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ARTICLES

LAWYERS WHO LIE ON-LINE: HOW SHOULD THE LEGAL PROFESSION RESPOND TO EBAY ETHICS?

by MARK E. WOJCIK†

The degree of truthfulness expected from a lawyer is higher than that expected from others.[1]

The line between being a lawyer and being an entrepreneur is not always sharp. But for disciplinary purposes, the distinction may not be crucial.[2]

The Internet is not some type of ethical free-fire zone where anything goes. Professional responsibility and malpractice rules apply to lawyer conduct on the Internet just as they do anywhere else. Lawyers who overlook this fact act at their peril.[3]

I. INTRODUCTION

A recent scandal erupted in the press when a painting that was offered for sale on an Internet auction site was believed to be a lost contemporary masterpiece. The seller appeared to be a married man who was cleaning junk out of his garage, including a painting that his wife

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1. In re Steffen, 567 P.2d 544, 545 (Or. 1977).

2. Attorney Grievance Comm'n of Maryland v. Kramer, 599 A.2d 100, 105 (Md. 1991).

3. JERRY LAWSON, THE COMPLETE INTERNET HANDBOOK FOR LAWYERS 205 (1999) (published by the Law Practice Management Section of the American Bar Association).

would not let him hang in the house. A bidding frenzy drove the price from the opening bid of 25 cents to more than $135,000 from a buyer in the Netherlands. The bidding reflected speculation that the painting was a lost work of the American modernist, Richard Diebenkorn. The spectacular sale was widely reported, including a series of front-page stories in the *New York Times.*[4] After the sale was finished, the seller was identified as a California lawyer who had never been married and who had been accused the year before of selling a fraudulent painting over the Internet. The sale of the purported Diebenkorn was never completed, however, because eBay learned that on the second day of the auction the lawyer had placed his own $4,500 bid on the item from another alias account.[5] The company voided the sale and suspended the lawyer's trading privileges for 30 days.[6] The lawyer expressed no remorse for his false description of the painting's provenance. He stated that he "hated the publicity" surrounding the attempted sale, and explained that he had sold a number of paintings (at least 33 in one month alone) only as a way to finance his fledgling law practice.[7] One newspaper commented that "[f]abricating a life story is a dubious foundation for a law practice."[8]

This article examines some of the ethical implications that arise from that attempted sale. Although the lawyer never expressly stated that the painting was or could be an authentic work of the artist Richard Diebenkorn, the story that the lawyer concocted appears to be a fraudulent misrepresentation meant to help sell the painting as a lost masterpiece of modern art.[9] He apparently expressed no regret for concocting

4. *See* Judith H. Dobrzynski, *Online Bid Soars to $135,805, Provenance Not Guaranteed,* N.Y. TIMES, May 9, 2000, at A1 [hereinafter Dobrzynski]; Judith H. Dobrzynski, *Online Seller of Abstract Work Adds a Money-Back Guarantee,* N.Y. TIMES, May 10, 2000, at A1 [hereinafter Dobrzynski2]; Saul Hansell & Judith H. Dobrzynski, *EBay Cancels Art Sale and Suspends Seller,* N.Y. TIMES, May 11, 2000, at A1; Judith H. Dobrzynski, *In Online Auction World, Hoaxes Aren't Easy to See,* N.Y. TIMES, June 2, 2000, at A1[hereinafter Dobrzynski3].

5. *See, e.g.,* Dobrzynski3, *supra* note 4, at A1.

6. *See* Dobrzynski2, *supra* note 4, at C1. The company would only later permanently suspend the attorney from eBay trading, after investigators uncovered other evidence that suggested shill bidding on other items.

7. *See* Judith H. Dobrzynski, *Online Seller of Abstract Work Adds a Money-Back Guarantee,* N.Y. TIMES, May 10, 2000, at A1; Jesse Hamlin & Chuck Squatriglia, *EBay Art: Going Once, Twice . . . Hold On; Expert to Determine If It's Really a Diebenkorn,* S.F. CHRON., May 10, 2000, at A1.

8. *Big Games,* USA TODAY, May 11, 2000, at 14A.

9. *See* Deborah Solomon, *Faith: An eSpree of Art Buying Makes a Believer,* N.Y. TIMES, June 30, 2000, § 2, at 1. At least one subsequent story about the attempted sale stated that the painting was "passed off as a Richard Diebenkorn." *Id.* While Mr. Walton may not have made any affirmative representations that the painting was a work done by Richard Diebenkorn, neither did he take any opportunity to disclose his real identity or to retract the false story he wrote to help sell the painting. One might also fairly speculate that the attorney may have even painted the "R.D. '52" signature line on the painting him-

that story – or for submitting the alleged "shill" bids that helped drive up the price of the work – other than the obvious regret that the sale attracted several investigative reporters who then exposed him as an unmarried lawyer instead of a haggard husband. Specifically, there appears to have been no statements by the attorney to suggest that he recognized that he had a higher duty than other sellers because of his status as an attorney. That failure may suggest not only a moral failure on the part of the attorney, but perhaps also a failure on the part of law schools and the organized bar to impress upon lawyers (and future lawyers) that they must uphold high ethical standards even outside the direct practice of law.

The fast-paced world of Internet auctions – and the normal inability to investigate claims made about items being sold on the Internet – makes it prudent for buyers to exercise extreme caution in their purchases on line.[10] Although the company voided the sale and suspended the lawyer's selling privileges, questions remain as to whether there are other legal and ethical ramifications to this sale and to others like it. In connection with this sale to a buyer in the Netherlands, legal issues arise as to whether the attempted sale violated California statutory or common law, U.S. federal law, Dutch law, international law (such as the Convention on the International Sale of Goods), or the law of some other Internet jurisdiction where the eBay server may have been based, or where any particular user may have accessed a particular website.[11] Those questions necessarily involve inquiry into matters of jurisdiction,[12] but also matters relating to the specific representations made, how the representations were made, and whether they were material to the terms of the sale. Aside from any pending or future investigations into potential civil or criminal liability for that attempted sale, there are questions about appropriate responses from the legal profession itself. Specifically, how should the profession treat a seller who is licensed as a lawyer and who makes apparently false representations for private com-

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self, and that this would account for his failure to produce it for inspection by experts. The painting does not appear to have been made available for inspection by any expert.

10. *See, e.g.*, Deborah Kong, *Internet Auction Fraud Increases: Buyers Learn the Hard Way To Be Careful Who They Send Money To - But Sometimes There's a Happy Ending Anyway*, USA TODAY, June 23, 2000, at 3B.

11. *See, e.g.*, Laurence J. Cohen, *E-Libel and Proportionality*, 1 E-JOURNAL: THE J. OF ELECTRONIC COMMERCE L. & PRACTICE 12, 13 (2000) (considering conflict of law issues on the Internet).

12. *See, e.g.*, AMERICAN BAR ASSOCIATION GLOBAL CYBERSPACE JURISDICTION PROJECT, ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A REPORT ON GLOBAL JURISDICTION ISSUES CREATED BY THE INTERNET (July 2000), <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> (visited Oct. 25, 2000); Robert B. Stefansky, *Online Jurisdiction: Summary of Key Cases*, in PRACTICING LAW INSTITUTE, FIRST ANNUAL INTERNET LAW INSTITUTE 797 (1997).

mercial gain?[13] Should the same response be made, for example, to a lawyer who misrepresents his identity in an online chatroom? Although the particular transaction at issue here did not involve the provision of legal services to a client, are there professional ramifications for the misrepresentations made online? If an attorney uses the law firm's email or Internet system while engaging in a fraudulent or deceptive transaction, should the firm be held responsible as well for the actions of that attorney?[14] Has the legal profession abandoned traditional ethical standards in favor of the new ethics of the Internet?[15] In short, how should the legal profession respond to "eBay ethics"?

II. BACKGROUND

eBay is a popular Internet-based auction company located in San Jose, California. The eBay on-line Internet auction allows registered sellers to offer items for sale to registered buyers,[16] often at a substantial savings.[17] The items sold on eBay comprise an "ocean of indifferent merchandise."[18] At any moment, there may be up for auction thousands of

13. Solomon, *supra* note 9, at 1, 34. Broadly considered, this question would be the same if the attorney placed a fraudulent advertisement in the classified advertisement section of a local newspaper instead of on an auction site on the Internet. In the local newspaper context, however, a potential buyer may have a greater opportunity to inspect merchandise before the final sale. The eBay site, however, "enables any Joe with a bogus Grandma Moses to post a listing." *Id.*

14. *See, e.g.*, Blakey v. Continental Airlines, 751 A.2d 538, 551 (N.J. 2000) (holding company liable for employee's use of electronic bulletin board); *see also* Mary P. Gallagher, *Employee May Sue for Online Slur*, NAT'L L.J., June 19, 2000, at B1, B4; *cf.* Robert W. Hamilton, *Defamation*, in KENT D. STUCKY ET AL., INTERNET AND ONLINE LAW § 2.03[3] (2000); James L. Brelsford, *Online Liability Issues: Defamation, Invasion of Privacy and Negligent Publishing*, in PRACTICING LAW INSTITUTE, FIRST ANNUAL INTERNET LAW INSTITUTE 471 (1997).

15. *See, e.g.*, Matt Richtel, *www.layoffs.com – Internet Work Force Has Its First Brush With Downsizing*, N.Y. TIMES, June 23, 2000, at C1, C12 (quoting the owner of a human resource consulting company as saying that among Internet companies, "[b]usiness ethics have gone down the toilet."). *See also* Peter H. Lewis, *Spy Software Puts Home PC's Under Surveillance – Inexpensive Snooping Programs, Designed to Catch Naughty Children, Seem to Be Catching More Cheating Spouses*, N.Y. TIMES, June 22, 2000, at D1, D3 (describing "snooping" software that raises "difficult moral, ethical and legal questions," and noting that those difficult questions do not seem to bother users of that software).

16. *See* Kimmel v. Degasperi, No. Civ. A. 00-143, 2000 WL 420639 at *1, (E.D. Pa. Apr. 7, 2000).

17. *See, e.g.*, Hal R. Varian, *When Commerce Moves Online, Competition Can Work in Strange and Mysterious Ways*, N.Y. TIMES, Aug. 24, 2000, at C2 (noting that "[p]roponents of online exchanges and auctions claim cost savings of 10 to 30 percent" but warning that such savings might not continue in the future).

18. Solomon, *supra* note 9, at 1.

books, compact discs,[19] coffee machines, flags, religious relics[20] and other antiquities,[21] stamps, coins,[22] stuffed animals,[23] sports[24] and movie memorabilia,[25] and an endless variety of other household articles, automobiles, commercial merchandise, and works of art.[26] The United States District Court for the Southern District of New York has even determined that "[t]he [s]ale of . . . [a]rt by auction in an online trading forum administered by eBay is likely to yield a price that is per se fair and the product of good faith and arm's length dealings."[27] There are reportedly more than 12.6 million registered users of eBay, and "[o]n any given day they place 1,000 bids a minute on the more than 4.5 million items up for sale."[28] The trade in fine art on eBay appears to have even created a number of new art collectors from persons who may not have previously purchased any works of art.[29]

It is relatively easy for individual sellers to put items up for open bidding on the eBay Internet website,[30] and some sellers are now mak-

19. *Cf.* Matthew Mirapaul, *Nervous About Using Napster? Used CD's Are Bargains Online,* N.Y. TIMES, Aug. 10, 2000, at D4 (describing various Internet sites that buy and sell used compact discs).

20. *See, e.g.,* Elizabeth Neff, *Religious Relics are Turning Up on the Internet,* CHI. TRIB., Aug. 6, 2000, § 4, at 1.

21. *See, e.g.,* Nancy C. Wilkie, *The Electronic Auction Block: The Lure of Antiquities Online,* 53 ARCHEOLOGY 5 (Sept./Oct. 2000) (warning that the sale of ancient art on eBay and amazon.com may encourage looting of archeological sites, even if the items sold on the Internet are forgeries).

22. *See, e.g.,* Jed Stevenson, *The Father of His Country Is an Imposter on a Coin,* N.Y. TIMES, Aug. 8, 2000, at A12.

23. *See, e.g.,* Kong, *supra* note 10, at 3B (describing, among other buyers, persons who "might purchase a rare Beanie Baby only to receive a common one").

24. *Cf.* Bob Tedeschi, *Sporting Goods Web Sites, Last Year's Costly Rage, Are Turned Over to the Professionals,* N.Y. TIMES, Sept. 4, 2000, at C5.

25. *See, e.g.,* Bruce Westbrook, *New Auction Stars: Movie Memorabilia,* CHI. TRIB., Aug. 14, 2000, § 4, at 4 (noting that in addition to sales by individuals on sites such as eBay, some movie studios have started their own "formalized auctions" of movie props and costumes, "sometimes at their own websites" while the movie is still playing in theatres).

26. *See, e.g.,* Gary Cohen, *EBay Gets an Art Lesson,* U.S. NEWS & WORLD REP., May 22, 2000, at 61; Mylene Mangalindan, *EBay Plans to Buy Half.com, Paying Up to $374 Million,* WALL ST. J., June 14, 2000, at B6; Thane Peterson, *Did You Get that Utrillo on the Web? Collectors Are Flocking Online to Buy Pricey Art,* BUSINESSWEEK INVESTOR, July 3, 2000, at E4; Joelle Tessler, *eBay Steps In, Stops Auction of Human Skull,* SAN JOSE MERCURY NEWS, May 23, 2000, 2000 WL 20720132 at *1.

27. In re AIOC Corp., Nos. 96 B 41895 and 96 B 41896, 1999 WL 1327910, at *1. (Bankr. S.D.N.Y. Dec. 20, 1999).

28. Dobrzynski3, *supra* note 4, at A1, C8; *see also* Mylene Mangalindan, *EBay Plans to Buy Half.com, Paying Up to $374 Million,* WALL ST. J., June 14, 2000, at B6.

29. *See* Solomon, *supra* note 9, at 1, 34.

30. *See, e.g.,* Peter Krivel, *Going Once . . . The Popularity of Internet Auctions Proves Once and For All That People Love Crap,* TORONTO STAR, Aug. 3, 2000, 2000 WL 24061366 at *1. As Mr. Krivel explains it:

ing thousands of dollars through their sales on eBay.[31] Many of the sellers on eBay are small businesses rather than individuals.[32] The number of sellers – and buyers – is constantly increasing.

Items are sold on eBay by describing them and often by including one or more photographs of the item.[33] The sale will last for 10 days.[34] When a sale is successful, the buyer will arrange to send payment of the winning bid while the seller will arrange delivery of the purchased item.[35] Some sellers accept personal checks and credit cards[36]; other sellers accept only cashier's checks and money orders.[37] When the sale is completed, the buyer and the seller each have an opportunity to post "feedback" about the transaction. For some sales, buyers and sellers may use i-Escrow, an escrow service that will hold a buyer's payment and send it off to the seller only after the buyer has inspected the merchandise and given approval for payment.[38] The auction site receives a part of the payment for facilitating the sale;[39] if the buyer and seller use an escrow service, there may be an additional fee for that service.[40] The

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> The concept is quite simple. You post an ad on an auction site, describing what you have for sale. Buyers respond by bidding on the item. Each item has a limit as to how long the auction will last. When the clock stops, the highest bidder wins. And in the process, the auction site takes a cut out of the transaction.

Id.

31. *See, e.g.*, Bellino v. Simon, No. Civ. A. 99-22208, 1999 WL 1059753 at *1 (E.D. La. Nov. 22, 1999) (describing one seller who alleged that he had "lost eBay sales in excess of $500,000. . . ").

32. *See, e.g.*, Lisa Guernsey, *The Powers Behind the Auctions – Small Businesses, Not Your Aunt's Attic, Are Fueling eBay's Success*, N.Y. TIMES, Aug. 20, 2000, § 3, at 1.

33. *See* J.D. Biersdorfer, *Putting Photos of Wares Onto eBay Auction Site*, N.Y. Times, Aug. 3, 2000, at G4 (describing mechanics of putting photographs on to an eBay auction site).

34. *See, e.g.*, Solomon, *supra* note 9, at 1, 34 (describing the eBay auction process).

35. Failure to deliver a purchased item is a major source of complaint in Internet auction fraud. *See, e.g., Statement of Eileen Harrington, Associate Director of the Bureau of Consumer Protection at the Federal Trade Commission, on "Consumer Protection in Cyberspace: Combating Fraud on the Internet," Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the U.S. House of Representatives Committee on Commerce* (June 25, 1998). The statement describes an FTC action against one seller who advertised personal computers on various Internet auction sites and took up to $1,450 each from the "successful bidders," but who failed to send any computers or refund the money taken. *See id.*

36. *See, e.g.*, Joelle Tessler, *Outrageous Sales Test eBay's Operating Procedures*, SAN JOSE MERCURY NEWS, May 27, 2000, 2000 WL 20721077 at *1.

37. *See, e.g.*, FEDERAL TRADE COMMISSION, INTERNET AUCTIONS: A GUIDE FOR BUYERS AND SELLERS 3 (Feb. 2000).

38. The escrow service also allows sellers to "have the same opportunity to inspect and approve a returned item before the buyer gets refunded." Current information about the escrow service should be available on the eBay website page, "Why eBay is Safe."

39. *See, e.g.*, Krivel, *supra* note 30, at *1.

40. *See, e.g.*, FEDERAL TRADE COMMISSION, INTERNET AUCTIONS: A GUIDE FOR BUYERS AND SELLERS 4 (Feb. 2000).

buyer will often pay for shipping of the items purchased, unless the seller has specifically assumed that cost in the description of the merchandise or by a separate agreement with the buyer.[41] Buyers generally are not paying sales tax on purchases they make on Internet auction sites.[42]

The eBay company itself generally does not get involved in the financial transaction or delivery of any products purchased, unless the sale is patently illegal.[43] The company does not authenticate the items sold on its website,[44] and some sellers have tried to sell stolen property on the eBay site.[45] eBay will not verify statements made by a seller in connection with the sale, such as where an item was kept in recent years or, if it is damaged, how that damage arose.[46] One recent exception involved an attempt to sell the "100 percent genuine raft"[47] used by Elián Gonzáles, a six-year-old Cuban boy whose mother drowned while attempting to emigrate from Cuba and enter the United States, and who became the center of an international family law struggle between his father in Cuba and his relatives in Miami.[48] The eBay sale was canceled when the seller could not provide proof that the raft was the one in which Elián floated to safety.[49] A $10 million bid had been made on that raft, but it was later retracted.[50]

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41. *See, e.g., id.* at 8.

42. *See generally* J. Clifton Fleming, Jr., *Electronic Commerce and the State and Federal Tax Bases,* 2000 B.Y.U. L. REV. 1; Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality,* 2000 B.Y.U. L. REV. 9.

43. *See, e.g., Ebay Ends an Auction of Votes for President,* N.Y. TIMES, Aug. 19, 2000, at A30 (reporting that eBay had stopped the attempted sale of votes for U.S. President, even though bidding on one individual's vote had reached $10,100).

44. *See, e.g.,* Gary Cohen, *EBay Gets an Art Lesson,* U.S. NEWS & WORLD REP., May 22, 2000, at 61.

45. *See, e.g.,* Shu Shin Luh, *Bid to Sell Camera Gear Via eBay Leads to Arrest - Police Say Man Tried to Unload $17,000 in Stolen Equipment He'd Purchased,* CHI. SUN-TIMES, Aug. 31, 2000, at 11.

46. Of course, some shoppers may seek out damaged or imperfect goods if they can be had at a lower price. *See, e.g.,* Michelle Slatalla, *Blemished Goods for Bargain Hunters,* N.Y. TIMES, Aug. 3, 2000, at G4 (describing on-line shopping sites that offer bargain merchandise).

47. *See* Patti Hartigan, *Conceptual Art Finds a Home on eBay,* BOSTON GLOBE, May 12, 2000, at C13.

48. *See, e.g.,* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000), *aff'd,* 212 F.3d 1338 (11th Cir.), *cert. denied,* 120 S. Ct. 2737 (2000); Mary McGrory, *The Elian Saga: It's All Relative - The Court Says the Boy Can Go Home to Cuba and Truly, His Father Has Not Seen Us at Our Best,* WASH. POST NAT'L WEEKLY ED., June 12, 2000, at 23. Elián's relatives in Miami contested his father's right to bring him back to Cuba, sparking a flurry of litigation and international publicity

49. *See* Larry Spears, *eBay Cancels $135,805 Sale of Artwork After Seller Bid on His Own Piece,* CONTRA COSTA TIMES, May 12, 2000, 2000 WL 20718041 at *2.

50. *See eBay Yanks Elian Items,* CBS News Website Article on file with the Journal of Computer and Information Law. The article reports that eBay removed other items related

Despite exceptions for items such as Elián's raft,[51] the general eBay philosophy appears to be "caveat emptor."[52] It considers the sales made through its site to be "private transactions."[53] However, the company does have a staff of "more than 100 people, including a number of former police officers and detectives, who work on 'trust and safety' issues."[54] The company also offers a $200 insurance policy with a $25 deductible – a modest amount of insurance that will cover most small purchases made on the site.[55] Other websites, such as Pawnbroker.com, allow buyers to get a refund for up to 10 days after receiving a purchased item in the mail, "no questions asked."[56] Still other websites, such as the edeal.com website based in Toronto, have set up a "Fraud Busters" page where victims of online auction fraud can submit complaints and warn others.[57]

The eBay site relies on users to report suspicious sales.[58] Those suspicious sales usually involve attempts to sell merchandise that eBay prohibits offering for sale,[59] such as live animals, narcotic drugs, firearms,

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to Elian in addition to the raft, including "a toothbrush 'like the one Elian would have used,' a jar of air containing scents from Miami's Little Havana neighborhood and an offer to sell Elian." *Id.*

51. Another exception involved an inmate on death row in Texas, who tried to sell tickets to view his execution. The eBay site pulled the listing before he received any bids on those tickets. *See Inmate Solicits Bids on eBay to View Execution,* CHI. TRIB., May 26, 2000, § 1, at 3.

52. *See, e.g.,* Krivel, *supra* note 30, at *1-*2; *see also* Lisa Guernsey, *A New Caveat for eBay Users: Seller Beware,* N.Y. TIMES, Aug. 3, 2000, at G1 (describing risks to sellers who suffer misfortune with their eBay sales, such as being billed by buyers using fraudulent or stolen credit cards).

53. *See* Dobrzynski, *supra* note 4, at A1.

54. Joelle Tessler, *supra* note 36, at *1. "They check out reports of prohibited listings and fraud, like misrepresenting items or using aliases and friends to boost bids in your own auction. The investigators can shut down auctions, issue warnings and even suspend users when necessary, and they work with law enforcement officials in cases that involve serious violations or illegal activity." *Id.*

55. *See* Hansell & Dobrzynski, *supra* note 4, at A1. Buyers who find merchandise for sale on eBay but who do not use eBay to complete these sales (to avoid paying a commission to eBay) are not covered by the eBay insurance policy. *See, e.g.,* Kong, *supra* note 10, at 3B.

56. *See* Michelle Slatalla, *Net Pawnshops Say They're Just the Ticket,* N.Y. TIMES, May 18, 2000, at G4. The policy provides in part:

> Pawnbroker.com merchants uphold the highest standard of quality for each of their products. If for any reason you are not satisfied with your purchase, however, you may send it back for a full refund within 10 days after receiving the item. This return policy applies to all items sold on our site and is one of the best in the industry for pre-owned items of high value.

57. *Id. See* Lily Nguyen, *Spotlight Shining on Internet Auction Fraud – Lawyer Suspended for 'Shilling' to Spark Bidding War,* TORONTO STAR, May 12, 2000, 2000 WL 19581898 at *2.

58. *See, e.g.,* Tessler, *supra* note 26, at *1.

59. *See, e.g.,* Tessler, *supra* note 36, at *2.

most alcohol, and human body parts, except for "skulls and skeletons that are used for educational purposes."[60] The company also relies on its users to provide feedback on sellers and buyers, whose real identities are almost never known. Wise bidders should, at a minimum, check the feedback on a given seller before placing a bid on anything they offer for sale. If there is significant negative feedback on the particular seller, the prospective buyer should avoid dealing with that seller, or should either deal with the seller only through an established internet escrow service or by paying for the purchased merchandise by a credit card, for example, which would provide some protection to the buyer if the merchandise is less than promised or is never sent at all.

On April 28, 2000, a man in California using the name "golfpoorly" put six items up for auction on eBay: an unopened roll of twine, a never-inflated basketball, a "Mexican voodoo mask," a Netgear network card, a pewter frame, and "a great big wild abstract art painting."[61] The opening bid for each item was 25 cents.[62]

The seller described the painting as 2 feet 11 inches by 3 feet 11 inches; he said that he had purchased it a few years earlier at a garage sale in Berkeley, California, "back in my bachelor days."[63] He did not identify the painter,[64] but said only that his wife wouldn't let him hang the painting in the house because it "looks like it was done by a nut case."[65] He also said that the painting had a small hole about an inch and a quarter long, caused by the handlebars of his son's "Big Wheel" tricycle.[66] Expressing an apparent complete lack of understanding as to how to properly restore a damaged painting, he said that the hole "would be easy to fix with duct tape."[67]

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60. Tessler, *supra* note 26, at *3. Other Internet auctions sites, and auction sites for countries outside the United States, may further restrict (or be forced to restrict) the categories of prohibited merchandise that may be offered for sale. *See, e.g., Yahoo! On Trial Over Nazi Items Offered for Auction,* CHI. TRIB., July 25, 2000, § 1, at 16.

61. *See* Dobrzynski, *supra* note 4, at A1.

62. *See* Zachary Coile & Suzanne Herel, *Seller Changes His Story About eBay Artwork – Made Up Some Details About Possible Diebenkorn, Will Have it Appraised Before Sale,* S.F. EXAMINER, May 10, 2000, at A4; *see also* Dobrzynski, *supra* note 4, at A1.

63. *See* Dobrzynski, *supra* note 4, at A1; Karen Samples, *Caveat Emptor – More Online Hijinks,* CINCINNATI ENQUIRER, May 12, 2000, at A18.

64. *See, e.g.,* Ken Bensinger, *EBay Painting Sale Stalls as Art World Questions Abstract Work's Authenticity,* WALL ST. J., May 10, 2000, at C13; *See* Dobrzynski, *supra* note 4 at A1.

65. *See* Zachary Coile, *EBay: Seller of Painting Cheated; Suspends Owner of Alleged Diebenkorn,* S.F. EXAMINER, May 11, 2000, at A11.

66. *See* Matt Fleischer & Michael Goldhaber, *Art of the Deal,* NAT'L L.J., May 22, 2000, at A6.

67. *See* Jesse Hamlin & Chuck Squatriglia, *Brush With Greatness? A Seller on eBay Originally Asked 25 Cents for a Painting he Said was Stored in His Garage. $130,000*

In a close-up photo ostensibly made to show the damage from the hole, bidders could see the signature "R.D. '52." Some "eBayers" thought that the painting could be a lost work of Richard Diebenkorn, one of America's great modern artists. Art collectors noted that its colors and composition roughly matched the painter's style.[68] One art dealer in New York who previously sold other pieces of Diebenkorn's work proclaimed that "[t]he palette is right, and the signature is right on."[69] The story on eBay seems also to have matched the painter's personal history, as Diebenkorn had lived in California for most of his life.[70]

Richard Diebenkorn (1922-1993) moved through three distinct phases in his art.[71] In the first phase, which extended from 1948 to approximately 1954 or 1955, Diebenkorn was associated with the school of Abstract Expressionism, guided by other painters such as Clyfford Still and Mark Rothko.[72] This first period of his work was known as a powerful and precocious period for him.[73] In the second phase of his art, Diebenkorn shifted from "abstraction" to "figuration," a development influenced by his contact with California painters David Park and Elmer Bischoff.[74] In the third phase, which began in 1967 after he moved to Santa Monica, Diebenkorn started a series of "majestic nonfigurative abstractions" known as the "Ocean Park Cycle."[75] One painting from that cycle, "Horizon: Ocean Park," was sold for $3.9 million in 1998 at an auction at Sotheby's.[76] His work now hangs in galleries around the world, including galleries such as the National Gallery of Art in Washington, D.C.

Although he spent most of his life in California, Diebenkorn had also studied and worked in other parts of the United States. In 1949 he resigned his faculty position at the California School of Fine Arts (now the

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Later, Some Aficionados Think it Might be a Diebenkorn, S.F. CHRON., May 9, 2000, at A1, *available in* 2000 WL 6482388.

68. *See Big Games,* USA TODAY, May 11, 2000, at 14A.

69. *See* Dobrzynski, *supra* note 4, at A1. Other art experts would later proclaim that the work was not authentic. Gerald Nordland, who reportedly studied Diebenkorn for 50 years, said that he did not recognize the work as being typical in format, color, or paint. *See eBay Painting Not Diebenkorn, Expert Agrees,* SEATTLE TIMES, June 23, 2000, at A6, *available in* 2000 WL 5541782.

70. *See* Jane Livingston, *The Art of Richard Diebenkorn* in JANE LIVINGSTON ET AL., THE ART OF RICHARD DIEBENKORN 17 (1997).

71. *See* H.H. ARNASON, HISTORY OF MODERN ART 561 (4th ed. 1998).

72. *See id.* at 561-62; GERALD NORDLAND, RICHARD DIEBENKORN 7 (1987). Walton reportedly sold another painting in December 1999 for $33,261.64 on speculation that it was the work of Clyfford Still.

73. *See* GERALD NORDLAND, RICHARD DIEBENKORN 7 (1987).

74. *See* ARNASON, *supra* note 71, at 562.

75. *See id.* at 562-63; *see also* Zachary Coile, *EBay: Seller of Painting Cheated; Suspends Owner of Alleged Diebenkorn,* S.F. EXAMINER, May 11, 2000, at A11.

76. *See* Coile, *supra* note 65, at A11.

San Francisco Art Institute), where Clyfford Still and Mark Rothko also taught.[77] He was unhappy there and resigned that position to enroll in a Master of Fine Arts program at the University of New Mexico,[78] taking advantage of his education benefits from previous military service in the U.S. Marine Corps.[79] He and his wife spent the next years there in New Mexico, and his work was shown at the University Art Museum in Albuquerque in the spring of 1951.[80] He finished his work in New Mexico in 1952, and in June of that year he accepted a teaching position at the University of Illinois at Urbana.[81] Before moving to Illinois in September, he and his wife returned to California for the summer.[82] There he met Paul Kantor, a Los Angeles art dealer who arranged Diebenkorn's only exhibition of work in 1952.[83] Diebenkorn did not last long in Urbana, and moved in 1953 to New York.[84] After thieves broke into his car and stole his typewriter and other personal belongings, however, he and his wife "made an on-the-spot and irrevocable decision to return to California."[85]

The artist's daughter, Gretchen Grant, still lives in Berkeley. She expressed doubt that the "R.D. '52" painting offered for sale on eBay was painted by her father because there was no record of it in the catalog of her father's work.[86] She also admitted, however, that although her mother saw almost all of his work and that she saw "a great deal of it, we certainly didn't see all of it."[87]

Diebenkorn's mobility, his tenure in California, and the appearance and color of the work itself were factors which led bidders on eBay to speculate that the painting might be a lost work. They engaged in a bidding frenzy that landed the sale on the front page of the *New York Times* and many other publications around the nation. A private art dealer in Oregon was one of the bidders, but he withdrew his offer of $128,600 after the seller refused to let him see the painting.[88] The dealer had offered to drive five hours from Oregon to the seller's home in California,

77. *See* ARNASON, *supra* note 71, at 562.

78. *See* GERALD NORDLAND, RICHARD DIEBENKORN 7 (1987).

79. *See* Livingston, *supra* note 70, at 34.

80. *See id.* at 36.

81. *See id.* at 39.

82. *See id.*

83. *See id.* at 39, 260.

84. *See id.* at 42.

85. *See* Livingston, *supra* note 70, at 42.

86. *See* Coile, *supra* note 65, at A11.

87. *See* Zachary Coile & Suzanne Herel, *Seller Changes His Story About eBay Artwork - Made Up Some Details About Possible Diebenkorn, Will Have it Appraised Before Sale,* S.F. EXAMINER, May 10, 2000, at A4.

88. *See* Dobrzynski, *supra* note 4, at A1.

and he was highly suspicious when the seller refused the request.[89]

After 95 offers, the auction closed with a high bid of $135,805 from a bidder in the Netherlands.[90] The bidder on the painting was Robert Keereweer, a Dutch software executive who had studied art history in college for five years and who said he was fairly confident that the painting was authentic.[91] He said that the "biggest risk" in submitting his bid was not the risk of it being an inauthentic painting, but the risk of having to explain to his wife why he had bid so much on a painting he had never seen in person.[92]

A few hours before the auction closed, "golfpoorly" posted a message about the attention generated by the sale. He wrote that "[h]onestly, we're freaked out by all of this, and because of the high price this painting is going for (WOW!!!!) I contacted an attorney."[93] He didn't say who "we" were, but eBayers may have inferred that is was another reference to the seller and his wife. Purportedly on the advice of that unnamed lawyer, "golfpoorly" added the following language to the description of the item: "This painting is sold in the same manner as the other items I am selling on eBay, and requires full payment within 7 days of the auction, in advance of delivery to the buyer, and is sold as described in the auction description, without representation as to authorship or authenticity."[94]

After the auction ended, "golfpoorly" was revealed to be Kenneth A. Walton, a 1997 graduate of the University of California at Hastings School of Law.[95] Although he claimed that his wife made him keep the painting in the garage, Walton has no wife. Although he claimed that his son had damaged the painting with his tricycle, he has no son.[96] Walton claimed that he invented the family and the tall tale "as a funny

89. *See id.* The authenticity of many works of art can be judged only by actual inspection of the article. A signed lithograph, for example, may be examined with a magnifying glass only in person, not online. Similarly, examination of the brush strokes and composition of paint on a painting can only be done in person, again with the use of simple tools such as a magnifying glass or special lights.

90. *See id. See also* Judith H. Dobrzynski, *Online Bidders in Frenzy Over Painting – Artwork on eBay May Be a Modern Classic – Or Then Again, Maybe Not,* INT'L HERALD TRIB., May 10, 2000, at 13.

91. *See* Coile, *supra* note 65, at A11; *see also* Coile & Herel, *supra* note 87, at A4.

92. *See* Coile & Herel, *supra* note 87, at A4; Dobrzynski, *supra* note 4, at A1.

93. *See* Dobrzynski, *supra* note 4, at A1. The message did not disclose that the seller was an attorney. *Id.* Indeed, it gives the opposite impression and suggested instead that this married couple contacted an attorney to learn about their legal rights in connection with this sale. *Id.*

94. *Id.*

95. *See* Jesse Hamlin, *EBay Cancels Art Sale – Seller Accused of Phony Bid,* S.F. CHRON., May 11, 2000, at B1.

96. *See* Hamlin & Squatriglia, *supra* note 7, at A1.

story to entertain bidders."[97] He initially explained that he "just thought it was a cute little vignette to explain why I was getting rid of junk from the garage."[98]

Walton does not seem to have been getting rid of "junk from the garage," however, nor was he a novice at selling paintings over the Internet. From March 30 to May 10, 2000, he had sold at least 33 other paintings on eBay under different Internet aliases.[99] It was also reported that in December 1999, Walton sold another expressionist painting for a winning bid of $33,261.64, on speculation that it was the work of Clyfford Still.[100] That work was reportedly signed "C. Still"; its authenticity "has since been debunked."[101] It is not yet known how many paintings he sold as an Internet art dealer.

Walton was also not a stranger to the Internet itself. When he was a law student, Walton wrote a law review note called *Is a Website Like a Flea Market Stall?*[102] He also served as the "Senior Internet Publications Editor" of the *Hastings Communications and Entertainment Law Journal,* which published his note.

Although most of his previous sales seem to have gone without complaint,[103] he was once threatened with legal action over the sale in 1999 of a painting with the signature of "P. Gray."[104] Michael Luther, a businessman in Nebraska, paid $7,600 for the painting, believing it to be the work of Henry Percy Gray, an early 20th century painter who was known

97. *See* Coile, *supra* note 65, at A11.

98. *See id.*

99. *See IsItAGenuineDiebenkorn.Com?,* NEWSWEEK, May 22, 2000, at 75; *see also* Dobrzynski2, *supra* note 4, at A1 ("Because records for eBay sellers are accessible for only 30 days, it is impossible [for the reporters] to determine a total [number of paintings sold by] . . . Mr. Walton during that entire period."). Although it is "impossible" for members of the public to check those records, the eBay company itself should be able to provide that information to the public.

100. *See* Blair Anthony Robertson, *FBI Shows Interest in Fake eBay Paintings,* Scripps Howard News Service, July 6, 2000.

101. *See id.*

102. Kenneth A. Walton, Note, *Is a Website Like a Flea Market Stall? How* Fonovisa v. Cherry Auction *Increases the Risk of Third-Party Copyright Infringement Liability for Online Service Providers,* 19 HASTINGS COMM. & ENT. L.J. 921 (1997); *see also* Matt Fleischer & Michael Goldhaber, *Art of the Deal,* NAT'L L.J., May 22, 2000, at A6.

103. Thirteen "buyers" gave previous feedback for his sales made under the alias of "golfpoorly," none of them negative. *See* Dobrzynski, *supra* note 4, at A1. One buyer wrote that he "[c]harged me less for shipping than he quoted," while the buyer of a $280 espresso machine wrote that it was "very good and honestly described." *See id.* It was later learned that at least Mr. Walton placed some of that feedback himself. *See* Dobrzynski3, *supra* note 4, at A1, C8. It is generally difficult for buyers to determine when several individuals or one individual with multiple user names leaves comments. *See, e.g.,* Kong, *supra* note 10, at 3B.

104. *See* Coile, *supra* note 65, at 11; *see IsItAGenuineDiebenkorn.Com?, supra* note 99, at 75.

for landscapes laden with oak trees.[105] By using a black light, Luther found that the signature was a fraud, added years after the painting had been done.[106] Luther complained that "[i]t was an amateur painting; it was garbage."[107] Luther wrote to Walton, saying that he would sue unless he got his money back.[108] Luther said that Walton emailed him to say "that he was an attorney and that he would fight back."[109] Apparently intimidated by that message, the Nebraska businessman never did sue the California lawyer.[110]

At the same time that Walton was offering the "golfpoorly" painting for sale, he was also reported to be selling four other paintings under the alias "advice."[111] Walton argued that he had been wrongly portrayed in the media as being "devious" and "untrustworthy," but he admitted to one reporter that he had brought much of the negative media coverage on himself.[112] He also said that he was "embarrassed by the whole thing," and that he was "really not a bad guy . . . It's Orwellian the way this is being twisted around."[113]

eBay voided the sale of the suspect painting not because Walton lied about having a wife and son, but because he had placed a bid on the painting from one of his other eBay alias accounts.[114] On the second day of the sale, Walton had placed a $4,500 bid on the painting using the alias "grecescu."[115] He had also used the alias "advice" for other eBay transactions,[116] and may have used any number of other names.[117] In the eBay "feedback forum," "advice" wrote that "grecescu" had "[f]riendly email and [was] an [*sic*] trustworthy ebayer. You da'man, Rolly!"

The practice of submitting false bids in an auction to drive up the price of an object is known as "shill bidding"[118] or "shilling."[119] Walton admitted that he placed a bid of $4,500 on the painting, but he claimed

105. *See* Coile, *supra* note 65, at A11.

106. *See id.*

107. *See* Hamlin & Squatriglia, *supra* note 7, at A1.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See* Judith H. Dobrzynski, *Internet Art Seller Faked Some Details of Painting,* INT'L HERALD TRIB., May 11, 2000, at 14.

112. *See* Coile, *supra* note 65, at 11.

113. *Id. See also* Allegra Knopf, Note, *Privacy and the Internet: Welcome to the Orwellian World,* 11 U. FLA. J. L. & PUB. POL'Y 79 (1999).

114. *See* Spears, *supra* note 49, at *2.

115. *See* Coile, *supra* note 65, at A11.

116. *See id.*

117. *See* Dobrzynski3, *supra* note 4, at A1, C8.

118. *See, e.g.*, Hansell & Dobrzynski, *supra* note 4, at A1; *see also* Christine Hanley, *FBI Probes Bidding Fraud on eBay,* CHI. SUN-TIMES, June 8, 2000, at 24; Kong, *supra* note 10, at 3B.

119. *See* Coile, *supra* note 65, at A11.

that he did so on behalf of a "friend" who did not have an eBay account.[120] Walton refused to disclose the identity of his "friend," saying that he was "not going to subject him to the media frenzy to which I've been subjected as a result of this."[121] The "friend" has never come forward.

In addition to voiding the sale, eBay suspended Walton from trading on eBay. Because some news reports only described the suspension in a short story, the public could easily believe that the suspension was a permanent one. The initial suspension, however, was only in effect for 30 days.[122] At the time of his suspension, Walton was warned that only if he bid again on his own merchandise would he be "permanently suspended" from eBay.[123]

Walton had previously been an attorney at Kronick, Moskovitz, Tiedemann & Girard in Sacramento, California, but he had left that firm to start his own law practice – ironically in the area of copyright, trademark, and intellectual property law.[124] He said that he was selling the paintings to finance this new law practice: "I'm trying to start a law practice, and it's tough. I can find these paintings for $20 to $30 a pop and put them up on eBay and get $300."[125]

Many art dealers and Internet buyers were outraged at the simple cancellation of the sale and the meager 30-day suspension. One art dealer in Carmel, California said that he could not believe that eBay would "let him off so easily" and suggested that eBay was "encouraging" future acts of fraud by him and perhaps others by merely suspending Walton for 30 days.[126] After further investigation disclosed a series of shill bids and false testimonials that seemed to have been placed by Mr. Walton, the company permanently suspended him from trading on eBay.[127]

Following the intense flurry of publicity surrounding Mr. Walton's attempted sale of the painting, the Federal Bureau of Investigation (FBI) announced that it had opened an investigation into shill bidding on

120. *See* Nguyen, *supra* note 57, at *1.

121. Hamlin, *supra* note 95, at B1. Walton said that he "placed this bid for an acquaintance of mine who doesn't have an active e-mail address. When he saw what was happening with the auction, he wanted to participate." *Id.* Some individuals may properly speculate why Walton did not simply arrange a sale directly to the man, assuming that he was truly Walton's friend and that he did in fact exist.

122. *See* Coile, *supra* note 65, at A11; Dobrzynski3, *supra* note 4, at A1, C8.

123. *See* Spears, *supra* note 49, at *1. Walton was later "permanently" suspended from eBay. *See* Judith H. Dobrzynski, *F.B.I. Opens Investigation of eBay Bids - Suspicion of Shills Rises As Web Auctions Grow,* N.Y. TIMES, June 7, 2000, at C1.

124. *See* Dobrzynski2, *supra* note 4, at A1.

125. *See id.*; Hamlin & Squatriglia, *supra* note 7, at A1.

126. *See* Spears, *supra* note 49, at *1-*2.

127. *See* Dobrzynski, *supra* note 6, at C1.

eBay.[128] Participation in shill bidding on the Internet can violate mail fraud[129] and wire fraud[130] statutes, and each count could carry a maximum penalty of up to five years in prison and up to $1 million in fines.[131]

Further details about the painting are expected to be revealed as the investigation of the attempted sale continues. Some details that have already emerged may suggest an even higher level of culpability on the part of the seller. Kevin Carey, "a 40-year-old self-described starving artist," told one news service in July, 2000 that he had testified in Sacramento, California before a federal grand jury in connection with the at-

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128. *See id;* Hanley, *supra* note 118, at 24; *FBI Investigating eBay Bidding on Painting,* USA TODAY, June 8, 2000, at 1B.

129. 18 U.S.C. § 1341 (1994). The federal mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id. 18 U.S.C. § 1342 (1994). An additional statute makes it a crime to use a fictitious name or address in connection with the same scheme as under section 1341:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

Id.

130. 18 U.S.C. § 1343 (1994). The federal wire fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id. See e.g., Student Charged with Internet Extortion, CHI. TRIB., May 26, 2000, § 1, at 17.

131. *See* Dobrzynski, *supra* note 6, at C1.

tempted sales on eBay.[132] Mr. Carey said that he had met Mr. Walton in a coffeeshop in late April or early May, in response to a classified advertisement that Mr. Walton had placed in the *Sacramento Bee* newspaper.[133] He said that Mr. Walton had offered to buy his full portfolio of 15 paintings that he had showed him, but he decided to sell only two paintings to Mr. Walton at a cost of $100 each, but only on the condition that Carey not sign his paintings.[134] Mr. Carey said that this coffeeshop meeting and sale of his unsigned paintings took place before the newspapers started to report on the scandal of the purported Diebenkorn painting.[135]

III. DISCUSSION

The Internet presents a broad range of new opportunities[136] that will fundamentally change the future practice of law.[137] The legal profession must also be aware of the potential ethical issues that arise alongside these new opportunities, however.[138] "In the borderless land of the Web," one report observes, "lawyers could find themselves in tangles with their bar associations about such things as whether postings on lawyer referral services constitute advertising in a state where a lawyer

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132. *See* Robertson, *supra* note 100.

133. *See id.*

134. *See id.*

> Walton told Carey not to sign the paintings, a request that struck Carey as unusual but not terribly suspicious. Carey was reluctant, but he needed the money. He had bills to pay. He was renting a small studio on J Street above Joe's Style Shop. He decided to sell two paintings. Carey knew Walton was going to turn around and sell them on eBay for a profit. He said he never saw those paintings with any other signature on them.

Id.

135. *See id.* The artist stated that when he finally read the first article about the eBay scandal, "the hair on the back of [his] neck stood up." *Id.* He also said that he wondered whether the lawyer was "signing these paintings himself." *Id.*

136. *See, e.g.*, Art Golab, *Law Firms Can Bid for Work on Web*, CHI. SUN-TIMES, Aug. 7, 2000, at 10.

137. *See, e.g.*, LAWSON, *supra* note 3, at 3.

138. *See, e.g.*, JONATHAN ROSENOER, CYBERLAW – THE LAW OF THE INTERNET 263 (1997) (hereinafter "CYBERLAW") ("Many of these ethical concerns "are not limited to attorneys only" but are "shared by a number of other professions"); 2 STEVEN D. IMPARL, INTERNET LAW: THE COMPLETE GUIDE III 1-1 (1998) (hereinafter "INTERNET LAW") ("The proliferation of communications on the Internet and the greater numbers of people who can access this global network of computer networks provides both opportunities and challenges to the practice of the traditional professions: medicine, accounting, and law."); *see also generally* Susan Ross & Mary F. Andreoni, *Legal Ethics, Malpractice, and the Internet*, in ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, THE INTERNET GUIDE FOR ILLINOIS LAWYERS 125 (Mary Ellen LeBlanc & John M. Rossi, eds., 1997).

is not admitted to practice law."[139] Lawyers must also take care when answering e-mail messages, lest they inadvertently create a "cyberlawyer/client" relationship, "with all of its attendant responsibilities."[140] Similarly, non-lawyers who dispense legal advice on the Internet may be charged with the unauthorized practice of law.[141] Other ethical issues may involve the constant need to remind clients that e-mail messages are not secure[142] and that unknown third parties may intercept communications with confidential information.[143] Those ethical pitfalls regarding the attorney-client relationship may be better known and more easily recognizable, however, than the ethical pitfalls that may await an attorney in contexts outside direct (or even indirect) representation of a client matter.

For all of its advantages in enhancing trade, communication, and access to information,[144] the Internet has also become a place where general moral and ethical standards seem to have been permanently compromised in favor of "the freewheeling ethos of the Web."[145] It is a virtual world of hackers, hucksters, and copyright pirates.[146] Many of the problems related to abuses on the Internet have arisen because of the virtual anonymity that cyberspace offers.[147] For example, because identities can easily be hidden on the Internet, many people pretend to be someone they are not when online. One study, for example, found that 40 percent of participants in online communities have at some point

139. Marci Alboher Nusboaum, *The Verdict Is In - Legal Web Sites Make a Strong Case for Themselves,* CHI. TRIB., June 23, 2000, § 6, at 1, 7; *see also* CYBERLAW, *supra* note 138, at 163-65; INTERNET LAW, *supra* note 138, at III 1-11 to 1-12;

140. *See* INTERNET LAW, *supra* note 138, at III 1-3.

141. *See* Nusboaum, *supra* note 139, at 1, 7

142. *See, e.g.,* GARY L. STUART, ETHICAL LITIGATION § 31.6 (1997) (discussing "Electronic-Age Ethical Issues").

143. *See, e.g.,* Kevin McGowan, *The E-Revolution and the Practice of Law,* WASH. LAW., July/Aug. 2000, at 22, 26.

144. *See id. at* 25. "As a research tool, the Internet is literally unlimited, circumscribed only by a lawyer's imagination and searching skills." *Id.*

145. Anna Wilde Matthews, *How the Web Yanked [An] Obscure U.S. Agency Into Legal Limelight - Copyright Office Finds Itself At Center of Tug-of-War Over Digital Protections,* WALL ST. J., June 14, 2000, at A1, A12.

146. *See, e.g.,* Robert M. Kunstadt, *Fat Lady Hasn't Sung on MP3,* NAT'L L.J., July 17, 2000, at A19 (lamenting that hackers have developed various ways to circulate files on the Internet without central supervision, and stating that the judicial system "seems helpless" because it is "[f]aced with such widespread flouting of the system.").

147. *See, e.g.,* Ian C. Ballon, *The Law of the Internet: Developing a Framework for Making New Law,* in PRACTICING LAW INSTITUTE, FIRST ANNUAL INTERNET LAW INSTITUTE 9, 12-15 (1997) (describing how anonymity removes various societal norms); Joyce Cohen, *Revenge Among the Nerds - For the Aggrieved, the Internet Makes Retribution Disturbingly Easy,* N.Y. TIMES, Aug. 24, 2000, at D1 (noting ease of hiding an identity on the Internet).

switched their gender on the Internet.[148] Internet users may assume alternative identities out of curiosity, amusement, or as a challenge to "their online acting skills."[149] They may switch back to their own gender and identity at some point, and the assumption of an alternative identity may be only temporary. When Internet users assume another identity, it is usually done without harm to others.[150] A person in a public chatroom, for example, will normally not harm anyone else by assuming another identity.[151]

There are many exceptions to this observation; in particular, the assumption of another person's identity might accompany clearly criminal activity, such as when the Internet user appropriates another person's name, personal information, and perhaps even credit card and financial information for personal profit instead of personal amusement.[152] The Internet has created unprecedented access to personal information,[153] some of which may be misused for fraudulent and illegal purposes.[154] Fears that personal information can be easily misused were often voiced in connection with new federal legislation to permit consumers and businesses to "sign" enforceable contracts electronically without the necessity of following up those electronic signatures with paper copies.[155] Similar fears will continue to be voiced as states enact the *Uniform Computer Information Transactions Act,* promulgated by the National Conference

148. *See* Bruce Headlam, *Boys Will Be Boys, and Sometimes Girls, in Online Communities,* N.Y. TIMES, May 25, 2000, at D8 (reporting a study titled "The Social Geography of Gender-Switching in Virtual Environments on the Internet," published in the *Journal of Information, Communication, and Society*).

149. *Id.*

150. *But see* Michael D. Goldhaber, *Cybersmear Pioneer,* NAT'L L.J., July 17, 2000, at A20 (describing problems caused by anonymous posters who defame corporations on the Internet, a practice known as a "cybersmear.").

151. *See, e.g.,* Knopf, *supra* note 113, at 86 ("Courts also have treated chat rooms as public places which do not provide an expectation of privacy.").

152. *See, e.g.,* Katherine Mieszkowski, *Credit Cards Vulnerable in Cyberspace: Study,* CHI. SUN-TIMES, Aug. 9, 2000, at 64.

153. *See, e.g.,* Lewis, *supra* note 15, at D1 ("Many people entrust their most intimate and sensitive information to their computers. So snoopware makes possible the computer equivalent of reading other people's private diaries, opening their mail, going through their garbage, scanning their bank statements and portfolios, cracking their safes, tapping their phones, and peeping through their windows, all at once.").

154. *See, e.g.,* Rick Hepp, *Losing Your Identity on the Web,* CHI. TRIB., June 12, 2000, § 4, at 1, 9 ("Easy access to all sorts of personal information stored on various Internet sites makes it pretty simple for a thief to grab your data and use it to obtain a bogus credit card in your name.").

155. *See, e.g.,* Lizette Alvarez & Jeri Clausing, *Senate Approves Bill that Allows Online Contracts,* N.Y. TIMES, June 17, 2000, at A1; *see also* William Neikirk, *House Says It's OK to Sign - On-Line,* CHI. TRIB., June 15, 2000, § 1, at 1, 26.

of Commissioners on Uniform State Laws.[156]

The general issue of Internet fraud is one that is commanding increasing attention. There have been calls for new federal regulations and even new federal agencies to police various aspects of the ever-expanding use of the Internet.[157] Some owners of commercial web sites assert that they are capable of policing themselves and would prefer self-regulation rather than government regulation of their activities.[158] Such a preference may be understandable given that the Internet is characterized by rapid change while the promulgation of new federal regulations must normally comply with time-consuming procedures, such as the notice and comment periods under the Administrative Procedure Act.[159] In short, by the time the government can respond to a new development, the Internet community feels that it may have already rendered any government-proposed solution obsolete. Additionally, some federal government agencies have been criticized for their considering future uses of the Internet in ways that would appear to violate concerns for personal privacy rights, to the extent that those rights may exist in cyberspace.[160] If the government cannot police itself, how can it police others?

A problem with the argument that industry self-regulation should suffice is that "[t]he industry participants are either not the best suited to stymie the spread of online auction fraud or they are incredibly slow to recognize the need for action and take steps to implement their plans."[161] An important principle of industry self-regulation has appar-

156. *See* Va. Acts 2000, ch. 101 (to be codified at VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2). Virginia was the first state to adopt the model law. *Id.* It will enter into effect in that state on July 1, 2001. *Id.*

157. *See, e.g.,* Knopf, *supra* note 113, at 98-99.

158. *Compare* Crissa Shoemaker, *Web Privacy Course Debated - Durbin Bill Pushes Consumer Control*, Chi. Trib., June 2, 2000, § 3, at 3 (noting claims that websites "are plenty capable of protecting the privacy of their customers and should be left to regulate themselves . . .") *with* Glenn R. Simpson, *Online Advertisers Are Negotiating Deal on Privacy Rules With U.S. Regulators,* WALL ST. J., June 13, 2000, at A8 (discussing voluntary negotiations between the Network Advertising Initiative and the Federal Trade Commission but also noting that the Commission has asked Congress for "considerable new authority to regulate Internet privacy.").

159. *See, e.g.,* 5 U.S.C. § 553(d) (1994).

160. *See, e.g.,* Marc Lacey, *Drug Office Ends Tracking of Web Users - White House Admits Privacy Concerns,* N.Y. TIMES, June 22, 2000, at A14; *see also* Frank James, *FBI Defends Use of E-Mail Monitoring Software,* CHI. TRIB., July 25, 2000, § 1, at 1; Ian Brodie, *Outcry Over FBI Secret Search of E-Mails,* THE TIMES [OF LONDON], July 13, 2000, at 20; Ted Bridis, *Judge Prods FBI to Decide on Carnivore,* WALL ST. J., Aug. 3, 2000, at B8; Joe Salkowski, *Life in Cyberspace: Net Users Could Find Federal Case Being Made of E-Mail Messages,* CHI. TRIB., Aug. 14, 2000, § 4, at, 4.

161. James M. Snyder, *Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?,* 52 FED. COMM. L.J. 453, 470 (2000).

ently been that buyers must assume much – if not all – of the risks connected to their online transactions. The principle of "caveat emptor" – let the buyer beware – is a well-known maxim of Roman civil law that many believe applies to the virtual Wild West of the Internet auction world.[162] In this case the principle could also have applied to the seller of a painting; had the painting offered on eBay been an authentic Diebenkorn, Mr. Walton would not have received its "true value" from the online auction,[163] which could have been in the millions of dollars.[164] Furthermore, many other sellers fall victim to buyers who use fraudulent and stolen credit cards.[165]

The Federal Trade Commission (FTC)[166] receives an ever-increasing number of complaints about unfair and deceptive practices in connection with Internet auctions.[167] In 1997 the FTC received 107 complaints of Internet auction fraud.[168] By 1999, the number of complaints of alleged Internet auction fraud had jumped to 10,700.[169] Internet complaints represent the largest category of complaints before the Federal Trade Commission, accounting now for up to 15 percent of all complaints made.[170] Of those who lost money to alleged Internet auction fraud, the average

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162. *See, e.g.,* Nick Pachetti, *Is "Buyer Beware" eBay's Bottom Line?,* MONEY MAGAZINE, July 1, 2000, *available at* 2000 WL 3963641; Gary Cohen, *eBay Gets an Art Lesson,* U.S. NEWS & WORLD REP., May 22, 2000, at 61; Michael Kimmelman, *Click Here for Glamour, Drama and Michelangelo,* N.Y. TIMES, May 15, 2000, at E1; Joan Roberts, *Buying Art Online,* N.Y. TIMES, June 7, 2000, at A30 (letter to the editor); Karen Samples, *Caveat Emptor – More Online Hijinks,* CINCINNATI ENQUIRER, May 12, 2000, at A18; *It's a Commercial Jungle Out There,* OMAHA WORLD-HERALD, May 12, 2000, at 26 (editorial).

163. *See* Roberts, *supra* note 162, at A30.

164. *See* Coile, *supra* note 65, at A11 (noting sale of a Diebenkorn painting for $3.9 million).

165. *See* Lisa Guernsey, *supra* note 32, at G1, G7.

166. *Statement of Eileen Harrington, Associate Director of the Bureau of Consumer Protection at the Federal Trade Commission on "Consumer Protection in Cyberspace: Combating Fraud on the Internet," Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the U.S. House of Representatives Committee on Commerce* (June 25, 1998).

> The primary legislative mandate of the Federal Trade Commission is to enforce the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. With the exception of certain industries, this statute provides the Commission with broad law enforcement authority over virtually every sector in our economy; commerce on the Internet falls within the broad sweep of this statutory mandate.

Id.

167. *See* Dobrzynski, *supra* note 6, at C1; *see, e.g.,* Kenneth A. Michaels, Jr., *Internet Privacy Protection: Complying with COPPA [the Children's Online Privacy Protection Act],* CBA RECORD, Apr. 2000, at 56.

168. *See, e.g.,* Kong, *supra* note 10, at 3B.

169. *See* Dobrzynski, *supra* note 6, at C1, C22; *see also* Hansell & Dobrzynski, *supra* note 4, at A1.

170. *See* Hansell & Dobrzynski, *supra* note 4, at A1.

loss was estimated by the National Consumers' League to be $293 in 1999.[171]

There is no indication that online fraud will fade away anytime soon. The problem is compounded by the failure of companies such as eBay to suspend users who appear to commit open acts of fraud.[172] Members of the public, including those who trade items on eBay, should be able to expect that harsher punishments will fall on persons who perpetrate fraud. Such expectations may be especially high when those who make the false statements are lawyers. As one court noted in a different context, "[t]he degree of truthfulness expected from a lawyer is higher than that expected from others."[173]

The practice of law is regulated by a complex matrix of statutes, court rules, administrative rules, and rules of professional responsibility.[174] Because law practice affects the public interest, it is subject to this extensive regulation as an exercise of the State's police power; because law practice also affects the administration of justice, it is subject to regulation by the courts, and usually by the highest court of that state or its designated commission for professional responsibility.[175] By tradition, the highest court of the jurisdiction where the attorney is licensed, rather than the state legislature, exercises this ultimate authority over attorney discipline.[176] The courts exercise their authority to license, regulate, and discipline attorneys for the public welfare and to ensure the proper administration of justice.[177] In this context, the goal of attorney disciplinary proceedings is not to "punish" an individual attorney,[178] but to protect the interests of the public,[179] the legal profession, our "system

171. *See, e.g.*, Kong, *supra* note 10, at 3B.

172. *See, e.g.*, Dobrzynski3, *supra* note 4, at A1, C8. For example, the initial 30-day suspension given to Mr. Walton was not for creating a false history of the painting and of his own life, but for alleged shill bidding. *Id.*

173. In re Steffen, 567 P.2d 544, 545 (Or. 1977).

174. *See generally* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (7th ed. 2000).

175. *See, e.g.*, Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 15 (Ill. 2000).

176. *See, e.g.*, In re Gregory, 411 S.E.2d 430, 431 (S.C. 1991); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 79 (1986).

177. *See, e.g.*, State ex rel. Oklahoma Bar Ass'n v. Braswell, 975 P.2d 401, 431 (Okla. 1988).

178. *See, e.g.*, Ex parte Wall, 107 U.S. 265, 289 (1882) ("The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them."); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 79 (1986).

179. *See, e.g.*, In re Sharp, 674 A.2d 899, 900 (D.C. 1996) ("The traditional view of Anglo-American jurisprudence is that disbarment is intended not as punishment, but as protection to the public."); Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 13 (Ill. 2000) (describing a desire to "protect the public from unscrupulous attorneys"); In re Bock, 607 A.2d 1307, 1310 (N.J. 1992) ("The attorney-disciplinary system is designed primarily to

of jurisprudence,"[180] and even the judiciary itself.[181]

An unfortunate reality of law practice today is that "lawyer misconduct spans a continuum of behavior."[182] Most cases of attorney discipline relate directly to client matters or the practice of law, as, for example, when an attorney embezzles or commingles client funds,[183] alters a legal document after it has been notarized,[184] fails to appear at a scheduled court hearing,[185] fails to communicate with a client or provide information on the status of a case,[186] or fails to report another attorney's misconduct.[187] Yet other rules apply outside the scope of an attorney-client relationship. One set of disciplinary rules comes into play when an attorney commits "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other re-

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preserve public confidence in the legal system. The goal of the disciplinary proceedings is not to punish, of course, but to protect the interests of the public and the bar, mindful of the interests of the individual involved.").

180. Joyce E. Peters, *Waiting for the Disciplinary Shoe to Drop,* WASH. LAW., July/Aug. 2000, at 12.

181. *See, e.g.,* In re Hickey, 788 P.2d 684, 687 (Cal. 1990) ("The primary purposes of sanctions imposed for professional misconduct are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by its members; and the preservation of public trust in the legal profession."); State ex rel. Oklahoma Bar Ass'n, 975 P.2d at 431 ("The object of a disciplinary proceeding is not to punish, but to evaluate a lawyer's continued fitness to practice law in light of this court's obligation to safeguard the interest of the public, of the judiciary, and of the legal profession."); Schoolfield v. Tennessee Bar Ass'n, 353 S.W.2d 401, 404 (Tenn. 1962) ("The purpose of disbarment is not primarily to punish, but to protect the court from the administration of persons unfit to preside as attorneys."). *See also* Illinois Judicial Ethics Committee Advisory Op. 99-6 (Apr. 14, 1999), http://ija.org/ethicsop/99-06.htm (visited September 1, 2000); Steven Lubet, *Judicial Ethics and Private Lives,* 79 NW. U. L. REV. 983, 987 (1985) ("Judges have available an array of disciplinary measures that are not available to lawyers, ranging from publicly or privately chastising the lawyer, e.g., for a sexist or racist remark, to holding the lawyer in contempt, to reporting the lawyer to the Attorney Registration and Disciplinary Commission. Care should be taken to punish the lawyer, however, not the client."). Judges are also subject to ethical rules that govern their private behavior and that require "judges to maintain 'high standards of conduct' even in their daily lives." *Id.*; *see also* William Glaberson, *States Rein In Truth-Bending In Court Races - Judges Face Penalties for Deceiving Voters,* N.Y. TIMES, Aug. 23, 2000, at A1.

182. Illinois Judicial Ethics Committee Advisory Op. 99-6 (Apr. 14, 1999), http://ija.org/ethicsop/99-06.htm (visited Oct. 25, 2000).

183. *See, e.g.,* Haimes v. Mississippi Bar, 601 So.2d 851, 854 (Miss. 1992).

184. *See, e.g.,* In re Fisher, 684 N.E.2d 197, 199 (Ind. 1997).

185. *See, e.g.,* Kentucky Bar Ass'n v. Greer, 959 S.W.2d 97, 98 (Ky. 1998).

186. *See, e.g., id.*; *see also* INTERNET LAW, *supra* note 138, AT III 1-6. ("You must keep clients informed about general matters that may be of interest to them and the specific, private matters in which you are representing them.").

187. *See, e.g.,* Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 13 (Ill. 2000); In re Himmel, 533 N.E.2d 790, 795-96 (Ill. 1988); MORGAN & ROTUNDA, *supra* note 174, at 68-69.

spects."[188] In this context, courts complain that "lawyers who act illegally diminish the stature of the legal profession and reduce public confidence in the rule of law."[189] A second set of disciplinary rules does not require conviction of a criminal offense, but merely "conduct involving dishonesty, fraud, deceit, or misrepresentation."[190] It may not even be necessary that an attorney succeed in a course of criminal or fraudulent conduct in order to face liability, as the *ABA Model Rules of Professional Conduct* prohibit even an attempt to violate a disciplinary rule.[191]

Imposing a higher standard of conduct for the conduct of attorneys outside the practice of law is far from a new concept in Anglo-American jurisprudence. In 1882 the United States Supreme Court summarized a string of earlier decisions from England:

> The rule to be deduced from all the English authorities seems to be this: that an attorney will be struck off the roll if convicted of a felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without a previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney: but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted.[192]

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188. ABA MODEL RULES OF PROFESSIONAL CONDUCT, R. 8.4(b); *see also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(3) ("A lawyer shall not . . . Engage in illegal conduct involving moral turpitude.").

189. Standing Committee on Discipline of the United States District Court v. Ross, 735 F.2d 1168, 1171 (9th Cir. 1984); Statewide Grievance Committee v. Hochberg, No. CV 970575688S, 1998 WL 211948, *2 (Conn. Super. Ct. April 17, 1998); Matter of Christie, 574 A.2d 845, 851 (Del. 1990).

190. ABA MODEL RULES OF PROFESSIONAL CONDUCT, R. 8.4(c); *see also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(4) ("A lawyer shall not . . . Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

191. ABA Model Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . .").

192. Ex parte Wall, 107 U.S. (2 Otto) 265, 280 (1882). In approving the disciplinary action taken by the lower court, Justice Bradley stated that the attorney's participation in the lynching was:

> not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government that he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordi-

In that decision, the United States Supreme Court affirmed an order disbarring an attorney who participated in leading a lynch mob that murdered a defendant during a temporary recess in the court proceedings.[193] Justice Field, in his dissenting opinion, stated:

> It is not for every moral offence which may leave a stain upon character that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming table; some have been dissolute in their habits; some have been indifferent to their pecuniary obligations; some have wasted estates in riotous living; some have been engaged in broils and quarrels disturbing the public peace; but for none of these things could the court interfere and summon the attorney to answer, and, if his conduct should not be satisfactorily explained, proceed to disbar him. It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them. He is disbarred in such case for the protection both of the court and of the public.[194]

Many lawyers and law students do not fully appreciate that the rules of professional conduct "make no distinction based on where or when the misconduct occurs."[195] The rules "do not simply apply to misconduct that occurs in the law office or the courthouse or in the course of an attorney-client relationship. A lawyer doesn't have to be practicing law for the rules to apply, and a disciplinary proceeding, which is quasi-criminal, may occur in addition to any criminal case that results."[196]

The status or prestige of the lawyer who is subject to discipline will not be protect him from disciplinary proceedings. In Arkansas, for exam-

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> nary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered.
>
> But besides the character of the act itself, as denoting a gross want of fealty to the law and repudiation of legal government, the particular circumstances of place and time invest it with additional aggravations. The United States court was in session; this enormity was perpetrated at its door; the victim was hanged on a tree, with audacious effrontery, in the virtual presence of the court! No respect for the dignity of the government as represented by its judicial department was even affected; the judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage?
>
> We have no hesitation as to the character of the act being sufficient to authorize the action of the court.

Id. at 274.

193. *See id.*

194. *Id.* at 306-07 (Field, J., dissenting).

195. Peters, *supra* note 180, at 12.

196. *Id.*

ple, a disciplinary committee of the Arkansas Supreme Court recommended that President William Clinton be disbarred for testifying falsely during a 1998 deposition lawsuit brought by Paula Jones that he did not have "sexual relations" with former White House intern Monica Lewinsky.[197] President Clinton contested the attempt to remove his law license, noting in part that although his deposition testimony was part of a lawsuit, his testimony was unrelated to his practice of law. A filing on his behalf stated that: "In Arkansas disciplinary cases which do not involve the practice of law or a felony conviction, the sanction of disbarment has historically been regarded as disproportionately severe and has not been imposed."[198]

Far from being an isolated cause of discipline, almost every jurisdiction has had the misfortune of finding it necessary to discipline attorneys for serious misconduct that took place outside the context of formal legal representation of client matters. Jurisdictions that have issued decisions in earlier cases include Alabama,[199] Alaska,[200] Arizona,[201] California,[202] Colorado,[203] Connecticut,[204] Delaware,[205] the District of

197. *See Mr. Clinton's Disbarment Case,* N.Y. TIMES, May 25, 2000, at A30 (noting that Clinton's testimony was not delivered as a lawyer but as a private defendant in a lawsuit that he considered to be politically motivated); *see also* David E. Rovella, *Clinton Has New Nemesis – Bar Prosecutor's Case For Disbarment Has Worrisome Strength,* NAT'L L.J., July 17, 2000, at A1, A8.

198. *See, e.g.,* James Jefferson, *Clinton Says Disbarment Unduly Harsh,* CHI. SUN-TIMES, Aug. 30, 2000, at 32; Neil A. Lewis, *Clinton Says Disbarment Is Too Harsh a Penalty,* N.Y. TIMES, Aug. 30, 2000, at A15; *Clinton Files Motion Asking to Retain His Law License,* CHI. TRIB., Aug. 30, 2000, §1, at 4. Other jurisdictions have held that "[a] sanction imposed on an attorney should generally be consistent with sanctions imposed upon other attorneys for similar misconduct." In re Twohey, 727 N.E.2d 1028, 1034 (Ill. App. Ct. 2000).

199. *See, e.g.,* Ex parte Grace 13 So.2d 178, 178 (Ala. 1943) ("the conduct justifying disbarment or disciplinary measures need not be connected with any professional employment.").

200. *See, e.g.,* In re Preston, 616 P.2d 1, 5 (Alaska 1980) ("We reject Preston's contentions that because his conduct was unrelated to his professional skill and ability to practice law that he should receive no discipline.").

201. *See, e.g.,* In re Pappas, 768 P.2d 1161, 1166 (Ariz. 1988) ("although [the attorney] may [have acted] as an investment advisor or otherwise, [the attorney] was 'bound by the ethical requirements of [the legal] profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity."); In re Horwitz, 881 P.2d 352, 356 (Ariz. 1994) (in disbarring a lawyer who was found guilty of negligent homicide for driving his car into a police car had blood tests that showed cocaine use, the court stated that "[w]ith due respect to Thomas More, who we fear is an exception to the rule, we do not equate the practice of law with the path leading to sainthood" but held that "the public has a right to expect that lawyers will, in general, live as law-abiding citizens.").

202. *See, e.g.,* Bullock v. Vultee, 808 P.2d 808, 812 (Cal. 1991); In re Hickey, 788 P.2d 684, 688 (Cal. 1990); In re Bloom, 745 P.2d 61, 63-64 (Cal. 1987). The law of California may merit special consideration here, given that California is the home state of the attorney who attempted to sell the painting. The *California Business and Professional Code* allows

Columbia,[206] Florida,[207] Georgia,[208] Hawai'i,[209] Illinois,[210] Indiana,[211]

disbarment or suspension of any attorney who commits an act involving dishonesty, without regard to whether that act occurred in "the course of his relations as an attorney or otherwise," and without regard to whether the act is a felony, misdemeanor, or not a crime at all. According to the statute: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." CAL. BUS. & PROF. CODE § 6106 (West 1995). "Moral turpitude" has been held to include fraud. *See* Call v. State Bar of California, 287 P.2d 761, 764 (Cal. 1955). If the act is a crime, the attorney may be disbarred or suspended even before a criminal conviction is entered. "If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor." CAL. BUS. & PROF. CODE § 6106 (West 1995). Indeed, even an acquittal will not bar subsequent disciplinary actions. *See* Hawkins v. State Bar of California, 591 P.2d 524, 526 (Cal. 1979); Yapp v. State Bar of California, 402 P.2d 361, 365 (Cal. 1965). California has also held that an attorney must conform to the *Rules of Professional Conduct* in the provision of all services, whether they be legal services or services of some other kind. *See* Kelly v. State Bar of California, 808 P.2d 808, 812 (Cal. 1991).

203. *See, e.g.,* People ex rel. Colorado Bar Ass'n v. Patterson, 138 P. 30, 31 (Colo. 1914) ("It is the duty of a lawyer . . . to transact whatever business he may attend to in a reputable and honorable manner, and he is held to the rule of honorable conduct as he is held to the rule of honorable conduct as a citizen, whether that conduct relates to the practice of law or not.").

204. *See, e.g.,* Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 294 (Conn. 1930) ("Professional honesty and honor are not to be expected as the accompaniment of dishonesty and dishonor in other relations. So it is that we . . . hold . . . that misconduct, indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismission as well as exclusion from the bar.").

205. *See, e.g.,* In re Christie, 574 A.2d 845, 851 (Del. 1990) (court disciplined an attorney who invited two teenage males to his apartment, gave them alcoholic beverages, showed them X-rated videotapes, and masturbated in front of them). The court stated that "[a]lthough protection of the client is a primary purpose of disciplinary action, there are other important purposes to be served by lawyer discipline. Disciplinary proceedings also serve to foster public confidence in the Bar, to preserve the integrity of the profession, and to deter other lawyers from similar conduct." *Id.*

206. *See, e.g.,* In re Kennedy, 542 A.2d 1225, 1228 (D.C. 1988). In *Kennedy,* a lawyer falsely inflated his annual salary when applying his mortgage and told his secretary to verify the false information if the bank phoned. *Id.* The court stated that "acts unrelated to the practice of law may nonetheless violate DR 1-102(A)(4). The rationale is that some 'conduct [in a private capacity] reflects adversely on professional fitness." *Id.; accord* In re Confidential, 664 A.2d 364, 367-68 (D.C. 1995). *See also* In re Sharp, 674 A.2d 899, 900 (D.C. 1996) (A lawyer disbarred for taking indecent liberties with a child.); In re Hadzi-Antich, 497 A.2d 1062, 1063 (D.C. 1985) (disciplining an attorney for submitting false resume to a prospective employer); Peters, *supra* note 180, at 12-14 (summarizing various cases from the District of Columbia and sister jurisdictions).

207. *See, e.g.,* Florida Bar v. Hosner, 520 So.2d 567, 568 (Fla. 1988) (disciplining an attorney whose leasing company failed to provide a customer with title to an automobile until almost a year after the customer paid in full for it). The court there stated that

> lawyers are necessarily held to a higher standard of conduct in business dealings than are nonlawyers. (citation omitted) Were we to follow Hosner's argument, we would be powerless to discipline attorneys who engage in conduct that is illegal, but not related to the practice of law, such as dealing in cocaine, or securities

Iowa,[212] Kansas,[213] Kentucky,[214] Louisiana,[215] Maryland,[216] Massachu-

fraud. Obviously we may discipline attorneys who engage in such conduct, just as we discipline Hosner for engaging in conduct which is improper, though not necessarily related to the practice of law.

Id.

208. *See, e.g.,* Thomas v. State, 75 S.E.2d 193, 196 (Ga. Ct. App. 1953) (asking whether it is "necessary that the misconduct be limited to what occurs in the course of [the attorney's] work as a member of the bar. Misconduct outside professional dealings may be sufficient to justify disbarment when indicative of moral fitness for the profession."). *See also, e.g.,* In re Miller, 441 S.E.2d 126, 127 (Ga. 1994) (disbarring attorney under Standard 66, Rule 4-102 of the Rules and Regulations for the State Bar of Georgia after felony convictions for child molestation, aggravated child molestation, solicitation of sodomy, and a violation of the Georgia Controlled Substances Act); Gordon v. Clinkscales, 114 S.E.2d 15, 19 (Ga. 1960) (holding that "irrespective of whether one is engaged in the practice of law, or activities disconnected with the practice, including judge of the superior court, his license will be canceled for conduct that would constitute grounds for disbarment of any attorney.").

209. *See, e.g.,* Disciplinary Bd. of the Hawaii Supreme Court, 592 P.2d 814, 818 (Hawaii 1979) ("It is the solemn duty of this court to regulate the practice of law in this state and to see that the integrity of the profession is maintained by disciplining attorneys who indulge in practices inconsistent with the high ethical standards demanded of all members of the bar. In carrying out this duty, we will not hesitate to impose substantial sanctions upon an attorney for any act whether committed in a professional capacity or not which evidences want of personal honesty and integrity or renders such attorney unworthy of public confidence."); In re Corey, 515 P.2d 400, 403 (Hawaii 1973) (holding that an attorney's misrepresentation in application for mortgage loan for a corporation warranted six-month suspension from the practice of law).

210. In re Imming, 545 N.E.2d 715, 722 (Ill. 1989) ("even if we were to agree with respondent that he was not in an attorney-client relationship with the investors in this case when the loans were made, respondent would still be subject to the rigors of the Code. An attorney may be subject to discipline for conduct outside of his professional capacity for any act that evidences an absence of professional or personal honesty that renders him unworthy of public confidence."); In re Vavrik, 512 N.E.2d 1226, 1228 (Ill. 1987) ("it is not the conviction itself which gives rise to discipline but the underlying conduct . . . It is not necessary that an attorney's misconduct be in the discharge of his professional duties in order to warrant discipline; any act which evidences a want of personal honesty or integrity may be sufficient to warrant disbarment."). *See also* Eva Matela, *Character & Fitness – Record Reveals Hale Failed to Sustain Burden of Proof by Clear and Convincing Evidence,* CHI. BAR ASS'N RECORD, June/July 2000, at 63 (describing, among other matters, the erroneous perception held by Matthew Hale – founder of the so-called "World Church of the Creator" – that the Rules of Professional Conduct did not apply to an insulting letter he had written to a woman who wrote an article in support of affirmative action; Hale had unsuccessfully argued that the Disciplinary Rules should not apply to a "fellow in his own house writing his own letter.").

211. *See, e.g.,* In re Littell, 294 N.E.2d 126, 130 (Ind. 1973) ("if the lawyer be nefarious in other endeavors, he may not escape accountability under the code of professional responsibility, although his conduct, in professional pursuits, be exemplar.").

212. "[I]t is not necessary for the [Iowa Supreme Court Board of Professional Ethics and Conduct] to prove that the respondent was acting as a lawyer at the time of the alleged misconduct. Lawyers do not shed their professional responsibility in their personal lives." Iowa Supreme Court v. Walters, 603 N.W.2d 772, 776 (Iowa 1999) (attorney wrote bad checks while repaying loan from former client); *see also* Iowa State Bar Ass'n v. Hall, 463

N.W.2d 30, 35 (Iowa 1990) (noting further that an attorney's actions can be compounded further if the attorney gives false testimony in a sworn deposition or makes false representations to the Committee on Professional Ethics and Conduct); Iowa Supreme Court Board of Professional Ethics and Conduct v. Polson, 569 N.W.2d 612, 613-14 (Iowa 1997) (finding that an intoxicated attorney who grabbed his wife's neck and then repeatedly violated a protective order had engaged in "contumacious conduct" that "prejudiced the administration of justice" and justified a two-year suspension from the practice of law, even though the Board had recommended a suspension of only nine months).

213. *See, e.g.,* Matter of Jones, 843 P.2d 709, 712 (Kan. 1992) (because "lawyers are subject to discipline for improper conduct in individual, personal, or business activities," it was no defense that a lawyer who stole money to support his cocaine habit stole that money from his employer rather than from a client); *cf.* Matter of Gooding, 917 P.2d 414, 419-20 (Kan. 1996) (after reviewing several mitigating factors, the court suspended a disciplinary order and instead placed an attorney on probation for two years subject to a number of particular restrictions and requirements).

214. "An attorney is an officer of the court and it is his duty and it is his responsibility to conduct his personal *and* professional life in a manner as to be above reproach." Kentucky Bar Ass'n v. Jones, 759 S.W.2d 61, 63 (Ky. 1988) (emphasis in original) (finding that driving an automobile while drunk "is not acceptable conduct for an attorney . . ."); *accord* Kentucky Bar Ass'n v. Dunn, 965 S.W.2d 158, 159 (Ky. 1998) (among other disciplinary measures, suspending for six months an attorney who was arrested at least twice for driving under the influence of alcohol). *See also* Pansiera v. Kentucky Bar Ass'n, 959 S.W.2d 96 (Ky. 1998) (allowing attorney to surrender his license to practice law under terms of disbarment for acts of sexual misconduct with a minor in another state).

215. *See, e.g.,* In re Deshotels, 719 So.2d 402, 406 (La. 1998)("While we acknowledge these convictions [for driving while intoxicated and for disturbing the peace] do not directly involve the practice of law, these matters, together with the conduct at issue in the Wiggins matter, show a pattern of misconduct which reflects adversely on respondent's professional fitness."); In re Brown, 674 So.2d 243, 246 (La. 1996) ("Conviction of a crime may warrant disbarment, even though the crime was not directly connected with the practice of law."); *see also Louisiana Bar Backs Lifetime Disbarment,* LAWYER'S WEEKLY USA, June 26, 2000, at B2 (reporting on a recommendation from the Louisiana State Bar Association to expand the power of the Louisiana Supreme Court to disbar lawyers for offenses including sex crimes and robbery).

216. *See, e.g.,* Attorney Grievance Comm'n of Maryland v. Shaw, 732 A.2d 876, 885 (Md. 1999) ("to maintain the integrity of the bar, we have determined that, not only misconduct arising in the practice of law is sanctionable, but that conduct by the attorney arising in the attorney's other, non-professional pursuits is also a proper subject of disciplinary proceedings."). Earlier precedents, however, indicated that attorney discipline for conduct outside the practice of law was administered "only if that conduct is dishonest or is conduct that reflects adversely on the legal profession, not each time [the attorneys] may undertake tasks for which they are underqualified or may be inexperienced." *Id.* at 887. *See also* Attorney Grievance Comm'n of Maryland v. Protokowicz, 619 A.2d 100, 104-05 (Md. 1993) (attorney disciplined for helping a long-time friend breaking into the home of his estranged wife, taking personal property and materials for evidence in their divorce case, and killing the family's cat in a microwave oven); Attorney Grievance Comm'n of Maryland v. Painter, 739 A.2d 24, 32 (Md. 1999) (attorney who commits acts of violence on his wife and children, and violates court ordered probation, has engaged in conduct prejudicial to the administration of justice and is subject to disbarment); Valerie G. Esch, *Attorney Grievance Comm'n of Maryland v. Painter - An Attorney Commits Repeated Domestic Violence and Has Been Convicted for Similar Conduct is Subject to Disbarment,* 30 U. BALT. L. F. 72 (1999).

setts,[217] Minnesota,[218] Mississippi,[219] Missouri,[220] Montana,[221] Nebraska,[222] New Hampshire,[223] New Jersey,[224] New Mexico,[225] New

217. *Cf.* In re DeSaulnier, 274 N.E.2d 454, 456 (Mass. 1971) (finding that the court may discipline a judge "for misconduct or acts of impropriety, whether such acts involve his judicial conduct or other conduct.").

218. *See, e.g.*, In re Shinnick, 552 N.W.2d 212, 214 (Minn. 1996) ("Discipline is appropriate in some cases in which attorneys engage in misconduct outside the practice of law."); In re Raskin, 239 N.W.2d 459, 461 (Minn. 1976); *accord* In re Larson, 324 N.W.2d 656, 659 (Minn. 1982) ("Both clients and nonclients have a right to assume that lawyers will treat them fairly and honestly in all of their dealings, whether professional or otherwise.").

219. *See, e.g.*, Haimes v. Mississippi Bar, 601 So.2d 851, 855 (Miss. 1992) ("Even if no attorney-client relationship had existed between [the attorney] and his ward or between [the attorney] and the guardianship, he conduct would still be subject to discipline."). In an earlier decision, however, the Mississippi Supreme Court seems to set a somewhat higher standard for discipline when the behavior in question does not involve an attorney-client relationship. The court stated that where the conduct arises outside of a professional capacity, "discipline should be imposed only if the alleged 'misconduct is of a serious nature, and tends to show him to be an unfit person to be an attorney.'" Watkins v. Mississippi Bar, 589 So.2d 660, 664 (Miss. 1991).

220. *See, e.g.*, In re Wilson, 391 S.W.2d 914, 917-18 (Mo. 1965) ("The right and power to discipline an attorney, as one of its officers, is inherent in the court . . . . This power is not limited to those instances of attorney misconduct wherein he has been employed, or has acted, in a professional capacity; but, on the contrary, this power may be exercised where his misconduct outside the scope of his professional relations shows him to be an unfit person to practice law.").

221. *See, e.g.*, In re Goldman, 588 P.2d 964, 974 (Mont. 1978) ("Any acts committed by an attorney, contrary to the highest standards of honesty, justice, or morality . . . . whether committed in his capacity as attorney, or otherwise, may constitute cause for discipline.").

222. *See, e.g.*, State ex rel. Nebraska State Bar Ass'n v. Douglas, 416 N.W.2d 515, 535 (Neb. 1987) ("An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had."); *see also* State ex rel. Nebraska State Bar Ass'n v. Matt, 327 N.W.2d 622, 623-24 (Neb. 1982) ("There can be no doubt that aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action."). The Nebraska Supreme Court uses a six-part test to determine the appropriate level of discipline to impose in a case of attorney misconduct, including misconduct that is not directly related to the practice of law. The factors are:

(1) the nature of the offense;
(2) the need for deterring others;
(3) the maintenance of the reputation of the bar as a whole;
(4) the protection of the public;
(5) the attitude of the offender generally; and
(6) the offender's present or future fitness to continue in the practice of law.

State ex rel. Nebraska State Bar Ass'n v. Brown, 560 N.W.2d 123, 129 (Neb. 1997).

223. *See, e.g.*, In re Hobbs, 73 A. 303, 304-05 (N.H. 1909); *cf.* Pamela Ferdinand, *N.H. Chief Justice Faces Impeachment – House Committee Declines to Sanction Two Others in Supreme Court Probe*, WASH. POST, July 6, 2000, at A3.

224. "Misconduct by an attorney, whether private or professional in nature, that evidences want of the good character and integrity that are essential for a person to engage in the practice of law constitutes a basis for discipline. The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities

York,[226] North Carolina,[227] Ohio,[228] Oklahoma,[229] Oregon,[230] Penn-

that may not directly involve the practice of law or affect the attorney's clients." In re Pepe, 659 A.2d 1379, 1383 (N.J. 1995) (suspending an attorney for using marijuana and sharing it with others); *see also* In re Hasbrouck, 657 A.2d 878, 880 (N.J. 1995) (addiction to a controlled substance warranted suspension when attorney used her father's prescription pads to write her own prescriptions); *accord* In re Magid, 655 A.2d 916, 918 (N.J. 1995) ("the private conduct of attorneys may be the subject of public discipline"); In re Bock, 607 A.2d 1307 (N.J. 1992) (same); *see also* Joyce E. Peters, *Waiting for the Disciplinary Shoe to Drop*, WASH. LAW., July/Aug. 2000, at 12, 14-15. The New Jersey Supreme Court explained that the rationale for imposing a higher standard of conduct to activities not directly related to a client matter or to the practice of law is

> not a desire to supervise the private lives of attorneys but rather that the character of a person is single and hence misconduct revealing a deficiency is not less compelling because the attorney was not wearing his or her professional mantle at the time . . . . If misbehavior persuades a person of normal sensibilities that the attorney lacks capacity to discharge his or her professional duties with honor and integrity, the public must be protected from such an attorney.

In re Howard, 673 A.2d 800, 802 (N.J. 1996).

225. *See, e.g.*, In re Norton, 788 P.2d 372, 374 (N.M. 1990) ("The fact that actions and omissions at issue occurred outside the scope of Norton's professional capacity as a lawyer is immaterial.").

226. "It is well-settled that the court's power to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed on members of the bar." Matter of Cohen, 598 N.Y.S.2d 797, 798 (N.Y. App. Div. 1993) (finding judge guilty of professional misconduct for designating a credit union as a depository for funds of children who had not yet attained majority but not disclosing that he had received several interest-free personal loans from that institution); *accord* In re Van de Loo, 659 N.Y.S.2d 899, 902 (N.Y. App. Div. 1997) ("An attorney may be disciplined for conduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the bar.")

227. *See, e.g.*, State ex rel. Solicitor v. Johnson, 88 S.E. 437, 438 (N.C. 1916) (attorney "confessed guilt on indictments charging him with selling spirituous or vinous licquors").

228. *See, e.g.*, Disciplinary Counsel v. Mascio, 725 N.E.2d 1111 (Ohio 2000) (lawyer, while acting as judge, was disciplined for sending out invitations to pool parties that were "undignified" and "lacking in taste"); Dayton Bar Ass'n v. Gross, 581 N.E.2d 520, 521-22 (Ohio 1991) (attorney's theft of his mother's funds by using a power of attorney was cause for discipline).

229. "Discipline is not limited by the Code of Professional Responsibility to conduct which occurs in the course of the attorney-client relationship. This court has the inherent power to discipline lawyers qua officers of the court. Its power extends to acts outside the scope of one's professional practice where the offending conduct bears on the practitioner's fitness to practice law." *State ex rel. Oklahoma Bar Ass'n*, 975 P.2d at 412 (rejecting attorney's defense that he did not have an attorney-client relationship in specific real estate transactions).

230. *See, e.g.*, In re Heider, 341 P.2d 1107, 1118 (Or. 1959). In that case the court stated that it was

> not impressed with petitioner's assertion suggestive of a dual personality; the one a man of business and finance, the other, and apparently a secondary concept, a lawyer. . . . When an attorney so intermingles these two aspects of his livelihood, promoting each by reliance upon the other, he cannot escape responsibility for conduct by averring he was acting in his business capacity and that his actions are to

sylvania,[231] South Carolina,[232] South Dakota,[233] Tennessee,[234] Texas,[235] Utah,[236] Vermont,[237] Virginia,[238] Washington,[239] West Vir-

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> be evaluated and judged by the standards of the competition of the market place, rather than by those of his profession. Law is not a business. It is a learned profession. Under the facts of this case there is no cleavage or separation of responsibility for petitioner's acts as a businessman and as a lawyer. He may not employ and accept the benefits of such intermingling of activity involving both law and business without assuming responsibility for both.

see also In re Steffen, 567 P.2d 544, 545 (Or. 1997). "We agree with the Review Board that it is not necessary that the act with which the accused is charged have been performed in his capacity as a lawyer for it to have violated the Disciplinary Rule. Neither is it necessary, in order to be disciplined, that the conduct be as grievous as that which would bar him from being admitted to practice had he performed the action as a non-lawyer." *Id.* For an interesting challenge to the jurisdiction of the court over disciplinary matters in Oregon, see In re Coe, 731 P.2d 1028, 1031-36 (Or. 1987) (involving a case where an attorney drew checks for attorney fees and personal representative fees in his capacity as personal representative of an estate; the court found that it was not necessary to find that the attorney had acted in his capacity as a lawyer).

231. *See, e.g.,* Office of Disciplinary Counsel v. Casety, 512 A.2d 607, 610 (Pa. 1986). Upon disbarring an attorney who had failed to inform the Disciplinary Council that he had been convicted in California for murdering his girlfriend, the Pennsylvania Supreme Court stated that "[a]n attorney who shows such disrespect for the law has forfeited his privilege to be numbered as an attorney, and is not competent to represent members of the public or to appear before courts." *Id.*

232. *See, e.g.,* In re Gregory, 411 S.E.2d 430, 431 (S.C. 1991) (attorney applying for loan falsified a tax return and superimposed the signature of his accountant). In that case, the court stated that "[m]isconduct" by an attorney "includes acts . . . which violate standards of professional conduct . . ., regardless of whether the acts occur in the course of an attorney-client relationship, as well as acts which tend to bring the legal profession into disrepute." *Id. See also* In re Gregory, 411 S.E.2d 430, 431 (S.C. 1991) (disciplining and attorney who applied for a loan by falsifying a tax return and superimposing the signature of his accountant).

233. *See, e.g.,* In re Morrison, 178 N.W. 732, 733 (S.D. 1920) (approving discipline of an attorney who filed charges of criminal libel with motives of ill will).

234. *Cf.* Schoolfield v. Tennessee Bar Ass'n, 353 S.W.2d 401, 402-03 (Tenn. 1962) (disbarring an attorney for misconduct while sitting as a judge).

235. *See, e.g.,* Minnick v. State Bar of Texas, 790 S.W.2d 87, 91 (Tex. Ct. App. 1990) ("the trial court did not err in disbarring Minnick for conduct that was committed in his capacity as a private person rather than in his capacity as an attorney.").

236. *See, e.g.,* In re Burton, 246 P. 188, 199 (Utah 1926). In that case the court stated that

> misconduct of an attorney, even though outside of his professional dealings as such, may be sufficient to justify his discipline or disbarment. And this court is committed to the doctrine that an attorney, as a member of this court, may be disciplined and disbarred though the acts and conduct are not directly connected with his practice, if they show such a lack of honesty, integrity, and fidelity as to indicate that he is an unfit and improper person to be intrusted with the powers and duties of an attorney.

Id.

237. *See, e.g.,* In re Berk, 602 A.2d 946, 949 (Vt. 1991) ("An attorney is subject to [disciplinary action for] misconduct even for actions committed outside the professional capacity.").

ginia,[240] and Wisconsin.[241] Yet, even in jurisdictions where the courts have not expressly ruled on disciplinary actions for serious misconduct outside of the direct practice of law, relevant court rules and statutes may prohibit dishonest conduct on the part of the lawyer.

The general rule against attorney misconduct even outside the context of an attorney-client relationship is thus well established, although the particular sanctions imposed in each case will necessarily vary depending on factors such as the degrees of intent and culpability, additional factors of harm, other evidence of wrongdoing, and mitigating factors including the attorney's assumption of personal responsibility for the particular behavior in question. As one court stated, "each attorney disciplinary case is unique."[242] In the jurisdictions surveyed, the failure to maintain "personal integrity" outside of the legal representation of a client has resulted in serious disciplinary sanctions for a variety of acts. For example, courts and disciplinary boards have disciplined attorneys (and even some judges) for failing to file income tax returns or other acts of income tax evasion,[243] for writing bad checks,[244] for engaging in

238. *See, e.g.,* Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S.E. 282, 284 (Va. 1934) ("It is not necessary that the offense charged be committed in court or even in the discharge of any professional duty.").

239. *See, e.g.,* In re Snelling, 224 P. 600, 601 (Wash. 1924) (approving discipline of an attorney who filed a fraudulent application to be a notary public, and stating that "a lawyer should know better than to do such things.").

240. *See, e.g.,* Committee on Legal Ethics v. Taylor, 415 S.E.2d 280, 283 (W. Va. 1992) (stating that the action of an attorney who writes a worthless check "at the very least, reflects adversely on his fitness to practice law."). *See also* Lawyer Disciplinary Board v. Swisher, 509 S.E.2d 884, 887 (W. Va. 1998) (finding that a failure to pay a note signed to settle a malpractice action gave rise to further discipline).

241. *See, e.g.,* In re Eisenberg, 423 N.W.2d 867 878 (Wis. 1988) ("We also reject Attorney Eisenberg's argument that in order to constitute misconduct, a lawyer's misrepresentation must have been made to a client, a judge or a jury, must have been made to gain some advantage from the client and must have been made in the context of the lawyer's role as lawyer, not as private citizen."). *See also* In re Cahill, 579 N.W.2d 231, 232 (Wis. 1998) (suspending an attorney for six months following misdemeanor convictions for acts including "fraud of a hotel innkeeper," writing bad checks, driving while intoxicated, and disorderly conduct related to her alcoholism, and noting that none of these offenses involved a client or the woman's "conduct as a lawyer"); In re Scruggs, 475 N.W.2d 160 (Wis. 1991) (suspending an attorney for resume fraud).

242. In re Twohey, 727 N.E.2d 1028, 1037 (Ill. App. Ct. 2000).

243. *See, e.g.,* Matter of Sandbach, 546 A.2d 345 (Del. 1988) ("A lawyer who disregards his duty as a citizen to pay income taxes fails to uphold the standards of his profession, irrespective of any conviction."); In re Sanders, 498 A.2d 148 (Del. 1985) (discipline imposed despite attorney's cooperation in the investigation and "otherwise flawless reputation"); *cf.* In re Goffe, 641 A.2d 458, 466 (D.C. 1994) (the fact that an attorney who fabricated charitable deductions for tax receipts did so as a party rather than as an attorney was irrelevant to the question of discipline); *see also* Steven Lubet, *Judicial Ethics and Private Lives,* 79 Nw. U. L. REV. 983, 991 (1985) (noting discipline of judges convicted of income tax evasion).

"fraudulent or deceitful financial transactions"[245] such as withdrawing money from the bank account of a murdered relative,[246] or for submitting false information when applying for a bank loan.[247] They disciplined one attorney for faking his own death.[248] They have disciplined attorneys (and again, even some judges) for alcoholism,[249] drunk driving,[250] for smoking marijuana,[251] and for using or possessing cocaine.[252] They

244. *See, e.g.,* Iowa Supreme Court v. Walters, 603 N.W.2d 772, 776 (Iowa 1999); In re Pokorny, 453 N.W.2d 345, 347 (Minn. 1990); Committee on Legal Ethics v. Taylor, 415 S.E.2d 280, 283 (W. Va. 1992).

245. *See, e.g.,* In re Shinnick, 552 N.W.2d 212, 212 (Minn. 1996) (noting that "the misconduct alleged . . . arose not from professional activity, but from a series of corporate transactions involving [the attorney] in his personal capacity or as a corporate officer or board member."); In re Cahill, 579 N.W.2d 231, 232 (Wis. 1998) (suspending an attorney for six months following misdemeanor convictions for acts including "fraud of a hotel innkeeper" and writing bad checks).

246. *See* Allen v. State Bar of California, 570 P.2d 1226, 1230 (Cal. 1977) ("The intentional and successful deception of a bank officer is clearly conduct so unprofessional as to warrant discipline.").

247. *See, e.g., State ex rel. Oklahoma Bar Ass'n*, 975 P.2d at 409 ("Providing information to a bank in a loan application indicating that his wife had a certain level of income, knowing that she did not regularly earn that amount . . . can only be described as dishonest and deceitful").

248. *See* In re Bock, 607 A.2d 1307, 1308-11 (N.J. 1992).

249. *See* In re Hickey, 788 P.2d 684, 688 (Cal. 1990) ("When . . . the State Bar finds that an attorney's alcoholism has led him to engage in violent criminal conduct, the State Bar need not wait until the attorney injures a client or neglects his legal duties before it may impose a discipline to ensure the protection of the public."); In re Cahill, 579 N.W.2d 231, 232 (Wis. 1998) (suspending an attorney for six months following misdemeanor convictions for acts including drunk driving and disorderly conduct related to alcoholism); *see also* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 66 (7th ed. 2000) (noting a study from Wash. state that found that 18% of all lawyers and 25% of those in practice for more than 20 years have a problem with drugs or alcohol).

250. *See, e.g.,* Kentucky Bar Ass'n v. Dunn, 965 S.W.2d 158, 159 (Ky. 1998) (among other disciplinary measures, suspending for six months an attorney who was arrested at least twice for driving under the influence of alcohol); People v. Fahselt, 807 P.2d 586, 589 (Colo. 1991) (Quinn, J., dissenting) (stating that a year's suspension for acts including driving under the influence of alcohol would have been more appropriate because a "lawyer is an officer of the court and is obliged to conduct his personal and professional life in a manner that will not bring the legal profession into disrepute."); Steven Lubet, *Judicial Ethics and Private Lives,* 79 Nw. U. L. REV. 983, 990 (1985) (noting discipline of judges who were convicted of driving while intoxicated).

251. *See, e.g.,* In re Pepe, 659 A.2d 1379, 1384 (N.J. 1995); *see also* MORGAN & ROTUNDA, *supra* note 174, at 66 (noting a study by the Association of American Law Schools Special Committee on Substance Abuse in the Law Schools that more than 20% of law students admitted using marijuana in the previous year).

252. *See* In re Horwitz, 881 P.2d 352, 356 (Ariz. 1994); *see also* Florida Bar v. Weintraub, 528 So.2d 367, 368 (Fla. 1988); Disciplinary Bd. of the Hawaii Supreme Court, 592 P.2d 814, 818 (Hawaii 1979); In re Gorman, 379 N.E.2d 970, 971-72 (Ind. 1978); Committee on Professional Ethics v. Green, 285 N.W.2d 17, 18 (Iowa 1979); Matter of Gooding, 917

have disciplined attorneys for vehicular homicide,[253] for acts of domestic violence,[254] for providing alcohol to minors and showing them pornographic films,[255] and for other acts of sexual misconduct.[256] They have disciplined judges for false statements that might be made during judicial election campaigns.[257] They have disciplined attorneys for falsely embellishing a resume given to a prospective employer,[258] for misusing a rental car,[259] and in at least one case, a court has suspended an attorney for one year for misusing the Internet. The case illustrates how disciplinary boards and state supreme courts will continue to struggle with "the application of traditional legal concepts to the new frontier of the

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P.2d 414, 419 (Kan. 1996); State ex rel. Nebraska State Bar Ass'n v. Matt, 327 N.W.2d 622, 623-24 (Neb. 1982); In re Berk, 602 A.2d 946, 949 (Vt. 1991). For additional cases, see Kristine Cordier Karnezis, Annotation, *Narcotics Conviction as Crime of Moral Turpitude Justifying Disbarment or Other Disciplinary Action Against Attorney,* 99 A.L.R.3d 288 (1980).

253. *See* Kentucky Bar Ass'n v. Jones, 759 S.W.2d 61, 63 (Ky. 1988) (suspending for two years an attorney who killed two people while driving under the influence of alcohol); In re Howard, 673 A.2d 800, 802-04 (N.J. 1996) (suspending an attorney for three months following her conviction for criminal homicide caused by driving a vehicle recklessly).

254. *See, e.g.,* In re Nevill, 704 P.2d 1332, 1333-35 (Cal. 1985); *see also* People v. Musick, 960 P.2d 89 (Colo. 1998); In re Knight, 883 P.2d 1055, 1055 (Colo. 1994); In re Walker, 597 N.E.2d 1271, 1271 (Ind. 1992); Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Patterson, 369 N.W.2d 798, 799 (Iowa 1985); In re Magid, 655 A.2d 916, 918 (N.J. 1995); In re Principato, 655 A.2d 920, 922 (N.J. 1995); Esch, *supra* note 216, at 72.

255. *See, e.g.,* In re Christie, 574 A.2d 845, 846-48 (Del. 1990).

256. *See, e.g.,* In re Sharp, 674 A.2d 899, 900 (D.C. 1996) (disbarring a lawyer for taking indecent liberties with a child); *see also* In re Miller, 441 S.E.2d 126, 127 (Ga. 1994) (disbarring an attorney after felony convictions for acts including child molestation, aggravated child molestation, and solicitation of sodomy); Pansiera v. Kentucky Bar Ass'n, 959 S.W.2d 96 (Ky. 1998) (disbarring attorney for multiple acts of "gross sexual misconduct upon a male who was known to be between the ages of 13 and 16 and for whom he had a responsibility as a sponsor in an Alcoholics Anonymous program."); In re Romano, 675 N.Y.S.2d 610, 611 (N.Y. App. Div. 1998) (disbarring attorney who had female clients in workers' compensation cases disrobe so that he could administer "physical examinations"). Disciplinary actions can, of course, also be taken against an attorney who engages in inappropriate sexual behavior with a client or prospective client. *See, e.g.,* People v. Meier, 954 P.2d 1068, 1069 (Col. 1998) (censuring an attorney who made inappropriate comments and who asked inappropriate questions of a sexual nature to a prospective dissolution of marriage client).

257. *See, e.g.,* William Glaberson, *States Rein In Truth-Bending In Court Races - Judges Face Penalties for Deceiving Voters,* N.Y. TIMES, Aug. 23, 2000, at A1.

258. *See, e.g.,* In re Hadzi-Antich, 497 A.2d 1062, 1063 (D.C. 1985); In re Scruggs, 475 N.W.2d 160, 161 (Wis. 1991).

259. *See* Peters, *supra* note 180, at 12, 14 (citing In re Terrell, DCCA No. 85-457) (Feb. 7, 1986) (examining the dishonest use of a rental car by lawyer acting in his private capacity).

Internet."[260]

The Internet case involved Laurence A. Canter, an immigration attorney who lived in Arizona and who was licensed to practice law in Tennessee. Mr. Canter was the co-author of *How to Make a Fortune on the Information Highway*.[261] The book described how in April 1994, Mr. Canter sent a "spam"[262] e-mail advertisement to more than five or six thousand Internet groups and thousands of other e-mail lists in an attempt to find new clients for his immigration law practice.[263] The email

260. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 78 (10th ed. 2000).

261. *See* LAURENCE A. CANTER & MARTHA S. SIEGEL, HOW TO MAKE A FORTUNE ON THE INFORMATION HIGHWAY: EVERYONE'S GUERRILLA GUIDE TO MARKETING ON THE INTERNET AND OTHER ON-LINE SERVICES (1994).

262. "[I]n the vernacular of the Internet, unsolicited e-mail advertising is sometimes referred to pejoratively as 'spam.'" Compuserve Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1018 (D. Ohio 1997); *see also, e.g., Developments in the Law: The Law of Cyberspace,* 112 HARV. L. REV. 1574, 1580, 1601 (1999) (describing "spam" as "deluges of irritating – and often offensive – unsolicited e-mail messages"); *see also Statement of Eileen Harrington, Associate Director of the Bureau of Consumer Protection at the Federal Trade Commission on "Consumer Protection in Cyberspace: Combating Fraud on the Internet," Before the Telecommunications, Trade, and Consumer Protection Subcommittee of the U.S. House of Representatives Committee on Commerce* (June 25, 1998) (describing the acronym "UCE" as referring to "Unsolicited Commercial E-mail"). One court stated that use of the term to describe such e-mail "is derived from a skit performed on the British television show Monty Python's Flying Circus, in which the word 'spam' is repeated to the point of absurdity in a restaurant menu." *Compuserve, Inc.,* 962 F. Supp. at 1018 n.1.

263. *See* In re Canter, Nos. 95-831-O-H, 96-868-O-H, 96-908-O-H, and 96-910-O-H (Disciplinary District O of the Board of Professional Responsibility of the Supreme Court of Tennessee, Feb. 25, 1997), *approved and adopted* (Tenn. June 5, 1997). The message read:

> Green Card Lottery 1994 May Be The Last One! THE DEADLINE HAS BEEN ANNOUNCED.
>
> The Green Card Lottery is a completely legal program giving away a certain allotment of Green Cards to persons born in certain countries. The lottery program was scheduled to continue on a permanent basis. However, recently, Senator Alan J. Simpson introduced a bill into the U.S. Congress that could end any future lotteries. THE 1994 LOTTERY IS SCHEDULED TO TAKE PLACE SOON, BUT IT MAY BE THE VERY LAST ONE.
>
> PERSONS BORN IN MOST COUNTRIES QUALIFY, MANY FOR THE FIRST TIME.
>
> The only countries NOT qualifying are: Mexico, Indio, [The People's Republic of] China; Taiwan, Philippines, North Korea, Canada, United Kingdom (except Northern Ireland), Jamaica, Dominican Republic, El Salvador, and Vietnam.
>
> Lottery registration will take place very soon. 55,000 Green Cards will be given to those who register correctly. NOT JOB IS REQUIRED.
>
> THERE IS A STRICT JUNE DEADLINE. THE TIME TO START IS NOW!!
>
> For the next FREE information via Email, send request to [Name, address, email, telephone number, and fax number omitted].

Id. at 8-9.

message became known as the "Green Card Incident."[264] A Disciplinary Board of the Tennessee Supreme Court found five areas of fault in sending the message. First, the e-mail message was unsolicited and appeared on many bulletin boards that had no relevance to immigration law.[265] Because each reader was required to read at least the introduction of the message, the disciplinary board found that it was "an improper intrusion into the privacy of the recipient."[266] Second, the board found that the target audience generally paid by the minute for the connection time that they spent reading the message, so that "[t]he recommendation for legal retention and employment was, therefore, not only unsolicited, but also at the recipient's expense."[267] Third, the message did not include the phrase "This Is An Advertisement," a phrase that must be included on "communications soliciting professional employment."[268] Fourth, the advertisement did not disclose Canter's professional qualifications that would allow him to describe himself as an "immigration attorney."[269] Finally, the attorney did not deliver a copy of the posting to the Board of Professional Responsibility within three days of its distribution.[270] The Tennessee Supreme Court approved and adopted the report of the subcommittee, and suspended Mr. Canter for one year from the practice of law. The court held that the spam e-mail message violated several ethical rules and improperly intruded into the privacy of those who received the message.[271] While Canter was permanently disbarred for other ethical violations such as neglecting cases, converting client funds, and writing bad checks, "his Internet infractions

264. *See* Ross & Andreoni, *supra* note 138, at 125, 139.

265. *See Canter*, *supra* note 263, at 9.

266. *Id.* As such, the board found the advertisement violated DR 1-102(A)(1), (5), and (6), and DR 2-103 of the Tennessee Rules of Professional Responsibility. *Id.*

267. *Id.* As such, the board found the advertisement violated DR 1-102(A)(1), (5), and (6), and DR 2-103(A) of the Tennessee Rules of Professional Responsibility. *Id.*

268. *Id.* Because the advertisement did not contain the required language, the board found that the message violated DR 2-101(N) of the Tennessee Rules of Professional Responsibility.

269. *Id.* The board found that the failure to include the required disclaimer violated DR 2-101(C) of the Tennessee Rules of Professional Responsibility.

270. *Id.* As such, the board found the advertisement violated DR 2-101(F) of the Tennessee Rules of Professional Responsibility. *Id.*

271. It is interesting to compare the finding that the sending of bulk email by an attorney was an ethical violation with other cases that have challenged particular uses of e-mail blocking services. *See, e.g.*, VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 74-78 (10th ed. 2000)(considering the decision in CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (D. Ohio 1997) in the context of "trespass to chattel" for the sending of unsolicited e-mail messages); Laurie J. Flynn, *Harris Files Suit Against AOL Over Blocking of E-Mail,* N.Y. TIMES, Aug. 3, 2000, at C7; *see also* Nick Wingfield, *MAPS Can Be a Roadblock to E-Mail Access,* WALL ST. J., Aug. 3, 2000, at B5 (describing MAPS as "Mail Abuse Prevention Systems" that identify sources of unsolicited commercial e-mail messages).

alone earned him a one-year suspension to run concurrently with the disbarment."[272]

Many attorneys who use the Internet to sell merchandise must know that they are, by virtue of being licensed to practice law, subject to higher standards than other sellers of merchandise on the Internet. It may be fair to ask whether attorneys should have this higher level of public responsibility in matters that are quite remote from their representation of clients, but the current ethical rules are so broadly written that the attorney's higher standard of public conduct is unquestioned.[273] Even if attorneys do not realize that they are subject to higher standards, the maxim "ignorance of the law is no excuse" applies also to the ethical rules that govern attorneys.

Attorneys may wonder why the liability must fall primarily on their profession. It seems fair to ask that eBay assume more responsibility for having created a system that seems to facilitate alleged shill bidding and other alleged forms of fraud,[274] such as posting false testimonials.[275] To its credit, eBay does seem to have recognized its responsibility in creating a system where it appears to be relatively easy to engage in shill bidding; in a little-noticed announcement in July 2000, the company's director of governmental affairs said that the company will start to verify the mailing addresses of individuals who sell merchandise on the eBay site.[276] Although this is a reasonable first step for the company to take, this will not eliminate the problem of shill bidding; users can still main-

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272. John F. Deleany & William I. Schwartz, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, in ECOMMERCE: STRATEGIES FOR SUCCESS IN THE DIGITAL ECONOMY 2000, 29, 179 (2000) (available on Westlaw at 588 PLI/Pat 29) (PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES, PLI Order No. G0-00FS).

273. Peters, *supra* note 180, at 12. The Bar Counsel for the District of Columbia has given some thought to the issue of whether the ethical rules should apply as broadly as they do to the private conduct of attorneys:

> So what is the proper framework for measuring a lawyer's private conduct against the Rules of Professional Conduct? Simply by using the notion of a framework suggests that there may be open spaces or areas not covered by the disciplinary rules. Should every conceivable act of misconduct, regardless of where or when it occurs, subject a lawyer to disciplinary sanctions? A "bright line" rule, while easy to enforce, frequently fails to take into account the reality of human nature. But to the extent that open spaces exist, the public is less protected and the primary goals of discipline – protection of the public, our courts, our system of jurisprudence, and our own profession, are less strongly served.

Id.

274. *See, e.g.*, Snyder, *supra* note 161, at 453.

275. *See* FEDERAL TRADE COMMISSION, INTERNET AUCTIONS: A GUIDE FOR BUYERS AND SELLERS 15 (Feb. 2000).

276. *See* Drew Clark, *EBay to Scrap Anonymous Trades*, NAT'L J. TECH. DAILY, July 10, 2000 (available in Lexis Newsgroup File).

tain multiple accounts at the same verified mailing address, and they can use various home and work addresses for their multiple accounts.

If eBay limited each person to a single account, for example, the opportunities for shill bidding will obviously decrease. Although some may argue that it would be impossible to limit individuals to a single account, eBay could require a background credit check, for example, as a pre-condition of being allowed to sell (or even buy) merchandise. It could also require sellers to post bonds or other security as a condition of being allowed to sell merchandise. Certainly the number of potential sellers (and buyers) would decrease if the company were to investigate the identities and creditworthiness of those wishing to transact business on its site, but the amount of potential fraud would likewise plummet and may indeed be offset by a corresponding increase in public confidence.

IV. CONCLUSION

Attorneys who use the Internet to sell merchandise must know that they are subject to higher standards than other venders. While liability will not attach for obvious "puffing" of certain attributes of merchandise for sale, there will be ethical consequences when the attorney engages in conduct that is fraudulent or dishonest. In addition to the ethical violation that may result in disciplinary action, the conduct may also violate state or federal criminal law.[277]

It is relatively easy to assign blame to others for the ethical lapses of attorneys who sell merchandise on the Internet. For example, eBay developed a system that allowed a single person to have multiple accounts and to use those multiple accounts for "shill" bidding on an article of questionable provenance. Calls to reform the system, when they are made, should include proposals such as limiting the number of accounts that an individual may have. The eBay company, and other Internet auction houses like it, may complain that because of the ease with which individuals may obtain separate email accounts, they have no way of limiting the number of accounts that an individual buyer or seller may use. Despite these protestations, however, the auction houses could require an individual seller – and perhaps also individual buyers – to register their true identities with the company before being allowed to sell merchandise on the Internet. In the United States, at least, a potential seller could be made to undergo a process similar to a credit check that is required as a condition of obtaining a credit card or bank mortgage. Admittedly, the process of registration would not be initially popular among those Internet users who value the privacy and anonymity that the web now offers; it would offend some individuals who might see creeping gov-

277. *See, e.g.*, Dobrzynski, *supra* note 6, at C1, C22.

ernment influence in a private company's demand that users identify themselves before engaging in a commercial transactions on the Internet.[278] Potential buyers, however, would have the confidence of at least knowing the identity of the sellers with whom they are dealing; when fraudulent acts arise, it would be easier to identify and perhaps stop those acts. These matters are beyond the scope of this article, however, which is limited to identifying the responsibility of the legal profession to better make known the ethical standards of responsibility for attorneys who engage in Internet transactions.

While the ultimate responsibility for ethical lapses falls on the attorneys who commit them, the legal profession as a whole appears to be neglecting its duty to educate law students and lawyers about the full range of ethical responsibilities of lawyers outside of the context of direct client representation. "[L]awyers need to be sensitive to what they do in their private lives and realize that the acceptance of a law license is not simply an authorization to practice law, but carries significant professional duties and moral standards with it."[279] Law schools may have a special obligation to point this out to law students, in legal ethics classes where such ethical concerns should naturally arise,[280] but often may not give extensive attention to the issue because of the press of other ethical concerns directly related to the practice of law. Mandatory and voluntary bar associations may also have a special obligation to point this out to practicing lawyers who are members of those associations. This information could be disseminated through bar journal articles, seminars, and perhaps even portions of the association's own websites.

Students and lawyers must know that the law expects more of them than other sellers, and that they must be completely honest in all of their dealings, including those that take place in cyberspace. The public, for its part, should also have greater confidence when purchasing items from a seller who is an attorney.

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278. *See, e.g.,* James, *supra* note 160, at 1; *see also* Brodie, *supra* note 160, at 20.

279. Peters, *supra* note 180, at 12.

280. *See, e.g.,* MORGAN & ROTUNDA, *supra* note 174, at 63.