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{1}Pretty scary. This whole business of technology and privacy. I don't know about you but it makes me think about that John Grimes song where he wanted to blow up the TV, throw away the paper, and move to the country. I think that there are probably some things that we can do and that we cannot do. One of the things that comes to mind in listening to my colleagues talk about the shutdown of the dotcoms, last year Congress overhauled the 65 year prohibition against insurance companies not being permitted to get involved in financial services and banking. So now insurance companies are presumably going to be merging with stock brokerage firms and banks. And we're seeing all these databases becoming consolidated so that your stockbroker will know about your bank loans and your financial transactions, and insurance companies will know about your assets and so forth. All these things are going to be sold off to the highest bidder as one big firm gobbles up another big firm; as one failed dotcom is bought up by a more successful dotcom that has a business model that makes a profit. The thing is, at least as a lawyer, there was a time when lawyers could not sell a law practice - those of you who practice law know that there was a prohibition against selling your law practice to another lawyer, if for no other reason than the fact that the information in your files is confidential and could not be disclosed to a third party without the client's consent. So, in order to have a successful sale of law practice you'd have to get the client's consent to transfer their pending matters or their files to the purchasing attorney. Now under the new rules of professional conduct you're allowed to do that.

{2}Why can't the private sector do that? If they're going to merge or sell a company to another buyer shouldn't there be some form of legislation that requires some form of notice to those persons that have given confidential information or information that the company has said through its privacy policy that it would keep private? So, that they are selling their business shouldn't exonerate them from that responsibility. I hope that our good friends at the FTC can work in that area to do something about it before it's too late, if it isn't too late.

{3}What I wanted to talk to you about now are privacy issues that are focused primarily on the legal profession and lawyers protecting their clients from being damaged or hurt through the use of technology. I begin my talk by talking about how much lawyers do use the Internet for many different things. There are lawyers, believe it or not, in chat rooms soliciting clients. I have a new UPL case on my desk right now. This individual, as far as I know, is not licensed to practice in any jurisdiction. But they are offering legal services to businesses and one of the things is that they are involved in is the drafting of privacy statements for web sites, web site operators, businesses and so forth.

{4}I find it interesting that he's using the Internet to solicit clients. In some jurisdictions lawyers are not allowed to engage in personal solicitation across the board. In our state, the prohibition is only against the plaintiffs' lawyers that are soliciting personal injury and wrongful death cases. Be that as it may, lawyers are using the Internet and setting up web sites. Some of them have virtual law firms. They use the web site for two way communication between clients, and prospective clients. They have directories. Some law firms are controlling and using passwords and user IDs to allow existing clients to have access to their files, to have access to information with the general public presumably can not have access to, because lawyers have an obligation to protect client information. There's nothing more fundamental to the legal profession than the protection of client information. That is without a doubt the paramount most important ethical rule that we learned in professional responsibility.
Lawyers are using Internet e-mail. All the courts are beginning to put their cases online. The Fairfax Circuit Court, interestingly, has a pilot program that will be implemented very shortly to allow e-filing, electronic filing of pleadings. That already exists now in the Bankruptcy Court in the Eastern District of Virginia. Bankruptcy petitions can be filed by electronic mail. The Fairfax Circuit Court has got the necessary approval to proceed with a comprehensive e-filing system for all their cases on the law side and on the chancery side. Wise County, way out in southwestern Virginia, where you at least expect it, a tech savvy clerk named Jack Kennedy has established one of the most unique web sites. You can have, from your computer at home, access to all the land records in that county. More importantly he has established a video cam broadcast of hearings and so forth. Cases can be watched and observed conferences can be scheduled with the judge with the lawyers in distant locations - video conferencing audio and video feeds into the courtroom.

{5}This raises some concerns that I'm talking about in my paper, particularly in the domestic relations area. Anyone that practices Domestic Relations Law knows that what goes into the bill of complaint and the pleadings, and reports from experts, and sometimes motions that are filed and so forth, contain bits and pieces of critical, embarrassing information. The property settlement agreements contain Social Security numbers, bank accounts, parties' assets. The allegations made in a fault-ground divorce may have high sensitivity; anywhere from adultery to child abuse. All this is in the public record. I can go to the clerk's office and go to the desk and ask to see the case of Hammer vs. Nail and the clerk would give me the file, even though I am not a party to the case. Judicial records, pleadings, and filings are presumptively open to the public, except where the General Assembly has imposed some restrictions. Obviously in the area of juveniles ... information in the juvenile and domestic relations court is not open to the public.

{6}Matters such as criminal records and so forth are, by statute, restricted in terms of access and there are procedures to be followed in to obtain those records. But what is going to happen when we take something like that from the traditional realm and put it in the virtual courthouse where anybody, any joker with a PC and software, can go through and gather data and files indiscriminately. They have no particular interest in any of the parties or the files, they're just mining data. Because these records are as a matter of law open to the public, can the legal profession, can the General Assembly, can the courts impose any type of restriction?

{7}The seminal case that is cited in the materials is the Richmond Newspaper case decided by the Supreme Court, the Shenandoah Publishing Company case, as well as the statute cited in the materials indicate of course that the court, a judge, cannot seal a public record except under certain circumstances because of the presumption of public access. The fact that the parties may want to have a secret settlement that is protected and placed under seal is not a sufficient enough consideration to override the First Amendment and the right of public access to that information. Shenandoah Publishing, of course, was the malpractice case in which the parties were to put the settlement and have the case put under seal. The media came in and were successful, ultimately in saying that the court could not put those records under seal.

{8}So here we are in the electronic age trying to figure out how to deal with this issue. The Virginia Bar Association and the Virginia State Bar appointed a technology task force, which is in the process of drafting a proposed amendment to the public record statute that would allow, upon the party's request, them to place matters under seal as far as electronic access is concerned, but would still require that the paper records in the courthouse remain accessible as they've always been. Of course, I suspect that the initiative will trigger some fire from the media and certainly their perspective is going to be that the easier and more conveniently that they can get to information the easier their job is, and why should they have to send folks down scouring through paper records? And that's assuming of course that we're going to continue to have paper filings.

{9}That's another issue. There will come a time when paper filings will no longer be acceptable. So this places the lawyer in ethical dilemma. You've got a client who is in a domestic relations case, a very difficult situation involving extramarital affairs. The person holds an important job; is this information going to be blasted across the TV? Is this information going to be available, published to others? Obviously most of the clients who represent will not be public figures. Most lawyers represent just ordinary people, but ordinary people have secrets to hide. And ordinary people have information, which if revealed to others would be detrimental and embarrassing to them. Our ethics rules, under rule 1.6, state that a lawyer should not reveal information that would be detrimental or embarrassing to the client. And we can't allow that to be done indirectly. If we know that information is capable of interception or disclosure to third parties we have an ethical duty to advise our clients. A good example of this is in the ethics opinions that have come down concerning communications through Internet e-mail which have also covered in the materials. That is, the ABA approach is if you have highly sensitive information going between an attorney and client by e-mail you have a duty to inform your client that there is a risk of interception. You don't have to encrypt e-mail. Most of the bar opinions have come down and the clear consensus seems to be that you are not breaching rule 1.6 concerning confidentiality because you use on encrypted e-mail to communicate with your client. On the other hand the bars expect you to use common sense. So a return back to our e-filing problem, and you know that the client has information in the property settlement agreement which you would not like to see disclosed to the outside world. It's bad enough that the other side gets to discover it. But the whole idea of having information widely disseminated or sold or used by third parties for other purposes is a thing that the lawyer needs to consider and to advise the client that perhaps the-filing is not the way to go in this case and that we should file in the traditional methods. So I'm suggesting as a legal ethicist that lawyers have an obligation to look at each case carefully and determine whether not the-filing is appropriate given the nature of the case the sensitivity of the information involved in the case and the lawyer may very well be doing an injustice to the client and breaching their fiduciary duty to protect client information if they allow certain types of cases to be e-filed.

{10}I know that there will be folks that disagree with me on that. The other side of the coin is the fact that these pesky little ethics rules get in the way of technology and what I'm saying is enforced too stringently, won't this in effect hamper or cripple technology and e-filing? My response is known in most cases. In most cases e-filing is probably going to be appropriate. But I do believe that if it's possible for the General

Assembly and the clerk's office to put some controls on access to electronic records so that they cannot be harvested in volume by those people who have nothing else better to do or for profit, go through Courthouse databases and in a matter of seconds collect all the information that they need out of all the files which would not be physically possible under the current system. That's what that statute purports to do. I think that probably at this point it's a good time for me to break. Thank you.

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[*] James M. McCauley is the Ethics Counselor for the Virginia State Bar and serves as staff counsel to the Standing Committee on Legal Ethics, Standing Committee on the Unauthorized Practice of Law, and the Standing Committee on Lawyer Advertising and Solicitation. Mr. McCauley writes the draft opinions for the Ethics and Unauthorized Practice of Law and Lawyer Advertising Committees and supervises a staff which provides informal advice over the telephone to members of the bar, bench and general public on matters involving legal ethics, lawyer advertising and the unauthorized practice of law. Mr. McCauley frequently lectures and publishes articles on matters relating to legal ethics and the unauthorized practice of law.

Prior to assuming his duties as Ethics Counsel, Mr. McCauley was an Assistant Bar Counsel for the Virginia State Bar for six years, prosecuting cases of attorney misconduct before the District Committees, Disciplinary Board and Three-Judge Courts. Before his employment with the Virginia State Bar, Mr. McCauley was in private practice for seven years.

Mr. McCauley graduated cum laude from James Madison University in 1978 with a B.A. in Political Science. He was awarded the Edward G. Hudgins Scholarship for Character and Leadership at the T.C. Williams School of Law, University of Richmond, where he graduated in 1982. Mr. McCauley wrote for and was a member of the University of Richmond Law Review.

The following articles are provided as a supplement to Mr. McCauley's presentation:

Cyberlawyers: Impact of the Internet on Law Practice and Legal Ethics
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Legal Ethics in Cyberspace
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