How (NOT) to Commit Malpractice With Your Computer



Presented by:
Ross L. Kodner, Esq.
MicroLaw, Inc.

October 5, 2004
9:00-10:30AM
Regency Ballroom, 2nd Floor

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Web: www.microlaw.com



- Marquette Univ. Law School, 1986 (Law Review)
- Founded MicroLaw, Inc. in 1985
- Legal Technologist, Educator, Author
- Over 700 law offices assisted across North America
- Frequent author and speaker nationwide on legal technology subjects
- Chair, Midwest Law & Technology Conference 2002, 2003, 2004
- Chair, Milwaukee Bar Association Technology Committee, 2002 - 2004
- Chair, ABA LPM Section Computer & Technology Division and Member, TECHSHOW 1997- 2001 Board, Co-Chair, LegalTech CLE Planning Board
- Technolawyer Legal Technology Consultant of the Year 1999, Contributor of the Year 2001, 2002
- Chair, T3 Network of Independent Legal Technology Consultants

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Practicing Law Without Technology . . .



An Impossibility Today

But Technology Can Enable You to Commit Ethical Violations and Malpractice . . .

At the Speed of Light!

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WHERE DO YOU GO FOR HELP

The Ethical Pitfalls and Traps of Electronic Law Practice

- **Useful techno.ethics sources on the web:**
  - **legalethics.com**
  - **www.abanet.org/cpr**
  - **findlaw.com/01topics/14ethics/index.html**
  - **State bar sites such as: Wisconsin Ethics Opinions at www.wisbar.org**

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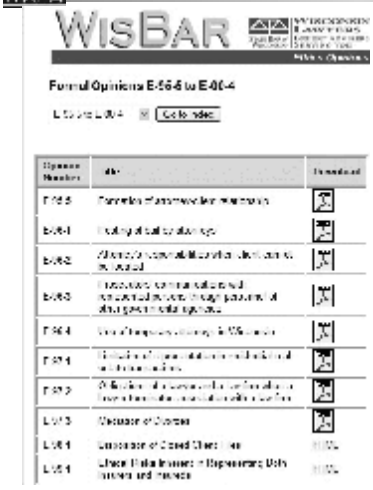

Wisconsin Ethics Opinions at www.wisbar.org

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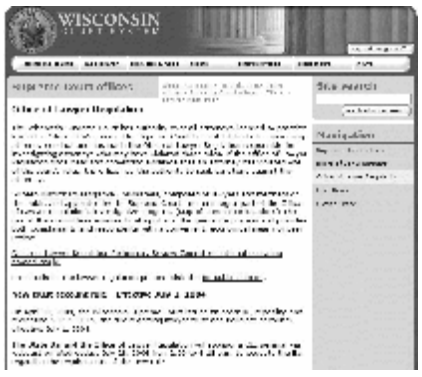
Office of Lawyer Regulation at www.wicourts.gov/about/organization offices/olr.htm



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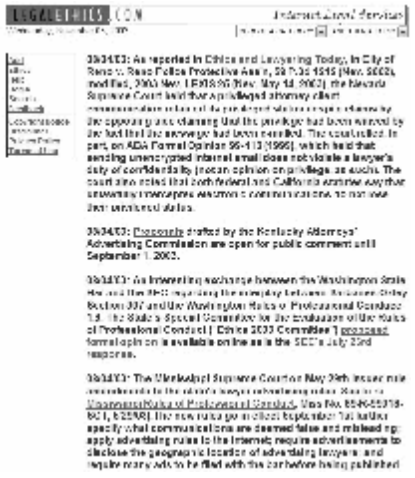

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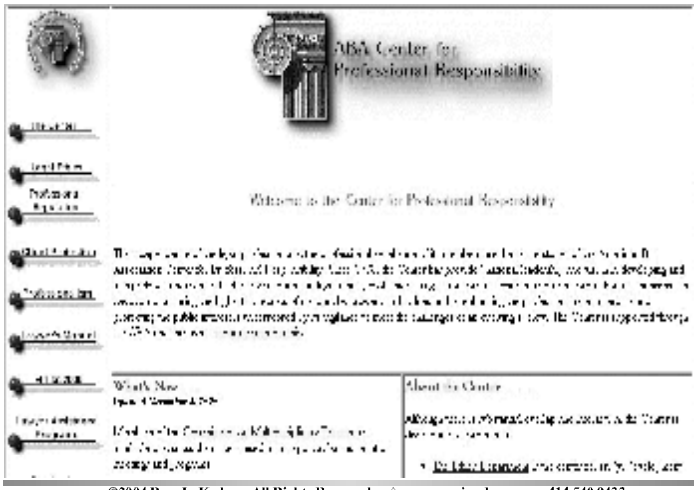

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E-MAIL

The Ethical Pitfalls and Traps of Electronic Law Practice

- ***I attached the final contract to the E-mail message. Just print it, sign it, and mail the original back to me.***
  - **Client edits the "final" and produces her own version.**
  - **Client has other party sign the "revised document."**
  - **How can I prevent the client from editing the final? Maybe PDF makes more sense**
  - **Educate your clients about response time.**



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E-MAIL SECURITY

The Ethical Pitfalls and Traps of Electronic Law Practice



- ***Don't worry about security when I send you this attachment - after all, who would be interested in reading legal documents?***
  - Do you need to worry about Internet e-mail security?
  - What approach do you take to alert recipients of the issues?
  - What about the ABA's statement on e-mail, security and confidentiality?
  - How can I protect my e-mail?

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IMPORTANT PDF TIPS!

Understand Security Issues Sending PDF Files



- ***Our firm has a "PDF First" approach for sending out electronic documents because the files can't be edited, right?***
  - Do you need to worry about the security of PDF files?
  - ABSOLUTELY! Without activing PDF security, PDF files are highly editable!
  - Procedurally, you need to secure all outbound PDFs as standard practice
  - Learn about PDF security and alert clients to the issue as well

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Adobe

Securing PDFs is Easy

• Select "Document", then "Security" then "Restrict Opening and Editing"

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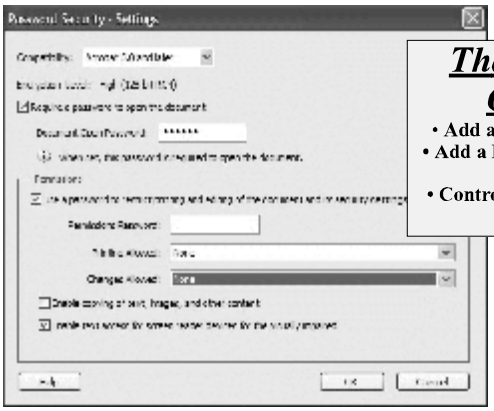

The Security Options

- Add a Password to Open
- Add a Password to Change Settings
- Control Copying, Editing, Printing

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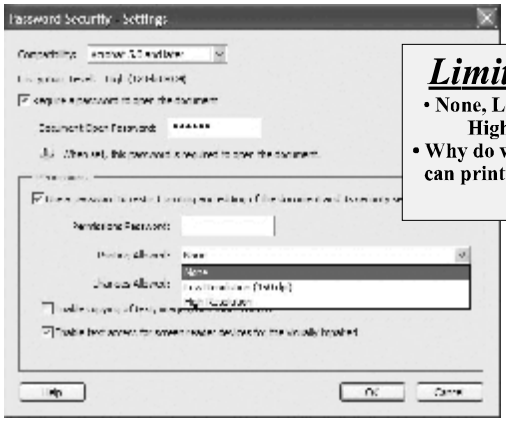

Limit Printing

- None, Low Resolution or High Resolution
- Why do we care if someone can print the PDF files we send?

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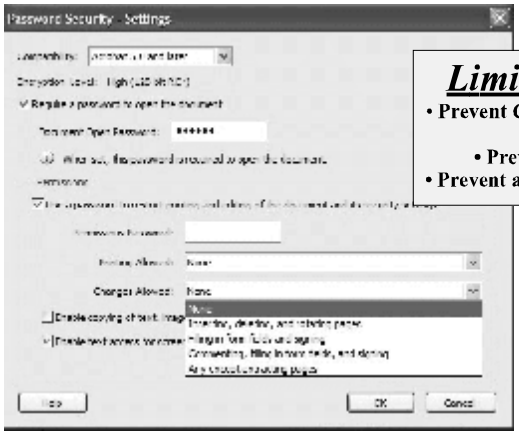

Limit Editing

- Prevent Copying From the PDF
- Prevent Editing
- Prevent any changes at all!

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E-MAIL ADDRESSING

Beware of the Dreaded "Auto-Complete" Function in Your E-Mail Software!



- ***Wow! I just accidentally sent an e-mail to opposing counsel that should have gone to my client! This is NOT good!***
  - **Beware of the "Auto-complete" functions in modern e-mail software!**
  - **This means that you could intend to address an e-mail to your client "Robert Jones" by typing "Rob". . .**
  - **But instead it pulls up opposing counsel "Robert Allen" . . . and you click "Send" before noticing! *OOPS!***

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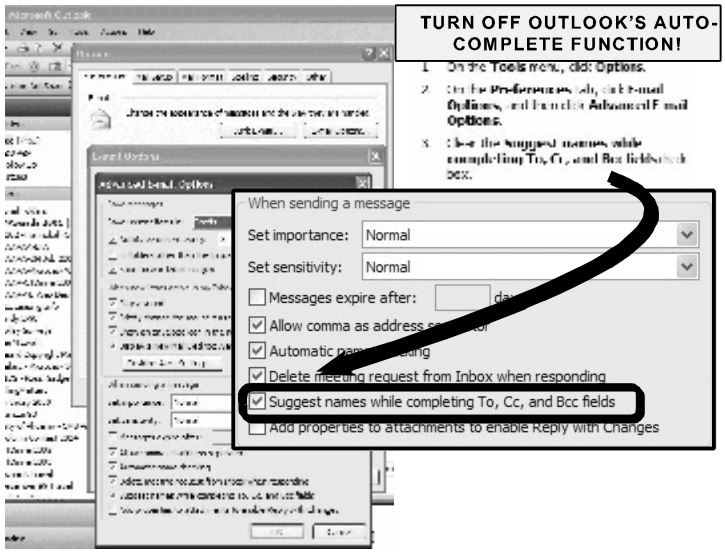

INTERNET SECURITY

Who You Should Fear: The "Inadvertent Hacker"

- ***We're a law firm -who would be interested in hacking into our network! No way! It's too dull!***
  - **If you have a full-time, always-on or wireless Internet connection, you're wide open to electronic intrusion**
  - **You need a firewall product -hardware or software (or both)**
  - **Think about Internet Explorer and "permitted" connections**
  - **Plug remote access "leaks"**
  - **Hacking attempts aren't likely to be targeted -they're more likely "inadvertent"**

HACK-R.COM



Tommy, Age 11. 6th grader, virus-writer and avid hacker

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WEB SITES

The Ethical Pitfalls and Traps of Electronic Law Practice

- ***The Internet is free. Legal ethics don't apply here. . . do they?***
  - Are you advertising?
  - Are you soliciting clients?
  - Are you practicing law outside your jurisdiction?
  - Are you giving impression of being a specialist?
  - Are you linking to non-legal sites?
  - Are you creating an attorney-client relationship?
  - Have you exploited copywritten materials?

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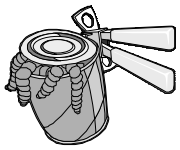
INTERNET USE

The Ethical Pitfalls and Traps of Electronic Law Practice

- ***Everyone in the office loves the Internet. We don't restrict access.***
  - Is E-mail among employees private?
  - Can those pornographic pictures really get you in trouble?
  - Can derogatory E-mails give rise to a claim of harassment?
  - Do you have an Internet use/abuse policy?
- **Check out http://www.llrx.com/features/wulffson1.htm**



Ungoverned 'Net use - the ultimate can of worms?

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Features

Internet Usage Policies in the Workplace, Part I

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"METADATA": INVISIBLY LURKING DISASTER!

This is NOT the Kind of Surprise You Want!



- ***What is "Metadata"?***
  - **Metadata is hidden information contained within certain types of files**
  - **Examples most notably include Microsoft Word, Microsoft Excel and Microsoft Powerpoint files**
  - **Other programs have Metadata issues to a lesser extent**
    - **Examples include Adobe Acrobat PDF files and Corel WordPerfect documents**

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"METADATA": THE RISKS

Ethical and Malpractice Issues Abound

- **Since Metadata contains information you often wouldn't want others to see in a Word, Excel or PowerPoint file . . .**
  - ***ETHICAL VIOLATIONS:*** *Confidential client information can be exposed*
  - ***MALPRACTICE: Tipping your hand in cases - disclosing information to opposing counsel and affecting case results***
  - ***EMBARRASSMENT***: *Disclosing embarrassing personal information or client relationship-damaging info*

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"METADATA": BAD THINGS WILL HAPPEN!

This Should Cause You to Lose Sleep -It's That Bad!



- ***ETHICAL VIOLATIONS: Confidential client information can be exposed***
  - **You paste text from Client A's contract to jumpstart Client B's contract -Client A's counsel also does work for Client B and see's the document**

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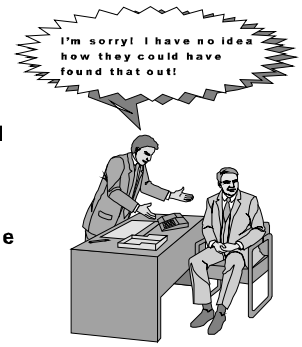
"METADATA": BAD THINGS WILL HAPPEN!

- ***MALPRACTICE RISK:*** *Tipping your hand in a case*
  - You paste text from Client A's settlement offer in a PI matter to jumpstart Client B's settlement offer - Opposing counsel views the Metadata and wants the "better prior" offer you made in the "other case" for their insurance client



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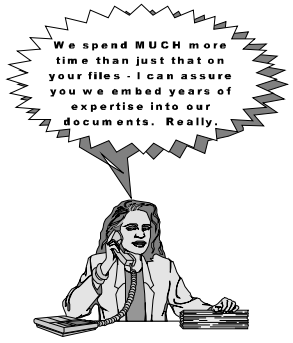
"METADATA": BAD THINGS WILL HAPPEN!

- ***EMBARRASSMENT:*** *Losing a Client who finds out how much time you "worked" on their file*
  - You bill a client $7500 for an estate plan
  - Word Metadata shows you spent exactly 37 minutes working on the file
  - Try explaining that to your client



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"METADATA": THE RISKS

- Special Legal Requirements Make This Urgent
- **Disclosure of confidential information today could cause your clients tremendous legal difficulties -examples include:**
  - ***Electronic Discovery*** - information is unknowingly produced as hidden Metadata
  - ***HIPAA*** -confidential healthcare information disclosure is a per se violation
  - ***Sarbanes-Oxley*** -disclosure issues abound





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"METADATA": WHAT CAN BE SEEN?

Many Types of Metadata Can Get You in Trouble

- Metadata examples lurking beneath the surface of Word files include:
  - Built-in document properties
  - Document statistics
  - Last 10 author information
  - Routing slip information
  - Document versions and authors
  - Tracked changes
  - Hidden text
  - Deleted document comments
  - Font Size 1
  - White Font



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"METADATA": WIDELY PUBLICIZED

Hard to Claim Ignorance Today

- Metadata is not some obscure "geeky" issue only pocket protector owners would know about
- Metadata has been publicly discussed in the mainstream press
  - *Wall Street Journal*
  - *Time Magazine*
  - *Newspapers*
  - *Local TV stations*
  - *Worldwide*



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"METADATA": IN THE MAINSTREAM PRESS

Embarrassing Examples are Reported On Regularly

The Register

British government embarrassed by Word Metadata showing plagiarizing of key intelligence document



Downing St dossier plagiarised

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"METADATA": IN THE MAINSTREAM PRESS

Embarrassing Examples are Reported On Regularly

cnet NEWS.COM TECH NEWS FIRST

Word Metadata leak shows "hidden" intention of a lawsuit that had not yet been filed by SCO against Bank of America


Hidden text shows SCO prepped lawsuit against BofA

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"METADATA": WHAT DOES MICROSOFT SAY ABOUT IT?

- Microsoft's position is one of disclosure -there are online "Tech Notes" on how to remove Metadata from Word 97, 2000, 2002 and 2003 documents
  - The processes are so cumbersome as to be absurd
- Microsoft released a Word "add-in" tool to "Remove Hidden Data" in Word 2003
  - ***Misleading! -only removes some, not all the Metadata - not satisfactory***

Microsoft

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Let's Look at Some Live Metadata Examples, Shall We?

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"METADATA": HOW TO DEAL WITH IT

- **OPTION ONE:** Don't send out Word, Excel or PowerPoint files
  - **PROBLEM:** Not very practical -sometimes you just have to send out editable Word, Excel and PowerPoint files



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"METADATA": HOW TO DEAL WITH IT

- **OPTION TWO:** Convert Word files to another format such as "RTF" (or even WordPerfect)
  - **PROBLEM:** Layout and readability problems on the part of the e-mail attachment recipient



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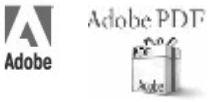
"METADATA": HOW TO DEAL WITH IT

- **OPTION THREE:** Send Word, Excel and PowerPoint files as PDF files
  - **PROBLEM:** Not editable (by most people), still security issues unless PDF/Acrobat Security enabled





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"METADATA": HOW TO DEAL WITH IT

The Ultimate Approach - A Law Practice Necessity

- **OPTION FOUR:** Use Metadata removal tools
  - **PROBLEM:** None

Payne Consulting Group

Workshare

ESQUIRE Innovations, Inc.

iScrub

KKL Software

OUT-OF-SIGHT

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"METADATA": BOTTOM-LINE

Doing "Nothing" is Not an Option

- **ARGUMENT:** It could be argued that disclosing Metadata in client matters, or *failing to advice clients not to expose this information could constitute malpratice*
- **ARGUMENT**: Breaches of client confidentiality are inevitable in a document creation world driven by "boilerplate" generation
- **ADVICE:** *Educate your people and clients about Metadata issues and take proactive measures to stop disclosure NOW*!

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The Intersection of Technology and Substantive Law is Blurred Beyond Recognition



Lawyers everywhere need to understand that new laws and new techniques mean new knowledge is mandatory. This means understanding e-Discovery issues and the broad, sweeping (and chilling) impact and reach of HIPAA and Sarbannes-Oxley

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LITIGATION AND DISCOVERY

The Ethical Pitfalls and Traps of Electronic Law Practice

- I deleted the file from the computer – it's gone! No one will find out about the dirty pictures!
  - Recycle bin.
  - Temporary files.
  - Cache files.
  - History files.
  - Word processor back-up files.
  - Word processor old versions of documents.
  - Back-up tapes and disks.



Data "scraps" are everywhere. They can either help you or haunt you.

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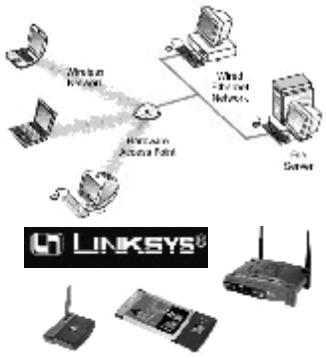
WIRELESS INTERNET ACCESS

What About Wireless Internet Access?

- What about Wireless security?
  - Activate "WEP"! (Wired Equivalency Privacy)
  - WEP is not 100% secure but is far better than doing nothing
  - Choose 128 bit WEP if available (v. 40 bit WEP)
  - Turn OFF "SSID Broadcasting"
  - MAC Address limiting - only authorized accessors allowed!
  - Don't be discouraged by the wireless concept - it is worth the effort to secure the system given the geographical freedom it permits



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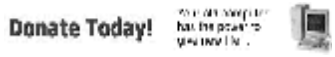
DISPOSING OF OLD PC EQUIPMENT AND MEDIA

The Ethical Pitfalls and Traps of Electronic Law Practice

- We just got new PCs - we donated the old ones to the local hunger bank!
  - Um . . . but what about all the confidential and sensitive client data on the hard drives?
  - Again: Recycle bin - when is it really gone?
  - What about old media like floppy disks and backup tapes?
  - Have you used a "destructive" file erasure process with programs like BCWipe?
  - What about the software licenses?



Careful because it also has the power to give your confidential client and firm data to the entire world!

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PASSWORDS

The Ethical Pitfalls and Traps of Electronic Law Practice

- We don't need passwords on our computers. Who cares about the data in our office?
  - Are client confidences safe and secure?
  - Are your passwords shared with others?
  - Are your passwords easy to remember?
  - Are your passwords easy to crack?
  - Are your passwords taped to your computer?
  - Are your passwords changed periodically?
    - What happens when an employee leaves the firm?
  - What if you forget your passwords?



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BACK-UP

The Ethical Pitfalls and Traps of Electronic Law Practice

- We back-up once each month. That should be sufficient.
  - If you lose it, will you cry?
  - Where did you put the back-up?
  - Does the backup really work?
  - Who knows how the backup works? Do you run "test restores" at all?
  - Do you run system disaster "fire drills?"
  - Where are the original disks with serial numbers?
  - Is your back-up protected from virus attacks?
  - Do you have a disaster plan?



Um . . . Ms. Jones? Remember that "Backup Thing" we were talking about last week?

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"ADEQUATE" LEGAL RESEARCH?

Avoiding Malpractice Means Intelligently Approaching Legal Research

- Examine your approach to legal research: don't forget the fundamentals!
- Text-searching of case law is NOT enough & if it's your only method of legal research, you ARE missing things:
  - There are *thousands* of cases that use only the names of the parties, specialties (i.e.oncologist, etc.), or regional/personal phrases to describe common legal concepts
  - Over 40,000 labor & employment cases that don't say "employee" or "employer"; over 38,000 landlord tenant cases that don't say "landlord" or "tenant", etc.
  - Over half of all published cases come from the courts initially with errors in spelling, citation, facts or holdings of law
- Secondary sources, such as ALR, AMJUR, CJS, Treatises, Law Reviews & Trade Journals, Litigation Reporters, etc. provide you with "instant" research ...
  - In-depth research and analysis done by scholars and experts brings a level of understanding that would take you weeks to achieve. A time saver and a "malpractice safety net" for you.
- Premium legal research services add a "safety net" of additional content, search terms, citator service, access to secondary resources, case corrections, etc.--make sure you know how your service compares to othersand what you are getting for your money



Westlaw.

LexisNexis

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PORTABLE COMPUTERS

The Ethical Pitfalls and Traps of Electronic Law Practice



- I love my portable computer. I take it everywhere, including on trips.
  - Is it safe at the airport?
  - Who else is watching your screen?
  - If it is stolen, can the data be replaced?
  - If it falls into the wrong hands, will you get sued?
  - If it breaks on the road are you out of business?
  - If it crashes, how do you replace the data?

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COPYRIGHTS & SOFTWARE LICENSING

- Unless they ask for payment, all the stuff on the Internet is free to view and use, isn't it?
  - Is there a copyright on that clip art you "borrowed" for your website's home page?
  - Is there a copyright on that moving gavel you took from another attorney's web site?
- I have one copy of each software program we use.
  - Read the license agreements!
  - If you buy, you must comply!



"If I don't see a copyright symbol, it's mine for the taking, right?"

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TECHNO.DANGERS THREATS TO YOUR PRACTICE & CLIENTS



- Other than computer viruses, the "Metadata" threat is the most terrifying technology threat to law practices and legal clients in the last 20 years
- What we will cover today:
  - *What is "Metadata"?*
  - *Why is "Metadata" a threat to your practice and clients?*
  - *What can you do about the "Metadata" threat?*
  - *What are the ethical/malpractice implications?*

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