

# ETHICAL HOT SPOTS FOR LAWYERS USING TECHNOLOGY

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1. COMMUNICATIONS THROUGH THE INTERNET

**a. Unsolicited e-mails from potential clients**

How do you handle an unsolicited e-mail you receive from potential clients? May an attorney who receives an unsolicited communication from a prospective client represent another client in the same matter against the prospective client? Can the lawyer disclose the unsolicited information to the existing client or use it against the prospective client?

As a safety precaution, law firm web sites that contain attorney e-mail addresses should include disclaimers stating that e-mail correspondence from prospective clients are not confidential and do not create an attorney-client privilege.<sup>1</sup> An absence of an express disclaimer suggests that the attorney may have implicitly agreed to consider forming a relationship, and may invoke a duty of confidentiality.<sup>2</sup>

Does the attorney owe a duty to the prospective client? Fiduciary duties, including confidentiality and conflicts of interests, extends to information shared during a preliminary consultation with a prospective client. The ABA/BNA Lawyer's Manual on Professional Conduct, ' 31.101 states:

A lawyer's fiduciary duty arises from his status as a member of the legal profession and are expressed, at least in part, by the applicable rules of professional conduct. These fiduciary duties, in particular the duty of confidentiality, extend to the preliminary consultation with the lawyer, even though actual employment does not arise.

The situation involving unsolicited e-mails, however, is slightly different. In a consultation conducted in the attorney's office or by telephone, the attorney has agreed to participate in the consultation. An unsolicited e-mail does not provide the attorney that choice. He cannot prevent the unsolicited e-mail, nor can the attorney warn a potential client not to provide any information to the lawyer that the client considers confidential.<sup>3</sup>

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<sup>1</sup> If you receive an unsolicited e-mail, you may want to respond and clearly express that there is no attorney-client relationship and that you cannot/will not handle their case.

<sup>2</sup> *Id.*

<sup>3</sup> *See* Ass'n of the Bar of the City of New York, Formal Opinion 2001-1.

On the other hand, the Pennsylvania Bar found that an attorney who participated in a referral panel for employment discrimination cases owes a duty of confidentiality to a potential client who e-mailed him a detailed account of her claim. *See* Pennsylvania Ethics Opinion No. 96-2. Participating in a referral panel is similar to agreeing to a consultation.

Is the attorney then disqualified from representing the current client in the litigation? Generally, no, because the law firm did not solicit the transmission of information from the potential client.<sup>4</sup>

Can the attorney disclose the confidential information or use it against the interests of the prospective client? Essentially, it depends upon your state's attorney-client privilege rules.<sup>5</sup> A New York City's ethic opinion advises that the information should be kept confidential, stating:

Thus, in the situation presented here, we believe that the prospective clients who approach lawyers in good faith for the purpose of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential.

On the other hand, ABA Rule 1.18, adopted in 2002 indicates that the attorney does not owe a duty of confidentiality to someone who sends an unsolicited e-mail. ABA Rule 1.18 addresses duties owed to a prospective client. On its face, the new rule limits confidentiality protection to only a prospective client who *actually discusses with a lawyer* the possibility of forming an attorney-client relationship. @Rule 1.18(a)-(b). (*emphasis added*). Moreover, Comment No. 2 to Rule 1.18 states:

This Comment explains that lawyers are not disqualified when a person unilaterally communicates information to the lawyer without any reasonable expectation that the lawyer will agree to discuss the possibility of forming a client-lawyer relationship.

In an opinion issued by the State Bar of Arizona, the Bar advised that an attorney-client relationship is not created simply because a would-be client unilaterally sends correspondence via e-mail to an attorney. The sender does not have a reasonable expectation of privacy. Therefore, the attorney does not owe a duty of confidentiality to the person who sent the unsolicited e-mail.<sup>6</sup>

## **b. Legal Chat rooms and Prepaid Legal Service Plans**

### **1. Chat-rooms**

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<sup>4</sup> See Ass'n of the Bar of the City of New York, Formal Opinion 2001-1.

<sup>5</sup> See Ass'n of the Bar of the City of New York, Formal Opinion 2001-1.

<sup>6</sup> See State Bar of Arizona Opinion No. 02-04 (September 2002).

Lawyers are allowed to take part in on-line chat rooms where attorneys communicate with internet users seeking legal information. However, the attorney must comply with applicable rules of professional conduct.<sup>7</sup> One danger associated with on-line legal chat rooms is the formation of an attorney-client relationship. If a lawyer is not careful, he may create an attorney-client relationship with a client who is in another state or who believes the attorney will handle the internet user's case.

To avoid this scenario, the attorney should refrain from giving specific legal advice in the chat room.<sup>8</sup> If the attorney believes that he may want to pursue the internet user's case, he should provide the internet user his attorney contact information so that the internet user can contact the attorney for a consultation.

Additionally, the chat room should display disclaimers that the purpose of the site is to provide legal information, not legal advice. In fact, the chat room should consider a click through page disclaimer which requires visitors to consent to the disclaimer before proceeding.<sup>9</sup> However, even the use of a disclaimer may not prevent the creation of an attorney-client relationship if the attorney's subsequent actions, such as providing legal advice to an internet user based upon a specific factual situation, undermine the disclaimer.<sup>10</sup>

## 2. Prepaid Legal Service Plans

Many companies are creating prepaid legal services programs wherein members of the public pay the company a monthly fee for legal services. The company then contracts with a law firm in each state to provide services to the members of the program for free or for a discounted rate.<sup>11</sup> Can one of these law firms communicate with the plan member through an internet service hosted by the company?

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<sup>7</sup> See District of Columbia Bar Association, Opinion No. 316.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *Lawyers Can't Communicate with Clients Via Prepaid Legal Service Plans* Web Site, ABA/BNA Lawyers' Manual on Professional Conduct, V. 19, No. 26, p. 685 (12-17-03), citing Maryland State Bar Association Committee on Ethics Opinion 2004-03 (11/20/03).

Under a plan proposed to the Maryland Bar Association Committee on Ethics, the plan members would communicate information to the company's website, and the company would then e-mail the information to the law firm. The Maryland Bar Association advised that this plan was not recommended. The member would likely waive the attorney-client privilege by communicating information through the company's website, a third party.<sup>12</sup> Additionally, a disclaimer would not prevent the problem. A plan member may waive his attorney-client privilege before the law firm has an opportunity to fully advise the member of the ramifications of waiving the attorney-client privilege.<sup>13</sup>

**c. Unencrypted E-mail**

The ABA has adopted the position that sending unencrypted e-mail does not violate an attorney's ethical duty under the Model Rules of Professional Conduct.<sup>14</sup> The ABA concluded the following:

[A] lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.<sup>15</sup>

However, an ethical duty may still remain. When dealing with highly sensitive information, the attorney should consult with the client to determine the best manner to communicate the information.<sup>16</sup> Moreover, as the ease of use of technology increases, it is likely that an ethical duty to use encryption technology will evolve.<sup>17</sup>

**d. Unsolicited E-mails to Potential Clients.**

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413.

<sup>15</sup> *Id.*

<sup>16</sup> See *Redefining Privacy and Security in the Electronic Communication Age: A Lawyer's Ethical Duty in the Virtual World of the Internet*, R. Scot Hopkins and Pamela R. Reynolds, *Georgetown Journal of Legal Ethics*, 16 *Geo. J. Legal Ethics* 675, 677 (Summer 2003).

<sup>17</sup> *Id.*, p. 689.

Unsolicited e-mails to potential clients must comply with general attorney advertising rules, including those that govern direct mail.<sup>18</sup> Additionally, they must comply with federal and state laws regarding unsolicited commercial e-mail.<sup>19</sup> In order to comply with the Federal CAN-SPAM Act, e-mail advertisements must include:

- 1) a valid return address;
- 2) a physical postal address;
- 3) an indication that the e-mail is a solicitation; and
- 4) a mechanism for consumers to opt-out of future solicitations.<sup>20</sup>

The e-mail solicitation may not contain any false or misleading headline information or subject lines.<sup>21</sup> Moreover, ABA Model Rule 7.3(c) requires the words "Advertising Material" to appear at the beginning and end of the e-mail solicitation.<sup>22</sup>

The Ohio Supreme Court's ethics board recently issued an opinion that unsolicited e-mails are not inherently unethical. However, the board discouraged e-mail solicitations until rules are added to Ohio's code of professional responsibility directly addressing this matter.<sup>23</sup>

Attorneys planning to solicit business through e-mails should consult their local rules on professionalism and ethics. Additionally, since Ohio has already issued an opinion discouraging e-mail solicitations, attorneys should be careful when advertising via e-mail.

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<sup>18</sup> *Unsolicited E-mails to Potential Clients are Discouraged in Ohio, but Not Forbidden*, @ABA/BNA Lawyers=Manual on Professional Conduct, V.20, No.4, p. 95 (2-25-04).

<sup>19</sup> *See* CAN-SPAM Act, 15 USC ' ' 7701-13; *Unsolicited E-mails to Potential Clients are Discouraged in Ohio, but Not Forbidden*, @ABA/BNA Lawyers=Manual on Professional Conduct, V.20, No.4, p. 95 (2-25-04).

<sup>20</sup> *Id.* *See* also New York State Bar Ass'n Committee on Professional Ethics, Opinion 756 (3/13/02)(determining that New York's DR 2-101(K) also requires that solicitations contain the telephone number of the law firm or attorney whose services are being offered).

<sup>21</sup> *Id.*

<sup>22</sup> Some states, such as Ohio, have not adopted this provision. *See* *Unsolicited E-mails to Potential Clients are Discouraged in Ohio, but Not Forbidden*, @ABA/BNA Lawyers=Manual on Professional Conduct, V.20, No.4, p. 95. (2-25-04).

<sup>23</sup> *See* Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Opinion 2004-1 (2/13/04); *Unsolicited E-mails to Potential Clients are Discouraged in Ohio, but Not Forbidden*.@ABA/BNA Lawyers=Manual on Professional Conduct, V.20, No.4, p. 95.

**e. Client Confidentiality and Work Product Issues**

**1. Does a client waive work product protection if she forwards her daughter an e-mail she originally sent to her attorney?**

This issue actually arose during Martha Stewart's criminal trial. Stewart sent an e-mail to her attorney, Andrew J. Nussbaum, setting forth her memory of the facts relating to her sale of ImClone Stock. The next day, she forwarded the same e-mail to her daughter. In response to a grand jury subpoena, the e-mail was listed in Stewart's privilege logs.<sup>24</sup>

Judge Miriam Goldman Cederbaum held that Stewart waived her attorney-client privilege by forwarding the correspondence to her daughter because disclosure of privileged material to a third party waives the privilege. Stewart's actions, however, did not vitiate the work product protection for her e-mail.<sup>25</sup> In making this determination, the Court noted that most courts have found a waiver of work product protection only when the disclosure opened the door for potential adversaries to obtain the information. According to Judge Cederbaum, the work product doctrine is intended to protect material from a litigation opponent, not necessarily from the rest of the world.<sup>26</sup>

**2. Does a law firm have to produce internal e-mails that discussed a client's threat to sue?**

In *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo PC*,<sup>27</sup> the Eastern District of Pennsylvania held that internal e-mails in which lawyers consulted with a colleague in their firm about a threat by dissatisfied clients to sue the firm are not privileged, and must be produced to the now-former clients.<sup>28</sup>

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<sup>24</sup> See ASuspect's Factual E-mail to Lawyer, Copied to Daughter, is Work Product,@ ABA/BNA Lawyers=Manual on Professional Conduct, V. 19, No. 23, p. 603 (11-5-03); citing *United States v. Stewart*, S.D.N.Y., No. 03 Cr. 717 (10/20/03).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> E.D. Pa, No. 02-971 (12-13-02).

<sup>28</sup> *Id.*; AFirm Must Turn Over Internal E-Mails That Discussed Clients=Threat to Sue It,@ ABA/BNA Manual on Professional Conduct, V. 19, No. 2, p. 33 (1-15-03).

In *Koen*, the firm continued to represent the dissatisfied clients while seeking legal advice internally regarding the potential lawsuit. This created a conflict of interest under Rule 1.7 of the Pennsylvania Rules of Professional Conduct between the firm's representation of its own lawyers and its ongoing duty to its current client.<sup>29</sup> The Court in *Koen* determined that as long as the Koen companies remained as clients, the firm owed them a fiduciary duty that superceded the firm's own interests.<sup>30</sup>

The Court also advised that the firm could have solicited the clients consent to continue representation after the conflict had been fully disclosed under Rule 1.7(b).<sup>31</sup> Unfortunately, if this situation occurs and the client does not consent, the firm may have to withdraw as counsel of record.

## 2. POTENTIAL DANGERS LURKING ON YOUR WEBSITE.<sup>32</sup>

### a. **Posting Papers and Articles on the Website.**

A great way to advertise a law firm's services and talents is to post papers or articles written by members of the firm. Although this serves as a great tool to showcase your firm's knowledge in particular areas, it can possibly expose the firm to liability. There is always the chance that a client or potential client may erroneously rely upon information contained in one of the articles. For example, a firm might post an article providing a summary of the Fair Labor Standards Act. If a potential client relies upon this summary, without consulting an attorney about the particular facts of his case, a number of problems may arise. The client may miss a statute of limitations deadline or fail to mitigate his damages.

Although not a guaranteed solution, the firm or attorney should post a disclaimer that clearly states that the material and information provided on the website is general in nature and not intended

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<sup>29</sup> Rule 1.7 of the Model Rules of Professional Conduct also contains a conflict of interest provision.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> California issued an opinion holding that "an attorney's website providing to the public information about her availability for professional employment is a "communication" under rule 1-400(A) of [California's] Rules of Professional Conduct and an "advertisement" under [California] Business and Professions Code sections 6157 to 6158.3" See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2001-155.

to address specific legal concerns. The disclaimer should also advise that individuals seeking legal advice should consult an attorney.<sup>33</sup>

**b. Firm Domain Names**

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<sup>33</sup> See *Æthical Problems with Legal Computer Advertising and Affiliations*,@Thomas E. Lynch III, Maryland Bar Journal (November/December 2001) 34-Dec Md B.J. 11.

Moreover, if the firm accepts fees for legal advice or information in response to e-mail inquiries, the firm is conducting business over the web. There is a question whether this type of legal activity is covered by general malpractice policies. If the firm charges fees for internet legal advice, it should consider obtaining liability insurance specifically designed to cover exposures that stem from web sites and e-mail correspondence. See *Æthical Problems with Legal Computer Advertising and Affiliations*,@Thomas E. Lynch III, Maryland Bar Journal (November/December 2001) 34-Dec Md B.J. 11, 14.

When determining the domain name for your firm's website, you can be creative, but not too creative, because the domain name is considered a professional designation.<sup>34</sup> The domain name does not need to be identical to the firm's name, but must comply with the Rules of Professional Conduct.<sup>35</sup> The firm or attorney may not use a false or misleading name, nor can the firm or attorney imply any special competence or affiliations unless actually true.<sup>36</sup> For example, an attorney who handles intellectual property cases cannot use the domain name *Apatentattorney.com@* unless he has passed the patent bar.

Law firms and attorneys are also prohibited from using domain names that erroneously suggest that a private firm or attorney has a special affiliation with the local bar or government. For instance, an attorney in Arizona asked the Arizona State Bar whether he could use the name of his county bar association in his domain name (*countybar.com*). The Arizona State Bar determined that the proposed domain name suggested that the attorney had a special affiliation with the local bar association, and would therefore be misleading under the Rules of Professional Conduct.<sup>37</sup>

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<sup>34</sup> See Model Rules of Professional Conduct, 7.5(a); State Bar of Arizona, Opinion No. 2001-05.

<sup>35</sup> See Model Rules of Professional Conduct 7.1 *et seq.*

The Association of the Bar of the City of New York has determined that a firm's domain name does not need to contain a variation of the law firm's name, provided that the domain name complies with ethical rules governing legal advertising and publicity. See The Association of the Bar of the City of New York, Formal Opinion 2003-01, *Lawyers and Law Firms Selection and Advertising of Internet Domain Names*.

<sup>36</sup> See State Bar of Arizona, Opinion No. 2001-05; Ethical Problems with Legal Computer Advertising and Affiliations, @Thomas E. Lynch III, Maryland Bar Journal, 34-DEC Md. B.J. 11, 14 (November/December 2001).

<sup>37</sup> See State Bar of Arizona, Opinion No. 2001-05.

Domain names also contain top level domains that identify the nature of the site. ACom@ identifies a commercial enterprise; Aorg@ identifies a non-profit entity; Aedu@ identifies an educational institution; Agov@ identifies a non-military government entity; and Anet@ identifies a network provider.<sup>38</sup> A law firm should use Acom@ in its domain name.

**c. Client Testimonials**

A lawyer may include a client testimonial in advertisements, such as a website.<sup>39</sup> However, the testimonial must be a bonafide, non-misleading client testimonial. Moreover, the testimonial cannot include statements or information that would violate any of the rules regarding attorney advertising.<sup>40</sup> Basically, a lawyer cannot avoid ethical requirements by using a client testimonial to express information the attorney himself cannot express.

**d. Internet Advertising**

One potential problem with internet advertising that various states, and countries, have access to the advertisement. Residents of states in which the attorney is not licensed will view the website. As a precaution, the attorney or law firm should indicate the specific states in which the attorney or members of the firm are licensed. This will set a jurisdictional limit upon the website.<sup>41</sup>

The California Bar Association has provided the following suggestions to limit exposure in states in which an attorney is not licensed:

- 1) an explanation of where the attorney is licensed to practice law;
- 2) a description of where the attorney maintains law offices and actually practices law;
- 3) an explanation of any limitation on the courts in which the attorney is willing to appear; and

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<sup>38</sup> *Id.*, citing *Department of Commerce Guidelines and Protocol on Top Level Domain Names*.

<sup>39</sup> *But See* *Ethical Problems with Legal Computer Advertising and Affiliations*,@ Thomas E. Lynch III, *Maryland Bar Journal*, 34-DEC Md. B.J. 11, 14 (November/December 2001)(stating that client testimonials and endorsements are unacceptable).

<sup>40</sup> *See* *The Association of the Bar of the City of New York, Formal Opinion 2003-01, Lawyers and Law Firms Selection and Advertising of Internet Domain Names*; *The Missouri Bar Informal Opinion No. 2001-0107*.

<sup>41</sup> *See* *Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers Out of Trouble*,@Kirkey, E. Jeffrey,(2001), 18 T.M. Cooley L. Rev. 37, 48, *citing* J.T. Westermier & Leonard Naura, *Ethical Issues for Lawyers on the Internet and World Wide Web*, *The Computer Lawyer*, Mar. 1997, at 14.

- 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's web site.<sup>42</sup>

Of course, as with other disclaimers, these disclaimers do not provide an absolute defense.<sup>43</sup>

### 3. TRACING E-MAIL AND OTHER ELECTRONIC DOCUMENTS

As discussed in previous presentations, e-mails and electronic documents often leave electronic traces, such as previous revisions. Can a lawyer use technology to access these trace elements? According to the New York Bar Association, the answer is no.<sup>44</sup>

The New York Bar Association determined that it is unethical for lawyers to use technology to surreptitiously examine and trace e-mails and electronic document. New York's Code of Ethics prohibits a lawyer from engaging in conduct involving dishonesty, deceit or misrepresentation and conduct that is prejudicial to the administration of justice.<sup>45</sup> The New York Bar compared using technology to examine e-mails and electronic documents to other prohibited attorney actions, such as soliciting the disclosure of unauthorized communications, exploiting the willingness of others to undermine the confidentiality privilege and making use of inadvertent disclosures of confidential communications.<sup>46</sup> Additionally, the New York Bar concluded that this type of action violates provisions prohibiting impermissible intrusions on the attorney-client relationship in violation of the code of ethics.<sup>47</sup>

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<sup>42</sup> See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2001-155.

<sup>43</sup> See *A Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers Out of Trouble*, Kirkey, E. Jeffrey, (2001), 18 T.M. Cooley L. Rev. 37, 48, citing J.T. Westermier & Leonard Naura, *Ethical Issues for Lawyers on the Internet and World Wide Web*, *The Computer Lawyer*, Mar. 1997, at 14.

<sup>44</sup> See New York Bar Association Committee on Professional Ethics, Opinion 749 (12/14/01).

<sup>45</sup> See DR 1-102(A)(4) & (5); New York Bar Association Committee on Professional Ethics, Opinion 749 (12/14/01).

<sup>46</sup> *Id.*, citing *Bubios v. Gradco Sys., Inc.*, 136 FRD 341, 347 (D. Conn. 1991); ABA Formal Op. 94-382; ABA Formal Op. 92-368.

<sup>47</sup> See DR 4-101; New York Bar Association Committee on Professional Ethics, Opinion 749 (12/14/01).

Although attorneys might argue that they should use every means available to advance their clients' interests, a bar on surreptitious e-mail traces is consistent with prior ethical restraints on uncontrolled advocacy.<sup>48</sup>

### **CONCLUSION and FINAL DISCLAIMER**

This paper provides a survey of potential hot spots for attorneys. Unfortunately, new hot spots are developing as fast as the new technology. In keeping with the disclaimer theme suggested throughout, please do not solely rely on the information provided in this paper. Each state has adopted its own rules that govern an attorney's ethical and professional obligations. The ABA has even provided a link, <http://www.abanet.org/cpr/profcodes.html>, to professionalism codes adopted by each state, including city and county bar associations. If you have any questions regarding an ethical or professional obligation, check the particular rules for your state and/or consult an ethics attorney in your area.

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<sup>48</sup> See New York DR 1-102(A)(4) & (5); New York Bar Association Committee on Professional Ethics, Opinion 749 (12/14/01).