

ADVISORY ETHICS OPINION 2000-04

SYNOPSIS:

A lawyer's Web site is "Advertising" within the meaning of the Rules of Professional Conduct; therefore the attorney must comply with the applicable requirements of Rules 7.1 and 7.2 concerning accuracy and record-keeping. Unless the information on the Web site is directed to persons or groups whom the lawyer knows to be in need of legal services and with whom the lawyer does not have a family or prior professional relationship, the Web pages need not include the words "Advertising Material" otherwise required by Rule 7.3(c). It is advisable for the lawyer to use carefully worded disclosures and disclaimers to clarify the purposes and value of the information on the Web site and in the lawyer's e-mail responses to questions generated by the Web site. However, the use of disclaimers will not necessarily preclude the formation of a lawyer-client relationship and its attendant ethical responsibilities, "in" particular circumstances.

FACTS:

The requesting lawyer maintains an extensive Web site intended for "advertising and providing a public service." The contents of the Web site are available to anyone who wishes to access it on the Internet. The Homepage lists a variety of topics about the lawyer, a list of specific legal areas, presumably those in which the lawyer offers legal services to prospective clients, and a section entitled "frequently asked legal questions," which consists of answers composed by the lawyer to questions he has invited visitors to the Website to ask. In addition, the lawyer's e-mail address is listed. From time-to-time the lawyer will receive inquiries from the public or prospective clients. The site includes disclaimers that relate to both the "frequently asked legal questions" and the information provided by individuals who may contact the lawyer by sending a communication to the e-mail address. The lawyer's intention is to disavow any lawyer-client relationship with respect to any professional responsibility for the answers to the legal questions and the confidentiality of any information included by an inquiring individual or prospective client who contacts the lawyer via the e-mail. When the lawyer answers an e-mail from an individual who is not already a client, the response also includes a disclaimer. Samples of the disclaimers are included at the end of this opinion.¹

The lawyer seeks advice about the application of certain provisions of the Vermont Rules of Professional Conduct to the Web site, the e-mail communications with prospective clients and the disclaimers. The applicable Rules involve Communications Concerning a Lawyer's Services (Rule 7.1); Advertising (Rule 7.2); Direct Contact with Prospective Clients (Rule 7.3); and Communication of Fields of Practice (Rule 7.4).

QUESTIONS PRESENTED:

The following questions are presented:

- Is the Web site "advertising" within the meaning of the applicable Rules of Professional Conduct?
- Is the Web site a direct or indirect means of contacting or communicating with prospective clients known to be in need of legal services and with whom the lawyer has no family or prior professional relationship?
- Is the Lawyer required to comply with the provisions of Rule 7.3 (c), and include the words "Advertising Material" at the beginning and ending of every page of the Web site?

¹ We offer this homepage, associated other pages and related links for the benefit of our clients and our friends and those with an interest in law and legal affairs in the State of Vermont. Please feel free to browse around, use what you find and comment to us as appropriate. This service, like the media which delivers it, will be in a constant state of evolution.

A word of caution. Lawyers use their knowledge of the law based on the facts of a particular problem and the circumstances of their particular client. While you are free to use the information provided here (as you would a good newspaper), no attorney client relationship exists between us until and unless we agree to one. Please note that your communication is not encrypted and could conceivably be read by Internet trespassers. For more information about the terms of your use of this site, please see our Legal Disclaimer.

Legal Disclaimer

The information contained in this Web site is being made available as a public service by the _____ Law Offices. No information posted here or materials provided is intended to constitute legal advice. We do not guarantee the accuracy of posted information or the accuracy of other sites given links herein. No one shall be entitled to claim detrimental reliance on any views, forms or models provided herein, or to claim any duty on our part to update the information contained here or to protect the interests of those accessing this Web site.

Neither the receipt nor the distribution of materials, including the use of private electronic mail, constitutes the formation of any attorney client relationship, which can be formed only upon the execution and delivery of a written retainer agreement and the satisfaction of the conditions contained therein.

E-MAIL: You are welcome and encouraged to email comments or questions to our offices. We cannot guarantee that all queries will get a response. Comments or questions received by us will not be considered confidential unless and until we expressly consent in writing to receive such information confidentially, and only if the communications are addressed to Attorney _____. Please note that since communications are not encrypted, all email sent via the internet may conceivably be intercepted and read by those to whom it has not been addressed.

- Does the Lawyer's offer in the Web site to respond to inquiries from members of the general public seeking information about the law or seeking legal representation invoke any ethical concerns regarding the establishment of lawyer-client relationships, confidentiality, conflict of interest or malpractice?
- Will the use of disclaimers (a) protect the lawyer from the risk of creating lawyer-client relationships with those who seek on-line legal information or advice through the Web site and the lawyer's e-mail address; and (b) eliminate the need for the lawyer to maintain confidentiality or assume responsibility for the content and accuracy of opinions on the Web site or contained in the lawyer's e-mail responses to legal questions posed by prospective clients?

RELEVANT PROVISIONS OF THE VERMONT RULES OF PROFESSIONAL CONDUCT

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;**
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or**
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.**

RULE 7.2 ADVERTISING

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television or other electronic media, or through written or recorded communication.**
- (b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.**
- (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this rule;**
 - (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and**
 - (3) pay for a law practice in accordance with Rule 1.17.****
- (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.**

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

- (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.**
- (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or**
 - (2) the solicitation involves coercion, duress or harassment.****
- (c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.**
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.**

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

- (a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;**
- (b) a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation; and**

- (c) a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in Vermont for approving certifying organizations. If, however, the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement.

DISCUSSION:

Lawyer Web Sites Are Advertising

In Opinion No. 97-5, analyzed under the former Vermont Code of Professional Responsibility, the Committee determined that an attorney's use of an Internet Web site to communicate with clients and prospective clients required compliance with DR 2-103 and DR 2-104 relating to advertising and solicitation. Relying upon Illinois State Bar Association Opinion No 96-10 (5/16/97) we adopted the reasoning that Web pages not directed to specific persons or groups "may be compared to advertisements in the telephone yellow pages or magazine articles...[as]...indirect means of communicating with existing or potential clients about an attorney, the attorney's services, and the law in general."² Under the facts as presented here, the new Rules clearly apply, since they govern "all communications about a lawyer's services... specifically including electronic mail, electronic bulletin boards, world-wide web sites, chat groups, listserves and mailing lists..." Comment to Vermont Rules 7.1 and 7.2. Therefore, lawyer or law firm Web sites should comply with the accuracy and record-keeping provisions of Rule 7.1 and Rule 7.2 (a), (b) and (d).

Indirect and Direct Communications with Prospective Clients By Means of Lawyer Web Sites

As presented in this request, the Web site contains information about the lawyer, the services offered and about the law in general, limited to certain areas. The information is made "available to the world.... The potential client seeks out information as in the yellow pages, and chooses whether or not to read and/or act on the available information. The lawyer has no choice as to who sees or reads the information posted."³ This type of advertising is not equivalent to either "direct mail contact" or "in-person or telephone contact," designed to solicit legal business, which would otherwise invoke the requirements of Rule 7.3 (a)-(c). It is important that the lawyer has not initiated the contact with prospective clients merely by posting a Web site; nor is the contact "direct" in the sense that the lawyer has identified particular individuals or groups "known to be in need of legal services in a particular matter."

If, however, the lawyer were to initiate unrequested Web site information contacts or e-mails to specific persons or groups that have been identified through bulletin boards or chat groups or knowledge that such persons needed legal services, then the contact becomes "direct" and additional requirements under the advertising and solicitation Rules would become applicable. In addition, there may be greater risk that the lawyer-initiated contact would be viewed by the recipient or prospective client as creating a lawyer-client relationship with its various ethical ramifications.⁴

Mere Posting of Information on a Lawyer Web Site and publishing answers to "Frequently Asked Legal Questions" Does Not Constitute Direct Solicitation

Under the foregoing reasoning, Rule 7.3 (c), which requires a disclosure that a direct communication is prepared as advertising for a particular individual or group, does not apply to the Requesting Lawyer's Web site; and it is not necessary that each page of the site contain the words "Advertising Materials."

An Offer In a Web Site to Respond to Legal Questions Posed by Visitors to the Web Site Requires Careful Evaluation of the Ethical Implications.

Both the content of the Web Site's invitation to individuals to seek answers to legal questions and the expectations of those individuals can bear upon the ethical obligations of lawyers who use the internet to promote their services. In the instant case the Web site "letterhead" states: "Welcome to the Heart of Vermont...and the Law Offices of [Requesting Lawyer]..." The site also states:

"As a courtesy to visitors to this site, we will provide short answers to questions involving the law of Vermont...Questions submitted ...will be reprinted here, without the name of the submitter; submitters would understand to that extent all questions are PUBLIC and NONCONFIDENTIAL. (If you wish to comment

² Vt. Op. No. 97-5.

³ Vt. Op. No. 97-5.

⁴ See Illinois State Bar Assoc. Op. No. 96-10; Tennessee Ethics Op. No. 95-A-570.

privately, do NOT respond to this forum. Instead contact [Requesting Attorney]...Those submitting questions and those reading responses should read the Legal disclaimer for additional details governing this forum.”

Despite the above caveat and disclaimers, as we note below, there remain unanswered questions about the lawyer’s vulnerability both ethically and legally. For example, a non-lawyer may rely upon the information in the Web site or the lawyer’s responses via e-mail to his or financial detriment. The lawyer, therefore, should make sure that the information is current, accurate and perhaps include a clear statement that readers should not rely upon it and that it does not constitute legal advice. The more personalized the response to the website visitor, the higher the risk that the interaction may involve ethical considerations of confidentiality and potential conflicts of interest.

In addition, if the request/response interaction approaches a “real time” conversation between the lawyer and the requester, it comes closer to a lawyer-client relationship that may create expectation that the lawyer is giving advice or that the information provided to the lawyer is to be received confidentially. Rule 1.6 applies to confidentiality of “information relating to representation of a client,” but the Reporter’s Note states that the Rule “imposes a duty of confidentiality concerning information relating to the representation regardless of whether is acquired before or after the relationship exists.” Under the former Code, we construed the confidentiality provisions of DR 4-101 to apply to free initial office consultations in which legal advice is sought and given in circumstances likely to create an expectation of confidentiality.” We relied in part on the language of EC 4-1 (which has no counterpart under the present Rules) that emphasized preservation of confidences and secrets of “one who has employed or sought to employ” the lawyer.

Thus, the lawyer who maintains a Web site, and utilizes it to invite potential clients to engage in electronic exchanges regarding their legal interests, should remain mindful that the consumers of the lawyer’s Internet services may develop greater expectations about the existence of lawyer-client relationships than the lawyer intends.

The Use of Carefully-Worded Disclaimers Will Help to Limit the Expectations of Potential Clients and Clarify the Purposes and Value of the Information Included in the Web Site and in E-mail Responses to Questions generated by the Web Site. However, Disclaimers Will Not Necessarily Preclude the Establishment of Lawyer-Client Relationships in Individual Cases.

Because we conclude that the Web site presented to us by the requesting lawyer constitutes “advertising” within the meaning of the Rules, and is not merely general public information, the use of the Web site by the lawyer is subject to the appropriate Rules regarding “Information About Legal Services.” Moreover, because advertising is intended to bring visitors to the site not only to provide them with information, but also to solicit their legal business, the prudent lawyer should use carefully-worded disclaimers or clear statements to give notice of the limits of the Website with respect to: (a) accuracy of the information; (b) its intended purpose as information and not legal advice; (c) that no lawyer-client relationship is intended by the response to frequently asked legal questions; (d) that readers should not act upon the information without seeking and obtaining professional legal counsel; and (e) that visitors not send any confidential information to the lawyer before personally speaking to the lawyer and obtaining authorization to send the information.

This recommendation stems from the Committee’s opinion that clear and complete information will assist visitors to the Website in understanding its limitations and enable them to make informed decisions about how to use it. We note that the more the lawyer tailors e-mail responses to specific facts, as contrasted with answers to generic legal questions, the greater the risk that a lawyer-client relationship would be formed. At the very least, the lawyer needs to be concerned about confidentiality of the information imparted by the potential client. (ABA Formal Opinion 358 (1990) states: “Information imparted to a lawyer by a would be client seeking legal representation is protected from revelation or use under Model rule 1.6 even though the lawyer does not work for the would-be client.”)

The Committee is not aware of any Ethics Opinions or decided cases that either uphold or discount the use of disclaimers by attorneys who establish Web sites. Therefore, we cannot advise that the disclaimers presented here will insulate the requesting lawyer from potential ethical difficulties that might arise from visitors who may rely upon the information or perceived advice provided via the lawyer’s Web site. We do not believe that the disclaimers change the character of the Web site insofar as the applicability of the Rules are concerned. The site definitely is a communication about the lawyer’s services and thus must not be false or misleading under Rule 7.1; and is otherwise covered by the record-keeping requirement of Rule 7.2. Neither the site nor e-mail answers to questions need be labeled as “advertising material,” unless under circumstances where information is directed at specific individuals or groups known to need legal services, as per Rule 7.3. Whether or not a lawyer-client relationship is established depends upon the nature and extent of the personal interaction via the Internet between the lawyer and a visitor to the Web site, and is not determined exclusively by the use of disclaimers.

We do not address the question of whether Web site advertising may be subject to lawyer advertising rules in other jurisdictions in which potential clients are invited to contact the lawyer. Other states' ethics committees have issued opinions approving interstate advertising subject to disclosures and compliance with home state ethics rules.⁵

NOTE: The most comprehensive list of ethics opinions relating to legal ethics and the Internet is found at <http://www.legalethics.com>. The American Bar Association Commission on Advertising has prepared a white paper that covers well the entire range of ethical issues relating to lawyers using the Internet to attract clients. ABA Commission on Advertising, A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies (July 1998) <http://www.abanet.org/legalserv/advertising.html>; <http://www.legalethics.com/articles/aba/adpaper.htm>.

⁵ See NY State Bar Assoc. Ethics Op. No. 709 (9/16/98) and especially Fn.3, 1998 WL 957924.