)(2).

175. 992 F. Supp. 44 (D.D.C. 1998).



by providing immunity even where the interactive service provider has an active, *even aggressive role* in making available content prepared by others.”<sup>176</sup>

Recently, in the case of *Doe v. America Online, Inc.*,<sup>177</sup> the Florida Supreme Court held that the ISP provisions of the CDA insulated America Online (“AOL”) from the illicit postings of one of its customers even though AOL had received notice of the postings. The plaintiff argued that AOL should be held liable for allowing Richard Russell, its customer, to advertise child pornography through AOL’s Internet service. AOL responded that the CDA “prohibits civil actions that treat an interactive computer service as the ‘publisher or speaker’ of messages transmitted over its service by third parties.”<sup>178</sup> Relying heavily on the CDA’s Good Samaritan provision, the court looked to the statute’s plain meaning and agreed.<sup>179</sup> Interestingly, the dissent would hold an ISP liable as a distributor of illicit content, even in light of the CDA, if the ISP has actual notice of the illicit content and fails or refuses to remove the content.<sup>180</sup> Currently, however, the immunity provided by the CDA to ISPs appears to remain completely intact.

In an inventive attempt to overcome this immunity, the plaintiffs in *Doe v. Franco*<sup>181</sup> tried to hold defendants “GTE and PSINet liable as publishers or speakers of information provided by another”<sup>182</sup> by alleging that, in addition to acting as ISPs, they acted as Web hosts by hosting the offending websites, and thus, the immunity did not apply to their actions as hosts.<sup>183</sup> Rejecting this argument, however, the court noted that “immunity under the CDA is not limited to service providers who contain their activity to editorial exercises or those who do not engage in web hosting, but rather ‘Congress . . . provided immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.’”<sup>184</sup> As the court astutely observed, by “offering web hosting services which enable someone to create a web page, GTE and PSINet are not magically rendered the

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176. *Id.* at 52 (emphasis added).

177. No. SC94355, 2001 WL 228446 (Fla. 2001). A petition for certiorari was filed with the Supreme Court in July 2001. See Julia Scheeres, *Mon: ISP Should Pay for Kid Porn*, WIRED NEWS (Jul. 27, 2001), available at <http://www.wired.com/news/business/0,1367,45473,00.html>

178. *Id.* at \*1.

179. See *id.* at \*7.

180. See *id.* at \*8.

181. No. 99-C-7885, 2000 WL 816779 (N.D. Ill. June 21, 2000).

182. *Id.* at \*3.

183. See *id.*

184. *Id.* at \*4 (quoting *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D. DC 1998)).

creators of those web pages" and thus, they do not lose the broad protection granted by the CDA to interactive service providers.<sup>185</sup>

A law firm, however, does not fall within the definition of an interactive computer service, and therefore does not have these broad protections. Thus, could a law firm or other non-ISP host be held accountable for the practice of law by a third party based upon legal advice posted by that third party on its bulletin board, listserv, or newsgroup? In other words, could the entity be deemed the publisher of the information and thus the provider of the advice?

In answering these questions, it may be helpful to review the case of *Lunney v. Prodigy Services Co.*,<sup>186</sup> the first case prior to the effective date of the CDA to deal with ISP liability for postings by third parties. In *Lunney*, the defendant Prodigy was sued by the plaintiff for libel *per se*, negligence, and harassment<sup>187</sup> based upon postings by an unknown "practical joker" who posed as the plaintiff on a bulletin board hosted by Prodigy and sent a "threatening, profane, electronic mail message" to a third party.<sup>188</sup> In affirming the summary judgment motion for Prodigy, the New York Court of Appeals noted that it could not deem Prodigy the publisher of the postings for defamation purposes, and thus could not be held liable. Although Prodigy reserved the right to edit and screen bulletin board postings as a condition for using its service, there was no evidence that it did in fact do so.<sup>189</sup> The court also observed that even if

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185. *Id.* The issue of liability for posting information prepared by others is by no means limited to the United States. In China, for example, Beijing's Haidian District Court recently heard a case filed against three Chinese media companies based upon their hosting of a report posted to their websites about the plaintiff, which was first published in the *Beijing Chenbao*. *Sina.com, Two Other Media Companies Named in Defamation Suit*, CHINAONLINE, at <http://www.chinaonline.com/topstories/000720/1/B100071817.asp> (last visited Apr. 10, 2001). In *Godfrey v. Demon Internet Ltd.*, Case No: 1998-G-No 30, High Ct. Justice, Queen's Bench Div. (Mar. 26, 1999), the ISP Demon Internet Ltd. ("Demon") agreed to a damage settlement in a libel action after a British court ruled that Demon would be held liable for a posting by a third party on a newsgroup hosted by Demon. *See id.*; see also Yaman Akdeniz, *Case Analysis: Laurence Godfrey v. Demon Internet Limited*, JOURNAL OF CIVIL LIBERTIES, 4(2), 260-267 (Jul. 1999), available at <http://www.cyber-rights.org/reports/demon.htm>. Specifically, Demon was found liable for the posting because Demon refused to remove the posting from a newsgroup despite having been asked by the plaintiff to do so when the plaintiff alleged that the message, posted under his name, was not in fact authored by him. *See id.*

186. 683 N.Y.S.2d 557 (N.Y.A.D. 2 Dept. 1998), *aff'd*, 723 N.E.2d 539 (N.Y. 1999), *cert. den.*, 529 U.S. 1098 (2000).

187. *Id.* at 558.

188. *Id.* at 559.

189. *See Lunney*, 723 N.E.2d at 542; see also John T. Aquino, *British Court Concludes ISPs Liable for Bulletin Board Postings*, AM. LAWYER MEDIA (Apr. 10, 2000).



Prodigy actually did screen and exclude some postings, Prodigy could not be held liable for the posting that gave rise to the suit absent proof that it actually screened the posting in dispute. Such activity would not "alter [Prodigy's] passive character in the 'millions of other messages in whose transmission it did not participate.'"<sup>190</sup> The court also noted Prodigy's request to be held harmless for the postings under the Good Samaritan provision of the CDA, but refused to decide the issue based upon that provision because such a decision would have required retroactive application of the CDA.<sup>191</sup>

The lower court's reasoning in *Lunney* is also instructive for assessing liability in claims based upon postings on a bulletin board, listserv, or newsgroup. Specifically, the Appellate Division found that Prodigy was not the publisher of the information, and thus not liable for the postings, based upon two grounds: 1) prior New York State Court of Appeals opinions on publication;<sup>192</sup> and 2) the extension of the common law qualified privilege applied to telegraph companies that unknowingly "transmit defamatory messages submitted by their customers," deemed applicable to ISPs such as Prodigy.<sup>193</sup>

With regard to prior New York Court of Appeals case law, the Appellate Division noted that "he who furnishe[s] the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler."<sup>194</sup> The Appellate Division did qualify this, however, noting that "no potential for liability exists, unless the defendant in question has *some 'editorial or at least participatory function' in connection with the dissemination of the defamatory material.*"<sup>195</sup>

Of great import to the issue of "participatory function" in postings, is the Appellate Division's observation that even if an entity "devise[s] a method by which certain epithets are automatically excluded from the messages sent via its network,"<sup>196</sup> this still does not rise to the level of editorial or participatory function. Namely, the "application of any unintelligent automated word-exclusion program of this type cannot be equated with editorial control. . . . Intelligent editorial control involves

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190. *Lunney*, 723 N.E.2d at 542.

191. *Id.* at 543; *see also* *Doe v. Oliver*, 755 A.2d 1000, 1003 (Conn. Super. 2000) (finding that "[the CDA] precludes courts from entertaining claims that would place a computer service provider in a publisher's role").

192. *See Lunney*, 683 N.Y.S.2d at 561 (citing *Anderson v. New York Tel. Co.*, 320 N.E.2d 647 (N.Y. 1974)).

193. *Id.* at 561.

194. *Id.* at 560 (quoting *Youmans v. Smith*, 47 N.E. 265 (N.Y. 1897)).

195. *Id.* (quoting *Anderson*, 320 N.E.2d at 650) (emphasis added).

196. *Id.* at 561.

the use of judgment, and no computer program has such capacity."<sup>197</sup> In essence, a program that automatically excludes postings to a bulletin board, listserv or newsgroup based upon pre-programmed criteria, such as a key word search, is not sufficient to attribute liability to the host because, to be held liable as a publisher, the host must exercise "intelligent editorial control." This rationale would appear to be consistent with the distinction drawn by the Association of the Bar of the City of New York in Ethics Opinion 1998-2,<sup>198</sup> wherein the Bar distinguished between moderated and unmoderated listservs.

Other courts have also relied upon the distinction between the performance of automated pre-programmed functionality and intelligent actions by a human being. For example, in distinguishing a patent from the challenged activity in *Charles E. Hill & Associates v. Compuserve, Inc.*,<sup>199</sup> the district court looked to the deletion of cached memory from an Internet user's hardrive and noted that a web browser that automatically deletes information from a cache "cannot be described as doing anything 'voluntarily'," as required by the patent, since the user has no control over when the data is in fact deleted.<sup>200</sup>

So what does *Lunney v. Prodigy* teach us about bulletin boards, listservs, and newsgroups operated by law firms or third parties? First, it teaches us that as a private entity, the law firm or third party would probably not qualify for the common law qualified immunity privilege granted to communication companies, such as a telephone company. Likewise, it is doubtful whether the law firm or third party would qualify for the privilege allotted to interactive computer services under the CDA.

Second, *Lunney* teaches us that, since unmoderated bulletin boards, listservs, and newsgroups do not encompass the exercise of editorial

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197. *Id.*

198. 1998-2, *supra* note 29.

199. No. IP97-0434-C-M/S, 2000 WL 1473875 (S.D. Ind. Aug. 24, 2000).

200. *Id.* at \*23. This fine distinction between exercising intelligent editorial control, however, may soon become somewhat blurred. After being ordered by a French court to prevent French citizens from participating in auctions for Nazi items and memorabilia on Yahoo's auction site, Yahoo announced that "beginning January 10th [2001], it will ban auctions of Nazi artifacts and other items 'that are associated with groups which promote or glorify hatred and violence.'" Lori Enos, *Yahoo! To Ban Nazi-Related Auctions*, E-COMMERCE TIMES, Jan. 3, 2001, at <http://www.ecommercetimes.com/perl/story/6432.html>. In order to perform this screening, "[a]ny items that appear to violate the company's ban on hate-related items will be automatically rejected, though users will be able to appeal rejections to a human being. In addition to the filtering technology, the company said it will rely on 'trained representatives who will monitor the site regularly.'" *Id.* The question then becomes whether this new editorial activity will rise to the level of actual editorial control over a given posting, such that it may affect Yahoo's immunity under the CDA, as alluded to in *Lunney*. See *supra* notes 186-98 and accompanying text.



control, a hosting law firm or legal website would probably be less likely to be held liable for posted content, even if it utilizes some type of screening software to screen for, and exclude, certain postings that involve the provision of specific legal advice. Conversely, if the law firm or legal website actively moderates or reviews postings on its bulletin board, listserv, or newsgroup, exercising some editorial judgment and control, then it would be more likely to be deemed a "publisher" of the content and be held liable for third party postings offering specific legal advice. At the same time, however, law firms might wish to heed the warnings provided by the Appellate Division in *Lunney*: "[h]e who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler."<sup>201</sup> It can be surmised from this language that even if a law firm or third party host does not engage in active, "intelligent editorial control" in moderating or editing postings, if the firm or party knows, or has reason to know, that its bulletin board, listserv, or newsgroup is being used to provide specific legal advice and it engages in some participatory function in disseminating that advice, it may nonetheless be found to be a publisher of those postings and thus be held accountable for the practice of law.

Finally, it is important to note that, although a law firm or third party that hosts a passive and unmoderated bulletin board, listserv, or newsgroup, over which it exercises no "intelligent editorial control," might not be deemed a "publisher" by the courts, they could nonetheless be held liable by state ethics regulators that utilize a different standard. As the Association of the Bar of the City of New York cautioned, "the dynamics of written legal discussions on the Internet are different from those of oral public discussion" and thus, if the law firm does "establish a discussion area, substantial caution and vigilance are advised."<sup>202</sup>

### *E. Legal Self-Help Websites and Software*

In addition to the new modes of communication offered by the expansion of the Internet, another technological innovation revolutionizing the practice of law has been the development of legal self-help software and interactive legal websites. The goal of this software and these websites appears to be the empowerment of the consumer to perform rudimentary legal tasks without the expense of

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201. *Lunney*, 723 N.E.2d at 560 (quoting *Yountans v. Smith*, 47 N.E. 265 (N.Y. 1897)).

202. 1998-2, *supra* note 29.

consulting and possibly retaining an attorney. While reducing legal expenses and expanding legal help are admirable undertakings in the abstract, concern regarding the practice of law once again rears its head.

In Oregon Ethics Opinion 1994-137,<sup>203</sup> the Oregon State Bar was asked to consider whether a lawyer would be aiding the unauthorized practice of law by "engag[ing] in a joint venture for profit with a non-lawyer to offer an online legal information system to the public that would provide information not only on substantive law issues but also on procedural and jurisdictional matters, such as identifying applicable rules, fees and forms."<sup>204</sup> Specifically, "[w]hen accessed through a computer terminal, the online system would pose questions to the user and generate responses derived from the system's database, without the direct participation of an employee."<sup>205</sup> To answer this question, the Bar looked to a 1975 Oregon Supreme Court case, *Oregon State Bar v. Gilchrist*,<sup>206</sup> which permitted the sale and marketing of do-it-yourself divorce kits that came complete with forms and instructions on how to fill them out. In upholding the sale of the self-help kits, the *Gilchrist* court stated that so long as the kits "do not personally advise the customers" they are permissible, because "the practice of law requires that a person be involved in rendering the individualized advice."<sup>207</sup> Expanding upon the *Gilchrist* ruling, the Oregon Bar reasoned that the use of legal self-help software, whether running a program on one's own computer or by remotely using an online service, is analogous to the do-it-yourself legal books and kits.<sup>208</sup> For example, the Bar noted that "[t]he legal information service provides customized information by generating responses from a database through the use of 'decision tree' software, similar to using the index or table of contents in a book."<sup>209</sup> The Bar therefore reasoned that "[i]n a sense, the customer who operates the legal software . . . is the one doing the customizing, much as does the reader of a legal self-help text or one completing a do-it-yourself legal kit."<sup>210</sup> As such, the Oregon Bar felt that since a person must actually exercise judgment in making specific legal recommendations, the implementation of the proposed joint venture would not be deemed the practice of law.<sup>211</sup>

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203. Or. Ethics Op. No. 1994-137 (1994).

204. *Id.*

205. *Id.*

206. 538 P.2d 913 (Or. 1975).

207. Or. Ethics Op. No. 1994-137 (1994) (construing *Gilchrist*, 538 P.2d at 916-17).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*



However, this Oregon Ethics opinion was issued in 1994, early in the evolution of the Internet and well before personal computers ("PCs") came equipped with sophisticated operating systems, high-speed microprocessors, and multi-gigabyte storage devices. By virtue of these changes in computing, numerous legal software packages and websites have been introduced to the mass consumer market, probably none of which was envisioned by the Oregon Bar at the time it issued its 1994 opinion. Moreover, legal software today is quite sophisticated and has the ability to interact with consumers in a way never before feasible. Finally, with features such as help screens that permit individuals to ask legal questions and retrieve detailed pre-programmed answers, the line between user customized software and pre-programmed legal advice is blurring.

Such changes might help to explain the decision in *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*,<sup>212</sup> which involved facts quite similar to those considered by the Oregon Bar in 1994, yet resulted in a decision completely counter to the 1994 Oregon Bar opinion. In *Parsons*, the Unauthorized Practice of Law Committee of the Texas Bar sued Parsons, a California defendant who developed, published, and marketed various software products, including the program Quicken Family Lawyer.<sup>213</sup> Some of the major features of the Quicken product with which the Committee took issue included:

- (1) packaging that represented that it was valid in 49 jurisdictions, including the District of Columbia;<sup>214</sup>
- (2) product representations that it was "developed and reviewed by expert attorneys" and is "updated to reflect recent legislative formats";<sup>215</sup>
- (3) the fact that when a user accessed a document, the program would ask questions relevant to filling in the form, and, with certain questions, would present a pop-up box explaining the relevant legal considerations a user might want to bear in mind when completing the form;<sup>216</sup>
- (4) that upon initial use of the program, the program would ask the user's state of residence and would inquire if the user wished to have documents suggested by the program, after which, depending upon the user's answers, the program would display

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212. No. CIV.A. 3:97CV-2859H, 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999).

213. See *id.* at \*3.

214. See *id.* at \*4.

215. *Id.*

216. See *id.* at \*6.

- all documents available and mark the few which were most appropriate to the user;<sup>217</sup>
- (5) that when a user selected a specific type of document, a screen would indicate that the laws regarding the use of the document varied from state to state, subsequent to which the program would open the appropriate document based upon the user's state;<sup>218</sup> and
- (6) the program's provision of a help feature which permitted a user to "Ask Arthur Miller," a virtual attorney, specific legal questions.<sup>219</sup>

The Committee's main argument was that the software acted as a "high tech lawyer" because it gave advice concerning legal documents, and also selected specific legal documents for users, both of which involved the "usage of legal skill and knowledge," thus constituting the practice of law.<sup>220</sup> It is worthwhile to note that the first time a user accessed the Quicken software, it would provide a disclaimer that it was not intended to provide specific information for a specific situation and that people would have to use their own judgment as to which forms were most appropriate.<sup>221</sup> The program also informed users that they may wish to seek the assistance of an attorney.<sup>222</sup>

Looking for guidance as to what constituted the practice of law, the *Parsons* court looked to three previous Texas court decisions. The first, *Palmer v. Unauthorized Practice of Law Committee*,<sup>223</sup> held that the "sale of . . . will forms containing blanks to be filled in by the user," along with instructions, constituted the unauthorized practice of law.<sup>224</sup> *Palmer* also held that the "exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument, necessarily affects important legal rights," and thus, also is the practice of law.<sup>225</sup> The second case, *Fadia v. Unauthorized Practice of Law Committee*,<sup>226</sup> held that since "the selection of the proper legal forms [also] affects important legal rights . . . it [too] constitutes the practice of law."<sup>227</sup> Finally, in *Unauthorized Practice of Law Committee v.*

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217. See *id.* at \*5.

218. See *id.* at \*6-7.

219. *Id.* at \*7.

220. *Id.* at \*13-14.

221. See *id.* at \*4-5.

222. See *id.*

223. 438 S.W.2d 374, 375 (Tex. App. 1969).

224. *Id.*

225. *Id.* at 377.

226. 830 S.W.2d 162 (Tex. App. 1992).

227. *Id.* at 165.



*Cortez*,<sup>228</sup> the Texas Supreme Court held that even the mere advising of a person as to whether to file a form requires legal skill and knowledge, and therefore would be the practice of law.<sup>229</sup>

Based upon the established body of law as to what constituted the practice of law in Texas, the sale of the Quicken software was found to constitute the practice of law, and thus violative of Texas' prohibition against the unauthorized practice of law.<sup>230</sup> Therefore, the plaintiff's motion for a permanent injunction against defendants was granted.<sup>231</sup>

While on appeal, however, the Texas legislature passed an amendment to the Unauthorized Practice of Law statute providing that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [o]f computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."<sup>232</sup> Thus, the injunction issued by the district court in *Parsons* was vacated.<sup>233</sup>

The issue of using software to perform regulated activities that would require licensure if performed by human beings has also come under fire in other contexts, including the realm of securities. In *Commodity Futures Trading Commission v. Vartuli*,<sup>234</sup> the Second Circuit ruled that software developed by a company called AVCO, of which the defendant Mr. Vartuli was the sole shareholder, violated the Commodity Exchange Act by functioning as an unregistered commodity trading advisor. In 1989, AVCO began marketing computer software called the "Recurrence System." The Recurrence System permitted a user to input current market prices for various foreign futures contracts, which, after analyzing the information and the current transactions taking place in the futures market for those contracts, would issue buy or sell signals.<sup>235</sup> After examining the definition of a commodity trading advisor under Section 1a5(A) of the Commodity Exchange Act,<sup>236</sup> the court determined that since the advisory services provided by the software were not "solely incidental" to the software, but were in fact the primary purpose of the software, the Recurrence System was acting as

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228. 692 S.W.2d 47 (Tex. App. 1984).

229. *See id.* at 49-50.

230. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 U.S. Dist. LEXIS 813, at \*32-33 (N.D. Tex. Jan. 22, 1999).

231. *See id.*

232. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999) (quoting H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999)).

233. *See id.*

234. 228 F.3d 94 (2d Cir. 2000).

235. *See id.* at 98.

236. 7 U.S.C. §1a5(A) (1999) (amended 2000).

a commodity trading advisor and AVCO was in violation of the Act for failing to register the company as a commodity trading advisor.<sup>237</sup>

Cases such as *Parsons* and *Commodity Futures Trading Commission* indicate that the automation of regulated processes that require strict licensure when performed by human beings does not exempt the company selling the automated software from the applicable licensure requirements. While the decision in *Parsons* was eventually vacated through legislative amendment,<sup>238</sup> and while many commentators have disagreed with the outcome in *Commodity Futures Trading Commission*,<sup>239</sup> taken together these cases raise an important issue for consideration in the context of legal self-help software. Specifically, since Quicken was vindicated only through legislative action in the particular jurisdiction, how many other states could potentially find the sale of such computer programs violative of their own unauthorized practice of law statutes?

#### *F. E-Mail Exchange*

One final mode of electronic communication with clients that has been facilitated through the Internet is e-mail. Without delving into the confidentiality issues surrounding the use of e-mail for legal communications, it is worthwhile to discuss the implications that the use of e-mail might have on the issue of the practice of law.

As case law pertaining to the use of e-mail has developed, it has become clear that courts generally view e-mail as an alternative form of written correspondence. Thus, it would be appropriate to apply the same rules pertaining to the use of written correspondence with out-of-state residents<sup>240</sup> to the use of e-mail correspondence with those residents. In Tennessee Advisory Ethics Opinion 95-A-576,<sup>241</sup> an attorney inquired as to the ethics of responding to an Internet posting through a private e-mail.<sup>242</sup> In responding to the attorney's inquiry, the Bar again drew a distinction between general and specific legal advice.<sup>243</sup> If the e-mail response were to contain general information, the Tennessee Bar would condone the response, as long as the attorney were to abide by all other

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237. *Vartuli*, 228 F.3d at 103.

238. *Parsons*, 179 F.3d at 956.

239. *Vartuli*, 228 F.3d at 103.

240. See, e.g., *Sterns v. Lundberg*, 922 F. Supp. 164 (S.D. Ind. 1996); Conn. Ethics Op. 97-25 (1997); Ill. Advisory Op. 94-02 (1994).

241. Tenn. Op. Advisory Ethics Comm. 95-A-576 (1995).

242. See *id.*

243. See *id.*



ethical considerations.<sup>244</sup> If the e-mail response were to contain specific legal advice, however, the Bar cautioned that an attorney/client relationship could be created, along with all of the concomitant obligations and responsibilities.<sup>245</sup>

The use of e-mail has also been analogized to communication in chat rooms. For example, it has been opined that “[a]nswering legal queries via e-mail carries much the same risk as chatting one on one with an individual about a legal question . . . .”<sup>246</sup> Once again, we return to the distinction between what an attorney may and may not provide in communications with non-clients. If the information is limited to general information, the communication would likely be deemed acceptable. On the other hand, however, it could be surmised that if the legal information is specific enough, the response could be deemed the practice of law, thus potentially implicating unauthorized practice concerns.

One of the additional benefits offered by e-mail, not offered by chat rooms, bulletin boards, listservs, or newsgroups, is the ability to attach documents and forms to the e-mail. This too could potentially implicate practice of law issues. For example, if the practice of law is interpreted in line with Texas and New York case law, then an attorney’s selection and provision of legal forms, and instructions on completing those forms, through e-mail attachments, might constitute the practice of law.<sup>247</sup> Indeed, even advising a person as to whether to file a form has been deemed by numerous states to involve legal skill and knowledge that would constitute the practice of law.<sup>248</sup> Thus, advising a person through e-mail to file a form might in itself be deemed to constitute the practice of law, which might in turn be considered the unauthorized practice of law if the e-mail recipient is located in a state in which the attorney is not licensed.

At the same time, however, the use of e-mail does present the opportunity for an attorney to control the subjective expectations of the recipient better, and thus control the recipient’s belief that the communication is meant to impart only general legal information and not personalized advice.<sup>249</sup> As such, while attorneys should be careful to avoid providing specific legal advice in e-mail with a non-client, attorneys should feel free to communicate via e-mail to the same extent permitted in other areas of electronic communication, as discussed

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244. *See id.*

245. *See id.*

246. *Rogers, Special Report, supra* note 81.

247. *See supra* notes 2–8 and accompanying text.

248. *See supra* note 8 and accompanying text.

249. *Rogers, Special Report, supra* note 81, at 100.

above. In such communications, however, attorneys should be ever cognizant of controlling the expectations of the recipient of the e-mail, utilizing clear and unambiguous cautionary language where appropriate.

#### IV. CONCLUSION

The legal profession has begun to embrace the revolutionary opportunities offered by electronic communication. As evidence of this, one need look no further than many of the larger national and regional law firms, which have created the position of "Knowledge Manager," to lead their respective technology initiatives and the integration of those technologies into their legal practice. Moreover, most law firms now utilize some type of e-mail to communicate with clients, and in some cases, even use offsite electronic data warehouses to store digitized documents and files. Similarly, law-related chat rooms and websites have proliferated over the Internet.

Although many of these communication venues were created to reduce the cost of legal resources, and to facilitate access to legal information by consumers who otherwise might not be able to retain an attorney, the use of the Internet does not suspend application of real world ethical obligations. The underlying bases for requiring attorneys to be licensed to practice within a given state, namely to protect that state's residents from unqualified legal assistance and to ensure that the attorney providing the advice is familiar with the laws in the state in which the resident resides, still apply.<sup>250</sup> Whether the individual seeking legal advice is sitting in front of an attorney in his office or in front of a computer 1,000 miles away, it is imperative that attorneys maintain the ethics and professionalism that have provided the role of attorney a special honorable place in our country's history.

While we currently lack a large body of ethics opinions specifically geared toward the virtual world, there is no reason to believe that older ethics opinions are somehow suspended or inapplicable in the online world. Quite the contrary, thanks to foresight on the part of state ethics regulators and courts, many of these opinions are drawn broadly enough to permit application to the changing landscape of legal practice. Yet, it is certainly clear that some types of legal practice in this new, faceless medium, create unique questions that have yet to be answered by ethics regulators. In such instances, this Article argues that by thinking "out-of-the-box," we can draw upon the growing body of Internet case law

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250. *In re Roel*, 3 N.Y.2d 224, 231 (1957), *app. dism'd* 355 U.S. 604 (1958) (noting that "[p]rotection of the members of the lay public of our state, when they seek *legal advice* . . . is the basis of the requirements of licensing of attorneys by the state . . .").



and utilize that case law to answer the cutting edge ethics questions that arise.

Early in the 20th Century, well before the Internet even came into existence, Albert Einstein observed that “[i]t has become appallingly obvious that our technology has exceeded our humanity.”<sup>251</sup> As officers of the court, it is our duty to do everything within our power to ensure that the needs of our clients, and humanity as a whole, are always placed above personal reward. Just as importantly, as guardians of justice, it is an imperative that we continually strive to ensure that Albert Einstein’s words never become a reality.

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251. Albert Einstein (1879–1955), *quoted in* QuoteGallery.com, at <http://www.quote-gallery.com> (last visited Jul. 31, 2001).