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A Business Lawyer Looks at the Internet

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A BUSINESS LAWYER LOOKS AT THE INTERNET

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I. INTRODUCTION

Not everything changes swiftly. In 1972, the author drove to work in a nice, top-of-the-line Toyota he bought new for $3,200. Like many modern cars, it featured an automatic transmission, air conditioning, an am-fm radio, and other creature comforts. Today, the author is still driving that same Toyota to work. It remains a clean car, and it moves down the highway in style (more or less). Today, a new top-of-the-line Toyota is called a Lexus and retails for over $50,000.[1] It is superior to the author's car in some respects,[2] but, at bottom, travel in a new Lexus is still just another way to get from here to there. While year after year cars supply the same service to their owners, transportation, prices inexorably ratchet upwards. Things are different in the computer business. In recent testimony before Congress, Bill Gates claimed that from 1971 to the present the cost of computing has decreased ten million fold.[3]

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1. The suggested retail price for a new Lexus LS 400 is $52,900. *Lexus Announces Pricing for 1998 Models*, PR NEWSWIRE, Sept. 4, 1997, *available in* LEXIS, News Library, Curnws File.

2. For example, the modern Lexus is doubtless safer and pollutes less.

3. *In Their Own Words: Three High-Tech CEOs Testify*, WALL ST. J., Mar. 4, 1998, at B1. Gates claimed that this is "the equivalent of getting a Boeing 747 for the cost of a pizza." *Id.*

When the author's Toyota rolled off the assembly line, Bill Gates was still in high school.[4] It was not until the author's Toyota was four years old that Steve Jobs teamed up with Steve Wozniak to launch a computer design called the Apple II.[5] Profits for Jobs and Wozniak were slow in coming. At the end of Apple Computer's first fiscal year, September 30, 1977, its net income totaled $41,575.[6]

That same year, the author's secretary was happily typing away on her brand new IBM Office System 6 Word Processor. The very large piece of equipment included a single keyboard console, a monochrome monitor displaying six lines of text, and a high-speed ink-jet printer.[7] For this machine, IBM charged approximately $31,850.[8] In 1977, Wozniak and Jobs could have paid for only one IBM System 6 Word Processor out of Apple Computer's first year earnings.

The pace of change in the office equipment business sharply accelerated into the 1980s. In the early 1980s, American businesses spent about ten percent of the money invested in information technology on personal computing.[9] By the end of the decade, the amount of money devoted to PCs in information technology budgets had risen thirty-five to fifty percent.[10] More importantly, PC expenditures represented a growing slice of an ever-enlarging pie. It is estimated that the amount of money spent per person on information technology grew by a factor of *six* over the last decade, and projected expenditures would rise "by a factor of five to ten in the 1990s, with a payoff of three to five times the total investment."[11]

By the early 1990s, PCs had won acclaim for their wordprocessing and spreadsheet capabilities, but a key piece of the puzzle still was missing. As Lester Thurow, an economist at the Massachusetts Institute of Technology (MIT), explained in 1991:

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4. Gates graduated from Lakeside High School in 1973; he dropped out of Harvard two years later. David M. Halbfinger, *Golden Gates*, NEWSDAY, July 5, 1995, at A4, *available in* LEXIS, News Library, Arcnws File.

5. Apple Computer, Inc., Registration Documents, at 4, 20-22, *reprinted in* LARRY D. SODERQUIST, SECURITIES REGULATION 637, 642, 658-60 (2d ed. 1988).

6. *Id.* at 673.

7. *IBM Enters "The Office of the Future,"* BUS. WK. INDUS. EDITION, Feb. 14, 1977, at 46H, *available in* LEXIS, News Library, Arcnws File. The machine read data stored on mag cards. Mag card compatibility was designed into the System 6 "so it would not outmode IBM's huge rental base of those obsolescent but immensely profitable units. Some analysts believe that IBM's conservative philosophy of protecting its installed base will continue to handicap the industry leader." *Word Processing Suffers Harsh Growing Pains*, BUS. WK. INDUS. EDITION, Nov. 21, 1977, at 102C, *available in* LEXIS, News Library, Arcnws File.

8. *IBM Enters "The Office of the Future,"* *supra* note 7, at 46H.

9. Ronald L. Evans et al., *What Do PCs Really Cost?*, PC-COMPUTING, June 1, 1989, at 122.

10. *Id.*

11. *Id.*

> Part of the reason computers aren't used in general outside of the business or writing community is that the electronic highways to use them are not there. If I was hooked up to everyone and had a system that was simple to use, I could imagine paying my bills electronically rather than stamping envelopes and writing checks.
>
> We're working on the electronic highways here at MIT, but it's a little bit like the telephone. The first telephone was useless because there was nobody to call. You need the whole world on the system before the system becomes useful.[12]

Such a system has become reality through the creation and implementation of the Internet and the World Wide Web.[13]

For lawyers, an electronic highway of sorts has been around as long as Lexis/Nexis and WestLaw have offered, for a substantial price, to link law firms to the precious data we use as raw material in solving other people's problems. But access to the big legal research databases is more like riding on a one-way street than a superhighway, because data only travels from the providers (them) to the users (us). Unlike the one-way Lexis/Nexis and WestLaw systems, the Internet is adept at two-way communication and more. It presents us with a research and communications device blessed with versatility and powers that were unimaginable a generation ago, or even at the start of this decade.

This article assesses the microcomputer revolution from the business lawyer's perspective. The focus is on the practical, with two main areas of inquiry. First, the article addresses ways business lawyers can enhance their productivity by using personal computers, discussing simple steps any lawyer can take to become more efficient in the computer age. The second part of the article is essentially the flip side of the first, and discusses how to avoid the traps that await the unwary and avoid sleepless nights.

II. STEPS TO COMPUTER-BOOSTED PRODUCTIVITY

Good writing comes from good editing. Straight-forward, compelling communication is a product of clear thinking, careful revision, and practice. A

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12. Glenn Rifkin, *What the PC Means to Me*, COMPUTERWORLD, Aug. 5, 1991, at 54.

13. In essence, the Internet is a network of smaller computer networks. The World Wide Web functions as a platform through which persons may communicate through shared information. For a concise history and explanation of the Internet and the World Wide Web in the form of judicial findings of fact, see *ACLU v. Reno*, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996), *aff'd*, 117 S.Ct. 2329, 2351 (1997). For a general discussion of the Internet's history and make-up, see Darrell F. Cook & Dwight H. Merriam, *An Introduction to the Internet and Related Technologies, in* 10 ALI-ABA LAND USE INSTITUTE, PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION COURSE OF STUDY MATERIALS 355 (Dec. 1996).

generation ago, framing and revising text was an arduous process that sometimes actually involved use of scissors and paste, or at least Scotch tape. Today, legal work is improved most efficiently when changes are made electronically. Right now, the lawyer who can type and wordprocess is best positioned to get a superior finished product out the door, while doing so faster.

Many lawyers can type, and many cannot. Those who cannot should learn to do so. Typing classes are ubiquitous, as are computer software programs that can have a novice typing fairly well in a few weeks. For the hard-working lawyer, it is fair to say that few, if any, investments of time and energy will ever generate the productivity boost derived from becoming a proficient typist. The chief barriers blocking this breakthrough are ego and sloth.

Dictaphones have their place, but dictated text needs to go into the word-processor immediately. The lawyer able to use a wordprocessor is well positioned to increase his or her productivity by using e-mail. E-mail provides a fast (though not necessarily secure)[14] means of delivering many forms of written communication.[15]

Before long, even touch-typing may be passé, at least for heavy duty document drafting.[16] Speech recognition technology is coming into its own with the release of large vocabulary, continuous speech-recognition engines.[17] Micron Electronics now includes voice recognition software as a standard component for one of its portable computer systems.[18] In a matter of years, we can expect to see dictation systems bundled by Microsoft into office suite products, if not attached (like Internet Explorer) to the operating system itself.[19]

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14. For discussions of confidentiality and ethics issues, see Stuart J. Chanen, *"Return to Sender" Won't Cut It*, A.B.A. J., Mar. 1998, at 84; James Diboise, *Protecting Trade Secrets: Tips for Companies on the Internet*, INTELL. PROP. STRATEGIST, Jan. 1998, at 7; Albert Gidari, *Privilege and Confidentiality in Cyberspace*, COMPUTER LAW., Feb. 1996, at 1; Richard Allan Horning, *The Ethics of Attorney-Client E-mail Communications*, COMPUTER L. STRATEGIST, Jan. 1998, at 1; Charles R. Merrill, *E-mail for Attorneys from A to Z*, N.Y. ST. B.J., May/June 1996, at 22-23.

15. The median message delivery time for e-mail is usually a few seconds. *E-Mail Delays Raise Red Flag*, ELECTRONIC COM. NEWS, Aug. 11, 1997, *available in* LEXIS, News Library, Curnws File. "On average, 12 percent of all E-mail takes more than five minutes to deliver." *Id.* A 1997 ABA survey showed that more than 90 percent of law firms with more than 20 lawyers are using the Internet to communicate with clients; the rate drops to 44 percent of firms with 20 or fewer lawyers. Chanen, *supra* note 14, at 84.

16. According to Michael Dertouzas, director of MIT's computer-science lab, "'Speech will eventually replace the need to use the mouse and keyboard.'" Brad Stone, *Are You Talking to Me?*, NEWSWEEK, Mar. 2, 1998, at 85.

17. *See, e.g.*, Alfred Poor, *Watch What You Say*, PC MAG., Mar. 10, 1998, at 129 (describing the history and effectiveness of speech recognition technology); Kimberly Patch & Eric Smalley, *Speech Recognition Makes Some Noise*, INFOWORLD, Feb. 2, 1998, at 69 (discussing different types of speech recognition products).

18. The dictation system is standard software on all of Micron's TransPort XKE systems. *See Micron Electronics Award-Winning Notebook Incorporates Intel's Latest Mobile Pentium Processor* (visited May 5, 1998) http://www.micronpc.com/about/pressreleases/pr011298%5Fmobile.html>.

19. In an interview with a Newsweek reporter, Microsoft's Bill Gates recently stated: "[T]hings

Suffice it to say that with keyboarding skills the modern business lawyer is ideally positioned to gain a competitive edge by using computerized research techniques such as e-mail, listservs, and specialized discussion groups.

III. THINK TWICE BEFORE YOU THROW AWAY DATA—AND AGAIN BEFORE YOU KEEP IT

We are the sum of our experiences. Work on successfully completed projects does not just pay our bills, it represents an investment in our own human capital. The saying "I'm better for having done that," is not just a slogan—it is a truism. Computer storage devices help harness and manage experiences and output, thereby furnishing a solid platform for future productivity and growth. Unparalleled access to data via the Internet creates a need to manage the information we find. The most efficient lawyers will learn to be their own librarians.

Attorneys should save accumulated wisdom—forms, memos, pleadings, disclosure documents, even seemingly mundane correspondence—so it is electronically accessible in the future and readily available to help solve the next client's problems. With the proliferation of inexpensive Iomega Zip drives[20] and other handy storage media, it has never been easier to archive data. Keeping past work product handy in a text searchable format will help ensure that attorneys are indeed getting *better* as they get *older*. It is better to be a lawyer with fifteen years of experience than to be a first-year lawyer fifteen straight years.

On the other hand, there is a need for discretion when it comes to data retention policies. Data retention has a serious downside.[21] Stored information

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like . . . speech . . . are things we have to build into the operating system to make it a better tool than it is today." Brad Stone, *We Have to Innovate,* NEWSWEEK, Mar. 9, 1998, at 39; *see also* Stone, *supra* note 16, at 86 (predicting that operating systems will soon be equipped with built-in speech capabilities).

20. *See Iomega Stuff* (visited Mar. 25, 1998) <http://bookstore.fullerton.edu/departments/computers/iomegapromo.html>.

21. Do you remember what Kenneth Starr's investigators from the FBI carted away from Monica Lewinsky's apartment last January? The answer is: her computer, along with some articles of clothing and mementos from the President. Stewart M. Powell, *Clinton: It Didn't Happen*, S.F. EXAMINER, Jan. 26, 1998, at A1. Remember Ollie North's hard drive erasure problem? The problem arose after he instructed his secretary, Fawn Hall, to erase sensitive Iran-Contra files on her office computer. She did, only to learn later that the files were retrievable using special software. Molly George, *Electronic Discovery Litigation's Newest Challenge to Corporate Records*, METROPOLITAN CORP. COUNS., Jan. 1997, at 45. Indeed, though much attention is paid to confidentiality questions raised by e-mail, computer files also pose serious problems for the business lawyer and the client:

> The tenacity of computer files brings to mind the old saying, "Gone, but not forgotten." In the case of computer files, however, the proper adage would be "Forgotten, but not gone." In an address at the 1995 American Bar

may have a negative value to you, but may be a godsend to your adversaries. For example, lawyers' documents published decades ago are now being wielded by plaintiffs' lawyers in tobacco litigation.[22] Weighing the pros and cons of document retention strategies also requires a clear understanding of privilege law.[23]

IV. SCHOOL YOURSELF ABOUT CHANGES IN COMPUTER TECHNOLOGY

Each week computer industry analyst John C. Dvorak wraps up his computing talk show on National Public Radio with this admonition: "And remember, everything you've learned this week will be null and void by this time next week."[24] There is a kernel of truth to Dvorak's whimsical sign-off line; never before has capitalism shown such elegance through fast-paced innovation coupled with falling prices. For example, while the price of a new top-of-the-line Toyota rose from $3,200 to over $50,000, the cost of a wordprocessor with printer fell from $31,000 for the IBM System 6 to under $2,000 today—and today's product is vastly superior.

The computer industry has given us "Moore's Law," named after Gordon Moore, one of Intel's founders. Moore's Law is the legendary pronouncement to the effect that computing power, as evidenced by the number of transistors on a chip, doubles every eighteen months.[25] That increase in power has bred vast

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> Association Annual Meeting, Joan Feldman cautioned lawyers to "scare the socks off" their corporate clients making them understand that "one (computer) file can equal three files (the original, the back-up to the hard drive, and an independently stored back-up); files are hard to kill; and files proliferate."

Id.

22. For example, one key piece of evidence described to the jury in plaintiffs' opening statement of a tobacco case was a "confidential memorandum" authored by a Chadbourne & Parke lawyer concerning a conference held more than 30 years earlier in American Tobacco's law library. Trial Transcript at *13, State v. Philip Morris, Inc., No. C1-94-8565, 1998 WL 36940 (D. Minn. 1998). The memorandum implies that company officials were dissuaded from conducting biological testing out of fear that the testing would create problems affecting the company's "public, medical and legal positions in the health controversy." *Id.* In the same case, the tobacco industry has faced the embarassment of having 39,000 allegedly privileged documents released and promptly posted on the Internet. Susan Headden et al., *Papers You Weren't Ever Supposed to See*, U.S. NEWS & WORLD REP., May 4, 1998, at 29.

23. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (3d ed. 1997); *see also* Ronald L. Motley & Tucker S. Player, *Issues in "Crime Fraud" Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C. L. Rev. 187 (1998) (discussing the crime fraud exception to the attorney client privilege).

24. For transcripts and recordings of Dvorak's shows, see *Real Computing with John C. Dvorak* (visited Mar. 25, 1998) <http://www.realcomputing.com>.

25. Martin Banks, *Moore's Law Passes the Test of Time—Memory Devices, A Prime Driving Force in Computer Developments*, FIN. TIMES, Apr. 23, 1991, at 13, *available in* LEXIS, News Library, Arcnws File.

improvements in hardware and software sophistication and flexibility, making worldwide instantaneous communication a reality for much of the world's population.

It is imperative to keep track of current developments in this world of fast-paced technological change. Fortunately, periodicals such as *PC Magazine*, *InfoWorld*, and *The Lawyer's PC*; Internet-related listservs; and an increasing array of computer and Internet-oriented Continuing Legal Education (CLE) courses are available to aid in this task. These sources provide the means for lawyers to discharge their duty under Rule 1.1 of the Model Rules of Professional Conduct to organize and manage a law office competently.[26]

V. USE YOUR COMPUTER TO LEARN FROM AND WITH OTHER LAWYERS

A. Listservs for Lawyers

Listservs make it possible for lawyers to correspond almost instantly with fellow professionals specializing in the same subject matter. Any lawyer with an e-mail account has access to this easy and inexpensive way of gathering timely legal information in any area of expertise. An Internet listserv functions like an electronic party line or mailing list. The list owner uses a computer server and special software to route e-mail messages among the list's subscribers. By entering various commands via e-mail, members of the public can sign on, and modify the information they receive in various ways.[27] Listserv software has the capacity to distribute a large amount of data over the Internet to subscribers around the globe. With other innovative developments like Usenet newsgroups[28] and World Wide Web home pages, listservs have the potential to change the way professionals communicate and interact with each other.

Listservs operate through a give-and-take format. If you have a question, you pose it by sending e-mail to the listserv computer which then routes your query to all members. If you have an answer, comment, or a follow-up question, you send it via e-mail to the listserv, which, in turn, disseminates it to all subscribers via the Internet. Listserv members, like lawyers generally,

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26. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1 (1998) ("[A] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

27. For a detailed introduction to the various commands, see *Discussion Lists: Mailing List Manager Commands* (last modified Oct. 26, 1997) <http://law.www.cwru.edu/cwrulaw/faculty/milles/mailser.html>.

28. A newsgroup and listserv are similar in that both are types of electronic bulletin boards. However, unlike a listserv, a message posted to a newsgroup is not automatically routed via e-mail to all subscribers. Instead, it is posted in cyberspace, where it can be read by anyone who is interested.

tend to be courteous, generous with their time, and interested in helping solve problems.

Law-oriented listservs are proliferating. An extremely detailed and useful introduction to law-related listservs, including various lists of law-related listservs, is maintained by Lyonette Louis-Jacques on the University of Chicago's Law Library web page.[29] For example, business-law-related listings created by Ms. Louis-Jacques and posted in alphabetical order on her web page include listservs for teachers, practitioners, specialists in such areas as family businesses, international business law, intellectual property, tax, and, of course, listservs related to technology and the Internet.[30] The Law List site is updated frequently and may be searched alphabetically or by term.[31]

Naturally, there is no guarantee the information gleaned via the Internet will

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29. Lyonette Louis-Jacques, *Law List Info* (visited Mar. 22, 1998) <http://www.lib.uchicago.edu/~llou/lawlists/info.html> [hereinafter *Law List*] (providing keyword and alphabetical searches of the Law Lists).

30. *Electronic Mailing Lists* (visited Mar. 25, 1998) <http://www.lib.uchicago.edu/~llou/lawlists.txt>. Law List contains, among others, the following listservs for practitioners:

> BORG-901@abanet.org (seminar/discussions for law students, faculty and practitioners on business organizations and other transactional law and practice topics of the American Bar Association)
>
> Send the following message to listserver@abanet.org:
> subscribe borg-901
> (related page at http://www.abanet.org/)
>
> CORPGEN@abanet.org (list for members of the Committee of Corporate General Counsel of the American Bar Association Business Law Section; subscription upon approval by moderator)
>
> Send the following message to listserver@abanet.org:
> subscribe corpgen
> (related site at http://www.abanet.org/discussions/home.html)
>
> ROUNDTABLE@home.ease.lsoft.com (Business Roundtable; networking forum for business executives, lawyers, and other professionals worldwide)
>
> Send the following message to listserv@home.ease.lsoft.com:
> subscribe roundtable Your Name
>
> FEDSEC@mail.law.vill.edu (Federal Securities Law list; is moderated; was on listserv@law.umab.edu or listserv@law.ab.umd.edu; there is also the FEDSEC-DIGEST LIST)
>
> Send the following message to majordomo@mail.law.vill.edu:
> subscribe fedsec
> (related page at http://vls.law.vill.edu)

Id.

31. To use the search feature, see *Law List* (last modified Feb. 23, 1998) <http://www.lib.uchicago.edu/cgi-bin/law-lists>. A recent search of the Law List using the term "business" produced 39 lists. For another list of law-related listservs, see *Directory of Law-Related Discussion Groups* (last modified Mar. 21, 1997) <http://www.law.uoknor.edu/lists.html>. *See also Washburn Law School Internet Services and Discussion Groups* (visited Mar. 22, 1998) <http://lawlib.wuacc.edu/washlaw/washburn.txt.html> (operating over 70 law-related lists).

be superior to that gathered from a treatise, phone call, or trip down the hall or street to another lawyer's office, but access to expertise is on the Internet, and the combination of speed, ease-of-use, and low price cannot be beat.

B. Web Browsing at Legal Sites

Investigating web sites related to business law can be a daunting task. Where to start? How best to do it? Fortunately, answering these questions is made easier by general search engines, such as Digital Communications' AltaVista,[32] law-related search engines, such as Findlaw.com and Lawcrawler.com,[33] and search engines able to run a single search through multiple engines.[34] Other specialized business-related web sites include the Practising Law Institute's web site,[35] the Securities and Exchange Commission's site,[36] sites that furnish updated stock price data,[37] the University of Maryland's blue sky site for securities research,[38] Stanford University Law School's site presenting novel information about securities litigation matters,[39] the University of Cincinnati's Center for Corporate Law site,[40] and one unusual site that includes links to more than 120 business-related sites spanning the globe.[41] Anyone

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32. *See, e.g., AltaVista: Main Page* (visited Mar. 25, 1998) <http://www.altavista.digital.com>.

33. *See FindLaw Internet Legal Resources* (visited Mar. 25, 1998) <http://www.findlaw.com>; *Lawcrawler Legal Web Search* (visited Mar. 25, 1998) <http://www.lawcrawler.com>.

34. *Dogpile* (visited Mar. 27, 1998) <http://www.dogpile.com>.

35. *Practising Law Institute Securities Law Online* (visited Mar. 25, 1998) <http://www.seclaw.pli.edu>.

36. *U.S. Securities and Exchange Commission* (visited Mar. 25, 1998) <http://www.sec.gov>. This site features a link to the EDGAR database of corporate information. EDGAR is the SEC's acronym for its Electronic Data Gathering, Analysis, and Retrieval system. For a thorough discussion of the system's architecture and rules, plus tips on how to successfully deal with the EDGAR filing requirements, see John Penhollow, *EDGAR*, *in* SECURITIES FILINGS 1997, 37-52 (1997).

37. *See, e.g., CBS Market Watch* (visited Mar. 25, 1998) <http://cbs.marketwatch.com>; *DBC Online* (visited Mar. 25, 1998) <http://www.dbc.com>; *Yahoo! Finance* (visited Mar. 25, 1998) <http://quote.yahoo.com>.

38. *Blue Sky Securities Regulation and Research* (last modified Sept. 22, 1997) <http://www.law.ab.umd.edu/marshall/bluesky>.

39. *Securities Class Action Clearinghouse* (visited Mar. 25, 1998) <http://securities.stanford.edu>.

40. *The Center for Corporate Law at the University of Cincinnati College of Law* (visited Mar. 25, 1998) <http://www.law.uc.edu/CCL>. This site features the Securities Lawyer's Deskbook which delivers the text of the 1933 and 1934 Acts, statutes, rules, and many of the forms. *Securities Lawyer's Deskbook* (visited May 5, 1998) <http://www.law.uc.edu/CCL/sldtoc.html>.

41. *The Outer Edge Link Page* (visited Mar. 25, 1998) <http://members.tripod.com/~toedge/biz1.html>. Among the foreign sites are those for the Oslo Stock Exchange, the Paris Bourse, and the Tokyo Stock Exchange.

familiar with the rapid pace of change that is the computer revolution's hallmark can survey these terrific web sites and say with confidence that the best is yet to come.

Never in human history have people had access to such a vast quantity of quality information with which to solve problems. Lawyers, scientists, business executives, stock analysts, private investors, travellers, and literally anyone with problems to solve can design their own personal information superhighways with Internet search devices. Just as the wordprocessor has removed much of the pain and drudgery involved in shaping prose, the Internet offers the potential for making the daunting chore of doing basic research cheaper in terms of energy and money expended.

VI. USE COMPUTERS TO RESEARCH FACTS

The crucial interplay between information access and problem-solving has created an urgent need for all lawyers to upgrade their research skills. Lawyers function in wide-ranging roles, from the courtroom advocate to the business advisor to the reflective tax planner toiling away in a library corner. Nonetheless, in performing our various lawyering roles there is a subcategory of tasks we perform that cuts across specialty areas, and that is the job of factual investigator. Computerized research facilitates this pervasive and crucial job amazingly well.[42]

The concept of "due diligence," in the sense of performing a careful investigation prior to entering into a transaction, is a conventional part of the business lawyer's practice. For example, securities registration statement preparation is always undertaken with a view towards enabling those facing liability under section 11 of the Securities Act of 1933[43] to make out due diligence defenses.[44] Section 12(2) of the same Act[45] provides another sort of due diligence defense,[46] which is mirrored by the defense found in section

42. Some confirmation that computer sleuthing is not only possible, but is being done, comes in the form of news that Terry Lenzer, one of the investigators subpoenaed by Special Prosecutor Kenneth Starr to testify before the Monica Lewinsky grand jury, is known as "a digital gumshoe, using sophisticated software to tap into deep pools of data." Howard Fineman & Daniel Klaidman, *Race to the Bottom*, NEWSWEEK, Mar. 9, 1998, at 19, 23. For an introduction to the huge array of databases available for use in conducting factual investigations, see *Investigators Guide to Sources of Information* (last modified Apr. 23, 1997) <http://www.gao.gov/special.pubs/soi/contents.htm>.

43. 15 U.S.C. § 77k (1994). The section reaches the issuer's directors, certain officers, underwriters, and various experts whose opinions are presented in the registration statement. *Id.* § 77k(a).

44. *See* SEC Rule, 17 C.F.R. § 230.176 (1997) (providing a short and vague checklist of factors that affect the reasonableness of a due diligence investigation for purposes of section 11 liability).

45. 15 U.S.C. § 77l(2) (1994).

46. Under section 12(2), which deals with liability for misrepresentation, a defendant can escape

410(a)(2) of the Uniform Securities Act[47] that has been adopted in many states.[48] A number of areas exist in the business field in which a party's due diligence can be important, such as whether a board of directors is entitled to the protection of the business judgment rule;[49] control share transactions in which a controlling shareholder may owe a duty to investigate a buyer;[50] leveraged buyouts in which lenders may owe an obligation to know the borrowers whom they finance;[51] the field of mergers and acquisitions;[52] rescission actions in which the party seeking rescission may be barred from recovery because of its

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liability by proving that he or she "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." *Id.*

47. UNIF. SEC. ACT § 410(a)(2), 7B U.L.A. 643 (1985).

48. Thirty-nine states and the District of Columbia have adopted some form of the Uniform Securities Acts of 1956 or 1985. Bruce G. Vanyo et al., *Securities Class Action Litigation in State Courts*, *in* SECURITIES LITIGATION 1996, 207, 285 (1996).

49. *E.g.*, Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("[A] board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule.").

50. *E.g.*, M. Thomas Arnold, *Shareholder Duties Under State Law*, 28 TULSA L.J. 213, 242-43 (1992).

> A controlling shareholder is under a duty not to transfer control to another where the circumstances surrounding the proposed transfer are sufficient to put the shareholder on notice that the purchaser may loot the corporation. Where the circumstances are sufficient to put a prudent person on guard, the controlling shareholder has a duty before selling the shares to conduct a reasonable investigation into whether the purchaser intends to defraud the corporation. The shareholder breaches his or her duty if he or she sells without any investigation or sells after an inadequate investigation. On the other hand, the duty is not breached by sale of the shares where a reasonable investigation discloses facts from which a prudent person would conclude that no fraud is intended or is likely to occur.

Id.

51. *See, e.g.*, Arlene Elgart Mirsky & Robert C. Mignella, *The Impact of Fraudulent Transfer Law on the Enforceability of a Leveraged Buyout*, *in* STRATEGIES FOR THE TROUBLED LEVERAGED BUYOUT 93, 119 (1991) ("Perhaps, the most important rule for an LBO Lender to follow is to know its borrower. Cases like *Gleneagles I* and *Wieboldt* which raise the specter of intentional fraud mandate that an LBO Lender perform adequate due diligence to determine the background of Buyer.").

52. For detailed discussions of due diligence issues in the mergers and acquisitions area, see Scott M. Zimmerman & Daniel I. Goldberg, *Due Diligence and its Impact on the Transaction*, *in* ADVANCED DOING DEALS 243 (1997), and Wilson Chu, *Cross Border M&A: Avoiding Surprises Through Due Diligence*, BUS. L. TODAY, Jan./Feb. 1997, at 8. For specialized discussions of due diligence in the context of intellectual property issues raised in mergers and acquisitions, see Diane W. Savage, *Intellectual Property Due Diligence in Acquisitions of Technology Companies*, *in* HANDLING MERGERS & ACQUISITIONS IN A HIGH-TECH AND EMERGING GROWTH ENVIRONMENT 329 (1997), and Howard L. Shecter, *Selected Risk Issues in Merger and Acquisition Transactions*, 51 U. MIAMI L. REV. 719, 776 (1997).

failure to exercise due diligence;[53] fraud actions in which reasonable reliance must be proved;[54] obligations owed under the Foreign Corrupt Practices Act;[55] and even thorough background checks on applicants for law-firm positions.[56] Clearly, the burgeoning availability of computerized databases offers much in each of these investigative areas as well as countless others.

Any business lawyer who thinks that the Internet plays no role as a research tool must read the Seventh Circuit's decision in *Whirlpool Financial Corp. v. GN Holdings, Inc.*[57] In this securities case, the issue was whether the plaintiff-investor's claim was time-barred.[58] The court faulted the investor for not seeking out readily available information in the public domain once discrepancies between the defendant's projected and actual performance results were noted. Attacking the investor's lack of diligence, the court held that

> In today's society, with the advent of the "information superhighway," federal and state legislation and regulations, as well as information regarding industry trends, are easily accessed. A reasonable investor is presumed to have information available in the public domain, and therefore Whirlpool is imputed with constructive knowledge of this information.[59]

If securities-purchasing investors are charged with constructive knowledge

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53. *See* RESTATEMENT (SECOND) OF CONTRACTS § 172 cmt. b (1981) (stating that reliance on a misrepresentation is not justified "[i]f the recipient knows that the assertion is false or should have discovered its falsity by making a cursory examination").

54. *See* RESTATEMENT (SECOND) OF TORTS § 541 cmt. a (1977) (stating that reasonable reliance requires more than blind trust; the relying party "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if had utilized his opportunity to make a cursory examination or investigation").

55. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1994) (barring certain direct and indirect payments to foreign officials, foreign political parties, and officials thereof). A party must exercise due diligence to determine whether any payees are government officials and to negate any inference that the company is illegally channelling money to government officials through third parties. For analyses of this problem and blueprints for avoiding liability under the Act, see David G. Norrell & Laurence A. Urgenson, *How Much Is Enough? An FCPA Due Diligence Checklist*, CORP. COUNS., Mar. 1997, at 3; Gregory J. Wallance, *Is Your Foreign Sales Rep Paying Bribes? When Looking the Other Way Can Be a Crime*, CORP. COUNS., July 1996, at 8, and Matt T. Morley & Yan Liu, *De-greasing the Wheels of Commerce: U.S. Anti-Bribery Initiatives Signal Stiffening FCPA Enforcement*, INSIGHTS, Apr. 1997, at 2, 3-5.

56. *See Lateral Hiring Roundtable . . . Due Diligence, Cultural Coherence Are Overriding Concerns for Cautious Law Firms*, OF COUNSEL, Feb. 3, 1997, at 1, 18 (mentioning the availability of computerized databases that "include a lot of information about the candidates that might be difficult to come by during the normal due diligence process").

57. 67 F.3d 605 (7th Cir. 1995).

58. *Id.* at 607.

59. *Id.* at 610.

of data readily available on the Internet, then it certainly is not unfair to expect the same obligation of diligence to apply to issuers, underwriters, and dealers who market securities to investors.[60] Lawyers and accountants who assist in securities transactions will have a difficult time explaining why constructive knowledge of data on the Internet can be imputed to lay people who read and rely on professionals' work, but should not be imputed to the professionals who prepare that same work product.

A vast amount of factual information is already available to lawyers and more is arriving online every day. For example, Idex is a company that specializes in expert witness research for specialists in defense litigation by providing the testimonial history of thousands of expert witnesses.[61] The company reports that it adds "an average of over 6,000 records each month to a database of close to 550,000 records on over 70,000 experts in literally hundreds of different specialties."[62] The Idex material is "the nexus for a rational network consisting of over 2,500 insurance companies, defense oriented law firms, corporations and government entities."[63] Likewise, plaintiffs' lawyers are developing streamlined means of collecting and exchanging crucial data.[64]

VII. COMPUTER-ASSISTED RESEARCH AND THE ROGUE CLIENT

The duty of stock brokers under the "know your customer" rule is well established in the law.[65] Likewise, bankers who run afoul of the "know your

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60. Indeed, a study of due diligence procedures in securities transactions lists Lexis-Nexis, Westlaw, and an Internet search as sources of data for conducting due diligence research on a prospective issuer's background. *See* ROBERT J. HAFT & BARRY J. HAFT, DUE DILIGENCE IN SECURITIES TRANSACTIONS § 2.04[4], at 2-28 (1996).

61. *Idex: Expert Witness Research* (visited Mar. 23, 1998) <http://www.idex.com>.

62. Letter from Judith M. Bornkessel, Idex Account Executive, to John P. Freeman 1 (Aug. 13, 1997) (on file with the author).

63. *Idex: Expert Witness Research* (visited Mar. 23, 1998) <http://www.idex.com>.

64. For example, the South Carolina Trial Lawyers Association makes available to its members DepoConnect, established by the Texas Trial Lawyers Association. DepoConnect provides on-line searchable data for witness leads, deposition transcripts, briefs, pleadings, and seminar papers. The annual membership charge of $95 for South Carolina lawyers is reduced to $12 for lawyers who contribute 10 depositions to the database. *DepoConnect* (visited Mar. 23, 1998) <http://www.depoconnect.com/newlog1.htm>. For additional material on conducting searches on expert witnesses, see Michelle Ayers, *Finding and Investigating Expert Witnesses* (visited Mar. 27, 1998) <http://www.llrx.com/columns/finding.htm>.

65. New York Stock Exchange Rule 405 states that "[e]very member organization is required . . . to (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization." 2 N.Y.S.E. Guide (CCH) ¶ 2405, at 3696 (Aug. 1994). *See also* American Stock Exchange Rule 411, 2 Am. Stock Ex. Guide (CCH) ¶ 9431, at 2647 (Oct. 1995).

The broker's duty to know the customer ties into the broker's duty to only recommend suitable

customer" obligation risk charges of criminal money laundering.[66] Although business lawyers have no formalized "know your client" obligation under ethical or statutory requirements, grave problems await the unwary. The problem client presents lawyers with an increased risk of malpractice claims.[67] Lawyers have long engaged in rudimentary client and matter screening for conflicts of interest, logistical feasibility, and assurance the firm has (or can associate) lawyers with sufficient competency.[68] Computerization affords a new way to uncover data about the backgrounds of prospective clients and their principals.

For example, consider the case of *SEC v. Martin*,[69] which involved a luckless tax lawyer who issued six tax opinions included in offering materials for arbitrage trading programs managed by the Federal Bank and Trust Co., Ltd. (FB&T),[70] an imposingly named entity that was actually a dormant St. Vincent corporation.[71] The opinions were used to market a tax shelter program involving approximately $140 million in phony IRS deductions.[72]

Martin was sued by the SEC for securities fraud and castigated for failing to pay attention to certain "red flags" that should have caused Martin to exert heightened vigilance concerning the deal.[73] The red flags the SEC alleged Martin was aware of included the fact that FB&T's offices and its trader's offices were vacant and that one of the FB&T promoters, the aptly-named Melvin Bogus, had been previously charged with selling illegal investments and enjoined by the SEC from violating the antifraud provisions of the securities laws.[74] At the time, information about Bogus's past unpleasantness with the

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securities to the customer for purchase. *See* Diane Lynne Virzera, *Redirecting the Debate on "Garden Variety" Abuses of Civil RICO: Suitability Rule Violations and the Case for Treble Damages*, 26 COLUM. J.L. & SOC. PROBS. 341, 347 n.19 (1993) (stating that the suitability obligation arises from harmonizing the "know your customer" rule with the obligation of "fair dealing" under NYSE Rule 401).

66. United States v. Giraldi, 86 F.3d 1368, 1372-73 (5th Cir. 1996) (involving a banker convicted of money laundering who was aware of and circumvented investigative procedures required to ensure the legality of his customer's dealings).

67. *See, e.g.*, Katja Kunzke, *The Hazard: Failure to Screen Cases*, A.B.A. J., Mar. 1998, at 57 (stating that "[o]ne of the best things lawyers can do to reduce their legal malpractice exposure is screen cases and clients in efforts to avoid, or at least be aware of, the ones that present the greatest risks for producing malpractice claims").

68. *See generally* Ronald E. Mallen, *Choosing Clients and Cases to Avoid Being Sued for Malpractice*, LEGAL MALPRACTICE REP., 1989, at 1 (noting that while lawyers have learned to screen clients to determine their ability to pay, few buyers conduct a similar analysis to determine the likelihood of a malpractice claim; the author lists guidelines for analyzing a potential client).

69. [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,509 (D.D.C. 1983).

70. *Id.*

71. Stewart Russell, *Domestic News*, REUTERS LTD., Dec. 12, 1984, *available in* LEXIS, News Library, Arcnws File.

72. *Id.*

73. *Martin*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,950.

74. *Id.*

SEC was strewn about the public record.[75]

Although past legal or disciplinary scrapes do not necessarily presage future wrongdoing, such problems do cause red flags to fly. Like Mr. Bogus, Cincinnati lawyer Charles H. Keating, Jr. was enjoined by the SEC in the 1970s in an action alleging securities fraud violations.[76] The SEC simultaneously disciplined Keating's former law firm for his misconduct.[77] Also, like Mr. Bogus, Charles Keatings' business life following his scrape with the SEC led to losses for investors and ignominy for the professionals who supported and furthered his business efforts.[78]

A more recent example of a law firm failing the "know your customer" rule is *Klein v. Boyd*.[79] In this case a Third Circuit panel upheld securities fraud claims brought against the Philadelphia law firm of Drinker, Biddle & Reath[80] (the same firm that drafted the ill-fated registration featured in *Escott v. BarChris Construction Corp.*,[81] the mother of all section 11 due diligence cases). In *Klein* the court found that a Drinker Biddle lawyer's exercise of due diligence was wanting. The issuer in *Klein* was Mercer Securities, Ltd. (Mercer LP), which was controlled by William D. Coleman.[82] At the time Coleman sought Drinker Biddle's assistance, he had "a long record of securities fraud, regulatory sanction, and customer claims of fraudulent conduct."[83] Coleman's pedigree worsened as his affiliation with the law firm progressed.[84]

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75. *See In re* Bogus, No. 34-13945, 1977 WL 43421, at *1 (S.E.C. Sept. 12, 1977); SEC v. Winters Gov't Sec. Corp., No. CIV. A. 77-6345-CIV-JLK, 1977 WL 43208, at *1 (S.D. Fla. Aug. 15, 1977).

76. SEC v. American Fin. Corp., No. CIV.A. 79-1701, 1979 WL 18434, at *1 (D.D.C. July 2, 1979).

77. *In re* Keating, Meuthing & Klekamp, 47 S.E.C. 95, 106 (1979).

78. Among the firms injured through dealings on behalf of Mr. Keating's Lincoln Savings & Loan Association were accounting firms Ernst & Young (settlement payment of $100.5 million) and Arthur Andersen (settlement payment of $40 million), and the law firms of Jones, Day, Reavis & Pogue (settlement payments of $75 million) and Kaye, Scholer (settlement payment of $61 million). Susan Beck, *A Look Back at Big Suits*, AM. LAW., March 1994, at 113.

79. [current] Fed. Sec. L. Rep. (CCH) ¶ 90,136, 90,317 (3d Cir. 1998).

80. *Id.* at 90,324.

81. 283 F. Supp. 643 (S.D.N.Y. 1968).

82. *Klein*, [current] Fed. Sec. L. Rep. (CCH) at 90,319.

83. According to the court, Coleman

> was censured by the Chicago Board of Options in 1987 for unauthorized trading. He entered into a consent order with the states of Vermont and Minnesota which barred him from certain broker-dealer positions. He was prohibited from soliciting clients pursuant to agreements with the National Association of Securities Dealers ("NASD"). Numerous complaints were brought against Coleman by investors, including claims of fraud, unauthorized option trading, and churning; many of these claims were settled at or near the full amount of the claim.

Id.

84. The appellate court noted

Drinker Biddle ultimately participated in preparing a "Disclosure Package" for investors. Conspicuously absent from the package was any mention of Coleman's "checkered compliance history and current restrictions."[85] In what was called a landmark decision,[86] the court held that the plaintiffs stated a cause of action for securities fraud against Drinker Biddle because the firm allegedly had authored or co-authored a client's fraudulent document.[87]

The Bogus, Keating, and Coleman examples show that an excellent way for a good lawyer or law firm to encounter malpractice exposure is to represent a dishonest client. Of course, prospective clients do not arrive in lawyers' offices with law enforcement officials in hot pursuit. What sets the dangerous prospective client apart from other clients is that dangerous prospective clients have engaged in questionable transactions in their pasts. In other words, the key to screening clients is thorough background checks. These days, lawyers can check a client's background swiftly and inexpensively by using computer databases. Currently, background information on investment professionals like Bogus and Coleman is available through state securities law administrators who can retrieve disciplinary information about brokers and brokerage firms from the NASD's Central Registration Depository.[88] Before long, that entire database will be available to individual investors on the Web, presenting, according to SEC

> [f]rom February 1993 through June 1993, numerous orders and restrictions were entered against Coleman, including Virginia and West Virginia orders imposing supervisory restrictions on Coleman, a California order barring Coleman from holding any position as a broker-dealer or investment advisor for four years, a Minnesota order barring Coleman from registration as a representative for five years, and an Oregon order barring Coleman from registration as an agent. During the same time period, Maryland, West Virginia, Virginia, California, Minnesota, and Oregon imposed supervisory restrictions on Mercer LP.

Id. at 90,320.

85. *Id.*

86. *Attorneys: CA3 Reinstates Investors' Claims Alleging Lawyers' Involvement in Client Fraud*, 30 SEC. REG. & L. REP. (BNA), at 273 (Feb. 20, 1998).

87. *Klein*, [current] Fed. Sec. L. Rep. (CCH) at 90,324. Whether *Klein* survives as a landmark decision depends on what the Sixth Circuit decides to do when it hears the case en banc. The panel's opinion was vacated when the petition for rehearing was granted on March 9, 1998. *Klein v. Boyd*, Nos. 97-1143, 97-1261, 1998 WL 55245, at *1 (3d Cir. Mar. 9, 1998) (on grant of rehearing en banc).

88. For example, the author requested a report of Coleman's disciplinary history from the South Carolina securities office. The report lists seventeen different disciplinary items, many of which pre-date Drinker Biddle's preparation of the fateful disclosure package in the Fall of 1993, including an April 1993 report from Virginia's Division of Securities that states, "Based on Mr. Coleman's disciplinary history he . . . agreed to be bound by a special supervision order which requires the constant monitoring of Mr. Coleman's activities for a minimum period of 12 months." Letter from Tracy A. Myers, Assistant Attorney General of South Carolina, to John P. Freeman 13 (Mar. 3, 1998) (on file with author). Drinker Biddle evidently either never found or appreciated the numerous red flags in Mr. Coleman's file or, worse, turned a blind eye to them.

Chairman Arthur Levit, "'an investigative device that Sherlock Holmes would envy.'"[89] Sometimes a lawyer's failure to see the obvious is more reminiscent of Inspector Clouseau than Sherlock Holmes. Consider the problems that lawyers at the now defunct Miami firm of Blackwell, Walker, Fascell & Hoehl could have spared themselves by carefully checking the background of a pretentiously named entity, European Arabian Trust, Inc., and its principals, Stewart Koral and Walter Johnson. Koral and Johnson claimed to control $3 *trillion* in gold bullion entrusted to them by an Indonesian admiral "made up of booty from World War II collected by 'FDR's bagman' and used to secretly finance the American space program, the Marshall Plan and the Vietnam War."[90] A portion of the sum was supposedly destined to be used to pay off the United States' national debt.[91]

Obviously, a prospective client with such grandiose ambitions deserves a careful background check. Needless to say, Blackwell Walker failed to inquire into Koral and Johnson's background. The *Miami Herald* reported on the fiasco as follows:

> Until this week, European Arabian was represented by one of Miami's biggest and best-known law firms, Blackwell, Walker, Fascell and Hoehl. Koral said the law firm has been paid about $180,000 since January to handle legal matters, including the purported deal with the U.S. government.
>
> One attorney for the firm, Michael Walker, also recently signed as a witness on an affidavit in which Johnson and Koral swear their story about the trillion-dollar fund is for real.
>
> Two days after Johnson showed the affidavit to The Herald, however, the Blackwell Walker firm filed motions to withdraw as European Arabian's attorneys. Lawyer Michael Walker refused to comment. The law firm's managing partner, John Hoehl, said the firm won't discuss a former client.[92]

A careful check into the backgrounds of the European Arabian Trust and its principals would not have been difficult. Nearly a year prior to the *Miami Herald* story quoted above, at about the time Blackwell Walker was undertaking to represent European Arabian, *The Bond Buyer* published a report about an aborted bond financing in New Orleans.[93] The financing involved Amcell,

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89. Bill Pietrucha, *Investors to Check Broker Credentials Online—SEC 02/09/98*, NEWSBYTES Feb. 9, 1998, at 1, *available in* LEXIS, News Library, Curnws File.

90. Susan Sachs, *Dozens Bet on Mystery Pot of Gold*, MIAMI HERALD, Nov. 13, 1986, at D1.

91. *Id.* At the time, the national debt was $2.1 trillion. *Id.*

92. *Id.*

93. Leslie Eaton, *La. Port Issue Sinks After Backer Fails to Give Information*, THE BOND BUYER, Dec. 3, 1985, at 1.

Inc., identified as a subsidiary of European Arabian. The report chronicled the collapse of a proposed $350 million financing in New Orleans that promised the creation of 6,000 jobs.[94] The bond issue failed amidst concerns that Amcell refused to supply basic financial data, Florida regulators were investigating European Arabian, and previously Mr. Koral was permanently enjoined by a Florida court for violations of the state's mortgage brokerage act.[95] The Louisiana deal failed because the local authorities performed a cautionary background search before consummating an agreement with European Arabian's subsidiary, Amcell. By contrast, Blackwell Walker blindly embraced a dubious client whom it followed into questionable dealings.[96]

VIII. RESEARCHING CLIENTS' BUSINESS AFFILIATES

Honest clients sometimes have dishonest partners, and this can breed problems for lawyers. Lawyers can screen these affiliated entities and their principals by using the Nexis news database and the WestLaw and Lexis federal and state case files. WestLaw's newspaper databases contain stories from local, regional, and national publications. World-Wide Web, Inc. Online[97] offers a special feature called "The Online Sleuth," that is expressly designed to enable you to retrieve business profiles and credit reports.[98]

The need to research business associates is especially urgent in transactions covered by the Foreign Corrupt Practices Act,[99] and the use of computer searches in this field is already well established.

> Computer databases have become one of the most useful sources of information for checking the reputation of the foreign party and building an FCPA due diligence record. This is due, in part, to the increasing reluctance or inability of sources used in the past (such as U.S. government agencies) to provide relevant information and, in other respects, to the rapid development and accessibility of computer databases and libraries that include publications from other parts of the world. Some of the most useful and economical databases for this purpose are certain Nexis libraries, Dialog and U.S. government bulletin boards and libraries accessible through the Internet. Running well-designed searches

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94. *Id.*

95. *Id.*

96. Blackwell Walker was sued for professional malpractice after siding with European Arabian in a transaction involving the buy-out of another client's business. For filing information, see Dewell v. Blackwell & Walker, P.A., No. 87034239CA01 (Fla. Cir. Ct. Aug. 5, 1987) (LEXIS, Docket Library, FlCiv1 File).

97. *Inc. Online* (visited Mar. 27, 1998) <http://www.inc.com>.

98. *The Online Sleuth* (visited Mar. 27, 1998) <http://www.inc.com/online_sleuth/>.

99. 15 U.S.C. §§ 78m, 78dd-1 to -2, 78ff (1994).

> and finding no adverse information does not necessarily mean that a foreign party has a good reputation or will comply with the FCPA, but it does contribute significantly to showing that the U.S. company conducted as thorough a search as was reasonably possible and that no public or semi-public evidence existed to raise questions about the foreign party.[100]

The Premium Sales scam in Florida presents a graphic example of the problems that flow from failing to carefully investigate a client's business associates. Premium Sales was a Ponzi scheme that collapsed in 1993 with losses to 1,584 investors exceeding $250 million.[101] The law firm of Baker & McKenzie served as legal advisor to investment partnerships that raised money for Premium Sales,[102] as did the major New York City firm of Cadwalader, Wickersham & Taft.[103] Investors were lured into the scam by promises of investment returns ranging from twenty to forty percent annually.[104]

The law firms and the investors lost sight of the fact that the investment returns ultimately depended on the quality of Premium's management. Unfortunately, Premium's top management not only lacked quality, it was thoroughly corrupt. *Forbes* exposed this fatal flaw in a highly uncomplimentary article about Premium that sparked a run on the investment partnerships and led to an

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100. Norrell & Urgenson, *supra* note 55, at 8. Also,

> [a]mong prophylactic measures to avoid the appearance of "looking the other way," a company can conduct background checks and due diligence reviews before hiring sales reps or agents. Sources of information include commercial attach[es] at the U.S. embassy or consulate; local law firms or the local branch of an American law firm; international investigative agencies; newspaper articles and other data banks accessible through online computer searches; and the company's own network of business contacts.

Wallance, *supra* note 55, at 8.

101. Dan Christensen, *Premium Sales: More Than a Scam?*, BROWARD DAILY BUS. REV., Dec. 19, 1997, at A14, *available in* LEXIS, News File, Curnws Database; *see Settlements Reached Before Trial*, NAT'L L.J., Feb. 10, 1997, at C13. For background on Premium Sales' collapse and its aftermath, see Walco Invs., Inc. v. Thenen, 975 F. Supp. 1468, 1469 (S.D. Fla. 1997) (awarding additional attorneys' fees); Walco Invs., Inc. v. Thenen, 947 F. Supp. 491, 494 (S.D. Fla. 1996) (denying Defendants' motion for summary judgment regarding the standing of the class); Walco Invs., Inc. v. Thenen, 168 F.R.D. 315, 321 (S.D. Fla. 1996) (granting Plaintiffs' motion for class certification); Walco Invs., Inc. v. Thenen, 881 F. Supp. 1576, 1579 (S.D. Fla. 1995) (denying Baker & McKenzie's motion to dismiss and Cadwalader, Wickersham & Taft's motion for judgment on the pleadings).

102. *See Settlements Reached Before Trial*, *supra* note 101, at C13.

103. David Lyons, *$10 Million Settles Fla. Case*, NAT'L L.J. Oct. 16, 1995, at A4. Investors in the partnerships that allegedly hired Baker & McKenzie allegedly lost $100 million, and investors in the partnerships that allegedly hired Cadwalader lost $40-50 million. Vera Titunik, *Firms Could Be Left Holding the Bag in Florida Grocery Fraud*, AM. LAW., Jan.-Feb. 1995, at 15, 15.

104. Lyons, *supra* note 103, at A4.

SEC investigation.[105] While the *Forbes* reporter's investigative efforts caused Premium's Ponzi scheme to implode, the efforts of the prestigious law firms' lawyers had no such salutary effect. The investigative and disclosure failings proved unfortunate for the firms involved.

Key facts about the questionable background of Kenneth Thenen, the Premium Sales principal featured in the devastating *Forbes* article, were readily available in the public record at the time the law firms undertook representation in connection with Premium-related securities offerings. For example, years earlier in *Berisford Capital Corp. v. Syncom Corp.*,[106] the court noted that Thenen stood accused of assisting in a fraud and was alleged to have been "untrustworthy and '. . . involved with' bankrupt companies previously."[107] Thenen was also accused of using "personal favors" to cause a party to overstate Syncom's cash position in order to obtain a loan, and of diverting corporate

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105. Matthew Schifrin, *Diverting Men*, FORBES, May 10, 1993, at 80. The author wrote,

> Premium Sales is run by two colorful wheeler dealers: Kenneth Thenen, 55, president, and Daniel Morris, a blond bodybuilder who is in charge of sales. Not disclosed to investors is that both have a history of failed businesses and unpaid debts.
>
> The duo's first entrepreneurial venture, in the late 1970s, involved two Indiana suppliers of boat-building materials. By 1982 these companies had folded with an estimated $1 million in unpaid debts, mainly to banks in South Bend. That March Morris filed for bankruptcy with $1.8 million in debts.
>
> The following year Thenen brokered an acquisition that landed him in the executive suite of a publicly traded miniconglomerate called Syncom Corp., of Miami Lakes, Fla. Syncom proceeded to acquire a slew of tiny companies, including a Brooklyn pipe-fitting shop and a costume jewelry maker called Fabulous Fakes of America. With advice from the penny stock brokerage firm Rooney, Pace, Syncom paid for the companies largely with stock and warrants.
>
> In 1985 Thenen and associates at Syncom (then with $9 million revenues) borrowed about $15 million, mainly from Foothill Capital, to buy four wholesalers, with total sales of $250 million. Within a year the wholesalers were bankrupt, Syncom's stock was worthless and the wholesalers owed around $30 million, mostly to Foothill and vendors (including General Foods, Clorox and Nestlé). In early 1992 Thenen paid an undisclosed amount to settle allegations of bribery and fraud.
>
> Meanwhile, Daniel Morris had bounced back from bankruptcy and become president of Southern Merchandise Distributing, a Hialeah, Fla.-based wholesaler of food and sundries that also engaged in diverting. But Southern went broke by 1986, owing nearly $3 million.
>
> With money now rolling in from investors to finance Premium and its offshoots, Thenen and Morris are living high on the hog. Thenen last year borrowed $850,000 to buy a condo on Florida's exclusive Williams Island. Says Thenen of his success in the diverting game: "We've found a niche and have become quite large. We are also very quiet." No wonder.

Id.

106. 650 F. Supp. 999 (S.D.N.Y. 1987).

107. *Id.* at 1000.

funds to his personal use.[108] According to the district court in *Syncom*, "[e]ven a cursory review of the expanded allegations in the amended complaint reveals a single common focus. . . . Whether the fraud is called common law fraud, securities fraud or fraudulent concealment, the 'issue,' . . . is the same."[109] Both Baker & McKenzie and Cadwalader Wickersham either failed to notice and research Thenen's highly questionable background, or they turned a blind eye to the obvious risk that his involvement presented to investors.

Of course, the law firms were not alone in failing to react to the readily available negative information about Thenen. Obviously, none of the Premium Sales investors were deterred by Thenen's background. However, this fact provides little solace to the firms which prepared the investor disclosure documentation used to funnel money into Premium Sales. Baker and McKenzie ultimately paid $20 million to settle investor lawsuits; Cadwalader Wickersham firm paid $10 million.[110]

IX. CONCLUSION

In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*[111] California's Supreme Court had this to say about lawyers' professional obligations: "[I]n our complex and interdependent society, human relations are ever being further fit into a framework of legal rights and responsibilities, and, in this process, the role of the lawyer has become increasingly crucial. As more individuals come to depend upon him, his responsibility must broaden and deepen."[112]

In 1971, when the *Neel* opinion was written, society seemed complex and interdependent, but, in retrospect, things were ordered and the pace was sedate. After all, that time predated FedEx, beepers, faxes, voice mail, cellular phones, PCs, e-mail, and the Web. Research tools and methods that were serviceable nearly three decades ago are yielding to new ways of gathering, organizing, and presenting data. In this task, the Web plays a crucial role, for it is neither hardware nor software; rather, it furnishes lawyers with a synthetic tool that assists research and communications efforts and whose uses are limited only by one's imagination. As Bill Gates recently testified before Congress, "[t]he beauty of the Internet is its openness. It cannot be controlled or dominated or cut off, because it is simply a constantly changing series of linkages. It is such a creative, living medium that no one yet fully comprehends its opportunities."[113]

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108. *Id.*
109. *Id.* at 1002-03.
110. *Settlements Reached Before Trial*, *supra* note 101, at C13.
111. 491 P.2d 421 (Cal. 1971).
112. *Id.* at 432-33.
113. *In Their Own Words*, *supra* note 3, at B1.

Today, good lawyering necessitates finding ways to make the Internet productive for the firm and its clients. The practice of law is nothing if not competitive, and maintaining a competitive edge is becoming a goal that is impossible to achieve without harnessing the benefits of developing technology. Lawyers who fail to invest in their own human capital by enhancing their research and communications skills through electronic resources will suffer in the competition for attracting and retaining clients. Worse, malpractice claims await the unwary who fail to find crucial data located on conspicuous web sites or other easily reachable places accessible with a modem and a computer.

The judiciary will not hesitate to hold ordinary investors accountable for information available on the Internet on the theory that such information is in the public domain.[114] Similarly, like-minded judges will not hesitate to hold accountable for malpractice lawyers and law firms whose research efforts fall short of the mark.

114. *See supra* text accompanying notes 57-59.