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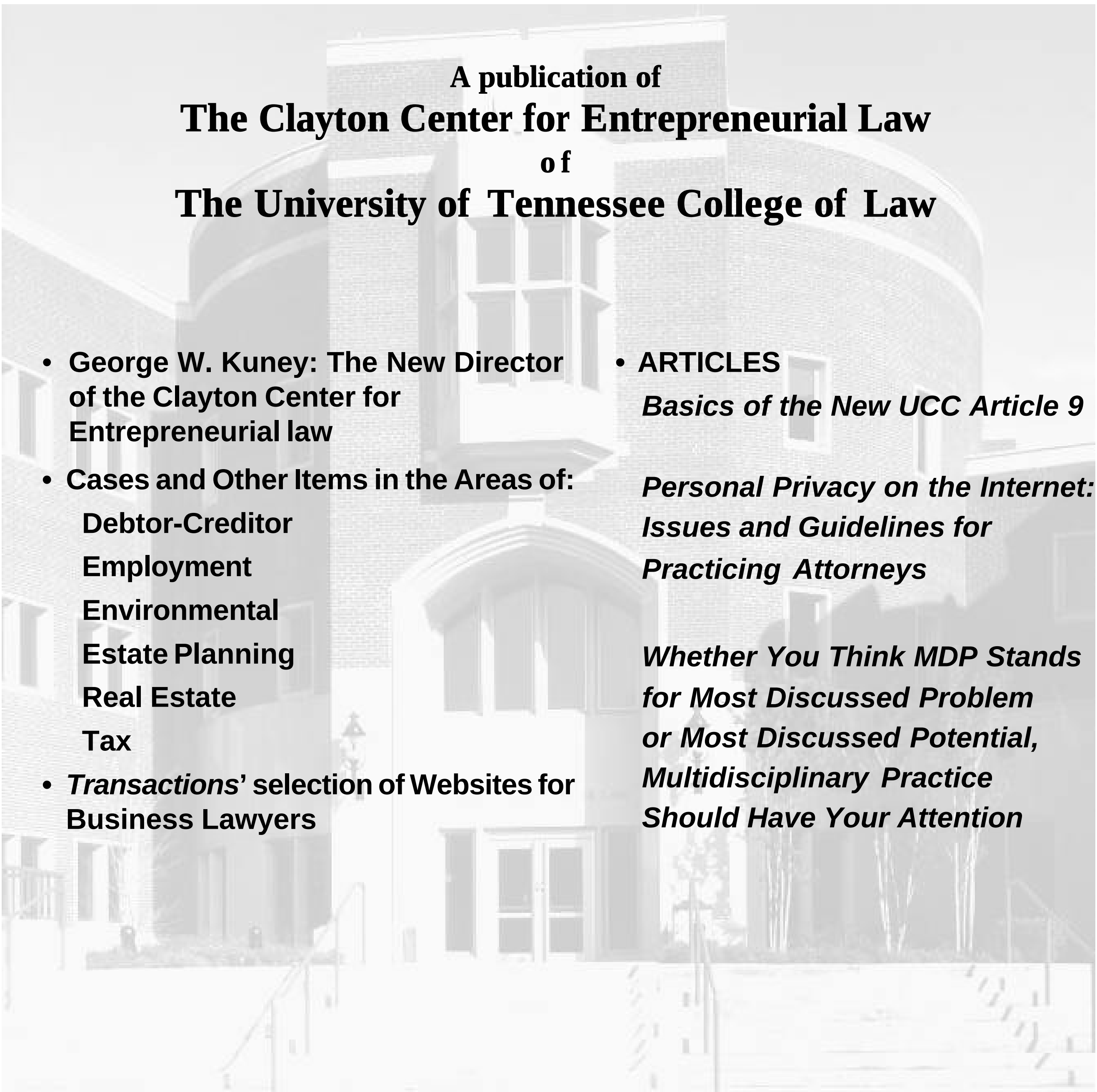

A publication of

The Clayton Center for Entrepreneurial Law

of

The University of Tennessee College of Law

- George W. Kuney: The New Director of the Clayton Center for Entrepreneurial law
- Cases and Other Items in the Areas of:
  - Debtor-Creditor
  - Employment
  - Environmental
  - Estate Planning
  - Real Estate
  - Tax
- *Transactions*' selection of Websites for Business Lawyers

- ARTICLES

  Basics of the New UCC Article 9

  Personal Privacy on the Internet: Issues and Guidelines for Practicing Attorneys

  Whether You Think MDP Stands for Most Discussed Problem or Most Discussed Potential, Multidisciplinary Practice Should Have Your Attention

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Your Complimentary Copy

Complimentary copies of *Transactions* are being distributed to introduce this new journal to the legal community and, in particular, to regional business practitioners.

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News & Publications

George W. Kuney: The New Director of the Clayton Center for Entrepreneurial Law

By Michael Lewis

The University of Tennessee College of Law's Clayton Center for Entrepreneurial Law welcomes George W. Kuney as its newest director. Professor Kuney replaces Professor Carl Pierce, who is leaving the director's position to concentrate on teaching and his work as Reporter for the Tennessee Bar Association Committee for the Study of Standards of Professional Conduct.

Professor Kuney comes to Knoxville from California where he was a partner in the firm of Allen Matkins Leck Gamble & Mallory LLP. His practice included business transactions, litigation, and reorganization work. He concentrated on the restructuring and reorganization of businesses under Chapter 11 of the United States Bankruptcy Code, and has confirmed over 65 plans of reorganization in the last ten years. He has represented bankruptcy debtors, creditors, trustees, and creditors committees in such diverse business settings as agriculture, alternative energy, banking, biotechnology, construction, engineering, entertainment, franchising, healthcare, manufacturing, real estate, retail, and travel.

In addition to his experience in bankruptcies and reorganizations, Professor Kuney has also counseled clients on many "straight" business matters, such as choice of entity, establishment of labor and operating guidelines, intellectual property rights, litigation arising out of business activities, and strategic acquisitions and dispositions of stock and other assets.

In addition to his impressive background in the practice of business law, Professor Kuney brings a strong

Professor George Kuney comes to Knoxville from California, where he was a partner in the firm of Allen, Matkins Leck Gamble & Mallory LLP. His practice included business transactions, litigation, and reorganization work.

academic background to the College of Law. He received his B.A. in Economics from the University of California, Santa Cruz in 1986, his J.D. from the University of California, Hastings College of Law in 1989, and earned an MBA with a venture management emphasis from the University of San Diego in 1997. He has pub-

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Faculty Notes

On March 29, 2001, **Professor Amy Morris Hess** delivered a presentation entitled *The Surviving Spouse's Elective Share: Where We Have Been; Where We Are Headed*, at a workshop sponsored by the Association of American Law Schools in Palm Springs, California, entitled *Defining the Family in the Millennium*.

Professor Don Leatherman accepted the Alumni Association Outstanding Teaching award in April. In June, 2001, he will begin a one-year term as chair of the Committee on Affiliated and Related Corporations for the Tax Section of the American Bar Association. An issue of Tax Notes forthcoming in late April will

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Kuney named Director

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lished in the area of business and bankruptcy law, and currently serves as the Editor-in-Chief of the California Bankruptcy Journal, the quarterly law review of the California Bankruptcy Forum. He formerly served as the Managing Editor and Editor-in-Chief of the Business Law News, the publication of the California State Bar's Business Law Section. He is also currently working on an in-depth examination of the uses and limitations of covenants and easements to convert malleable contract rights into impervious lasting property rights for multi-parcel real estate developments involving substantially different but complimentary uses.

Professor Kuney is also an experienced teacher. He served as an adjunct professor at California Western School of Law in San Diego since 1997, where he taught advanced legal drafting, bankruptcy and creditors' rights. Prior to that, while in practice at the Morrison & Foerster and Howard, Rice firms in San Francisco, he was an instructor at the University of California, Hastings College of Law, where he taught legal research, writing and appellate advocacy.

Professor Kuney plans to develop the mission of the Center for Entrepreneurial Law in four areas: the Business Transactions Concentration at the College of Law; CLE and informational programs for attorneys and business persons; publications, including this journal; and the development of a clinical component for the curriculum focused on providing business law counseling and services to un- and under-served small businesses. In this last pursuit he is working closely with Professors Doug Blaze and Paula Williams, who are devoting substantial support and resources to the project.

Faculty Notes

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contain Professor Leatherman's article *United Dominion: Can the Supreme Court Unearth Plain Meaning in the Consolidated Return Regulations?* At the ABA Tax Section Spring Meeting in May, 2001, he will moderate a panel discussing current developments for consolidated groups; he will prepare materials to be presented by the panel and distributed at the meeting. He prepared materials for and spoke on a panel on the same topic at the ABA Tax Section Winter Meeting in January, 2001.

Professor Gregory M. Stein's article, *When Can a Nonrecourse Lender Reach the Personal Assets of its Borrower?*, was published in the March 2001 issue of The Practical Real Estate Lawyer. He is also contributing a chapter to a forthcoming book on regulatory takings, to be published by the American Bar Association. The book will contain chapters that air divergent views on various topics in regulatory takings law. Professor Stein's chapter will focus on the role of investment-backed expectations in regulatory takings analysis, with emphasis on *Palazzolo v. Rhode Island*. Professor Stein, along with two co-authors, also recently signed a contract with the American Bar Association to publish a book tentatively entitled Commercial Real Estate Law in Practice. The book is aimed at helping practitioners who are new to real estate law-including both new attorneys and attorneys experienced in other areas of the law-break into the field. The book will be published later this year.

Professor Colleen Medill accepted the Harold Warner Outstanding Teacher Award at the Honors Banquet held November 17. She has been invited to speak at the Kansas Governor's Conference on Aging, May 3-4, in Topeka, Kan. Her topic will be *What 401(k) Plans Teach Us About Privatizing Social Security*. She was also granted tenure this spring.

Professor Robert M. Lloyd has been speaking and writing extensively on the revised UCC Article 9. His article *The New Article 9: Its Impact on Tennessee Law* appeared in two parts in the Tennessee Law Review at 67 Tenn. L. Rev. 125 (1999) and 67 Tenn. L. Rev. 329 (2000). He has also given talks on the new Article 9 for the East Tennessee Bankruptcy Trustees, the Mid-South Com-

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Faculty Notes

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mercial Law Institute, the Tennessee Bar Association, and the Knoxville Bar Association. Professor Lloyd has also prepared three interactive tutorials which cover the basics of Revised Article 9. They are accredited for one hour of CLE credit each and are available at www.law.utk.edu/cle/letcred/index.htm.

Professor George W. Kuney's article, *Intellectual Property Licenses in Bankruptcy*, was solicited by and will be published in the Summer 2001 issue of the California Business Law Practitioner, a quarterly publication of CEB, Continuing Education of the Bar, California. Prof. Kuney is also serving as a consultant and reviewer for a new treatise on small business reorganizations due to be published by CEB in the late Winter of this year.

Professor Carl Pierce has continued his service as a reporter of the Tennessee Bar Association Committee on Standards of Professional Conduct whose recommendation for adoption of new rules of professional conduct is pending before the Tennessee Supreme Court. He also continues to serve as a reporter for the ABA Ethics 2000 Commission whose proposal for revision of the ABA Model Rules of Professional Conduct will be presented to the ABA House of Delegates this summer.

The Norton Bankruptcy Law Advisor published **Professor Thomas E. Plank's** article, entitled *More Muddy Water from* Whiting Pools: In re Greene *Contends with the Errors of a Higher Court*, in its February 2001 issue. His article *The Limited Security Interest in Non-Assignable Collateral Under Revised Article 9* was solicited by and will be published in the American Bankruptcy Institute Law Review in May 2001. Professor Plank also recently served as an expert witness on securitization matters in the LTV Steel Co. bankruptcy case.

Professor Joan Heminway recently served as an expert witness on Tennessee securities law matters on behalf of plaintiff investors in a pooled investment scheme.

Basics Of The New UCC Article 9

By Robert M. Lloyd*

-- Changes to Filing Rules --
-- New Types of Collateral --
-- More Extensive Default Provisions --

On July 1, 2001, a new version of UCC Article 9 will go into effect nationwide. This is not just a minor revision like the one adopted in Tennessee in 1985. This time the statute has been completely rewritten. The new Article 9 is not only longer than the existing statute, but also more complex. Every lawyer whose practice touches on secured transactions has to take time to learn about the Revised Article 9.

I. Filing Rules

The most talked-about features of Revised Article 9 are the changes in where a financing statement is filed. There are changes in both the rules governing the state in which the financing statement is to be filed and the rules governing the office within the state in which the filing is to take place. In both cases the new rules are less complex than those they replace. (This is one of the few places where Revised Article 9 has actually made things easier.)

In place of the old statute's complex provisions governing the state where the financing statement is to be filed, Revised Article 9 substitutes a straightforward rule. The financing statement is filed in the jurisdiction in which the **debtor** is located.[1] "Located," however, is given a definition that is in some respects Clintonesque. Revised Section 9-307(e) provides that a "registered organization" is located in the state under whose laws it is organized. A "registered organization" is an organization like a corporation, limited liability company or limited partnership whose existence depends on the filing of a public record.[2] Thus if the debtor is a Delaware corporation, a financing statement must be filed in Delaware and (subject to some very limited exceptions) only in Delaware. This is true even if all of the debtor's business is done in Tennessee and all of its assets are located here.

If the debtor is an individual, she is deemed located at her principal residence.[3] If the debtor is an organization other than a registered organization (e.g., a general partnership), it is located at its chief executive office.[4]

Virtually all financing statements will now be filed in the office of the secretary of state.[5] The cumbersome local filings for consumer goods and farm-related collateral have been abolished. Local filing is required only for fixtures, timber and minerals.[6]

If a financing statement has been properly filed under the old law, it will not be necessary to file a new financing statement to maintain perfection. The old financing statement will continue to be effective until the normal expiration of its effectiveness or until June 30, 2006, whichever comes first.

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* Robert M. Lloyd is the Lindsay Young Distinguished Professor at the University of Tennessee College of Law.

[1] Tenn. Code Ann. § 47-9-301(1) (1999). Unless otherwise noted, all citations are to Tenn. Code Ann. (1999).

[2] § 47-9-102(70).

[3] § 47-9-307(b)(1).

[4] § 47-9-307(b)(2), (3).

[5] § 47-9-501(a)(2).

[6] § 47-9-501(a)(1).

II. New Types of Collateral

Revised Article 9 will allow lenders to take security interests in a number of types of collateral that could not serve as security under the old statute. Many of these are items that only secured transactions specialists need be concerned with, but a few will impact non-specialists as well. Probably the most important type of new collateral is bank accounts ("deposit accounts" in Article 9 terminology). Old Article 9 excluded deposit accounts from its coverage, and while it was possible to take a common-law assignment of a bank account for security, it was cumbersome, and it generally wasn't done. It may still be cumbersome to take a security interest in a bank account under Revised Article 9, but because of Revised Article 9's new priority rules and because Revised Article 9 expressly authorizes these security interests, more and more lenders' counsel are going to insist on a security interest in the debtor's bank account. It may reach the point where a lawyer who does not at least discuss with the client the advantages and disadvantages of such a security interest has left herself open for criticism. To discourage the sort of routine encumbering of bank accounts that I have suggested may become the norm, the drafters of Revised Article 9 provided that a security interest in a deposit account cannot be perfected by filing.[7] Instead, the drafters provided that the primary means of perfecting a security interest in a deposit account would be through a control agreement in which the debtor, the bank and the secured party agree that the bank will follow the secured party's instructions without further consent by the debtor.[8] As long as the secured party has the right to take control of the account at any time, its security interest remains perfected even though it allows the debtor to continue withdrawing funds from the account.[9] If the bank at which the account is maintained is itself the secured party, the security interest is automatically perfected.[10]

One reason it may be important to perfect a security interest in a bank account is that a security interest perfected in the account itself has priority over the interest of a secured party whose proceeds are deposited in the account.[11] Thus, financiers of inventory, accounts and chattel paper will want to take security interests in the debtor's bank accounts so that they do not lose their proceeds when they are deposited in the account. It should also be noted that a security interest in which the secured party is the bank with which the account is maintained takes priority over a security interest perfected through a control agreement.[12] Thus, any control agreement should expressly provide that any security interest the bank may take will be subordinated.

Other new collateral types available under Revised Article 9 include letter-of-credit rights, commercial tort claims, health-care insurance receivables, and electronic chattel paper. Revised Article 9 also provides that a security interest in negotiable instruments can be perfected by filing.[13] Old Article 9 allowed perfection only by possession. In some cases, therefore, it will make sense to file a new financing statement with respect to an already-existing deal to perfect security interests in instruments not in the secured party's possession.

III. More Extensive Default Provisions

The default provisions of Revised Article 9 deserve special attention. They are much longer and more complex than those of the old law. In particular, there are detailed provisions concerning the contents of the notice that is to be given before the collateral is sold or otherwise disposed of. If the collateral is consumer goods, there is a list of eight items that **must** be included in the notice.[14] If the notice omits any of the items, the secured party is liable for

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[7] § 47-9-312(b)(1).

[8] §§ 47-9-312(b)(1), 47-9-104(a).

[9] § 47-9-104(b).

[10] §§ 47-9-312(b)(1), 47-9-104(a)(1).

[11] § 47-9-327(1).

[12] § 47-9-327(3).

[13] § 47-9-312(a).

[14] § 47- 9-614(1). Strictly speaking, the provision applies only where the collateral is consumer goods and the loan was made for personal, family or household purposes.

a substantial penalty.[15] The statute contains a safe-harbor form, which when filled in constitutes a proper notice.[16] A secured party would be ill-advised to deviate from the form.

Where the collateral is not consumer goods, the statute is not quite so rigid, but it still will require that secured parties make substantial revisions in their notices. Section 9-613(1) provides that the contents of a notification are sufficient if it contains the five items listed in the section. If the notification omits any of the items, its sufficiency becomes a question of fact.[17] Once again, there is a safe-harbor form,[18] and lawyers who fail to use it will do so at their peril.

This article has merely touched on a few of the most critical provisions of Revised Article 9. There are many other important changes that I have not been able to discuss because of space limitations. I have prepared a series of three on-line tutorials covering Revised Article 9. Each carries one hour of CLE credit in Tennessee and several other states. They are available at http://www.kingballowlearning.com. From that page, choose Continuing Legal. The courses are titled UCC 101, UCC 102 and UCC 103.

Professor Robert Lloyd has prepared a series of three on-line tutorials covering Revised Article 9. Each carries one hour of CLE credit in Tennessee and several other states.

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[15] Section 9-625(c)(2) provides that the debtor may recover an amount equal to 10 per cent of the principal balance plus 10 per cent of the interest to be paid over the life of the loan.

[16] § 47-9-614.

[17] § 47-9-613(2).

[18] § 47-9-613(5).

Personal Privacy on the Internet: Issues and Guidelines for Practicing Attorneys

By Robert J. Batson, III*

I. Introduction

Many scholars consider the Internet to be one of the greatest inventions of all time, arguing that this new form of communication provides a unique way for greater amounts of information to be collected, used and disseminated all over the world nearly instantaneously. The Internet is a boon for businesses, as it allows them to compile vast commercial databases and assists them in keeping track of detailed demographic information that can improve marketing strategies.

Despite these advantages, the Internet does have its critics, as many contend that it has led to a lack of individual personal privacy. For example, many consumers are concerned that personal and private information is becoming too available on the Internet and, as a result, ends up in the hands of others without individual knowledge or consent:

> Bit by bit and click-by-click, intimate details of your personal life are piling up in enormous commercial databases—often without your knowledge or consent. Once you're there, information about what you buy, what you read, what ails you and what you're worth can be sorted, blended with the contents of other databases and used by anyone with an interest in selling to you, [or] tracking you . . . .[1]

Because of this struggle between business and consumer, it is important to properly balance the concerns of online consumers with the interests of Internet businesses. Thus, business attorneys must be aware of and sensitive to these issues and concerns in order to effectively counsel their clients.

This article identifies and discusses issues and problems regarding personal privacy rights on the Internet. Specifically, Part II provides an overview of how online information is gathered, used and disseminated by website operators. Part III reviews the legal right to privacy under the common law, federal law and state law. Part IV presents both public and private solutions that have been proposed to protect online privacy. Finally, Part V concludes by encouraging practicing attorneys to be aware of the many important issues of privacy.

II. Information Gathering on the Internet

As a medium of communication, the Internet[2] has provided a new marketplace in which businesses may sell their products to other businesses ("Business-to-Business" or "B2B") or to consumers ("Business-to-Consumer" or "B2C"). This online marketplace has continued to grow at an exponential rate and at a faster pace than any other modern form

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* Robert J. Batson, III is a May 2001 graduate of the JD/MBA program at the University of Tennessee College of Law and College of Business.

[1] *Big Browser is Watching You!*, Consumer Reports, May 2000, at 43-44 [hereinafter *Big Browser*].

[2] The Internet grew out of a 1969 U.S. military project of the Advanced Research Project Agency and was called "ARPANET." Reno v. ACLU, 929 F. Supp. 824, 831 (E.D. Pa. 1996) [hereinafter Reno I]. ARPANET was designed to enable computers operated by the military, defense contractors, and research universities to communicate with each other. *Id*. at 831; *see also* Reno v. ACLU, 521 U.S. 844, 849-50 (1997) [hereinafter Reno II]. This network later allowed researchers to directly access computers located at certain universities and laboratories. Reno I, 929 F. Supp. at 831. As this network began to extend beyond its original U.S. research locations to universities, corporations, and individuals all around the world, the ARPANET began to be called the "DARPA Internet," and then simply the Internet. *Id*.

Since its inception, the Internet has been referred to as "the Net," "the World Wide Web," "Cyberspace," and the "Information Superhighway." In each case, the Internet basically refers to the same concept: a system of worldwide network of computers of communication.[3] The "ever-increasing power and decreasing costs of the Internet also make it possible to gather, store, and analyze detailed personal data on an unprecedented scale, both online and off."[4] Oftentimes this online information is personal and private, such as the addresses, phone numbers, levels of income, property values and marital status of the individuals using the Internet.[5] While much of this information has previously been available through direct mailings and telemarketing, the Internet now provides a way for an even larger group of people to have access to this information at little or no cost.

A. Gathering Information from the Voluntary User

One way Internet companies collect personal information about an online user is simply by asking visitors for the data. By entering contests or sweepstakes, completing surveys, or filling out application forms and questionnaires,[6] online consumers may provide such personal information as their names, e-mail and postal addresses, phone numbers,[7] hobbies, finances and even medical conditions.[8] Websites often require an online visitor to provide some level of personal information before allowing the user to take advantage of the site.[9]

B. Gathering Information Through "Cookies"

Another method by which website operators gather personal information is through the use of "cookies." Cookies are "tiny packets of data placed on your hard drive at the direction of the host server of a company whose site you

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that allows its users to communicate with each other. Panavision Int'l v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998). Each individual Internet connection consists of two or more computers or computer sites, called "hosts," that are linked together to share information. MTV Networks v. Curry, 867 F. Supp. 202, 204 n.2 (S.D.N.Y. 1994). Each specific web page has its own website with a unique Internet address and identifying "domain name," which allows the users seeking to exchange information to establish a connection. *Id.* This integrated network or system allows Internet users to visit millions of different websites or Web pages, which may consist of names, messages, pictures or links to other information. *See* <www.ftc.gov/bcp/conline/pubs/online/sitesee/index.html> (Apr. 27, 2001) for helpful information about using the Internet, including relevant online definitions.

Although the Internet can be viewed as one integrated system, it is neither controlled by a single organization or entity, nor does it have any real geographical borders. Reno I, 929 F. Supp. at 838. Rather, the Internet is nearly completely free from government regulation and intervention. *Id.* *See also* ACLU v. Reno, 217 F.3d 162, 169 (2000) (hereinafter Reno IV).

[3] Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace*, *available at* <http://www.ftc.gov/reports/privacy3/index.htm> (Apr. 17, 2001) [hereinafter *2000 Report*]. *See also* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1607, 1616 (1999).

It took: 38 years for the telephone, 17 years for the television, and 13 years for personal computers to penetrate 30% of American households. In the case of the Internet, however, it has taken less than 7 years. *See State of the Internet: USIC's Report on Use & Threats in 1999*, U.S. Internet Council, *at* <http://usic.org/usic_state_of_net99.htm> (Apr. 21, 2001). Recent estimates show that over 90 million Americans currently use the Internet on a regular basis, with over 60 million shopping online. *2000 Report*, *supra* note 3, at 1. It is estimated that the Internet economy will grow to over $1 trillion by the year 2001, and $2.8 trillion by 2003. *Id.* at 2.

[4] *Big Browser*, *supra* note 1, at 44. "The content on the internet is as diverse as human thought." Reno I, 929 F. Supp. at 842.

[5] Karl D. Belgum, *Who Leads at Half-Time?: Three Conflicting Visions of Internet Privacy Policy*, 6 Rich. J.L. & Tech. 1, *4 (Symposium 1999), *available at* <http://www.richmond.edu/jolt/v6i1/belgum.html> (Apr. 27, 2001).

Globalization and new technologies are radically changing the contours of the late Twentieth Century marketplace. In the 1980's, the personal computer revolution enhanced the ability of government, industry and consumers to capture a vast array of personal information automatically. In the 1990's, the technology underlying the Internet is making it even easier and less expensive to gather, store, analyze, transmit and reuse personal information in ways that were unimaginable just a few years ago.

FTC Staff Report, *Public Workshop on Consumer Privacy on the Global Information Infrastructure*, Dec. 1996, Section I [hereinafter *FTC 1996 Workshop*].

[6] Belgum, *supra* note 5, at *5. A 1998 FTC study found that of the 1,402 websites surveyed, 92% collected a form of personal information from the Internet user. *Id.*

[7] *Id.* at *5.

[8] *Privacy: Selling is Getting Personal*, Consumer Reports, Nov. 2000, at 16 [hereinafter *Getting Personal*].

[9] While an online user may provide specific personal information to a website, there is no guarantee that the information will always be accurate. A person may pretend to be someone else, state different characteristics, or give completely inaccurate information—all in an effort to protect the true identity. For example, a 60 year-old male construction worker could log onto the Internet and pretend to be a 20 year-old female college student. Because there is currently no law or regulation prohibiting such activity, online personal information gathered from the voluntary user may not always be accurate.

visit, to record the digital comings and goings."[10] Cookies allow website operators to track the sites visited by online users. By tracking this online activity, the website can then use that information to provide selective advertisements for that user.[11] Therefore, when an individual uses the Internet, it is likely that cookies are providing an online profile of that person. Subsequently, the information provided by the cookies is then tracked in order to target specific ads to that person.[12]

Although the use of cookies is widespread on the Internet, many online consumers are unaware of their existence, or that online activity can be tracked. Also, consumers are often unaware of ways to disable the cookies on their computer,[13] which can be done by setting their web browsers to inform them before new cookies are implanted in the computer's hard drive. Furthermore, various software programs are available that allow online users to block advertisements and shut out cookies.[14]

C. The Use and Dissemination of Online Personal Information

The use of the collected personal information by Internet businesses is not always clear. For instance, companies may simply use the information to process a particular online purchase, or they may possibly use it to better inform the user of similar products, services, or promotions.[15] On the other hand, online businesses may share the gathered personal information with other companies.[16] As one Internet expert has stated:

> There are virtually no limits to what a company can do with personal information that it has obtained about you. Your name, address, telephone number, Social Security number, height, weight—practically anything that a company can get its hands on in the normal course of business—can be doled out for money, services or anything else that might benefit them.[17]

As this quotation indicates, online businesses may generally use the collected personal information in whatever way they wish. For instance, some websites collect personal data by using "look-up" or "individual reference" services, which gather the information into large databases. Once these databases are compiled, they can then be linked to information from other public and private sources,[18] given to a large data-collection company,[19] or directly to third

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[10] *Big Browser*, *supra* note 1, at 44. The use of cookies has been described as "like tracking strangers through the woods when you can only see their footprints now and then." *Id.*

[11] Paul Kedrosky, *Why Cookies Are Good for You: Web Info Packets Don't Take a Bite of Your Privacy*, National Post, July 22, 2000, at D11.

> In cyberspace the greatest threat to privacy comes … from the electronic footprints that make it possible to monitor and trace nearly everything we read, write, browse, and buy. Most Web browsers are configured to reveal to every website you visit the address of the page you visited most recently and your Internet Protocol address, which may—or may not—identify you as an individual user. This information can be collected and stored to create detailed profiles of your tastes and preferences and reading habits, which are highly valued by private marketers.

Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America 163 (2000).

[12] UCLA Law School Professor Jerry Kang provides a good comparison between the shopping experience at an actual mall versus one in cyberspace. Rosen, *supra* note 11, at 165. Professor Kang argues that in an real shopping mall, one can buy ice cream with cash, check out a magazine rack in a bookstore, and then purchase a scarf with a credit card. *Id.* In those activities, most likely only the scarf purchase could be traced to the buyer because of the credit card information. *Id.* However, in cyberspace, all the above activities could potentially be traced to the Internet user, because invisible scanners can automatically record the stores a user visits or what he reads. *Id.* As with the credit card purchase in an actual store, all of the data in cyberspace is permanently traceable and permanently retrievable. *Id.*

[13] *Big Browser*, *supra* note 1, at 47. Details on how to locate and delete existing cookies on your computer can be found at <www.cookiecentral. com/faq>.

[14] *Id.* Some of these software products include Norton Internet Security, Guard Dog, and interMute. *Id.*

[15] *Sharing Your Personal Information: It's Your Choice*, *available at* <www.ftc.gov/privacy/protect.htm> (Apr. 24, 2001).

[16] *Id*.

[17] Mark Grossman, *Personal Info a Hot Commodity on Internet*, Palm Beach Daily Bus. Rev., Aug. 1, 2000, at A1.

[18] Amy Borrus, *Online Privacy: Congress Has No Time To Waste*, Bus. Wk., Sept. 18, 2000, at 54. For example, this may involve combining such public information as property records, birth certificates, driving records, and court records, with such private information as credit and marketing reports. *Id.*

[19] *Getting Personal*, *supra* note 8, at 16. One of the leading information vendors, Acxiom, has compiled a database of over 20 million unlisted phone numbers, which it can legally make available to various federal agencies, corporations, or attorneys. *Id.*

parties. The information is often sold to the highest bidder—many times without the knowledge or consent of the individuals.[20] Generally, these third parties are interested in the personal information because it provides much-needed marketing or advertising data. The practice of selling such personal information is allowed in the United States, as there are no federal laws that currently govern how private businesses may disseminate the personal information (of adults) they have gathered.[21] Thus, only the voluntary privacy policies adopted by the online companies may serve to protect consumers from the dissemination of personal information.[22]

D. Consumer Concern

While millions of people continue to log onto the Internet, there is growing consumer concern about the type of personal information that may be collected, as well as the ways in which the information is gathered and used.[23] The Federal Trade Commission (FTC)[24] recently found that 92% of Americans are concerned, and 67% are very concerned, about the misuse of online personal information.[25] Fully 80% of Americans believe that future legislative action is necessary for protecting their privacy online,[26] and 92% would be uncomfortable if a website shared their information with third parties.[27]

One of the biggest consumer concerns is that website operators will disclose certain personally identifying information—such as one's name, e-mail or home address, Social Security number, or credit card numbers.[28] In many cases, someone only needs a name and a Social Security number in order to actually steal that person's online identity.[29] Thus, having quick and easy access to another person's Social Security or credit card number can easily assist those attempting to commit such crimes as credit card fraud or identity theft.[30] In addition, access to this personal information can also assist one in non-criminal purposes, such as gathering information about employees' online activities.[31]

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[20] As one Internet expert has stated:

> [Y]our personal information is a hot commodity, and the selling and trading of personal information has blossomed into a multimillion-dollar industry. Today, companies pay thousands of dollars to get a peek at the personal information of other companies' customers. The information helps retailers refine their own marketing strategies, and advertise their products to appeal to a customers' specific habits, tastes or personality.

Grossman, *supra* note 17, at A1.

[21] Mark Grossman and Bradley Gross, *When Your Private Information is No Longer Private*, Legal Times, Nov. 6, 2000, at 30. Private companies, however, are restricted in how they gather and use personal information from children via Children's Online Privacy Protection Act, as discussed in Part III(B)(2).

[22] *Id*. *See* Part IV, below.

[23] According to Amy Borrus, who covers privacy issues for Business Week:

> [T]rafficking in Web data is far more of a privacy threat because e-companies can gather so much more – and more intimate information about users than real-world companies can. A bricks-and-mortar bookseller knows what you've bought but not where you browse, while a Web bookseller knows you've scanned reviews of self-help books for HIV sufferers or erotica.

Borrus, *supra* note 18, at 54.

[24] The Federal Trade Commission is discussed in more detail in Part III(B)(1).

[25] *2000 Report*, *supra* note 3, at 15-16. The FTC also suggests that this concern could ultimately translate into lost online sales ranging from $2.8 billion in 1999 to $18 billion in 2002. *Id*. at 2.

[26] *Id.* at 15.

[27] *Id*. at 2.

[28] Borrus, *supra* note 18, at 54.

[29] Jared Sandberg, *Losing Your Good Name Online*, Newsweek, Sept. 20, 1999, at 56.

[30] Eric J. Sinrod and Barak D. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech and Cyberspace*, 1999 Stan. Tech. L. Rev. 1, at *5.

[31] *Id*. One recent example of an individual being harmed by the disclosure of online personal information occurred in the case of McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998). In that case, a decorated U.S. Naval Officer, Timothy McVeigh, was discharged from his military service for "homosexual conduct" when the Navy learned that he had described himself as "gay" on the AOL member profile directory. *Id*. at 217. In response to the attempted discharge, McVeigh sued to enjoin the dismissal, and the U.S. District Court for the District of Columbia found in his favor. *Id*. at 216, 222.

With regard to cookies in particular, a growing debate exists as to whether the use of cookies is itself a violation of privacy. Opponents of cookies generally contend that such practice is a violation of consumer privacy. These critics argue that personal and private information is being taken from online users without their knowledge or consent. Critics believe that tracking online behavior reveals not only the simple shopping habits of users, but also very personal and sensitive details about their life. Further, they argue that few Internet users actually know that they can disable their cookies, and that opting out does not always work.[32] Without any general law to protect such online personal information, it is not clear how to stop companies from distributing it.[33]

Supporters of cookies, on the other hand, argue that gathering information on the Internet is no different than with other off-line methods. These methods include: magazines buying and selling subscriber lists, credit card companies providing life insurance companies with customer lists, and sweepstakes companies selling their entry-form data.[34] Online companies contend that merely tracking the sites visited by a consumer to gain access for advertising placement decisions benefits consumers.[35] Thus, these companies argue that cookies are simply used as a means to better provide consumers with the information in which they are interested—not to gain access to personal or private information. In addition, supporters of cookies state that a customer always has the choice of "opting out."[36]

III. Current Law Relating to Online Personal Information

A. <u>The Common Law Right to Privacy</u>

The concept of a right to privacy in the United States emerged for the first time in an article written by Samuel Warren and Louis Brandeis in the 1880's.[37] In this article, the authors introduced the "right to be left alone" and stated

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[32] In addition, some opponents of cookies cite to a number of different examples in which companies or groups improperly use personal information, thus proving that cookies are not as harmless as many argue. Sinrod and Jolish, *supra* note 30, at *5. For example, DoubleClick, which is the main company operating online advertisements, was recently involved in a controversial situation upon purchasing the company Abacus Direct. Because Abacus held the records of 88 million households that make purchases from catalogs, there was concern that DoubleClick would then be able to combine online viewing with a person's name and address. *Id.*

[33] Grossman, *supra* note 17, at A1.

According to privacy consultant Robert Gellman, the four major factors that will ultimately lead to changes in the way companies handle online personal information are the:

1) changing of corporate attitudes about the effect of privacy protections on corporate image;

2) realization that some of the information they are gathering is not valuable;

3) deployment of new privacy-enhancing technologies; and

4) possibility of more federal privacy regulation.

Lisa Mathis, *Consumer Attitudes, Legislative Attention Seen As Leading to More Privacy Protection,* 5 Electronic Comm. & L. Rep. 41, at 1047 (*numbering inserted*). Mr. Gellman argues that as more consumers grow concerned about the use of online personal information, many will pay more attention to online privacy policies. *Id.* As a result, to be successful online companies will soon be forced to address consumer concerns and recognize that a lack of concern for privacy could negatively affect how consumers view them. *Id.*

[34] Sinrod and Jolish, *supra* note 30, at *2.

The issue of protecting consumer privacy in the United States was first raised in a significant fashion by federal commission studies in the 1970's. Yochai Benkler, *Symposium Overview: Part IV: How (If at All) To Regulate the Internet: Net Regulation: Taking Stock and Looking Forward,* 71 U. Colo. L. Rev. 1203, 1240 (2000). *See* Secretary's Advisory Comm. on Automated Personal Data Systems, 93rd Cong., *Records, Computers, and the Rights of Citizens* (1973) and The Privacy Protection Study Comm., *Personal Privacy in an Information Society* 345-91 (1977). *Id.* Since the 1970's, the practice of businesses collecting and sharing information about consumer habits, and using such information to better target their advertisements, has steadily increased. Benkler, *supra* note 34, at 1241.

[35] Kedrosky, *supra* note 11, at D11. According to Kedrosky, the problem with cookies is merely people's fear of them:

So, if cookies can't track you, don't contain personal information, and if it is no worse online than offline, what's the problem? The problem is people. Worried about half-explained things that they one-quarter understand, the easily stampeded are worrying unnecessarily. It's no reason to make cookies crumble. *Id.*

[36] Jane Bryant Quinn, *Fighting the Cookie Monster*, Newsweek, Feb. 28, 2000, at 63.

[37] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Jonathan P. Cody, *Comment, Protecting Privacy Over the Internet: Has the Time Come to Abandon Self-Regulation?*, 48 Cath. U.L. Rev. 1183 (1999).

that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others."[38] Warren and Brandeis believed that all individuals had the right to live their lives without being subjected to undesired publicity or commercial exploitation. Furthermore, the authors argued that an invasion of the right to privacy should lead to an "action of tort for damages in all cases."[39] Over time, Warren and Brandeis' concept of privacy—this "right to be left alone"—has become the accepted position and the basis for the simple tort concept for invasion of privacy.[40]

The right to privacy is, essentially, an individual's ability to regulate information about himself, thereby allowing him to control "when, how, and to what extent information about them is communicated to others."[41] This definition is consistent with the common law approach, which is now generally recognized by the four invasion of privacy torts:

1) unreasonable intrusion upon the seclusion of another;

2) misappropriation of another's name or likeness;

3) unreasonably publicizing another's private life; and

4) unreasonably placing another in a false light before the public.[42]

While tort law provides the general remedy for protecting an individual's personal privacy, it inadequately addresses online personal information protection. Each of these torts fails to address the situation in which an Internet user attempts to prohibit the collection, use, or dissemination of online personal information, because when the consumer uses the Internet, he or she is voluntarily interacting with the website to produce the information, rather than seeking to be left alone.[43] These torts do not apply in these circumstances.

B. Existing Federal Law

Historically, privacy law has involved piecemeal as a "hodgepodge of state and federal laws which sometime overlap and other times leave gaping holes."[44] So far, Internet privacy law has followed this pattern, particularly

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[38] Warren and Brandeis, *supra* note 37, at 198.

[39] *Id.* at 219.

[40] Ken Gormley, *One Hundred Years of Privacy*, 1992 Wisc. L. Rev., 1335, 1345.

[41] *Id.* at 1338, *quoting* Alan F. Westin, Privacy and Freedom 7 (1967).

[42] Restatement (Second) of Torts § 652A(2)(a-d) (1976) (*numbering inserted*); *see also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of another." Restatement (Second) of Torts § 652A(1). Each of these particular forms of privacy invasion "involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from prying eyes, ears and publications of others." *Id.* at fn.b. Over time, these four forms of privacy invasion have become "clearly crystallized and generally been held to be actionable as a matter of tort liability. *Id.* at § 652A(2), fn.c.

[43] Cody, *supra* note 37, at 1196, n.67. *See* Fred H. Cate, *Privacy in the Information Age* (1997) for a complete discussion.

[44] Although one may expect otherwise, the United States Constitution does not mention a specific "right to privacy." Rather, the right to privacy in America has most often been inferred from the First, Fourth, Fifth, and Fourteenth Amendments. Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 Va. J. L. & Tech. 6, 8 (2000).

For example, with regard to the First Amendment, a right to privacy may be considered "the right to be let alone, when an individual's freedom of speech threatens to disrupt another citizen's liberty of thought and repose." Gormley, *supra* note 40, at 1434. Examples of such rights include the right to educate one's children and the right to associate. Griswold v. State of Connecticut, 381 U.S. 479, 482-83 (1965). With respect to the Fourth Amendment, the Supreme Court has also found a right to privacy in the right to be free from unreasonable government searches and seizures. Griswold, 381 U.S. at 484. Additionally, regarding the Fifth Amendment, the Court has stated that a citizen has a "zone of privacy [surrounding him] which [the] government may not force him to surrender to his detriment." *Id.* Last, from a Fourteenth Amendment perspective, a right to privacy may stem from the "right to be let alone, with respect to fundamental (often unanticipated) decisions concerning the individual's own person, which are explicitly or implicitly reserved to the citizen (rather than ceded by the government) by the terms of the social contract." Gormley, *supra* note 40, at 1434.

because much of the early federal Internet legislation has involved either protecting children using the Internet[45] or addressing specific sectors of the economy, such as banking and financial services.[46] Despite these shortcomings, three separate federal laws have emerged as the best protection for online personal information: the Federal Trade Commission Act, the Children's Online Privacy Protection Act, and the Gramm-Leach-Bliley Act.

1. The Federal Trade Commission Act

The Federal Trade Commission Act ("FTCA")[47] provides the Federal Trade Commission ("FTC") with "broad investigative and law enforcement authority over entities engaged in or whose business affects commerce."[48] Electronic commerce or "e-commerce" falls under this statutory mandate, giving the FTC the authority to regulate the Internet for deceptive acts and practices.[49] The agency has stated that an online company's use or dissemination of personal information contrary to a stated privacy policy would qualify as a deceptive practice under the FTCA.[50] Thus, when appropriate, the FTC may bring enforcement actions against non-abiding online companies and individuals to stop deceptive information practices on the Internet.[51]

Since 1994, the FTC has attempted to stop online fraudulent and deceptive behavior by periodically reviewing the privacy policies of many online businesses, as well as by filing numerous lawsuits against certain Internet companies. Between 1994 and 1999, the FTC brought more than 90 enforcement actions against over 200 companies and individuals.[52] Of these cases, the FTC suit against a popular Internet service provider, GeoCities, was the first to address Internet privacy.[53] In that case, GeoCities was charged with misrepresenting the purposes for which it was collecting personal information from its customers. GeoCities, which had been gathering personal information through its online membership application and registration forms, had created a database that included e-mail and postal ad-

[45] Congress' two main attempts to regulate online material for the sake of children have come in the form of the Communications Decency Act (CDA), 47 U.S.C. § 223(a), (d) (1996), and the Child Online Protection Act (COPA), 47 U.S.C. § 231 (1998). The relevant cases addressing the CDA and the COPA are as follows: Reno I, 929 F. Supp. 824 (first case to address the CDA); Reno II, 521 U.S. 844 (striking down the CDA as unconstitutional); ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (granting preliminary injunction of the COPA) [hereinafter Reno III]; Reno IV, 217 F.3d 162 (affirming lower courts' preliminary injunction of the COPA).

[46] For instance, to address the misappropriation of online information, the federal government enacted the Identity Theft and Assumption Deterrence Act, Pub. L. 105-318, 112 Stat. 3007 (Oct. 30, 1998) (codified as amended at 18 U.S.C. § 1028, et seq). This particular Act made it illegal to knowingly use without consent personally-identifying information with the intent to commit unlawful activity.

Additionally, the "Electronic Signatures in Global and National Commerce Act," gives online consumers the option of choosing whether to use traditional handwritten signatures or electronic signatures in online transactions. Pub. L. No. 106-229, 114 Stat. 464 (2000).

[47] The main function of the FTC is to enforce the Federal Trade Commission Act, which prohibits unfair methods of competition, as well as unfair or deceptive acts or practices in commerce. FTC Prepared Statement, May 25, 2000 [hereinafter *May Statement*].

[48] *Id*.

[49] *Id.* The FTC is granted certain authority under about 40 different statutes governing specific practices and industries, such as the "Truth in Lending Act," 15 U.S.C. § 1601 et seq., and the "Fair Credit Billing Act," 15 U.S.C. § 1666 et seq. FTC Prepared Statement, July 13, 1999, at fn. 4 [hereinafter *July Statement*]. The FTC also enforces over 30 rules regarding specific practices and industries, such as the "Used Car Rule," 16 C.F.R. Part 455, and the "Telemarketing Sales Rule," 16 C.F.R. Part 310. *July Statement*, at n.4.

[50] *Id*. at 1.

[51] *July Statement*, *supra* note 49, at n.5.

[52] In many of these lawsuits, the FTC attempted to thwart the more traditional crimes, such as pyramid and credit repair schemes, as well as "fraudulent e-mail marketing." *Id*.

[53] *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case,* FTC Press Release, Aug. 13, 1998 < www.ftc.gov/opa/1998/9808/geocite.htm> (Apr. 23, 2001). At the time, GeoCities was one of the most popular websites on the Internet with over 2 million members. *Id*.

dresses, information regarding income, education, gender, marital status and occupation.[54] According to the FTC, GeoCities improperly disclosed this information to third parties in violation of its own privacy policy.[55]

Ultimately, the FTC case against GeoCities was settled by a consent decree in which GeoCities agreed to: (a) develop and post a privacy policy on its website; (b) inform consumers (1) what information is collected, (2) for what purpose, (3) to whom the information is disclosed and (4) how consumers may access and remove the collected information.[56] The consent decree also requires GeoCities to obtain parental consent before it collects personal *information from children (12 and under).*[57]

2. *The Children's Online Privacy Protection Act Requiring Parental Consent*

In 1998, Congress enacted the Children's Online Privacy Protection Act ("COPPA"),[58] which requires website operators to obtain parental consent before collecting, using, or disseminating information about young children.[59] Under COPPA, Internet operators are also required to post a privacy policy that outlines their collection practices, provides notice to parents of its information collection practices and provides access to the information collected as well as the opportunity to delete it.[60]

COPPA went into effect only in April of 2000, but early evidence indicates that it is *not* working. For instance, in July of 2000, the FTC checked numerous children's Internet websites for compliance under COPPA's provisions, and found that 50% of the sites collecting personal information from children had serious compliance problems.[61] Many of these non-complying Websites failed to post an appropriate privacy policy or neglected to set up a system to allow parents to approve the request to collect a child's data.[62] In response, the FTC has submitted warnings to those web operators in apparent violation, stating that failure to comply could result in legal action.[63] Although the FTC has yet to take action beyond these "warnings," attorneys should counsel their clients that an FTC enforcement action is possible if their sites are not brought into COPPA compliance.[64] Further, failure to properly respond to an FTC warning can also lead to substantial disruption of business and heightened exposure to third party liability.

3. *Gramm-Leach-Bliley Act*

In late 1999, Congress enacted the Gramm-Leach-Bliley Act ("GLB Act")[65] to enhance competition in the financial services industry by providing a framework for the affiliation of banks, securities firms, and other financial service

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* For additional information on the FTC Complaint and Consent Decree involving GeoCities, see *Analysis of Proposed Consent Order to Aid Public Comment* <www.ftc.gov/opa/1998/9808/9823015.ana.html > (Apr. 27, 2001).

[58] Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, §§ 1301-1308 (1998) (codified as amended at 15 U.S.C. §§ 6501-6506) (West Supp. 1999) [hereinafter *COPPA*]. Pursuant to COPPA, the FTC implemented the Act's requirements by issuing a rule, which became effective on April 21, 2000. 16 C.F.R. Pt. 312.

[59] *Id.*

[60] Violators of the Act may face up to $50,000 in fines and six months in prison for each violation. *COPPA*, § 3(f).

[61] FTC Press Release, *Websites Warned to Comply With Children's Online Privacy Law*, July 17, 2000, <www.ftc.gov/opa/2000/07/coppacompli.htm> (Apr. 27, 2001).

[62] William Glanz, The Washington Times, July 18, 2000, at B7. According to a recent study by research firm Jupiter Communications, about 10.4 million children ages 12 or younger used the Internet in 1999. *Id.* This figure is expected to increase to 13.7 million children in 2000, and 26.9 million children by 2009. *Id.*

[63] *Id.* at B7.

[64] For additional information on the legal process of an FTC investigation, *see* FTC website, *How the FTC Brings an Action*, *available at* <www.ftc.gov>. For more information on how to bring a website in compliance with COPPA, *see* <www.ftc.gov/bcp/conline/pubs/buspubs/coppa.htm> (Apr. 23, 2001).

[65] Gramm-Leach-Bliley Modernization Act, or the Pub. L. 106-102, 113 Stat. 1338 (enacted Nov. 12, 1999), codified at 12 U.S.C. § 3412 and 15 U.S.C. § 6801 et. seq.

providers.[66] With regard to Internet privacy, the GLB Act addresses the protection of nonpublic personal information of the clients of financial institutions.[67] The GLB Act recognizes that each financial institution "has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."[68] Specifically, the GLB Act states that financial institutions may not disclose a customer's nonpublic personal information to third parties without first providing notice to the customer.[69] The notice must clearly and conspicuously state, in either written or electronic form, that such information may be disclosed. In addition, the consumer must be given the opportunity to opt out of such disclosure proceedings.[70] Thus, if a financial institution has a website with a privacy policy, then it must clearly state the types of personal information that will be collected and shared with third parties, as well as give consumers an opportunity to "opt out" of such dissemination.[71]

C. <u>Existing State Law</u>

At the state level, few laws fully address or protect personal information gathered online. While a few state legislatures have passed some form of online privacy legislation, most states have yet to do so.[72] Many have, however, submitted proposals to address the concerns of online consumers.[73] In these cases, the states have generally drawn upon both the common law and particular state statutes to provide varying degrees of privacy protection. Thus, in the absence of federal legislation in the near future, states may ultimately pass their own online privacy laws, which could lead to many different variations of Internet privacy laws.

In light of proposed state laws, counsel for companies doing business on the Internet must remain vigilant regarding legislative actions to avoid being surprised by enforcement actions brought by state (or states') attorneys general. Given the wide range of jurisdiction possibilities of such a suit, a website operator could be subject to suit in all 50 states (not to mention federal and foreign courts) for violation of 50 sets of state law.

D. <u>Other Implications of the Current State of the Law</u>

Practicing attorneys need to be aware how to counsel individual clients with regard to Internet privacy. For example, an attorney may wish to warn those clients with privacy concerns about the potential gathering, use and

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66 *Id.*

67 *Id.*

68 *Id*. at § 501(a).

69 *Id*. at § 502(a).

70 *Id.*

71 *Id.*

72 For example, in Virginia, State agencies with an Internet website were required to develop a privacy policy and privacy policy statement by Dec. 1, 2000. *See* Va. Code Ann. 2.1-380. Additionally, Virginia has also considered the "Virginia Internet Policy Act," which would require online companies to clearly post: how personal information is collected; how the information is used; and how a user may opt out. Sinrod and Jolish, *supra* note 30, at *10. This particular Act was drafted by the Commission on Information Technology, which is a 36-member Commission created by Virginia Gov. James Gilmore and includes members from the public sector and private corporations such as AOL, Microsoft, and MCI-Worldcom. *Id.*

Both the States of California and Michigan have also passed legislation to better protect its citizens from certain unauthorized access to computer data and computer systems. *See* Cal. Penal Code § 502, and Mich. Comp. Laws § 752.791.

Additionally, New Mexico, Michigan, Virginia, and New York have each created their own version of the CDA in an attempt to protect children in their state. Ron N. Dreben and Johanna L. Werbach, *Senators Versus Governors: State and Federal Regulation of E-Commerce*, 17 No. 6 Computer Lawyer (June 2000) at *9; *see* N.M. Stat. Ann. § 30-37-3.2 (Michie 1999); Mich. Comp. Laws § 722.671(a) et. seq. (1999); N.Y. Penal Law § 235.22 (McKinney 1999); Va. Code Ann. § 18.2-391 (West 1999).

73 Some recently proposed state legislation includes: California Assembly Bill 1793, Senate Bill 129; Hawaii House Bill 1232; Massachusetts House Bill 4105; Michigan House Bill 4171; New Jersey Assembly Bill 591; New York Assembly Bill 1909 and 9401; South Carolina House Bill 4469; and Wisconsin Assembly Bill 548 and Senate Bills 375 and 259. *See* Lori A. Schechter and Andrew D. Muhlbach, *Privacy on the Internet: A Legal Framework*, 618 PLI/Pat 739, *763-64.

Additionally, the State of New Jersey has considered at least two separate online privacy bills: one requiring website operators to tell Internet users how collected personal information will be used, and the other requiring website operators to obtain parental consent before collecting personal information from children. *See* New Jersey Online Privacy Protection Act, A.B. 591, 209th Leg. (N. J. 2000) and *see* Adolescents' Online Privacy Protection Act, A.B. 593, 209th Leg. (N. J. 2000).

dissemination of personal information on the Internet, particularly through the use of cookies, and how they may be disabled. An attorney may also wish to recommend that his clients be wary of voluntarily providing personal information to websites that do not have a stated privacy policy or are not members of one of the privacy seal programs. Alternatively, if a website has a privacy policy, then it must abide by its stated rules or potentially be subject to action by the FTC.

IV. Public and Private Initiatives

The FTC and the U.S. Congress have both proposed the enactment of federal laws to properly protect online personal privacy. At the same time, the private sector has developed a number of online privacy protection solutions, such as Internet company privacy policies, privacy seal programs and new software.

A. <u>Public Initiatives</u>

1. Federal Trade Commission Studies and Recommendations to Congress

Since 1994, the FTC has served as the federal government's most active entity in the debate about online privacy.[74] As the agency with the authority of promoting an efficient marketplace for consumers, the FTC studies the Internet environment, as well as determines the costs and benefits to online business and consumers.[75] Over the years, the Commission has analyzed the information-gathering practices of websites and also commented on the technological developments and self-regulation efforts of Internet companies.[76] In addition, the FTC has held numerous workshops for the public[77] and testified in dozens of Congressional hearings regarding online privacy.[78] The Commission has also submitted to Congress a series of reports involving the Internet, including *Privacy Online: A Report to Congress* (the "1998 Report")[79] and *Privacy Online: Fair Information Practices in the Electronic Marketplace* (the "2000 Report"), which provide Congress with information and suggestions for addressing online privacy issues.

In its reports to Congress, the FTC set out a group of "core principles of fair information practice" to better protect consumer privacy. These core principles are as follows:

1) <u>Notice</u>—data collectors must disclose their information practices before collecting personal topic (hope fully current) related to high school season information from consumers;

2) <u>Choice</u>—consumers must be given options with respect to whether and how personal information collected from them may be used for purposes beyond those for which the information was provided;

3) <u>Access</u>—consumers should be able to view and contest the accuracy and completeness of data collected about them; and

4) <u>Security</u>—data collectors must take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use.[80]

The FTC also recommended the creation of a reliable system of enforcement to impose the appropriate sanctions when someone violates the four fair information practices.[81]

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[74] *May Statement*, *supra* note 47, at 1. FTC Prepared Statement, May 25, 2000; *2000 Report*, *supra* note 3, at 3. For more information about the FTC and various privacy issues, *see* its website at <<u>www.ftc.gov/privacy/index.html</u>> (Apr. 27, 2001).

[75] Prepared Statement of the Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace*, before the Committee on Commerce, Science, and Transportation, U.S. Senate, May 25, 2000. *See* 15 U.S.C. § 45(a).

[76] *Id*.

[77] The FTC held its first public workshop in April of 1995, its second workshop in June of 1996, and its third workshop in June of 1997. *July Statement*, *supra* note 49, at n.5.

[78] *Id*. at n.8.

[79] Federal Trade Commission, *Privacy Online: A Report to Congress* (June 1998), *available at* <<u>http://www.ftc.gov/reports/privacy3/index.htm</u>> (Apr. 23, 2001) [hereinafter *1998 Report*]. The *1998 Report* presented the results of the FTC's first online privacy survey of commercial websites. For example, the *1998 Report* stated that while nearly 92% of the surveyed websites collected personal information from the consumers, even though only 14% of those sites disclosed their information practices.

[80] *Id*. at 4 (*numbering inserted*).

[81] *1998 Report*, *supra* note 79, at 7-11.

In its 1998 Report, the FTC originally recommended that self-regulation, rather than federal legislation, was the proper course of action. In doing so, the Commission urged the Internet industry to adopt the above fair information practices.[82] More recently in the 2000 Report, however, the FTC reversed course and recommended that Congress enact legislation to protect online privacy.[83] In making its recommendation, the FTC stated that, while there was significant progress with self-regulation efforts, such industry actions had simply not been enough.[84] The Commission further argued that the absence of a broad online protection system demanded legislative action in order to fully protect online personal information.[85] Additionally, the FTC stated that a uniform protection would ultimately build public confidence in electronic commerce.[86]

In recommending Congressional legislation, the FTC suggested that any law "ensure a minimum level of privacy protection for online consumers, establishing 'basic standards of practice for the collection of information online.' "[87] The FTC suggested that future laws be phrased in general terms, be technologically neutral, and include relevant definitions and guidance for compliance in its rules and regulations.[88] In support of the recommendation, the FTC presented the results of its recently conducted Online Privacy Survey, which assessed the effectiveness of industry self-regulation efforts.[89]

2. Federal Legislation Regarding Online Privacy

Due in part to the FTC's recommendation for legislation, numerous Congressional leaders have proposed hundreds of different online privacy bills, and as a result, it is likely that privacy legislation will eventually pass—perhaps

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[82] *2000 Report*, *supra* note 3, at 5.

[83] The 2000 Report was passed by a 3-2 vote by the five FTC Commissioners. *Id.*

> The Commission believes that industry's limited success in implementing fair information practices online, as well as ongoing consumer concerns about Internet privacy, make this the appropriate time for legislative action. Such legislation, in conjunction with self-regulation, would ensure important protections for consumer privacy at a critical time in the development of the online marketplace.

John Schwartz, Washington Post, May 23, 2000, at E5.

[84] *2000 Report*, *supra* note 3, at 35.

[85] FTC Press Release of Online Privacy Report, *FTC Recommends Congressional Action to Protect Consumer Privacy Online*, May 22, 2000.

[86] *Id.* To illustrate, FTC Chairman Robert Pitofsky stated:

> [S]urvey results show that such [self-regulation] efforts have not been enough. As this year's survey makes clear, the number of websites meeting basic standards of privacy protection is far too low, endangering consumer confidence in this fast-growing, pro-consumer marketplace. *Id.*

[87] *Id.* at 15.

[88] *Id.* at iii.

[89] *See 2000 Report*, *supra* note 3, at 7-24. Specifically, this Survey disclosed information about both a "Random Sample" and a "Most Popular" group of websites. *Id.* at 9. The "Random Sample" of websites consisted of 335 sites that offer a variety of different good and services on the Internet, such as auctions, banking, clothing, online directories, and software. *Id.* The "Most Popular Group" consisted of 91 of the 100 most-visited websites, including search engines, Internet service providers, and websites offering a variety of goods and services. *Id.*

Overall, the Survey found that only 20% of the randomly visited websites, and 42% of the most popular sites, had implemented all four of the fair information practices. *Id.* at 12. The 2000 Report also stated that 41 percent of all surveyed websites met both the notice and choice standards, and 8 percent had joined online "privacy seal" programs that tell consumers that the best industry practices are being followed. *Id.* In addition, the FTC stated that nearly all sites surveyed (97% of the random, 99% of the most popular) collect some type of personal information. *Id.* at 9.

While the FTC as a whole recommended legislation, FTC Commissioner Orson Swindle continues to argue that self-regulation remains the best way to respond to the online privacy issue. *See* Dissenting Statement of Commissioner Orson Swindle in *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress* (2000). Specifically, Swindle states:

> The current recommendation, however, defies not just logic but also fundamental principles of governance. In recognition of some of the complexities of regulating privacy—particularly Access and Security—the Commission asks Congress to require all commercial consumer-oriented websites to comply with extensive, yet vaguely phrased, privacy re-

even this year as a result of bipartisan efforts.[90] Thus, counsel need be aware of the pending proposals, and prudent businesses will wish to monitor the progress of these proposals in Congress so that they can design compliance programs well in advance of any future legislation.

One particular Internet privacy bill to be introduced in Congress is the "Consumer Internet Privacy Enhancement Act" ("CIPEA"),[91] which was introduced on July 26, 2000.[92] According to one of the bill's prominent co-sponsors, Senator John McCain, the overall purpose of the bill is to "ensure that commercial websites inform consumers about how their personal information is treated, and give consumers meaningful choices about the use of that information."[93] Specifically, CIPEA would require the operators of commercial websites to disclose their privacy policies,[94] and it would give Internet customers the choice to opt out of some data gathering practices.[95] With regard to the four information practices proposed by the FTC, CIPEA would mandate that websites provide "notice" and "choice," but not "access" and "security."[96] For instance, CIPEA would require websites to state in plain, everyday language, the

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> quirements and to give the Commission (or some other agency) a blank check to resolve the difficult policy issues later. This would constitute a troubling devolution of power from our elected officials to unelected bureaucrats.

Id. at 27.

[90] Cheryl Rosen and Beth Bacheldor, *The Politics of Privacy Protection*, Information Week, July 17, 2000, at *3.

One estimate, made by the Corporation Director of Federal Affairs at AT&T, is that over 2,000 state and federal Internet-related bills were introduced in 1999. Ron Eckstein, *Web Lobby Fights Foes On All Sides*, Legal Times, June 5, 2000, at 1.

Some of the proposed laws in the 106th Congress include the following: "Consumer Internet Privacy Protection Act of 1999" (H.R. 313); "Electronic Privacy Bill of Rights" (H.R. 3321); "Privacy Commission Act" (H.R. 4049); "Secure Online Communication Enforcement Act of 2000" (H.R. 3770); "Online Privacy Protection Act of 1999" (S. 809/H.R. 3560); "Secure Online Communication Enforcement Act of 2000" (S. 2063); and "Internet Integrity and Critical Infrastructure Protection Act" (S.2448).

One of the online privacy bills is the "Consumer Privacy Protection Act of 2000" (S. 2606). This bill, introduced the day after the release of the FTC 2000 Report in May, would generally require online sites to obtain consumer consent before collecting information. In addition, consumers would have the choice to opt out of giving out information. *Id.* Currently, this bill has been referred to the Senate Committee on Commerce, Science and Transportation.

Another online privacy bill, H.R. 4049, recently failed to pass in the House of Representatives by a vote of 250-146 on October 2, 2000. Derrick Cain, *Bill to Create Internet Privacy Commission Falls Short of Two-Thirds Majority in House*, 5 Electronic Comm. & L. Rep. 38, at 987. H.R. 4049, which had been previously passed (by voice vote) on June 29, 2000, by the House of Representatives Committee on Government Reform and Oversight, would have created a government commission to study Internet privacy regulations and practices. *Id.* This 17-member commission was to be named the Commission for the Comprehensive Study of Privacy Protection, and it would have studied the existing privacy laws, conducted hearings to receive comments from the public, and make legislative recommendations to Congress. *Id.* at 987-98.

Two other Senators, Patrick Leahy and Robert Torricelli, introduced the "Privacy Policy Enforcement in Bankruptcy Act of 2000." S. 2857, 106th Cong. (2000). This particular bill would amend federal bankruptcy law to exclude personally identifiable information from the assets of a debtor in bankruptcy. *Id.* In essence, this bill would serve to uphold an online company's privacy policy, and prevent the sale of personal information, even in the event of a future bankruptcy. *Id.* This bill specifically responds to the case involving Toysmart.com, an online retailer of children's toys before going bankrupt. D. Ian. Hopper, *Stronger Online Privacy Sought*, AP Online, July 12, 2000. Toysmart.com had put all of its assets—including customer records—up for sale even though their privacy policy stated that the information would remain private. *Id.* The online watchdog company, TRUSTe, had discovered that Toysmart was attempting to sell the information. *Id.* To resolve the problem, Walt Disney, which is the majority owner of Toysmart, plans to purchase the company's customer lists to ensure that they be kept confidential. *Id.*

[91] S. 2928, 106th Cong. (2000).

[92] S. 2928 was introduced by Senators John McCain, John Kerry, Spencer Abraham, and Barbara Boxer.

[93] Statement by John McCain, July 26, 2000. Further, Sen. McCain acknowledges the potential fears of online consumers:

> [T]he ability of the Internet to aid business in the collection, storage, transfer, and analysis of information about a consumer's habits is unprecedented. While this technology can allow business to better target goods and services, it also has increased consumer fears about the collection and use of personally identifiable information. *Id.*

[94] *Id.*

[95] *Id.*

[96] Co-sponsor Sen. McCain stated in a October 3, 2000, Senate Commerce, Science, and Transportation Committee hearing:

information that will be gathered, how it will be used, and whether it will be sold to third parties (i.e. "notice").[97] The privacy posting must provide information regarding how consumers can "opt out" of having the information collected and passed along (i.e. "choice").[98] Under CIPEA, violations of privacy policies would be treated as unfair trade practice and enforceable by FTC authority.[99] Penalties for failing to post proper notices would be $22,000 for each violation up to a maximum amount of $500,000.[100]

CIPEA would also create a commission to work with the National Academy of Sciences to study access, security, and industry regulation issues, as well as the differences between "online and off-line information collection practices."[101] The bill would provide for a moratorium on state privacy legislation until the publication of a findings report, to be completed and submitted to Congress within one year.[102]

While legislation to protect online privacy continues to be debated, many argue that such Congressional attempts are in vain due to the complex and unique nature of the Internet. These critics contend that the Internet is an atypical form of communication that cannot be easily regulated by legislation. Rather, the Internet is an international system crossing all borders without bounds or limits. Thus, critics of Internet privacy legislation argue that no matter what steps are taken, one country cannot possibly control the content and dissemination of online material. Some critics contend that "you're dealing with a universe so large, government regulation is unworkable,"[103] and that attempts to regulate the Internet would be incredibly expensive and complex. Further, others assert that Internet legislation would in itself be a potential invasion of privacy because rather than privacy invasions stemming from various public groups, the intrusions would come from the government.[104]

While the 106th Congress failed to pass general Internet privacy legislation, it is likely that the 107th Congress will continue to address the issue. For instance, the Senate Commerce Committee will likely hold additional hearings on the subject during the first half of 2001.[105] Additionally, with the increasing concern about online privacy from Internet users, the privacy debate figures to be one of the main issues in Congress in the coming years.

> [S. 2928] would ensure that consumers are informed of a website's information practices in a "clear and conspicuous" manner. It would also require websites to give consumers a simple method of exercising meaningful choices about how that information is used. By focusing on these two fundamental principles I believe we strike a balance between protecting privacy and imposing burdensome rules that do little to help consumers. We may not all agree about the specific details of a legislative proposal, but we all agree that the time has come to enact legislation to protect consumers' privacy.

Improving Internet Privacy: Hearing Before the Senate Commerce, Science, and Transportation Committee, 106th Cong. (October 3, 2000) (statement of John McCain, U.S. Senator) (hereinafter *Commerce Hearing*).

[97] The bill requires that the notice be "clear, conspicuous and easily understood." S. 2928, 106th Cong. (2000).

[98] Cheryl Rosen and Beth Bacheldor, *The Politics of Privacy Protection*, Information Week, July 17, 2000, at *3.

S. 2928 would also serve to pre-empt some of the existing state laws to better ensure for more uniform online protection. In addition, the bill would provide state attorneys general with enforcement authority, requiring them to notify the FTC before prosecuting violators. S. 2928, 106th Cong. (2000).

[99] Derrick Cain, *Senate Panel Debates Internet Privacy; Still Not Near Consensus on Legislation*, 5 Electronic Com. & L. Rep. 39, at 1008.
[100] S. 2928, 106th Cong. (2000).

[101] *Id.*

[102] Cheryl Rosen and Beth Bacheldor, *The Politics of Privacy Protection*, Information Week, July 17, 2000, at *3-4.

[103] Steve Jarvis, *FTC Pushes, But Bills Aren't Moving Yet*, Marketing News, July 31, 2000, at 6 (*quoting* Doug Wood).

[104] *Id.*

[105] Near the end of the October Commerce Committee hearing, Senator McCain stated:

> As much as I would like to assure people that we will pass legislation between now and the next week or two, it simply is not something that is going to happen. But at the same time, I think by the time January or February rolls around, this issue will have increasing importance that the Congress of the United States act in some way on it.

Commerce Hearing (statement of Sen. John McCain), *supra* note 96.

B. Private Initiatives

1. *Privacy Policies*

Many of today's Internet companies now post a "privacy policy" on their website.[106] Basically, these privacy policies are intended to address consumer concern by letting them know how the information gathered by the company, either voluntarily or via cookies, will be used. At a minimum, prudent policies should:

1) Be easy to understand and prominently posted;

2) Disclose what information is collected;

3) Describe how the collected information will be used; and

4) Provide customers with the ability to opt out of the data collection process.[107]

Most often, the online company allows its viewers to read its privacy policy by clicking on a link usually located at the bottom of the website's main page.[108]

As stated earlier, Internet companies are not required to post a privacy policy on their website under current U.S. law. However, if an online business elects to have a privacy policy, it must not violate it—or it risks an FTC enforcement action. Corporate clients and their counsel should carefully consider how they plan to use any personal information and determine whether or not to create and post a privacy policy that strictly follows such a plan. They must then monitor their business practices to ensure compliance.[109]

2. *Privacy Seal Programs*

A second way for online companies to provide privacy protection is to join a privacy seal program, such as TRUSTe and BBB*OnLine*. These online seal programs generally require its member websites to follow certain privacy policy requirements and submit to monitoring. In exchange for following these requirements, the member sites can display the program's privacy seal.[110]

For instance, TRUSTe distributes its "trustmark" to its member websites. To receive this TRUSTe trustmark, the online company must: 1) create a privacy statement that is approved by TRUSTe, 2) sign a license agreement, 3) agree to the TRUSTe oversight and resolution process, 4) complete a self-assessment form, and 5) pay an annual license fee based on the company's annual revenues.[111]

Another major industry seal program, BBB*OnLine*, is a wholly owned subsidiary of the Council of Better Business Bureaus.[112] BBB*OnLine* provides both "Reliability Seal" and "Privacy Seal" programs, which are designed to help Internet users find online companies meeting the BBB*OnLine* standards.[113] The Reliability Seal Program is a

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[106]An example of an Internet privacy policy may be found on the FTC's website, <www.ftc.gov>.

[107] Robert L. Hoegle and Christopher P. Boam, *Putting a Premium on Privacy Protection Policies*, National L. J., Aug. 21, 2000, at C8.

[108] *Id*. at C8. Most Internet scholars recommend that online users carefully read privacy statements before providing personal information at a website. Also, some websites, such as <www.ConsumerReports.org> and <www.enonymous.com>, provide users with the privacy policies and ratings of many commercial Websites. *Big Browser*, *supra* note 1, at 47.

[109] *See* Stuart D. Levi and Andrew M. Goldner, *Posting Privacy Policy is Not Enough*, New York L. J., Nov. 6, 2000, at S7.

[110] Hoegle and Boam, *supra* note 107, at C8.

[111] Tom Kirchofer, *Value of Web Privacy Seals Questioned*, The Boston Herald, July 31, 2000, at 23. TRUSTe has increased its membership from 500 websites in 1999 to more than 2,000 members today. *Id.*; *see also 2000 Report*, *supra* note 3, at 6. "The trustmark is awarded only to sites that adhere to our established privacy principles of disclosure, choice, access and security. Furthermore, websites that display the TRUSTe privacy seal agree to comply with ongoing TRUSTe oversight and our alternative dispute resolution process." *See* <www.truste.com>.

The annual license fee ranges from $299 (company revenues of $0-$1 million) to $6,999 (company revenues of over $75 million). *Id.* For more information about the TRUSTe program, *see* <www.truste.com>.

[112] Kirchofer, *supra* note 111, at 23.

[113] *See* <www.BBBOnline.com>.

voluntary self-regulatory program that helps online businesses identify themselves as reliable and trustworthy companies.[114] Similarly, the Privacy Seal Program helps online consumers identify those online companies that have met the FTC's self-regulation requirements of notice, choice, access, and security in using personal information.[115] Similar to the TRUSTe applicants, online companies applying for the BBB*OnLine* symbol must complete the necessary forms and questionnaires, sign a Participation Agreement, and implement a privacy policy meeting FTC requirements.[116]

While the TRUSTe and BBB*OnLine* seal programs lack widespread use, their corporate memberships are growing.[117] Presumably, if privacy seal programs become widely adopted, online consumers will become familiar with the meaning behind these privacy seals, and they will begin to look for the seal when determining whether to provide personal information to the website. Critics of the online seal programs, however, suggest that consumers should not be quick to trust the seal programs. For example, some Internet experts argue that the two companies cannot be completely trusted because both are funded by the high-tech industry itself. Critics note that the seals of members who commit privacy violations are not consistently removed.[118] Other critics argue that using monitoring companies is simply a veiled attempt to avoid much larger and intrusive government regulations in the future.[119]

Practicing attorneys may wish to advise their corporate clients to consider becoming members of one of the privacy seal programs. While some are critical of these programs, they appear to be becoming more common and accepted by online consumers. Online consumers will eventually expect to see some type of privacy seal for assurance when using the Internet, and customers may take their business elsewhere in the absence of a seal.

3. Technology That Allows Consumers to Protect Themselves

Technological advances in software also provide consumers with additional tools to protect their online privacy. New programs allow online consumers to use the Internet without revealing their true identities. For example, software from Anonymizer.com and Zero Knowledge Systems[120] allow online users to conceal their real identities or create different online names and personas while using the Internet. This introduces the very real possibility that the information gathered by a site might be incorrect, exacerbating the problems caused by voluntarily-submitted incorrect information. Additionally, certain software programs, such as PrivaSeek's "Persona" system, allow users to determine for themselves the types of personal information they are willing to distribute to website operators.[121]

Other computer software programs also block cookies to prevent others from tracking an Internet user's activities.[122] For instance, Platform for Privacy Preferences ("P3P")[123] is a particular program that allows Internet users to determine how much personal information will be released to online companies.[124] Thus, online users may personalize the level of privacy protection to fit their own needs.[125] The P3P program, however, has raised concerns within the computer industry. One critic, Barry Steinhardt, Electronic Frontier Foundation president, stated:

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[114] As of Feb. 10, 2001, the BBB*OnLine* Reliability Seal Program had been distributed to over 9,000 online companies. *See* <www.BBBOnline.com>.

[115] Sinrod and Jolish, *supra* note 29, at *10. As of February 10, 2001, the BBB*OnLine* Privacy Seal had been distributed to over 750 online companies, including Intel, AT&T, and the New York Times. *See* <www.BBBOnline.com>.

[116] *See* < www.BBBOnline.com>. The annual license fee is determined by the local Better Business Bureau office policy. *Id.*

[117] *2000 Report*, *supra* note 3, at 6.

[118] Kirchofer, *supra* note 111, at 23.

[119] *Id.*

[120] *See* <www.anonymizer.com> and <www.zeroknowledge.com>.

[121] Deborah Branscum, *Do You Know Who's Watching as You Surf the Web? The FTC and Software Developers are Looking for New Ways to Protect Users*, NEWSWEEK, June 5, 2000, at 77.

[122] *Id.*

[123] *See* <www.w3.org/P3P>.

[124] *Id.*

[125] *Id.*

> [t]here are still a lot of unanswered questions about P3P and the underlying philosophy of industry self-regulation….If you turn [P3P] on and say you want to be anonymous, you're going to be blocked from a lot of sites….There's question of whether this will work or [whether] there will be a consumer revolt.[126]

Others disagree with Stienhardt, however, and raise the point that P3P and other, similar technological advancements would ultimately serve to protect online privacy better than the government. One advantage to these technological solutions is that they call for consumers to take action to protect themselves, thereby decreasing the need for regulations that burden the industry.

4. European Model of Regulation

While the U.S. has yet to pass substantive online privacy legislation, other countries acted early in passing comprehensive online privacy law. For instance, the European Union's Directive on Data Protection ("EU Directive") regulates how personal information is collected and used within the European Union.[127] Specifically, the EU Directive prohibits the transfer of personal information to foreign countries that do not provide an adequate level of privacy protection ("adequacy standard").[128] The U.S. lacked a comprehensive privacy law when the EU Directive went into effect in October of 1998 and therefore, it did not pass the adequacy standard.[129] This led to concern that the EU Directive would stifle American companies attempting to do business with EU companies.[130] As a result, the Department of Commerce worked with the European Commission for two years to develop certain "Safe Harbor Principles," which would provide a presumption of the "adequate" privacy protection standard required under the EU Directive.[131] The European Union approved these principles in May 2000. Abiding by these principles is voluntary for U.S. companies, but those that do so will meet the EU Directive's adequacy standard and may then legally gather personal information from EU individuals or entities.[132]

V. Conclusion

Because the Internet is here to stay, practicing lawyers need to know and understand the privacy issues that may affect their clients. Potentially, some form of state or federal Internet privacy legislation will pass in 2001. It is the author's hope that this article will bring awareness to the many important privacy issues relating to the Internet and assist attorneys in their representation of corporate clients.

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***Transactions*' Selection of Websites**
for Business Lawyers is found on pages 42-44 of this issue

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[126] Sinrod, at 12; quoting International Trade Administration Electronic Commerce Task Force Letter to Industry Representatives, *formerly available at* <http://www.ita.doc/gov/ecom/menu.html#safe> (at time of publication page was no longer available at this address).

[127] Terri J Seligman and James D. Taylor, *FTC Reverses Privacy Policy*, New York L. J., June 19, 2000, at S8. For additional information on the European Directive, *see* Marie Clear, *Falling into the Gap: the European Union's Data Protection Act and its Impact on U.S. Law and Commerce*, 18 J. Marshall J. Computer & Info. L. 981, Summer, 2000.

[128] *Id.*

[129] Seligman and Taylor, *supra* note 127, at S8.

[130] *Id.*

[131] *Id.*

[132] *Id.*

Whether You Think MDP Stands for Most Discussed Problem or Most Discussed Potential, Multidisciplinary Practice Should Have Your Attention

By J. Britt McAfee*

I. Introduction

Multi-disciplinary practice (MDP) is a way to allow lawyers and non-lawyer professionals to join together in business organizations and sharing profits in a practice that delivers both legal and non-legal services to clients.[1] In the MDP debate, the ABA uses a restrictive definition that characterizes "non-lawyer professionals" as members of recognized professions or other disciplines, such as accountants or financial planners, whose members are subject to ethical standards.[2]

While this restrictive definition of "non-lawyer professionals" serves to limit the varieties of potential "partners" a lawyer or law firm might go into business with, an MDP could conceivably include partnerships and fee sharing between lawyers and a plethora of other professionals.[3] Though this point is important for "Main Street" lawyers who have decided to expand the range of services provided to their clients, most of the discussion thus far has centered on the combination of lawyers and accountants (specifically the accounting firm's consulting wings) in firms or partnerships.[4] The reason that dialogue on MDP in the United States has been principally centered on the accountant / lawyer paradigm is because of the legal community's growing awareness of the Big Five accounting firms' success in establishing MDPs in Europe. There is a perception that these firms are attempting to form similar arrangements here, only more subtly.[5]

The discussion on whether lawyers should be allowed to either form, or work in, MDPs has been sharply divided. Proponents argue that the modern, global economy has changed the nature of business and business relationships. Consequently, clients or potential clients of both transactional and dispute resolution lawyers now demand the efficiency and cost savings of integrated financial and legal services.[6] Proponents contend the constraints that now prevent MDP are barriers to the efficient delivery of professional services. Unless these constraints are lifted, the role of lawyers and their relevance to society will be greatly diminished.[7]

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[1] *Multidisciplinary Practice: What's the debate?*, 2 TortSource No.2 (Winter 2000), at 1 [hereinafter *What's the debate?*].

[2] *Id.*

[3] *Id.*

[4] Mary C. Daly, *Choosing Wise Men Wisely: The Risk and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 Geo. J. L. Ethics 217, at 219.

[5] *Id.* at 234.

[6] *What's the debate?*, *supra* note 2, at 1.

[7] *See generally* ABA Commission on Multidisciplinary Practice, *Report to the House of Delegates* (July 2000) *available at* <www.abanet.org/cpr/mdpfinalrep2000.html> (Nov. 15, 2000) [hereinafter *July Report*].

Opponents of MDP argue that the modifications to the ethics rules that would be necessary to facilitate MDPs would undermine the core values of the profession.[8] Namely, they fear that the preservation of a lawyer's independence of loyalty and judgment and the protection of the client's right to confidentiality are at stake.[9]

The contentiousness and magnitude of this issue prompted the American Bar Association to establish a commission to study the problems and potential benefits for lawyers participating in MDPs.[10] The results of the commission's efforts were compiled in a report to the ABA House of Delegates in July 2000.[11] The findings of the report and the ABA's decision concerning the report's recommendations will be examined later.

II. Barriers To Multi-Disciplinary Practice

There are two sets of "rules" that currently preclude the existence of MDPs in the United States.[12] The first set is the ABA's Model Rules of Professional Conduct. The Model Rules prohibit lawyers from sharing fees with non-lawyers and from forming partnerships with non-lawyers if any of the partnership's activities include the practice of law.[13]

The second set of rules is the various state statutory prohibitions against the unauthorized practice of law ("UPL").[14] UPL statutes reserve the practice of law to those individuals admitted to the Bar in the subject state.[15] Consequently, a non-lawyer in an MDP, such as a financial planner in the trust department of an accounting firm, might be guilty of the unauthorized practice of law depending on his or her job duties and the state's definition of what constitutes the practice of law.[16] Furthermore, a lawyer working in an MDP with offices in multiple jurisdictions could be guilty of the unauthorized practice of law if he or she were "advising" clients whose businesses were located in jurisdictions where the advising lawyer was not admitted to the Bar.[17]

As MDPs have pushed their way to the forefront of the legal community's consciousness in the last few years, the prohibitions against MDP and the policies underlying them have drawn journalistic attention.[18] However, the move to prohibit the unauthorized practice of law and partnerships between lawyers and non-lawyers started in the 1920's.[19]

The ABA first adopted rules that proscribed business affiliations between lawyers and non-lawyers in 1928.[20] This long-standing prohibition was challenged in the 1980's by the emergence of legal franchises whose operations raised some issues similar to those of the present MDP debate.[21] To address this change in the legal landscape, the ABA appointed a special commission, the Kutak Commission, in 1982.[22] The Commission concluded that modifying the model rules to lift the ban on non-lawyer / lawyer practices was in the best interest of clients and would not damage the core values of the profession, namely the exercise of a lawyer's independence of judgment.[23] Furthermore, the

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[8] Thomas E. Dwyer, *Multidisciplinary Practice: Where Are We? Where Are We Going?*, Boston B.J. Nov.-Dec. 1999, at 2.

[9] M. Peter Moser, *The Argument For Change*, Experience, Summer 1999, at 4.

[10] ABA Comm. Rep. at 1.

[11] *Id.*

[12] *What's the debate?*, *supra* note 1, at 1.

[13] Model Rules of Professional Conduct Rule 5.4 (1983).

[14] Model Rules of Professional Conduct Rule 5.5 (1983).

[15] *Id.*

[16] Moser, *supra* note 9, at 6. *See also* Cleveland Bar Assoc. v. Misch, 695 N.E. 2d 244, 247 (Ohio 1998), Birbrower v. Superior Court, 949 P. 2d 1, 3-5 (Cal. 1998).

[17] Model Rules of Professional Conduct Rule 5.5 (1983). *See also* Birbrower, 949 P. 2d at 3-5, Cleveland Bar Assoc., 695 N.E. 2d at 247.

[18] *See supra* note 1, at 1.

[19] Daly, *supra* note 4, at 240.

[20] *Id.*

[21] Anna Marie Kukec, *A Bit of History - MDP Roots extend to 1980s*, Bar Leader, Summer 1999, at 14.

[22] *Id.*

[23] Daly, *supra* note 4, at 242.

Commission criticized the prohibition as "economic protectionism" for traditional legal service providers and for "impeding the development of new methods of providing legal services."[24]

The ABA House of Delegates, however, concluded differently and voted down the commission's recommendations in 1983.[25] This rejection caused lawyers whose clients needed multi-disciplinary services to maintain the status quo and to continue offering legal advice in conjunction, but not partnership, with professionals in other fields.[26]

Today, the primary ethical obstacles that keep MDPs from operating openly in the United States are the Model Rules of Professional Conduct.[27] Specifically, Rule 5.4 (Fee Splitting Partnerships), Rule 5.5 (Unauthorized Practice of Law), Rule 1.6 (Confidentiality), and Rules 1.7, 1.9 and 1.10 (Conflict of Interest) all arguably serve to bar the combination of law firms and accounting/consulting firms into a "one-stop", fully integrated provider of financial and legal services.[28] The primary aim of these rules is to preserve a lawyer's professional independence of judgment in serving clients.[29] The linchpin of these ethical rules against MDP is Model Rule 5.4 [30].

The current version of Model Rule 5.4 prohibits lawyers from sharing fees with a non-lawyer (except under limited circumstances). It prohibits forming partnerships with non-lawyers if the business of the partnership consists of practicing law, and from practicing in a professional corporation where a non-lawyer has the right to direct or control the lawyer's professional judgment.[31] The only jurisdiction with an exception to this ban is the District of Columbia, where the ethics rules permit lawyers and non-lawyers to combine into partnerships and to share fees.[32]

The District of Columbia rules, while allowing interdisciplinary partnerships, do not provide for fully integrated practices, because the combination of lawyers and non-lawyers must be in a firm that provides *only* legal services.[33] So, while D.C. permits accountants to work in conjunction with tax lawyers in rendering legal services to clients, D.C. Rule 5.4 does not sanction such a combination for the provision of accounting or non-legal consulting work.[34] Passive investment is also restricted under the D.C. approach. An entity not providing professional services within the organization does not satisfy the rule's requirement for participation in the firm.[35]

The second set of rules restricting MDPs in the United States is the Unauthorized Practice of Law rules and statutes in each of the states.[36] These prohibitions are legal, as well as ethical,[37] and consequently carry criminal penalties for lawyer and non-lawyer violators who would otherwise escape the professional sanctions by their respective state bars.[38]

Whether a lawyer or non-lawyer is actually practicing law unlawfully is not always a clear-cut question, due to the absence of a uniform definition of what constitutes the practice of law. The Model Rules do not provide a precise definition, and UPL statutes vary from state to state depending on how broadly or narrowly they are written and

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[24] ABA Commission On Evaluation Of Professional Standards, Proposed Final Draft: American Bar Association Model Rules of Professional Conduct 176-78 (1981).

[25] Kukec, *supra* note 21, at 14.

[26] Daly, *supra* note 4, at 243.

[27] *What's the debate?*, *supra* note 1, at 1.

[28] Model Rules of Professional Conduct Rules 1.6, 1.7, 1.9, 1.10, 5.4, 5.5 (1983).

[29] Moser, *supra* note 9, at 4.

[30] *Id.*

[31] *Id.*

[32] Washington D.C. Rules of Professional Conduct Rule 5.4.

[33] *Id.*

[34] *Id.*

[35] *Id.* at cmt. 8.

[36] *What's the debate?*, *supra* note 1, at 1.

[37] *See* Model Rules of Professional Conduct Rule 5.5 (1983).

[38] Moser, *supra* note 9, at 6.

construed.[39] Such vagueness leaves lawyers in accounting and consulting firms guessing as to whether they might be subject to sanction. Likewise, it is not hard to imagine how the lack of a definitive standard could pose enforcement problems for state authorities that might attempt to scrutinize the services being provided by accounting/consulting firms.

III. The Changing Landscape of the Legal World

Currently, thousands of lawyers are working in accounting firms[40] and performing consulting work that Sherwin Simmons, chairman of the ABA's Commission on MDP says, "look[s] remarkably like the practice of law."[41] Why do so many lawyers choose to work for accounting firms where they "consult" but, so as not to violate Rule 5.4, are ostensibly not "practicing law?" The answer lies in the economic growth and subsequent rise in the stature of the consulting services industry.[42]

Accounting firms have come to depend more on the revenues generated by their consulting divisions as traditional auditing services have become less profitable.[43] Additionally, recent corporate mega-mergers have produced more international conglomerates that demand integrated financial and legal services.[44] The changing needs of their clients, and the need to expand their revenue base, has prompted accounting firms to begin offering services previously dominated by law firms.[45] In response to the changing economic environment, the accounting/consulting firms are now challenging major law firms in terms of the number of lawyers employed.[46] In fact, among international law firms, only Baker & McKenzie and Clifford, Chance, employ more lawyers than accounting firms Arthur Anderson and PriceWaterhouseCoopers.[47]

The Big Five accounting firms employ over 5,000 lawyers.[48] The trend seems to be growing as Ernst & Young and PriceWaterhouseCoopers have increased the number of non-tax lawyers in their employment in just the last several years.[49] Are these lawyers practicing law in ways that violate the legal and ethical rules of conduct? The practice of law "is not limited to [making] court appearances but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved."[50] Some courts also further delineated that activities such as drafting buy-sell agreements, applications for financing, negotiating with state and federal tax authorities, arbitration negotiations, and negotiating with lenders or creditors on behalf of business clients constitute the practice of law.[51]

In order to avoid open conflicts with the model rules, lawyers at accounting firms claim that they are not "practicing law," and are only providing consulting services to clients. They may also argue that it is the accounting firm, and not the firm's clients, using and paying for, the staff lawyer's legal work.[52] Although this arrangement deprives the

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[39] Cleveland Bar Assoc., 695 N.E. 2d 244, 247 (Ohio 1998), Birbrower, 949 P.2d 1, 3-5 (Cal. 1998), In Re Florida Bar Advisory Opinion, 571 So. 2d 430, 435 (Fla. 1990), El Gemayel v. Seaman, 533 N.E. 2d 245, 246-47 (N.Y. 1988).

[40] Lawrence J. Fox, *The Argument Against Change*, Experience, Summer 1999, at 8-9.

[41] Ann Woolner, *MDP Lesson: Picking Principle Over Profit*, Fulton County Daily Rep., Sept. 7, 1999, at 3 (quoting Sherwin Simmons).

[42] *Accountants and Lawyers: Disciplinary Measures*, Economist, Mar. 6, 1999, at 68.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Moser, *supra* note 9, at 6.

[47] *Id.*

[48] Daly, *supra* note 4, at 231.

[49] *Id*.

[50] *See* Cleveland Bar Assoc., 695 N.E. 2d 244, 247 (Ohio 1998).

[51] *See* Birbrower, 949 P.2d 1 (Cal. 1998).

[52] Ann Woolner, *MDP Lesson: Picking Principle Over Profit*, Fulton County Daily Rep. Sept. 7, 1999, at 173.

accounting firm's clients of the protections afforded a lawyer's client, such as confidentiality, independent legal judgment, or conflict of interest rules, acknowledgment of a different employment scheme would violate Rule 5.4.[53]

Recent events indicate that at least some of the large accounting firms are willing to push to envelope even further. Last year, the professional services giant KPMG attempted to form a strategic alliance between itself and a group of tax attorneys.[54] The high profile law firm Morrison & Foerster was one of the firms to participate with KPMG in this new endeavor. Morrison & Foerster, which earlier lost a senior partner to Ernest & Young, insisted, however, that the move to ally themselves with KPMG was not a response to the talent drain being inflicted on law firms by the accounting giants, but rather an attempt to generate more business.[55]

From the accountants' perspective, these strategic alliances provide them with an edge in the delivery of services to clients. The law firms that are allied with accountants essentially serve as general counsel for the accounting firms and provide them with services that, under the Model Rules, lawyer employees of the firm cannot. Litigators in the allied law firms can advise the accountants on business strategies based on their experience litigating tax questions in the courtroom.[56]

The advantage to law firms in such an arrangement is the increased business from being the de facto general counsel to the accounting firms themselves, as well as the business from the accountants' clients.[57] The strategic alliance model, discussed in more detail later, keeps the union from being exclusive. This allows the law firm to recruit and retain its own clients. This thus is not a fully integrated practice in violation of Rule 5.4.[58]

Treading even closer to the line, and possibly over it, is a move made by Ernst & Young in 1999. On November 2, 1999, Ernst & Young made headlines by announcing the hiring of King & Spalding senior partners William S. McKee and William F. Nelson to form McKee, Nelson, Ernst & Young, the first affiliated law firm in the United States.[59] This new start up firm is touted as being a separate entity from Ernst & Young, but it plans to offer services in conjunction with those offered by the accounting giant.[60] The potential benefits to clients as well as to the new law firm from this marriage are multiple. Clients will have the convenience and flexibility of "one -stop shopping" for both legal and financial advice and planning while the law firm will have access to the technological resources of an $11 billion, 85,000 employee accounting firm.[61]

McKee, Nelson, Ernst & Young, although the first venture of its kind, is touted as being much like a traditionally structured law firm, with several key differences. The first, and most glaring difference, is that Ernst & Young is bankrolling the law firm with a loan, the amount and terms of which the parties refuse to disclose.[62] Second, the law firm and Ernst & Young have entered into agreements, which cover the use of the Ernst & Young name and trademark, a lease of office space for the law firm in Ernst & Young's building in Washington, D.C., and for administrative support services.[63]

In an attempt to insulate themselves from a charge of violating ethics rules, or charges that Ernst & Young is practicing law without a license, McKee, Nelson Ernst & Young will maintain a wall of separation between the law

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[53] *Id.*

[54] Ritchenya A. Shepherd, *Why MOFO teams with KPMG*, National L. J., Aug. 23, 1999, at A12.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Tom Herman, *Ernst and Young Will Finance Launch of Law Firm in Special Arrangement*, Wall St. J., Nov. 5, 1999, at B10.

[60] Siobhan Roth, *The Path From King & Spalding to Ernst & Young*, Fulton County Daily Rep. Nov. 10, 1999, at 7.

[61] *Id.*

[62] *Id.*

[63] *Id.*

firm and Ernst & Young, according to William Nelson.[64] The law firm's offices will be "hermetically sealed" from Ernst & Young.[65] It remains to be seen if this "hermetic seal" will be enough to shield the firm or Ernst & Young.

Despite the assurances of independence by the principals of the law firm, ethics experts say that potential challenges to the legality and or ethical propriety of the new firm could likely spring from the loan given to the firm by Ernst & Young. The use of "Ernst & Young" in the law firm's name is another potential pitfall.[66] Though Model Rules 7.1 and 7.5 do not prohibit a law firm from using *another law firm's* name on letterhead or communicating that it is affiliated with another firm, such communication cannot be misleading as to the relationship.[67] The implications of this prohibition for a firm like McKee, Nelson, Ernst & Young are obvious. While Ernst & Young and McKee, Nelson, Ernst & Young are ostensibly not fully integrated providers of legal and financial services (an MDP), the use of the Ernst & Young trade name in the law firm name can be viewed as a misrepresentation as to the relationship of the law firm with the accounting/consulting firm.

IV. The ABA Commission on MDP

The realization that the integration of legal and financial services is not only desired, but is happening served as a catalyst for the ABA to appoint a commission to study MDP.[68] In its report, the Commission constructed several models that represented the range of integration between lawyers and non-lawyers in the delivery of legal and non-legal services.[69] The first three models within the definition of the Commission, while the final two are examples of multi-disciplinary practice.[70]

Model 1 - The Cooperative Model

This model represents the status quo in the United States.[71] In this model, the lawyer can either directly employ a non-lawyer to assist him or her in advising clients or the lawyer can work cooperatively with non-lawyer professionals who are independent contractors. Under this scenario, the lawyer is responsible for taking steps to ensure that the non-lawyer's behavior is compatible with the ethical and legal rules governing the behavior of lawyers.[72]

Model 2 - The Command and Control Model

This model is based on the amended version of Rule 5.4 as adopted in the District of Columbia. Here, a lawyer and non-lawyer are permitted to form partnerships and share legal fees, provided that certain restrictions are met. The conditions are: (1) the organization must have "as its sole purpose the provision of legal services" to other entities besides the firm itself; (2) the non-lawyers in the firm must agree to abide by the rules of professional conduct that bind lawyers; (3) the lawyers with financial interests in the firm, or with management authority, are responsible for the conduct of the non-lawyer participants in the firm to the same extent as if the non-lawyers were themselves lawyers; and (4) these conditions must be set forth in writing.[73] Further, under District of Columbia Rule 5.4, passive investment in such a firm would be prohibited.[74]

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[64] *Id.* at 8.

[65] *Id.*

[66] Siobhan Roth, *McKee Took Months to Study the Proposal*, Fulton County Daily Rep., Nov. 10, 1999, at 8.

[67] Model Rules of Professional Conduct Rule 7.5. cmt. (1983).

[68] Roth, *supra* note 60.

[69] ABA Commission on Multi-disciplinary Practice, *Report and Recommendations, Hypotheticals and Models*, (1999) *available at* <www.abanet.org/cpr/multicomhypos.html> (October 14, 2000) [hereinafter *Hypotheticals and Models*].

[70] ABA Commission on Multi-disciplinary Practice, *Reporter's Notes* (1999) *available at* <www.abanet.org/cpr/mdpappendixc.html> (Oct. 27, 2000) [hereinafter *Reporter's Notes*}.

[71] *Id.*

[72] *Hypotheticals and Models*, *supra* note 69.

[73] *Id.*

[74] Washington D.C. Rules of Professional Conduct Rule 5.4 (1990).

Model 3 - The Ancillary Business Model

In this model a law firm can operate an ancillary business, which offers professional services to clients. Model Rule 5.7 permits the operation of such a business, provided that the business stays within certain parameters. Specifically, the ancillary business must make clear to clients that it is a separate and distinct entity from the law firm and that it does not offer legal services. In this model, the lawyer and non-lawyer partners share fees and jointly make management decisions; however, the non-lawyer partners in the ancillary business cannot be partners in the law firm. Also, the client base of the ancillary business cannot be exclusively composed of clients of the law firm.[75]

Model 4 - The Contract Model

In the Contract Model, model, a professional services firm can contract with an independent law firm to provide services to the professional service firm's clients. This model uses the scenario where the law firm identifies its affiliation with the professional services firm on its letterhead and in its advertising, a non-exclusive client referral agreement exists between the two firms and the law firm agrees to purchase goods and services from the professional services firm, as well as leasing office space from the firm. Under this formula, the law firm would still remain an independent entity controlled and managed by partners in the law firm. The law firm would also be free to engage clients with no affiliation to the professional services firm.[76]

This particular model can take several forms. First, the professional services firm might contract with a single law firm with one office or with a single law firm with several branches, in different jurisdictions. In second variation, the professional services firm might contract with several separate law firms.[77]

Model 5 - The Fully Integrated Model

In this arrangement, there is no independent law firm. There would be only the professional services firm with many organizational units, which includes a legal services department. The legal service department of the firm could represent clients who retain only the services of the legal department or retain the services of the professional services firm, including legal services. In the case of the later, the legal and non-legal services could be provided in connection with the same or differing matters.[78]

After receiving written and oral comment on the above models and hearing sixty hours of testimony from fifty-six witnesses, including American and foreign lawyers, consumer advocates, representatives of the large accounting firms, law professors, ABA section chairs, bar association officers, ethics counselors, small business clients, the American Corporate Counsel Association and in-house counsel of international corporations, the Commission issued a report of its findings in July 2000.[79] Some of the most notable recommendations are as follows:

(1) That the ABA amend the Model Rules of Professional Conduct to permit lawyers to "share fees and join with non-lawyer professionals in a practice that delivers both legal and nonlegal professional services (multi-disciplinary practice), provided that the lawyers have control and authority necessary to assure lawyer independence in the rendering of legal services.[80] 'Non-lawyer professionals' means members of recognized professions or other disciplines that are governed by ethical standards."[81]

(2) Non-lawyers in such a practice would be prohibited from providing legal services.[82]

[75] *Hypotheticals and Models*, *supra* note 69.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *July Report*, *supra* note 7.

[80] *Id.*, Recommendations 2,3.

[81] *Id.*

[82] *Id.*, Recommendation 4.

(3) All lawyers in the MDP who deliver legal services would be bound by the rules of professional conduct, even if contrary to the instruction of a non-lawyer supervisor.[83] Also all rules of professional conduct that now bind lawyers would be applied to the MDP.[84]

(4) The rules concerning conflict of interest, and the imputation of such conflicts to all members of a firm would apply to all clients of the MDP, whether the clients were seeking legal or non-legal services.[85]

(5) The lawyers in an MDP must inform clients of the different obligations as to disclosure and confidentiality of client information that bind the lawyer and non-lawyer members of the MDP.[86]

(6) If the MDP is *not* controlled by lawyers, then the MDP and its management must obligate itself in writing to the highest court in the jurisdiction with authority to regulate the legal profession that the MDP will not interfere with the lawyer's exercise of professional judgment, and will abide by the legal rules of professional conduct.[87]

V. Response Of The ABA To The Commission's Report

The Commission's recommendation to allow fee splitting and partnerships with non-lawyers was welcomed, at least initially, by those like former ABA president Philip S. Anderson who observed that, like it or not, "it's here and it's going to stay here. How [lawyers] handle it will determine the future of our profession."[88] Others in the ABA, however, view suspiciously the contention that lawyers can retain their independence in such a scenario.[89]

Opponents of MDP believe instead that the governing principle of the legal profession should be "not [that] whatever exists, be regulated, [but] whatever exists, be evaluated."[90] Some have opined that allowing fee sharing and partnership with non-lawyers will inescapably lead to erosion of protections that Model Rules provide for clients of lawyers.[91]

A parallel can be drawn here between the legal profession as it confronts this issue and the medical profession after the advent of Health Maintenance Organizations (HMOs).[92] Not only do doctors who work for non-doctors now often find themselves not able to exercise their independent judgment as how to best treat a patient, worst yet, some HMOs create an obscene conflict of interest by offering the doctors financial incentives not to engage in some forms of treatment.[93]

From this illustration it is not a hard stretch to imagine how, once lawyers find themselves in co-dependant money sharing arrangements with non-lawyers who are not trained in, dedicated to, and subject to the ethical principles of lawyers, the independence and integrity of the profession could disappear.[94]

Since the Model Rules, as adopted in the respective jurisdictions, are the codification of the ethical standards by which all attorneys are bound, any modification of the ABA's Model Rules would seemingly apply to *all lawyers*, not just those in a transactional practice. Viewed through this paradigm, it seems fair to question whether the legal profession and the public at large will be better off if the Model Rules are modified to allow any lawyer to become partners and share profits with any non-lawyer professionals.

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[83] *Id*., Recommendation 5,6.

[84] *Id*., Recommendation 7.

[85] *Id*., Recommendation 8.

[86] *Id*., Recommendation 9.

[87] *Id*.

[88] Woolner, *supra* note 41, at 2.

[89] Fox, *supra* note 40, at 8.

[90] Woolner, *supra* note 41, at 3.

[91] *See* Fox, *supra* note 40, at 8.

[92] *Id*.

[93] David G. Savage, *Cost-Cutting Consequences*, A.B.A. J., February 2000, at 30.

[94] *See* Fox, *supra* note 40, at 8.

While the rule change recommended by the Commission might benefit a broad based constituency, from the transactional lawyer, to the Big Five stock holder, to the indigent client who might obtain greater social justice through a multi-disciplinary practice offering a mix of legal and social services,[95] the implications of allowing "main street" lawyers to partner with other "main street" professionals are fraught with danger as well as possibility.

Though many lawyers and law firms view the issue of MDP as principally a "big firm issue," some commentators have opined that small town and small firm lawyers will be the group most impacted by multi disciplinary practice.[96] The advantages to the "main street" lawyer are similar in nature, if not in scope or magnitude, to those for large firms. Solo practitioners or small firms who would be able to team up with other providers of services in a small market could exponentially expand their client bases and gain a competitive advantage by being able to offer cost-effective, one-stop shopping to clients.[97]

On the flip side of this perspective, allowing lawyers to partner with other professionals, could have a deleterious effect on the legal system as a whole and on how lawyers are perceived by the public.[98] For example, consider the potential ramifications of multi-disciplinary practices as they might appear in the context of tort law. Plaintiff's attorneys generally are not paid unless they obtain a recovery, cannot rely on repeat business with longstanding clients, and thus feel great competition to get new cases.[99] Conversely, insurance companies have a financial interest in dissuading litigation involving their insureds.[100]

Now, consider the possibility that plaintiff's attorney, in an MDP world, would be free to partner with, or work for, physicians groups, ambulance services, insurance companies, chiropractors and other types of "professionals" in an arrangement that would split fees derived from litigation of cases referred to the lawyers by these professionals.[101] The possibility of arrangements like these, especially between chiropractors and lawyers, is very foreseeable because it goes on today in spite of the rules against it.[102]

Imagine, then, a scenario in which an injured person who is the victim of tortuous conduct is transported by ambulance and in route to the hospital, is given a recommendation by the emergency medical technician to see a certain lawyer.[103] Once at the medical facility, a doctor might refer the patient or their family to the same, or a different, trial lawyer or, alternatively, a "staff" attorney of the doctor/lawyer MDP visits the patient in the physician's office.[104] While this might speed monetary recovery, the public perceptions engendered by such a set-up would likely do great harm to the standing of the legal profession. The lawyers no longer merely chase the ambulances, now they drive them![105]

Another commentator has suggested the situation where a lawyer, a doctor, and an investment banker are partners in an MDP.[106] In this scenario, a client of the MDP is injured by the doctor's negligence and is left destitute by the

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[95] Lora H. Weber, *How to Create a Legal System that is More Consumer Friendly*, Bar Leader, Summer 1999, at 20, 22.

[96] Micheal M. Bowden, *How Small Firms Can Position Themselves to Compete in the Era of Multi-disciplinary Practice*, Lawyers Wkly, February 21, 2000.

[97] Victoria Kremski, *Multi-disciplinary Practice and the Main Street Lawyer*, 79 Michigan B. J. No. 9 (Sept. 2000) *available at* <www.michbar.org/journal/home.cfm> (Nov. 28, 2000).

[98] Memorandum from Cale Conley to Dick Campbell, Chair, ABA Trial and Insurance Practice Section [hereinafter The Conley Memorandum] (Feb. 7, 2000) (on file with the author and Transactions).

[99] *Id.* at 2.

[100] *Id.*

[101] *July Report*, *supra* note 7.

[102] Johnathan Ringel, *Lawyer faces 31 Counts as 'Runner' Case Probe Expands*, Fulton County Daily Rep., January 20, 2000, at 5.

[103] The Conley Memorandum, *supra* note 98, at 4.

[104] *Id.*

[105] *Id.*

[106] Kremski, *supra* note 97 (quoting Anthony Davis, partner in the firm Moye, Giles, O'Keefe, Vermiere & Gorrell, speaking at the ABA National Conference on Professional Responsibility, June, 2000).

negligent investment of the client's funds by the investment banker partner.[107] The lawyer, who did not commit malpractice, is the only member of the firm to carry malpractice insurance and is subsequently sued by the client.[108] In this case, several questions arise: Will the policy exclusions bar recovery by the client? What effect would such a situation have on the cost of malpractice insurance? Will insurance coverage begin to be issued by project instead of to an individual?[109]

The showdown came to a head July 11, 2000 at the ABA annual meeting in New York.[110] For the foregoing reasons and doubtless many others, a majority in the ABA raised their voices in opposition to modifying the Model Rules to allow multi-disciplinary practices.[111] Voting by a margin of nearly 3 to 1 against changing the Rules 5.4, the House of Delegates sent a clear message about its unwillingness to sanction mixed practices.[112]

VI. Conclusion

The ethical quagmire that encompasses the MDP debate and the desire of many lawyers to maintain the core values of the profession, with the stated goal of client protection first among them, seems to have shelved the question of multi-disciplinary practice for the moment. However, those who feel that the question has been settled are premature in their thinking. The types of business arrangements that are currently in operation, and in which lawyers are participating, whether in compliance with the rules of professional responsibility or not, evidence that economic realities are pushing the bounds of historically accepted arrangements and suggest that the debate over multi-disciplinary practice is far from over.

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[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *It's a Done Deal*, A.B.A. J., Sept. 2000, at 92-93.

[112] *Id.*

Synopses

Debtor-Creditor

New York Court Rejects FDCPA Statutory Preemption of "Account Stated" Doctrine in Consumer Transactions *Citibank v. Jones*, 706 N.Y.S.2d 301 (2000).

By Rachel Hinkle

On a question of first impression, the District Court of New York held that the Federal Fair Debt Collection Practices Act "FDCPA" and New York's General Business Law did not pre-empt the common law doctrine of "account stated" as applied to consumer transactions.

The doctrine of account stated originated in medieval England, but is still recognized by a majority of U.S. states. It is essentially an estopple that arises when one partly gets a bill and does not protest its amount within an appropriate time. The defendants argued that account stated is contrary to the public policy of New York found in General Business Law § 517, which states that an agreement between a credit card issuer and holder containing a provision stating that any statement sent to the holder is correct unless objected to within a specified period of time is void as against public policy. The court rejected the defendants' interpretation of the statute, stating that the provision merely "prohibits a credit or debit card issuer . . . from imposing a strict time requirement for the dispute of debts" and does not prevent courts from determining what is a reasonable period of time that the debtor retained the account without objection.

The defendants also argued that account stated was pre-empted by 15 U.S.C. § 1692g(c) of the FDCPA. This section states that a court may not construe a consumer's failure to dispute the validity of a debt under the section as an admission of liability. The court used the language "under this section" to conclude that this statute did not pre-empt the doctrine of account stated because the FDCPA "applies only to communications sent out by third party commercial debt collectors," not to communications sent out by creditors.

Tennessee has long recognized the common law doctrine of account stated. Tennessee courts have not considered the issue of statutory preemption of account stated, but would likely agree with the court in *Citibank v. Jones* because Tennessee courts are reluctant to abandon long-recognized common law practices, especially ones favorable to business. *See Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 397.

Employment

Employment Compensation Eligibility: Employee on Business Trip Generally Acting "In the Scope of Employment" at All Times. *McCann v. Hatchett*, 19 S.W.3d 218 (Tenn. 2000).

By Trudy Helterman

The Supreme Court of Tennessee concluded that an employee on a business trip swimming at his leisure in a hotel pool is acting in the "scope of his employment" for purposes of workers compensation.

In *McCann v. Hatchett*, King, an employee of Glen Hatchett Carpet Services, was working for his employer at an out-of-state job site, and the company paid for him to stay at a hotel. King drowned in the hotel's swimming pool while he engaged in leisure activity.

On appeal of the trial court's judgement for the company, the Supreme Court of Tennessee reversed, deciding that "a traveling employee is generally considered to be in the course of his or her employment continuously during the duration of the entire trip, except when there is a distinct departure on a personal errand." *McCann v. Hatchett*, 19 S.W.3d at 221. Because King was traveling for his employer, the court considered him to be in the course of employment during his entire trip.

As a transactional attorney, one might offer advice as to the insurance required to protect the employer in these types of situations. Also, a corporate attorney would need to advise his client of potential problems that might arise as a result of his employees traveling.

Worker's Compensation in Tennessee: Disability Payments Awarded for Permanent Total Disability After Age Sixty. *Warren v. American Holding Co.*, 20 S.W.3d 621 (6th Cir. 2000).

By Troy Svihl

Applying Tennessee law, the United States Court of Appeals for the Sixth Circuit held that a plaintiff was only entitled to 195 weeks of permanent total disability because his injury occurred before his sixtieth birthday. A worker with a permanent injury may receive permanent total disability benefits under worker's compensation up until that worker reaches age sixty-five, providing the compensable injury occurred before the worker reached age sixty.

Plaintiff Jacob Warren suffered a work-related injury to his back during the course of his employment with Defendant American Holding Company. He continued to work for the defendant after he settled an initial claim for benefits and was awarded 12.5 percent for permanent partial disability. Approximately four years after his injury, Warren was permanently injured and a new hearing was conducted to reconsider his permanent injuries.

The trial court awarded Warren 400 weeks of permanent total benefits with a credit to the employer for the partial disability payments previously paid because Plaintiff had been 57 years old at the time of the initial injury and was 61 years old when his injury rendered him permanently disabled. Defendant appealed, arguing that the trial court's award violated Tenn. Code Ann. § 50-6-207(4)(A)(i), which states that "awards of permanent total disability shall be paid during the period of the permanent total disability until the employee reaches 65 years of age unless the injury occurs after age 60, in which case the benefits are payable for a period of up to 260 weeks." However, on appeal Warren maintained that Tenn. Code Ann. § 50-6-207(4)(A)(i) was inapplicable because he had not reached age 60 when he was first injured. He further argued that he was entitled to 400 weeks of benefits as permitted under Tenn. Code Ann. § 50-6-242 because he met the criteria of the statute and was entitled to the awards of permanent partial disability for up to 400 weeks.

The Sixth Circuit rejected Warren's argument and emphasized that the 400-week provision of Tenn. Code Ann. § 50-6-242 applied only to permanent partial disability benefits and that Warren's award was changed to an award for permanent total disability. Accordingly, the Sixth Circuit held that Tenn. Code Ann. § 50-6-207(4)(A)(i) controlled and that Warren was only entitled to 195 weeks of permanent total disability, which represented the number of weeks between his last date of employment and his sixty-fifth birthday.

This decision highlights the importance of determining exactly when an employee brings a claim for employee benefits as a result of a work-related injury and reinforces the distinction between a permanent partial disability and permanent total disability and the separate statutory awards that injured employees in Tennessee may expect to recover.

Environmental

Corporate Liquidation of a Specific Line of Business May Not Provide Protection from CERCLA Liability for Successor Corporations. *Maytag Corporation v. Navistar International Transportation Corp.*, 219 F.3d 587 (7th Cir. 2000).

By Jeremy Cherry

The United States Court of Appeals for the Seventh Circuit held that the abandonment of a specific line of business does not constitute a corporate liquidation for purposes of determining successor liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Generally, when a bankrupt corporation liquidates its assets to satisfy current debts, the buyer and any subsequent holders of those assets are not liable for any claims against the dissolved corporation. The application of this rule is at issue where the "dissolved" corporation abandons and liquidates an unprofitable line of business but retains substantial assets and continues its operations, although under a different name. In *Maytag*, the Rock Island Line, after consistently sustaining significant annual losses, liquidated its railroad operations to satisfy its debts and emerged from bankruptcy with substantial assets and tax-deductible loss carryovers as well as a new name, Chicago Pacific Corporation. Soon thereafter, Chicago Pacific sold one of its assets, the Iowa Transfer Railway, to Heartland Rail Corporation, who in turn, leased the Railway's yard and other operating assets to Iowa Interstate Railroad. Several years later, the Coast Guard found that oil was leaking from the railyard into a nearby tributary of the Mississippi River.

All of the parties concerned asserted that the oil seeped into the ground while the Rock Island Line operated the yard. Consequently, the parties joined Maytag Corporation, the successor in interest of Chicago Pacific and, thus, the Rock Island Line, as a third-party defendant from whom they sought contribution. Maytag asked the trial court for an injunction against the claim of contribution and the trial court granted the injunction, finding that the Rock Island was liquidated and thus, there was no corporate entity for the parties to sue. It is a well-accepted rule of bankruptcy law that liquidation marks the end of a corporation's existence, and therefore, any claims against such corporation are not transferable to subsequent holders of that corporation's assets. The injunction issued. On appeal, the parties argued that the Rock Island's abandonment of the railroad business amounted to a corporate reorganization, not a liquidation, and, consequently, Maytag as a successor, could be liable for claims against its predecessor.

The applicability of the contribution provision to the parties in *Maytag* turned on whether the Rock Island was liquidated or reorganized following the abandonment of its railroad business. The court held that a reorganization, not a liquidation, occurred because: (1) Rock Island gave up the railroad business but retained substantial assets; (2) the corporation, despite changing its name to Chicago Pacific, continued its operations as conducted under Rock Island; and (3) Chicago Pacific acquired Rock Island's substantial operating loss carryforwards, which would not have been possible if the corporation was liquidated. Furthermore, appellate proceedings in connection with the Rock Island bankruptcy indicated "that Chicago Pacific was the same corporation as the debtor, and that a reorganization occurred." *Maytag*, 219 F.3d at 591. Having determined that a reorganization took place, the appellate court remanded the case to resolve the issue of whether Maytag, as a successor in interest, was protected from liability under the injunction issued at the Rock Island bankruptcy closing.

As *Maytag* illustrates, the elimination of a particular line of business by a corporation is not equivalent to its liquidation or dissolution. The practical effect of *Maytag* is that corporations will not be able to escape liability for claims against them by quitting an unprofitable line of business under the guise of liquidation, while retaining substantial assets and continuing operations. As long as a buyer of liquidated assets is not engaged in a ploy of this nature, *Maytag* stands for the proposition that, generally, the buyer should not be subject to sucessor liability for claims against previous owners.

Estate Planning

The Battle over Condemnation Proceeds for Property Devised by Will. *Beech v. Hibbett*, No. M1997-00239-COA-R3-CV, (July 19, 2000); 2000 Tenn. App. LEXIS 464; 2000 WL 987828 (Tenn. Ct. App. 1999).

By Kevin Howard

The Tennessee Court of Appeals held that where ownership of condemned realty is divided between a life tenant and one holding a vested remainder, the condemnation award should be made available to the life tenant on the specific condition that she invest the whole. The life tenant is thereafter solely entitled to all resulting investment income from the award until the life estate ends naturally or determines on condition, at which point the full amount of the award must be distributed to the holder of the remainder interest.

In *Beech*, the decedent devised a tract of real property in fee simple to his adult daughter, Claudia Hibbett Beech, subject to the determinable life estate of his surviving wife, Patricia Hibbett. Some time after decedent's death, the Tennessee Department of Transportation condemned a portion of the tract. In the condemnation proceedings, all parties agreed that the property's value was $38,500. Not surprisingly, however, Ms. Hibbett and Ms. Beech disagreed on how the condemnation proceeds should be divided between them. Accordingly, Ms. Beech filed suit requesting the court to order the State to pay the proceeds into court and then to declare the two parties' rights to the proceeds. The trial court entered an order awarding the proceeds to Ms. Beech on the condition that she invest them and divide the investment income equally with Ms. Hibbett for the duration of Ms. Hibbett's life estate. The court of appeals reversed, awarding care of the principal and all the investment income to the life tenant during her life.

The court of appeals reasoned that by allocating the rights to the condemnation award in this way, the law attempts to achieve some consistency between the parties' rights in the land before and after the condemnation. Specifically, a life tenant is entitled to the "use" of the property during the term of the life estate, but may not "encroach upon the corpus." *Beech v. Hibbett*, 2000 Tenn. App. LEXIS 464, at *9 (July 19, 2000) (citing *Wooten v. House*, 36 S.W. 932, 935 (Tenn. Ct. App. 1895)). The life tenant's right to the use of the property amounts to a right to receive the income the realty produces. The life tenant's right to the use of the property, however, is limited to the investment income in the same way that a life tenant cannot convey or waste real property against the ultimate interests of the remainderman. Hence, while the life tenant is entitled to the investment proceeds, she must leave the principal for the remainderman.

One problem with the court's decision is that it fails to recognize that a remainderman often does receive benefits from the appreciation of the property while it remains in the life tenant's possession. Property values often appreciate at least at the same rate as inflation, and sometimes at even a faster rate than inflation. Under the court's holding, however, Ms. Beech has no right to the appreciation of the condemnation proceeds. In fact, Ms. Beech actually loses relative to inflation. Another problem with the court's decision is that it gives the investment decision-making power solely to the life tenant, who almost certainly will have a conflicting view with the remainderman regarding the proper rate of return and risk of the investment. Perhaps a court appointed trustee would be the best approach to this problem although here too, fees would erode the return on investment.

Nonetheless, practicing attorneys should be aware of the result in *Beech*. At a minimum consider including specific provisions regarding condemnation or other forced sale into any instrument creating a life and remainder estate.

"The Testator Wanted Me to Have the Money": Attorney-In-Fact Must Show Validity of Transaction by Clear and Convincing Evidence When Serving as both Fiduciary and Beneficiary of a Gift. *Powell v. Moore*, No. W1998-00001-COA0-R3-CV, (Feb. 17, 2000); 2000 Tenn. App. LEXIS 108; 2000 WL 286729 (Tenn. Ct. App. 2000).

By Jessica Bell-Pruett

The Tennessee Court of Appeals held that where an attorney-in-fact breaches her fiduciary duty by exerting undue influence to accomplish a gift in her own favor, the gift is invalid. The court held further that where an attorney-in-fact presides over a gift to herself, she bears the burden of proving by "clear and convincing" evidence that the transaction did not involve undue influence.

In 1988, the deceased, Albert Cox, executed a will providing for a testamentary trust to benefit his son, Albert Cox, Jr. ("Buddy"), who suffered from Downs Syndrome. Moore was designated trustee and also served as a remainder beneficiary along with her sisters. The remainder beneficiaries would receive the remainder of the trust corpus after Buddy's death according to the will. As the decedent's health began to fail, he also signed a general and durable power of attorney in favor of Moore.

Subsequently, Moore withdrew money from the decedent's bank account, purchased a certificate of deposit, and created a series of joint savings accounts and a safe deposit box with right of survivorship in decedent's name and her own. The contents of the savings accounts totaled approximately $72,000. After the death of the decedent, the right of survivorship on the savings accounts passed the money directly to Moore as sole property owner.

Powell, the executrix of the estate, filed suit against Moore for breach of fiduciary duty and undue influence. At a hearing, several witnesses testified that the decedent intended that his entire estate be transferred to the testamentary trust for the benefit of his son Buddy. In addition, Powell testified that she overheard Moore threaten to place the decedent in a nursing home if he disagreed with the way she handled his finances as his attorney-in-fact.

The trial court concluded that Moore used her control over the decedent as his attorney in fact to unduly influence him and therefore breached her fiduciary duty. Because she breached her duty of loyalty, the court held that Moore held the money as trustee of a resulting trust[1] for the benefit of Buddy. Moore was named trustee of the resulting trust but appealed the trial court's decision, arguing that because she was the survivor on the joint savings accounts, all of the money is now her sole property and should not be subject to a resulting trust. The Tennessee Court of Appeals disagreed, holding that while joint accounts are "generally immune from attack," the presence of fraud, misrepresentation, or undue influence will permit a challenge to the validity of the joint account accounts and a presumption of undue influence arises when the dominant party in a fiduciary relationship receives a gift or some other benefit from the party. This presumption renders the transaction invalid unless the fiduciary can present clear and convincing evidence to rebut the presumption. On the factors and the breach of fiduciary duty, the joint savings accounts were invalid and the money is transferred to the resulting trust in favor of Buddy.

Powell v. Moore reinforces the understanding that Tennessee courts will closely scrutinize attorneys-in-fact when they accomplish gifts to themselves in their capacities as fiduciaries. While the law is established for the treatment of undue influence or breach of fiduciary duty when a testamentary instrument is involved, *Powell v. Moore* exhibits that testamentary substitutes, such as joint accounts, are also susceptible to attacks for fraud, undue influence, and breach of fiduciary duty.

Real Estate

No Damages for Breach of a lease with a failed Tennessee Bank *In Re The Liquidation of United American Bank of Knoxville, Tennessee, Security Pacific Equipment Leasing, Inc. v. Federal Deposit Insurance Corporation as Receiver of United American Bank*, No. E1999-00270-COA-R3-CV; 2000 Tenn. App. LEXIS 80; 2000 WL 145078 (Tenn. Ct. App. 2000).

By Blake Bourland

A lessor challenged a lower court decision upholding the constitutionality and applicability of a Tennessee statute limiting lessor's damages to two month's lease payments if the cause of the breach is a result of a bank's failure. The court affirmed the decision, recognizing the fact that the state has a legitimate interest in conserving and maintaining assets of a liquidated bank and rejecting an argument claiming violation of due process.

An equipment lessor sued the FDIC making two contentions: 1) Tenn. Code Ann. §45-2-1504(b), limiting lease termination claims against failed banks to two months rent, violated the Equal Protection Clauses of the United States and Tennessee Constitutions by treating lessors differently from other contract claimants; and 2) the application of the statute results in an unconstitutional taking of its property without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 21 of the Tennessee Constitution. The trial court granted summary judgment in favor of the FDIC.

In rejecting the Equal Protection claim, the Tennessee Court of Appeals used the "rational basis" test to determine the constitutionality of the statute: if a reasonable basis exists, or if any set of facts can be reasonably interpreted to justify a reasonable basis, the statute is constitutional. The court looked at the intent of the legislature in passing this statute and found that the legislature intended to "bring state banks on par with national banks as far as their rights and powers are concerned." The U.S. Congress had passed an act similar to Tennessee that stated that the receiver was not liable for any damages except those specifically allowed for the disaffirmance or repudiation of such a lease. 12 U.S.C. § 1821(e)(1). The court recognized the fact that the state has a legitimate interest in conserving and maintaining assets of a liquidated bank. Therefore, because restricting a lessor's ability to recover damages after a bank has been liquidated is rationally related to the state goal of conserving bank assets, a reasonable basis exists for treating holders of executory leases differently from other contract claimants. Thus, the statute did not violate the Equal Protection Clauses of the United States and Tennessee Constitutions.

SPELI's second contention was that the application of Tenn. Code Ann. § 45-2-1504(b) results in the unconstitutional taking of its property without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 21 of the Tennessee Constitution. The court rejected the contention, citing that the "substantive Due Process Clause is not concerned with the garden variety issues of common contract law."

Any Tennessee transactional attorney who may represent a lessor entering into a lease with a bank should be aware of Tenn. Code Ann. § 45-2-1504(b) and counsel clients to take the risk of termination upon bank failure into account when pricing the lease or negotiating for credit support, perhaps in the form of a letter of credit or third party guarantee.

Traditional Use Should be Stated in Deed *Thompson v. Hulse*, No. 03A01-9908-CV-00269, (Jan. 26, 2000); 2000 Tenn. App. LEXIS 31; 2000 WL 124787 (Tenn. Ct. App. 1999).

By Ethan Underwood

When not specifically stated in a deed of property, the traditional use of another's land may not be protected by law. Although a prescriptive easement may be established over time, it is often difficult to meet the statutory requirements to do so.

In *Thompson v. Hulse*, Thompson owned a parcel of land adjacent to land owned by the Horse Creek Free Will Baptist Church. Thompson's aunt had owned Thompson's property from 1970 until Thompson purchased it in 1986. In 1992 or 1993, Thompson vacated the property, at which time her daughter took up residence on the land. On the Church's property, a driveway bisects the lot and "provides access to two perpendicular roads that border the Church property." Thompson and others used this driveway without the permission of the Church to access a paved area next to the house on Thompson's property from 1970 until April 1998. However, in April 1998, the Defendants placed barriers on the Church property that prevented access to this paved area on Thompson's property. There is no mention of an easement in the Church's deed, nor any encumbrances on the face of the recorded warrantee deed. Moreover, there is no mention of an easement, any driveway, or even the parking area in the plaintiff's or her predecessor's warrantee deed.

At trial, Thompson asserted a prescriptive easement. The Defendant claimed that Thompson's use was permissive and that Thompson had failed to prove hostile possession of the land because the Church had never objected to Thompson's utilization of the driveway.

The Trial Court held for Thompson and granted both a prescriptive easement for Thompson and injunctions ordering the Church to move the obstructions to the drive, to refrain from creating such obstructions in the future, and to repair the asphalt damage caused by erecting the obstruction. The Trial Court found that Thompson's use of the driveway was open and adverse and substantiated its holding with the fact that Thompson's fence with a gate and the paved area extend six to eight feet onto the Church's property, thus effectively giving the Church notice of Thompson's adverse possession since 1970. The court found that, because of land obstructions, it would be inconvenient for Thompson to construct an alternative driveway to access the paved area. The court further allowed Thompson to tack, or combine her twelve-year period of ownership with her aunt's sixteen-year period of ownership in order to satisfy the twenty-year statutory period required to successfully claim a prescriptive easement in Tennessee. In denying the Church's motion to dismiss, the court held that mere nonobjection to adverse use does not make such use permissive.

On appeal, the Tennessee Court of Appeals considered whether the trial court was correct in finding that Thompson had proved that the Church had notice of her hostile claim and whether the court was correct in allowing Thompson to tack her period of ownership with that of her aunt, the previous owner. The appellate court affirmed the trial court's finding that Thompson provided notice of her hostile claim because her aunt's and her "open and apparent use of the property inconsistent with possession by the true owner was notice to the world that the claim was adverse." The court found fault with the trial court's tacking of Thompson's and her aunt's periods of ownership. For tacking to be permitted in Tennessee, the combined periods must be successive, the elements of a prescriptive easement must be satisfied, and the possessions must be in privity. The appellate court addressed only the requirement of privity.

In Tennessee, privity may be established by either contractual intent or by legal relationship. In order to do so by contractual intent, the property claimed must "be described in the deed transferring ownership between the adverse possessors, or be established through parol evidence sufficient to establish the buyer's right of reasonable reliance on representations made by the buyer's predecessor relating to the transfer of ownership." Here all deeds were silent on this issue.

For the purposes of tacking, Tennessee recognizes privity in only two legal relationships: spousal and parent-child. The appellate court found that Thompson's relationship to her aunt was not legally recognized and that the trial court had erred in allowing Thompson to tack the two ownership periods. Because Thompson owned her property from 1986 to 1998, the statutory requirement of twenty years in adverse possession was not satisfied. The Court of Appeals reversed the judgment of the trial court.

Thompson demonstrates that Tennessee is holding fast to traditional property law. Landowners may not simply claim that their nonobjection to adverse use makes such use permissive. If allowed, this claim would thwart any assertion of adverse possession. However, for the purposes of tacking, Tennessee still requires that privity be established by either specific contractual intent or by a spousal or parent-child relationship; no other familial relationship will be recognized. Both holdings demonstrate that Tennessee strongly supports landowner rights, and will not easily allow others to claim adverse property rights.

TAX

State Use Tax: Airlines too must Pay at the Pump. *American Airlines, Inc. v. Ruth E. Johnson, Commissioner of Revenue,* NO. M1999-02390-COA-R3-CV, (Aug. 16, 2000); 2000 Tenn. App. LEXIS 539; 2000 WL 1156618 (Tenn. Ct. App. 2000).

By Kristian Lehmkuhl

The Tennessee Court of Appeals held that when an airline American Airlines pumps fuel into its airplanes within the State, it must pay Tennessee's use tax on the fuel. In Tennessee, goods used within the state are generally subject to a use tax, unless double taxation would occur. Tenn. Code Ann. § 67-6-203. Tennessee does, however, exempt from taxation "tangible personal property imported into this state or produced or manufactured in this state for export." Tenn. Code Ann. § 67-6-313(a) (the "import-for-export provision").

The plaintiff, American Airlines, Inc. ("American"), does business from the Nashville International Airport, and imports fuel to that airport for use in its planes departing from there. Between 1992 and 1995, American paid over $7 million in use tax on fuel pumped into its planes at the Nashville airport. American sued for a refund of the taxes paid, claiming that only fuel "burned off" by its planes within Tennessee's boundaries is properly taxable under Tennessee's use tax, as the other fuel is not actually used in Tennessee. American claimed alternatively that fuel burned off by its planes outside the boundaries of Tennessee is actually exported from Tennessee, thus is exempt from taxation under the import-for-export provision.

Generally, courts read tax statutes strictly, interpreting ambiguities in favor of the taxpayer. The court will not, however, defeat the legislature's intent to tax when the plain meaning of the statute indicates such intent. Tenn. Code Ann. § 67-6-102(31) broadly defines "use" as "the exercise of any right or power over tangible property incident to the ownership thereof." Tenn. Code Ann. § 67-6-217(a) directly assesses the use tax upon aviation fuel that is used, consumed, distributed or stored in Tennessee, and "is actually used in the operation of airplane or aircraft motors." The court concluded that the definition of "use" will subject to tax all fuel that is stored and then pumped into airplanes within the state. The court concluded that while the fuel was not all "burned off" in Tennessee, American's acts of storing fuel at Nashville and then pumping it into aircraft (distributing) at Nashville constitute a sufficient "exercise of any right or power" to subject the fuel to the use tax.

The court similarly rejected American's argument that fuel "burned off" outside Tennessee was exported, and thus eligible for the import-for-export exemption in Tenn. Code Ann. § 67-6-313. Courts generally place a high burden on the taxpayer to prove that legislation is intended to exempt an otherwise taxable item. The court concluded that because the fuel was imported into Tennessee, stored at the Nashville International Airport, and subsequently pumped into American's airplanes, the fuel was not eligible for exemption under the import-for-export provision.

This decision establishes a very broad definition of "use," and thus subjects much to the use tax. As applied to fuel, it is clear that storage combined with any subsequent use in vehicle operation in Tennessee will subject the fuel used to the use tax. The import-for-export exemption, however, will still apply to any goods which are merely stored in Tennessee, and then later transported outside of Tennessee without any use within the state.

Transactions' Selection of Websites for Business Lawyers

The following websites have been collected by the editors of *Transactions* as a service to *Transactions* readers. If you have favorite or useful websites of use to business lawyers that did not make the list, please e-mail the specifics to transact@justice.law.utk.edu for consideration for inclusion in future issues.

UNIVERSITY OF TENNESSEE WEBSITES

Transactions Website:
www.law.utk.edu/centers/entrep/Transfrt.htm

University of Tennessee: **www.utk.edu**

UT College of Law: **www.law.utk.edu**

Clayton Center for Entreprenurial Law:
www.law.utk.edu/centers/entrep/business.htm

Center for Advocacy and Dispute Resolution:
www.law.utk.edu/centers/advocacy/advocacy.htm

Tennessee Law Review
www.law.utk.edu/admin/lawrev/lreview.htm

FREE CASE LAW/STATUTES

Free Court opinions for the last five years/statutes/other useful information:
www.lexisone.com

Caselaw in various searchable databases: **www.findlaw.com**

Caselaw in various searchable databases: **www.alllaw.com**

Caselaw in various searchable databases:
http://internetlawyer.com/til/index.htm

General Law Topics by Catagory:
www.law.cornell.edu/topics/topic2.html

SEARCH ENGINES AND DIRECTORIES

AltaVista: **www.av.com**

Cyber411: **www.cyber411.com**

Dogpile: **www.dogpile.com**

Excite: **www.excite.com**

Fast Search: **www.fastsearch.com**

Findsame: **www.findsame.com**

Google: **www.google.com**

Hieros Gamos: **www.hg.org/hg.html**

Hotbot: **www.hotbot.com**

Infoseek: **www.infoseek.com**

Law Crawler-Legal Search Information:
www.lawcrawler.com

LawGuru's Multiple Resource Legal Research Section:
www.lawguru.com/multisearch/multisearch.html

Liszt: **www.liszt.com**

Lycos: **www.lycos.com**

MetaCrawler: **www.metacrawler.com**

Profusion: **www.profusion.com**

WhoWhere: **www.whowhere.com**

Yahoo: **www.yahoo.com**

FEDERAL GOVERNMENT

U.S. Department of justice: **www.usdoj.gov**

Office of the Solicitor General (government brief submitted to the Supreme Court):
www.usdoj.gov/osg

U.S. House of Representatives: **www.house.gov**

U.S. Senate: **www.senate.gov**

Congressional Legislative Information (Thomas):
www.thomas.loc.gov

Code of Federal Regulations:
www.access.gpo.gov/nara/cfr/

Congressional Record:
www.access.gpo.gov/su_ docs/aces/aces150.html

Federal Register:
www.acess.gpo.gov/su_docs/aces/aces140.html

Legi-Slate (Washington Post Co.'s online service covering fed eral legislative and regulatory activities):
www.legislate.com/pages/sub-toc.html

Federal Rules of Evidence (by Cornell University's Legal In formation Institute (LII)):
www.law.cornell.edu/rules/fre/overview.html

Federal Courts Home Page (press releases & court informa tion):
www.uscourts.gov

U.S. Constitution (sorted by article, from Cornell University):
www.law.cornell.edu/constitution/constitution.overview.html

U.S. Code (searchable by title and section, from Cornell Uni versity):
www.law.cornell.edu/uscode

STATE AND LOCAL GOVERNMENT AND RELATED ENTITIES

State of Tennessee: **www.tennesseeanytime.org**

Tennessee Bar Association: **www.tba.org**

Tennessee Administrative Office of the Courts: **www.tsc.state.tn.us**

TnCrimLaw: Tennessee Law Resources: **www.tncrimlaw.com/tnlaw.html**

City of Chattanooga, Tennessee: **www.chattanooga.gov**

Chattanooga Bar Association: **www.chattbar.org**

City of Knoxville, Tennessee: **www.ci.knoxville.tn.us**

Knoxville Bar Association: **www.knoxbar.org**

City of Memphis, Tennessee: **www.ci.memphis.tn.us**

Memphis Bar Association: **www.memphisbar.org**

City of Nashville, Tennessee: **www.nashville.org**

Nashville Bar Association: **www.nashbar.org**

OTHER GENERAL LEGAL RESEARCH SITES

The Law Library Resource Xchange (court rules): **www.llrx.com/columns/litigat.htm**

Uniform Business & Financial Laws Locator (extensive listing of uniform laws, from Cornell University): **www.law.cornell.edu/uniform/vol7.html#arbit**

LEGAL JOBS

www.attorneyjobs.com

www.greedyassociates.com

www.lawjobs.com/

www.lawmatch.com

www.vault.com

Salary Information: **www.jobstar.org/tools/salary/sal-prof.htm**

LEGAL NEWS

www.lawnewsnetwork.com

www.lweekly.com/

LEGAL ETHICS AND MANAGEMENT

www.abanet.org/lpm

www.legalethics.com

Legal Ethics by State (from Cornell University) : **www.law.cornell.edu/ethics**

CONTINUING LEGAL EDUCATION

www.cleonline.com

www.kingballowlearning.com/courses/classes/clelist.htm

ANTITRUST

Cornell General Antitrust: **www.law.cornell.edu/topics/antitrust.html**

General Antitrust: **www.lawmall.com**

BANKING LAW

Cornell General Banking Site: **www.law.cornell.edu/topics/banking.html**

BANKRUPTCY

Cornell General Bankruptcy Site: **www.law.cornell.edu/topics/bankruptcy.html**

The American Bankruptcy Institute: **www.abiworld.org**

National Association of Bankruptcy Trustees: **www.nabt.com**

Commercial Law League of America: **www.clla.org**

National Association of Credit Managers: **www.nacm.org**

Bankruptcy Document Retrieval, Inc. (a commercial document retrieval service): **www.bkauthority.com**

Bankruptcy Law Finder: **www.agin.com/lawfind**

Daily Bankruptcy News: **www.bkinformation.com/news/dailynews.htm**

Federal Filings, Bankruptcy Online (copies of key pleadings in lay cases available): **www.fedfil.com/bankruptcy**

Executive Office for US Trustees, Directory, Formal announcements: **www.usdoj.gov/ust**

CONTRACTS

Cornell General Contracts Site: **www.law.cornell.edu/topics/contracts.html**

CORPORATIONS AND SECURITIES LAW

www.freedgar.com

www.seclaw.com

Cornell General Corporation Law Site: **www.law.cornell.edu/topics/corporations.html**

Cornell General Securities Site: **www.law.cornell.edu/topics/securities.html**

American Corporate Counsel Association: **www.acca.com**

Corporate Financials Online: **www.cfonews.com**

EDGAR Database of Corporate Information (the SECs extensive, searchable site of corporate information):

www.sec.gov/edgar.shtm

Securities Class Action Clearing House (by Robert Crown of the Stanford law library):

securities.stanford.edu

Uniform Business and Financial Laws Locator (fromCornell University):

www.law.cornell.edu/uniform/vol7.html

EMPLOYMENT LAW

www.eeoc.gov

www.nlrb.gov

www.dol.gov

Cornell Employment Discrimination Site:

www.law.cornell.edu/topics/empolyment_discrimination.html

ENVIRONMENTALLAW

www.ljx.com/practice/environment/index.html

HEALTH CARE LAW

www.healthlawyers.org

www.modernhealthcare.com

www.healthlaw.org

www.medscape.com

INTELLECTUAL PROPERTY

U.S. Patent and Trademark Office: **www.uspto.gov**

Copyright Web Site (copyright law for the novice):

www.benedict.com

PARTNERSHIP LAW

Cornell General Partnership Site:

www.law.cornell.edu/topics/partnership.html

REAL ESTATE

Cornell General Real Estate Site:

www.law.cornell.edu/topics/real_estate.html

Findlaw General Real Estate:

www.library.lp.findlaw.com/propertyrealestate.html

TAX

Cornell General Income Tax Site:

www.law.cornell.edu/topics/income_tax.html

Cornell General Estate and Gift Tax Site:

www.law.cornell.edu/topics/estate_gift_tax.html

General Tax Website: **www.taxworld.org/**

IRS Code: **www.fourmilab.ch/ustax/ustax.html**

Tax Court Opinions: **http://www.ustaxcourt.gov/**

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