Message from the Chair

Mac R. McCoy
Carlton Fields
Tampa, FL

The upcoming ABA Annual Meeting in San Francisco will mark the first year of my term as Chair of the Young Lawyer Committee ("YLC"). I cannot help but express (again) how proud I am of the tremendous work the YLC leadership and Section staff have done to advance our mission of serving the interests of young lawyers within the Business Law Section. I look forward to all that we can and will accomplish in the next two years as our efforts gain even greater momentum.

Whether or not you plan to attend the ABA Annual Meeting, I strongly encourage you to consider supporting the YLC's public service project benefiting the San Francisco Food Bank. Details of the public service project, including volunteer and donation information, are contained in this newsletter and can be found here.

If you plan to attend the ABA Annual Meeting in San Francisco in person, please make every effort to attend the following YLC-sponsored or co-sponsored meetings and events:

**Friday, August 9, 2013**

**Program:** How Law Firms Can Better Serve Their Corporate Clients - and Get and Keep Their Business  
**Time:** 10:30 AM - 12:30 PM (Pacific)  
**Location:** Fairmont Hotel, Gold Room, Lobby Level  
**Sponsor:** Corporate Counsel Committee (co-sponsored by the Young Lawyer Committee)

**Saturday, August 10, 2013**

**Program:** Things My Ethics Professor Didn’t Tell Me: Top Ethical Pitfalls for the Social Media Age  
**Time:** 8:00 - 10:00AM (Pacific)  
**Location:** Fairmont Hotel, Terrace Room, Terrace Level  

**Open Meeting:** Young Lawyer Committee Meeting (All young lawyers are welcome!)  
**Time:** 11:30AM - 12:30PM (Pacific)  
**Location:** Fairmont Hotel, Vanderbilt Room, Terrace Level

Note: Any changes to meeting times and locations will be posted near the on-site registration desk.

If you cannot attend the Young Lawyer Committee Meeting in person, please join by teleconference. The toll-free dial-in number (U.S. and Canada) is (866) 646-6488. The international dial-in number is (707) 287-9583. The conference code is 3199473460.

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**Featured Articles**

**Putting the Shoe on the Other Foot**  
By Neil Hazan

One characteristic of life in a big law firm is that professionals often have a high degree of specialization at early stages in their careers. As a corporate lawyer working at Canada's largest firm, it is rare for me to have an opportunity to be involved in litigation due to the fact that many of my...
colleagues have a wealth of specialized expertise in this area, often making it more cost-effective for them to handle litigious matters directly.

More...

**So What Is It We (Should) Do Anyway?**
*By Michael J. Dayton*

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More...

**Grow Your Law Practice Through the Use of Mediation**
*By Jeffrey Carr*

Utilizing mediation as an integral aspect of your law practice can be one of the major building blocks to growing a successful and satisfying career. Though Alternative Dispute Resolution (ADR) and even mediation are now being added to many law school curricula, integration of these techniques and tactics can provide your client with alternatives that may not have been presented to them in any previous interactions with the legal system. As such, mediation can give you a tool that sets you apart from your colleagues in how you represent your clients and are perceived in the public.

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More...

**Subcommittee Feature**

The Business and Corporate Litigation Pro Bono Subcommittee, the Pro Bono Committee and the Young Lawyer Committee are organizing an exciting pro bono and public service project for the upcoming Annual Meeting in San Francisco. We will support the San Francisco Food Bank, a wonderful organization that does so much for the community. Two examples of its programs include:

- **Healthy Children Pantries**, which provides low-income parents with fresh fruits and vegetables, protein-rich foods such as meat or eggs, and staples like rice and pasta that they can use to prepare nutritious meals for their families at home. These farmers' market-style pantries are conveniently located in public schools, giving parents easy...
access to nutritious food as they drop off or pick up their children. More than 5,600 families are served by this network of 57 Healthy Children Pantries each week.

- **Morning Snack Program**, which provides students with wholesome snacks such as fresh fruits, carrots and string cheese, giving them the fuel they need to learn. Working in partnership with over 30 public schools with large numbers of low-income students, the Morning Snack Program serves 11,000 children each school day.

These are just two examples of the great work this organization does that benefits many other groups and individuals. More information on the San Francisco Food Bank can be found on their [website](#).

**HOW CAN YOU HELP? Section members and Annual Meeting attendees will have three ways to support the San Francisco Food Bank:**

1. **Donate** to the San Francisco Food Bank! Your donation allows the Food Bank to supply six times worth what you are donating (i.e., for every $1 donated, the Food Bank is able to supply $6 worth of food). The link to the ABA Donation webpage is the following: [http://fooddrive.sfoodbank.org/team/9595924671](http://fooddrive.sfoodbank.org/team/9595924671).

2. Join the Section in volunteering at **Glide**, an organization supported by the San Francisco Food Bank that provides daily meals to those in need, to prepare lunch from **9:30 a.m. - 11:30 a.m. on Friday, August 9**. RSVP to volunteer to Leslie Archer by Monday, August 5.

3. When you get to the Annual Meeting, there will be containers at the Registration Desk and near the Membership Desk at the Fairmont. Please bring non-perishable items to put in the containers. There are many supermarkets and grocery stores near the hotel where you can pick up a few items and drop them off during the Meeting in the containers. Your donation will go a long way!

For more information, please contact Victoria Newman at [Victoria.newman@hklaw.com](mailto:Victoria.newman@hklaw.com), or Kristin Gore at [kgore@carltonfields.com](mailto:kgore@carltonfields.com), or Betty Boyd at [attorneybboyd@live.com](mailto:attorneybboyd@live.com).
Putting the Shoe on the Other Foot

By: Neil Hazan

One characteristic of life in a big law firm is that professionals often have a high degree of specialization at early stages in their careers. As a corporate lawyer working at Canada’s largest firm, it is rare for me to have an opportunity to be involved in litigation due to the fact that many of my colleagues have a wealth of specialized expertise in this area, often making it more cost-effective for them to handle litigious matters directly. My experiences with conflict at the office are by and large limited to the negotiation of contentious deal points with opposing counsel, the lion’s share of which are settled amicably, followed by the execution of a final contract and, if we are fortunate, a celebratory closing dinner. Notwithstanding my general lack of significant exposure to the nuts and bolts of lawsuits and all of the drama surrounding them, a couple of years ago I found myself advising a client in connection with a distribution contract gone awry. While I was relieved that the less-than-stellar contract in dispute was not our firm’s handiwork, the situation provided me with a valuable opportunity to see the practice of law from a commercial litigator’s perspective. The file in question, which ultimately resulted in a full-blown international arbitration, enabled me to reflect upon actions that corporate lawyers can take during contract negotiations that can help prevent future problems and gain a new perspective on the preparation and interpretation of material contracts. The following are a few practice tips that I gleaned from my experience on the file.

When drafting contracts and correspondence, ask how the document in question will be looked at in retrospect. When the dispute came to my attention, an exclusive distribution agreement with an Asian company was not working out as the parties had hoped, and the client sought my views regarding its rights and obligations pursuant to the agreement. While the client’s position had some weaknesses, I suggested that the client remain firm in its position because based
upon my understanding of the law and the situation, our client had a high likelihood of success. I consulted a senior member of our litigation group regarding a draft of a formal letter that I had prepared in the file’s early stages outlining the client’s position. My decision to appeal to a litigator was a good one, as the correspondence in question would later be essential in helping an arbitrator render his judgement in favour of our client. My litigation colleague helped me refine the client’s letter and advised me that when drafting correspondence in anticipation of litigation, it is essential to keep in mind that there is a likelihood that it will eventually be read by a judge in an attempt to reconstruct the facts. This piece of advice has served me well in subsequent files involving litigation risk.

*If the client asks you to run with the ball, go for it.* Once it became clear that the dispute was not going to be resolved by negotiation, we advised the client that it would be necessary to invoke the contract’s arbitration clause, which thankfully was impeccably drafted. At that point, I figured that it was my opportunity to back away from the matter and pass it along to the litigation department. To my surprise, the client was adamant that I remain on the file, leaving me to supervise the arbitration process despite my lack of in-depth litigation or arbitration experience. The client’s trust in my ability to manage the file and my willingness to continue working on the matter opened the door to one of my most rewarding professional experiences to date. Being involved in the process enabled me to strategize, draft and edit memorials, attend an arbitration behind closed doors, experience the anticipation associated with waiting for the final award and ultimately experience the successful culmination of over three years of hard work.

*Assemble the best team possible.* In assembling the team handling the file, it was essential to hand-pick a good combination of expertise and cost-effective personnel. I was fortunate to benefit from the guidance of one of the country’s top arbitration specialists, the head of our local litigation department as well as a small group of students and talented young associates, two of which had previously worked at the Supreme Court of Canada. While the associates brought
top notch analytical skills and energy to the file, the senior litigators helped polish their documents and anticipate the other side’s arguments.

Avoid drafting ambiguities and inconsistencies. The preparation for the arbitration involved the seemingly endless review of the same contract in addition to the hundreds of emails related to it and allowed me to focus on refining our theory of the case while at the same time helping identify avoidable drafting ambiguities and inaccuracies. The latter is particularly useful in my day-to-day practice, which frequently involves the drafting of domestic and international distribution agreements. In the era of readily-available boilerplate clauses, increased vigilance is essential, particularly in ensuring the internal consistency and coherence of contracts.

Appreciate that litigators and corporate lawyers have different perspectives. The drafting and editing of our memorials was a team effort which helped me contrast and appreciate the vastly different perspectives from which commercial lawyers and litigators approach the same agreement. This lesson was invaluable in that it convinced me of the wisdom of consulting my litigation colleagues for their often different sensibilities, perspective and input. While corporate lawyers accuse litigators of acting like Monday morning quarterbacks from time to time, sometimes a litigator’s comments can add value to a contract before it is executed, enabling the parties to avoid future difficulties.

Hope for the best, but prepare for the worst. When the hearing date arrived, for the first time I witnessed an arbitration in action and had the opportunity to meet the arbitration panel as well as the other side’s counsel and witnesses. The hearing was remarkably informal and was less antagonistic than I had anticipated. Strangely, from my perspective the most intense aspect of the arbitration was actually waiting for the arbitrator’s final reward, a gut-wrenching period that lasted around six months. Once the award arrived and was in our client’s favor, we were concerned that we would have difficulty collecting the award and were prepared to initiate our course of action outside of our home jurisdiction in the
event that the respondent was not prepared to pay. Thankfully this ended up being a moot point once the wire transfer arrived.

My arbitration experience taught me a number of valuable lessons regarding the efficiency and costs associated with arbitration and will also help me avoid potential future pitfalls arising from imprecise and sometimes poor drafting. All in all, my first foray into the world of arbitration was a valuable lesson in teamwork, the art of preventing problems and pushing beyond my comfort zone, priorities which will likely help me become a more effective, well-rounded legal professional.

About the Author: Neil Hazan is a partner at Borden Ladner Gervais LLP in Montréal. His practice focuses on mergers and acquisitions, corporate finance, joint ventures and general commercial matters. He also advises clients on agency agreements, distribution agreements and a broad range of telecommunications contracts.
So What Is It We (Should) Do Anyway?

By: Michael J. Dayton

Here’s a good one: What do you call a smiling, sober, courteous person at a bar association meeting? The caterer.

When I hear a “lawyer joke” or someone says to me “Oh, you’re a lawyer” I cringe, though only a bit, because we all know lawyers that are the basis of the stereotype. You know, Jim Carey in Liar, Liar, but without the comical goofiness or inevitable epiphany. In response I say “But I am not that kind of lawyer.” Amid the sure-to-follow eye rolling, I explain that I am not unethical, I am not 6’ 4”, lanky or with big teeth and, most importantly, I never chase ambulances or even enter a courtroom (at least not for job-related purposes). I am a business lawyer.

As the person stares blankly at me, I come to the realization that most people do not know that this profession exists. A lawyer that helps entrepreneurs and business owners start up, run and dissolve or sell their businesses. A lawyer that, though an advocate for his client, is negotiating not to “win” but to get a deal done. A lawyer that can think and problem solve and maneuver and strategize to find a compromise where there was deadlock. A lawyer that assesses risks, gives options and allows the client to determine the best course of action. What kind of lawyer is that? Really, it is the best kind.

Over drinks I ask my litigator friends, “How can you live with yourselves, being lawyers? Never accomplishing anything, always fighting it out? You should have a worthwhile profession, like mine.” I believe most of this. I really do feel like a business lawyer is a different job. If we do things right, we can accomplish something in our profession that litigators arguably (and the litigators will argue, it is their nature) do not. But to accomplish something – to get a deal done – it is important to keep in mind what you are doing, because what we do and what we learned in law school are completely distinct concepts.

So what is it (should it be) that we do anyway? And, importantly, how do we do it?

I have compiled this list of concepts and thoughts from my mentors and my experience over my seven years of practice. I am fortunate that my colleagues and primary mentors are and have been very good and very successful lawyers, and that they were willing to teach these concepts to me. I was an avid pupil.

1. **This is a Customer Service Profession – Don’t Forget It.** Whatever your reasons for wanting to be a lawyer – good pay, great hours, having 60 bosses instead of one – one of your reasons should not have been “because I am smart and I want to prove it to people.” The practice of law, especially business law, is customer service, and the first rule of customer service is “the customer is always right.” That statement is (somewhat) hyperbole. But remember what at least one of your ultimate goals in this profession is: to sell your services. If you want a company to continue to bring their business to you, you need to make them happy. In litigation, results make clients happy. In the corporate world, results usually aren’t obvious. What makes clients happy in the corporate world is
similar to what makes customers happy in the consumer world: (1) cost of the product, (2) efficiency/turnaround time, (3) responsiveness, (4) pleasantness, (5) knowledge and (6) willingness to make things work when something goes wrong. In all cases, you should strive to create a great work product, but there is not necessarily a correlation between great lawyering and good sales.

2. **You’re an Advisor – So Give Advice.** I like the words “advisor” and “counselor”. They have such better connotations than “attorney” and “lawyer.” I like to think that I advise and counsel my clients on issues, providing them knowledge and piece of mind. Of course, to be an advisor, you need to give advice. That can be one of the most difficult things for a young lawyer to do. Law school has taught us to provide caveats and carveouts and exceptions and hesitations in every answer to almost any question. But when a client says “Should I do this, yes or no?”, a “maybe” is not going to suffice. Give direct, concrete answers and advice with respect to the questions that have been addressed to you. If you need to follow it up with a 15-page memorandum, that can be appropriate in some cases. However, a “geez, I just don’t know” is never appropriate.

3. **Be Confident, Not Cocky.** This is difficult too. I am sure you are very smart, after all, you are reading this article. But you won’t have the experience or the gray hair anytime soon that will convince a client you know what you are doing. And, most of the time, you won’t know what you are doing. Being confident and assertive will convince clients that your advice is worth listening to and the more confident they are in your abilities the more likely they will use you in the future. (By the way, you should back your confidence and assertiveness with actual knowledge and not fluff, because an experienced client will see right through you.) But don’t be cocky. Don’t think you are the smartest person in the room. From a happiness standpoint, you really should not compare yourself to others anyway, because there will always be someone better than you at anything. You will have some clients and directors and officers of clients that couldn’t do what you do, but most of the time it comes down to economics. Does the client want to spend his time trying to learn the law for himself or does he want to be the CEO and pay someone else to be the lawyer? Be assertive, but don’t assume.

4. **Find Solutions, Not Just Issues.** Do you know why salespeople hate to go to in-house lawyers? Because the lawyers always find issues with deals, and say “no” to this idea and “no” to that idea. Salespeople are by profession less risk averse than lawyers, which is fine. They have a much better chance of ending up very poor or very rich, and we have a 100% chance of being in the middle class. But their risk tolerance is the reason why they would rather do the deal and ask for forgiveness later than go to the “no factory” in the beginning to get permission. But what if you weren’t the slayer of hopes and dreams and, instead of just finding the myriad issues in the deal (the issues are legitimately there, by the way), you could also find solutions? Well, that wouldn’t seem as bad. Now the salesperson can both get her deal done and cover her rear-end by pointing at the lawyer if something blows up. Sounds like the best of both worlds for a client, and it is. And you are happy to get paid for it. So whether you are an in-house attorney or an out-house attorney, point out the issues, but also point out the solutions to the issues. In some
instances, and I would say rarely, a deal simply will not work, but don’t assume a deal won’t work just because one structure doesn’t.

5. **Never Hold Up or Kill a Deal.** Never, ever, ever be the one to hold up the deal (unless the client wants you to hold up the deal and to blame you for it), and never, ever, ever kill a deal (unless the client wants you to kill the deal and to blame you for it). As far as timing is concerned, “hurry up and wait” should be your motto. Get things done fast and right and get them to the other side — this is customer service. As to killing deals, do not let your arrogance, ineptitude or inflexibility kill a deal. Remember that the ultimate goal of your client is to reach a deal. Do everything in your power to strategize and find a way to make the deal work. Then give options to the client, explain the risks to the client, and let the client decide whether or not he wants to take the risk with a particular transaction. That risk assessment isn’t your business. Remember it is a business decision made by the client whether to approach you for advice in the first place, so, in the end, it is a business decision made by the client whether to do a deal or not. Your personal preferences and risk tolerance should not play into the equation. Provide the solutions and the advice, then let it go.

One final point is worth mentioning. Your client will never remember the specific advice you gave her nor will she remember the intricate discussion on the risks associated with your advice and solutions. If something goes wrong, the client will remember that you said “this is fine.” So, irrespective of my points above, do properly paper your file with the advice you gave and the risks and solutions associated with that advice, because the nuances of your discussions will be lost. This isn’t customer service, it’s just smart.

About the Author: Michael Dayton is a shareholder in the Business, Finance, and Real Estate Department. Michael assists entrepreneurs from the start up to the eventual sale or other wind up of their businesses and with everything in between. He has assisted professionals and companies in a variety of industries, including: health care (hospitals, clinics, physicians, insurance companies); agribusiness; family farms; construction, supply, distribution and manufacturing; creative services, branding, printing and merchandising; wind energy, biodiesel and other renewable energy; trucking, warehousing and logistics; chemical manufacturing and distribution; vegetation management; swine genetics; agricultural equipment finance; and banking.
GROW YOUR LAW PRACTICE THROUGH THE USE OF MEDIATION

By: Jeffrey Carr

Utilizing mediation as an integral aspect of your law practice can be one of the major building blocks to growing a successful and satisfying career. Though Alternative Dispute Resolution (ADR) and even mediation are now being added to many law school curricula, integration of these techniques and tactics can provide your client with alternatives that may not have been presented to them in any previous interactions with the legal system. As such, mediation can give you a tool that sets you apart from your colleagues in how you represent your clients and are perceived in the public.

Utilizing mediation in your practice is best implemented by including it as one or your strategies beginning with your first meeting with a client. Discussing mediation as an option provides the potential client with the ability to make decisions regarding their representation as well as how the steps of the legal system may work for them. Discussing mediation as an option is one way to let your clients know that litigation is not the only option, and in most cases, not the best option. Many of today’s clients are familiar with mediation through their employer, other organizations to which they belong, or just the exposure of mediation in the public, especially in areas of sports and governmental actions and disputes.

The most effective use of mediation involves planning for its usage as a primary settlement tool beginning with the first client interaction. Planning for and preparing for mediation solutions helps to make each step of the legal process fit into the mediation option more effectively when the mediation date arrives. This includes drafting the original complaint or answer in a fashion that provides basis for discussion points and negotiation options that can be utilized later in the process.

Successful mediation requires optimizing the discovery process. Having knowledge of the probabilities of the outcome of litigation is vital in determining the range in which the client is willing to resolve the dispute. It also provides the mediator, attorneys, and clients with knowledge of alternatives to a financial statement. My personal experiences representing clients have shown that conducting interrogatories and requests for documents, followed up by depositions, put me in the strongest position to negotiate during mediation on behalf of my clients. It also helped my clients know their strengths and weaknesses when deciding when to settle. In-depth discovery also let us know any weaknesses of our case. These are vital when making the decision to settle or litigate.

Mediation should not be utilized as a tool of discovery. Hopefully, the parties have performed their discovery prior to the mediation. However, the intense discussions held throughout several hours of mediation give attorneys and clients a rational knowledge of the
other party’s willingness to settle and at what level. This is very helpful if the case does not settle at that time. Most litigation includes a negotiation phase the week or so prior to trial. Having these earlier mediation and negotiation discussions provide all parties and their attorneys with a basic foundation to build upon for eleventh hour negotiations.

Utilizing all options of ADR is good representation in today’s legal environment. Clients are more educated than in past decades. Many attorneys and clients do not utilize ADR and its benefits to an optimal level. As such, young lawyers have tools available to them that more experienced lawyers do not. This can give you the advantage over the attorney or law firm with more experience and more resources. Using what may be your only advantage can help you grow your legal practice and ensure more satisfied clients.

Today’s attorney must use all of his resources. This includes incorporating mediation into every aspect of litigation. It also includes exploring other ADR options, such as arbitration. To do so requires that your strategies and tactics incorporate these options into your planning at every aspect of client representation. Doing so will provide your clients with better representation than they could have received from more traditional representation, providing more satisfied clients and a growing law practice.

Jeffrey Carr

Jeffrey Carr is a licensed attorney in Pennsylvania, as well as a Certified Mediator in North Carolina. He also teaches Business Law at various local colleges and universities. He has served as a mediator throughout the United States and internationally for over ten years.
The Ethical Ramifications of Developing Online Leads

By: Steven J. Olsen

Young lawyers today recognize the advantages of using the internet and social media to build an identity for themselves and their firms. Marketing by these means is second nature for young lawyers. They were taught to use this medium throughout their years of education. But few have been informed of the pitfalls associated with legal marketing.

The moment an individual is licensed to practice law they accept and acknowledge that they are governed by a new set of responsibilities. Attorneys are regulated by the Rules of Professional Conduct both on and off duty. Young lawyers understand that they are symbols of the legal profession. They recognize that attorneys cannot make false or misleading statements about themselves or the services they offer (Rule 7.1) and cannot perform in person solicitations of non-attorney strangers as prospective clients for pecuniary gain (Rule 7.3). They also recognize that Rule 7.3 extends to preclude them from using real time electronic contact to solicit non-attorney strangers as prospective clients for pecuniary gain. On the other hand, young lawyers know that they can advertise their professional and law related services (Rule 7.2). Therefore, many legal professionals choose to advertise their legal services through a firm website.

It sounds simple enough. A website does not use in person or real time electronic contacts to solicit prospective clients. Instead, the prospective clients locate the website and then make an informed decision on whether to correspond further with the firm. Many firm websites today permit prospective clients to submit legal inquiries or other information through the website. This is a viable and productive method of obtaining potential clients, but it is not free of pitfalls.

An attorney should reflect on two concerns before beginning to obtain information from prospective clients over an interactive website. First, it is important for an attorney to review the Rules of Professional Conduct and understand what obligations the attorney has as a result of a submitted legal inquiry from a prospective client. Second, the attorney should consider the reason for obtaining the information provided and develop a privacy policy for all information obtained from users of the firm website.

Rule 1.18 of the ABA Model Rules of Professional Conduct governs an attorney’s duties to prospective clients. Rule 1.18 (a) states, “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” This is a very broad definition of a prospective client and likely includes any person submitting an online legal inquiry to a firm. Rule 1.18 requires communication with a prospective client to be kept confidential. It further considers the prospective client for conflict of interest purposes by stating, “[a] lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter,” except under limited circumstances.
An attorney cannot control what a prospective client will reveal on an online legal inquiry submission. Accordingly, an opposing party could submit an online legal inquiry that raises a conflict of interest with a current client. It is important to address this concern prior to permitting such online submissions. Comment five to Rule 1.18 gives guidance in this area: “A lawyer may condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” Informed consent under this comment requires the prospective client to receive adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of communication.

In light of the above comment, an attorney should provide a disclaimer on the submission form and require the prospective client to check a box agreeing to the terms of the disclaimer prior to submitting the legal inquiry. The disclaimer should (1) acknowledge that the website is for general information only, (2) confirm that nothing identified on the website should be construed as legal advice, (3) confirm that the website and submission form should not be construed to create a client-lawyer relationship, (4) confirm that nothing submitted in the legal inquiry will prohibit the firm from representing a different client in the same matter, (5) explain the risks of submitting confidential information with the legal inquiry, (6) explain the reasonable available alternatives to submitting the online legal inquiry, and (7) provide a link to the firm’s privacy policy that describes in detail the firms intended use of submitted information. These steps will help prevent future conflicts while still obtaining prospective client information.

Next, an attorney must develop a privacy policy covering all information obtained from users of the firm website. A privacy policy provides candor to prospective clients and allows the attorney to be in conformity with the law as required by the ABA Model Rules of Professional Conduct. California passed legislation requiring companies to have a privacy policy on their website. The California legislation prevents a company from obtaining information from a California resident without first having a published privacy policy. The internet is global and a firm cannot preclude residents from California from submitting online legal inquiries to the firm. Therefore, the best approach is to develop a privacy policy that conforms to the requirements of the California statute.

A user of the firm’s website should be able to locate the firm’s privacy policy directly from the home page. Often a hyperlink entitled privacy policy or privacy statement is provided at the bottom of the homepage. The hyperlink should be conspicuous.

Under the California statute, the firm privacy policy must have five essential elements: (1) it must identify the information collected or obtained by the firm through the website, including any personally identifiable information (name, address, e-mail, telephone number, social

security number, or any other identifier that permits the physical or online contacting of a specific individual); (2) it must describe how the firm intends to use the obtained or collected information and with whom the firm intends to share such information; (3) it must describe the process, if any, by which an individual may review and request changes to personally identifiable information collected by the firm; (4) it must describe the method by which the firm will notify users of the website of any material changes to the privacy policy; and (5) it must identify its effective date. A privacy policy should also, pursuant to federal law, include a children’s privacy section that establishes the firm’s policy not to solicit data from children under the age of 13 and to delete any such information obtained in error. Finally, the privacy policy should provide information about opting-out of future communications from the firm and discuss security safeguards for the information obtained.

The firm should work closely with the website developer to ensure they understand all of the information collected through the website. A firm must know if their website collects user information through cookies, weblogs, web beacons, or other hidden methods. It is important to remember that the more information a firm obtains from its users, the more likely the firm will create conflicts of interest. The best approach for law firms is to limit the information collected to that which is voluntarily submitted by the prospective client. This ensures the prospective client is aware of what has been collected and gives a firm an opportunity to perform a conflict check before obtaining too much information. It will also ensure that the firm does not receive any information without the prospective client acknowledging that they agree with the terms of the firm’s disclaimer.

Once a firm has reflected on the above concerns, it can make an informed decision on how to proceed with its website. By implementing the above protections, a firm can manage the expectations of the prospective clients prior to any legal inquiry being submitted over the internet. The privacy policy explains to the prospective client what information is being obtained, why the information is being obtained (i.e. perform conflict check and determine possibility of future representation), and what the firm intends to do with the information obtained. The disclaimer permits the prospective client an opportunity to make an informed decision about initiating the legal inquiry and puts the prospective client on notice that the firm may already represent the opposing party. These safeguards assist attorneys in meeting their ethical responsibilities as outlined by the Indiana Rules of Professional Responsibility and avoid some of the pitfalls associated with legal marketing.

**About the Author:** Steven J. Olsen is a fourth-year associate at Yoder Ainlay Ulmer & Buckingham, LLP, in Goshen, Indiana. He is licensed to practice law in Indiana and Michigan. His practice areas include, among other areas, corporate law, employment law, property law, and commercial and general practice litigation. He has experience in drafting a variety of computer and Internet agreements, contracts, and policies. Mr. Olsen can be reached at solsen@yaub.com.

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