

The Ethical Ramifications of Developing Online Leads

By: Steven J. Olsen

Young lawyers today recognize the advantages of using the internet and social media to build an identity for themselves and their firms. Marketing by these means is second nature for young lawyers. They were taught to use this medium throughout their years of education. But few have been informed of the pitfalls associated with legal marketing.

The moment an individual is licensed to practice law they accept and acknowledge that they are governed by a new set of responsibilities. Attorneys are regulated by the Rules of Professional Conduct both on and off duty. Young lawyers understand that they are symbols of the legal profession. They recognize that attorneys cannot make false or misleading statements about themselves or the services they offer (Rule 7.1) and cannot perform in person solicitations of non-attorney strangers as prospective clients for pecuniary gain (Rule 7.3). They also recognize that Rule 7.3 extends to preclude them from using real time electronic contact to solicit non-attorney strangers as prospective clients for pecuniary gain. On the other hand, young lawyers know that they can advertise their professional and law related services (Rule 7.2). Therefore, many legal professionals choose to advertise their legal services through a firm website.

It sounds simple enough. A website does not use in person or real time electronic contacts to solicit prospective clients. Instead, the prospective clients locate the website and then make an informed decision on whether to correspond further with the firm. Many firm websites today permit prospective clients to submit legal inquiries or other information through the website. This is a viable and productive method of obtaining potential clients, but it is not free of pitfalls.

An attorney should reflect on two concerns before beginning to obtain information from prospective clients over an interactive website. First, it is important for an attorney to review the Rules of Professional Conduct and understand what obligations the attorney has as a result of a submitted legal inquiry from a prospective client. Second, the attorney should consider the reason for obtaining the information provided and develop a privacy policy for all information obtained from users of the firm website.

Rule 1.18 of the ABA Model Rules of Professional Conduct governs an attorney's duties to prospective clients. Rule 1.18 (a) states, "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." This is a very broad definition of a prospective client and likely includes any person submitting an online legal inquiry to a firm. Rule 1.18 requires communication with a prospective client to be kept confidential. It further considers the prospective client for conflict of interest purposes by stating, "[a] lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter," except under limited circumstances.

An attorney cannot control what a prospective client will reveal on an online legal inquiry submission. Accordingly, an opposing party could submit an online legal inquiry that raises a conflict of interest with a current client. It is important to address this concern prior to permitting such online submissions. Comment five to Rule 1.18 gives guidance in this area: “A lawyer may condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” Informed consent under this comment requires the prospective client to receive adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of communication.

In light of the above comment, an attorney should provide a disclaimer on the submission form and require the prospective client to check a box agreeing to the terms of the disclaimer prior to submitting the legal inquiry. The disclaimer should (1) acknowledge that the website is for general information only, (2) confirm that nothing identified on the website should be construed as legal advice, (3) confirm that the website and submission form should not be construed to create a client-lawyer relationship, (4) confirm that nothing submitted in the legal inquiry will prohibit the firm from representing a different client in the same matter, (5) explain the risks of submitting confidential information with the legal inquiry, (6) explain the reasonable available alternatives to submitting the online legal inquiry, and (7) provide a link to the firm’s privacy policy that describes in detail the firm’s intended use of submitted information. These steps will help prevent future conflicts while still obtaining prospective client information.

Next, an attorney must develop a privacy policy covering all information obtained from users of the firm website. A privacy policy provides candor to prospective clients and allows the attorney to be in conformity with the law as required by the ABA Model Rules of Professional Conduct. California passed legislation requiring companies to have a privacy policy on their website.¹ The California legislation prevents a company from obtaining information from a California resident without first having a published privacy policy. The internet is global and a firm cannot preclude residents from California from submitting online legal inquiries to the firm. Therefore, the best approach is to develop a privacy policy that conforms to the requirements of the California statute.

A user of the firm’s website should be able to locate the firm’s privacy policy directly from the home page. Often a hyperlink entitled privacy policy or privacy statement is provided at the bottom of the homepage. The hyperlink should be conspicuous.

Under the California statute, the firm privacy policy must have five essential elements: (1) it must identify the information collected or obtained by the firm through the website, including any personally identifiable information (name, address, e-mail, telephone number, social

¹ CAL. BUS. & PROF. CODE §§ 22575–22579 (2010).

security number, or any other identifier that permits the physical or online contacting of a specific individual); (2) it must describe how the firm intends to use the obtained or collected information and with whom the firm intends to share such information; (3) it must describe the process, if any, by which an individual may review and request changes to personally identifiable information collected by the firm; (4) it must describe the method by which the firm will notify users of the website of any material changes to the privacy policy; and (5) it must identify its effective date. A privacy policy should also, pursuant to federal law, include a children's privacy section that establishes the firm's policy not to solicit data from children under the age of 13 and to delete any such information obtained in error.² Finally, the privacy policy should provide information about opting-out of future communications from the firm and discuss security safeguards for the information obtained.

The firm should work closely with the website developer to ensure they understand all of the information collected through the website. A firm must know if their website collects user information through cookies, weblogs, web beacons, or other hidden methods. It is important to remember that the more information a firm obtains from its users, the more likely the firm will create conflicts of interest. The best approach for law firms is to limit the information collected to that which is voluntarily submitted by the prospective client. This ensures the prospective client is aware of what has been collected and gives a firm an opportunity to perform a conflict check before obtaining too much information. It will also ensure that the firm does not receive any information without the prospective client acknowledging that they agree with the terms of the firm's disclaimer.

Once a firm has reflected on the above concerns, it can make an informed decision on how to proceed with its website. By implementing the above protections, a firm can manage the expectations of the prospective clients prior to any legal inquiry being submitted over the internet. The privacy policy explains to the prospective client what information is being obtained, why the information is being obtained (i.e. perform conflict check and determine possibility of future representation), and what the firm intends to do with the information obtained. The disclaimer permits the prospective client an opportunity to make an informed decision about initiating the legal inquiry and puts the prospective client on notice that the firm may already represent the opposing party. These safeguards assist attorneys in meeting their ethical responsibilities as outlined by the Indiana Rules of Professional Responsibility and avoid some of the pitfalls associated with legal marketing.

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² The Children's Online Privacy Protection Act of 1998 §§ 1301-1308, 15 U.S.C. §§ 6501-6506 (2006).