Ethical Issues in “E-Lawyering”

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New-age ‘Electronic’-lawyers may be changing the medium in which they practice, but still are burdened with such age-old ethical issues as the unauthorized practice of law, maintaining client confidentiality, improper solicitation and advertising -- just in another, more ephemeral form.

When, for example, can lawyers register their names, or that of their firms, on such commercial law-related web sites as Lawyers.com or Americounsel without skirting ethical precepts for advertising? And how creative can their firm’s website domain name be?

Can lawyers reply to legal inquiries posted on Internet “bulletin boards” or in other “chat rooms” without running afoul of anti-solicitation or unauthorized practice ethics rules? Do we have to encrypt e-mail to and from clients?

Is it permissible for otherwise unaffiliated lawyers and/or small firms who share office space to share office e-mail and other electronic word-processing and bookkeeping systems?

Like most substantive legal problems, the answer is: “It depends.” But what it depends on is an emerging patchwork of ethics rulings cropping up across only a handful of jurisdictions. And, while they may not yet be authoritative, this first wave of opinions
nevertheless offer a beacon signal for practicing law in the electronic era.

*Commercial Web Sites*

Ohio lawyers may pay an online referral service a membership or registration fee as well as a fee calculated on a percentage of the legal fee earned provided that the lawyer referral service is in compliance with the local RPCs and the Bar’s Lawyer Referral and Information Services regulations. See *Opinion 2000-5* (12/1/00).

Ohio lawyers may not, however, participate in a commercial law-related Web site that provides them with clients if the arrangement entails prohibited payment for referrals or if the business is engaged in the unauthorized practice of law. (Ohio Supreme Court Board of Commissioners on Grievances and Discipline, *Op. 2001-2*, 4/6/01). When an attorney is contacted by a law-related commercial Web site company that offers to make available, in some manner, the attorney’s name, address, phone number, area of practice, or other information to potential clients in exchange for the attorney providing compensation to the company, the attorney must be extremely cautious. The opinion distinguishes between payments for advertising and payments for referrals.

Attorneys on Long Island, N.Y., however, may affiliate with an on-line legal services-related web site, subject to the ethics rules on advertising. *Nassau County Opinion #01-4* (2/6/01).

Maine attorneys can participate in commercial web sites that give users access to legal services provided that the lawyers (a) evaluate the accuracy of the venture’s advertising; (b) comply with applicable requirements relating to personal approval and storage of paid advertising; and (c) do not promise the web site operators that the attorney
will withdraw from representation only if the client consents. Maine Board of Bar Overseers Professional Ethics Commission, Opinion 174 (10/10/00). Interestingly, the Commission found that the web sites arrangement for listing its members was the functional equivalent of a law listing or legal directory.

But the Iowa Supreme Court Board of Professional Ethics and Conduct has ruled that attorneys there may not link to and participate in an online referral service that provides consumers with a way to find attorneys by specialty and locale and publishes a wealth of consumer legal content and attorney resources. Iowa 00-07 (12/5/00).

D.C. lawyers may use web sites as a tool to find people willing to sign up as plaintiffs for class action law suits, but must not make misleading statements and must disclose their financial interest in the case. District of Columbia Ethics Opinion 302 (11/21/00). The opinion also notes that attorneys may participate in web sites that post RFPs (Requests for Proposals) for corporate work. This view is contrary to that expressed in New York City 2001-1.

Visiting the web site of a client’s adversary in litigation does not violate the rule against lawyers’ communications with persons known to be represented by other counsel, though attorneys are still warned to avoid interactive contacts. Oregon State Bar Legal Ethics Comm, Op. 2001-164 (1/01).

Cyber-Advertising

Not surprisingly, web sites that feature quotations from clients -- even with their
consent -- describing the general nature of a firm’s legal services, its responsiveness, and other non-substantive aspects of the firm’s representation run afoul of the same ban on client testimonials and the prohibition against misleading public statements in Ohio as such statements would in a paper brochure. Ohio Supreme Court, Opinion 2000-6 (12/1/00).

The ethical rules seem a little more liberal with respect to law firm domain names, however. A law firm domain name does not have to be identical to the firm’s actual name (ours is “rightslaw@aol.com”) but it otherwise must comply with the Rules of Professional Conduct; i.e., it cannot be false or misleading, nor imply any special competence or unique affiliations unless factually true. Query whether an e-mail server for a plaintiff’s law firm called “sueyourboss.com” skirts the anti-solicitation rules. Interestingly, an Atlanta law firm with the domain name, “redhotlawgroup of ashley” passed ethical muster only because it included the name of a a firm member (ostensibly because a client could locate the firm by the member’s if necessary.

Finally, a for-profit law firm domain name should not use the domain suffix “.org” nor should it use a domain name that implies that the law firm is affiliated with a particular non-profit organization or governmental entity. Arizona 2001-05 (3/01).

Confidentiality and the Electronic Office

According to the ABA Standing Committee on Ethics and Professional Responsibility, “[c]onfidential client information must be “acquired, stored, retrieved and transmitted under systems and controls that are reasonably designed and managed to
maintain confidentiality.” “ABA 99-413 n.4 quoting Restatement (Third) of the Law Governing Lawyers, Sect. 112, cmt. d (proposed initial draft 1998). This does not mean that e-mail has to be encrypted!

The Committee merely made a comparative review of how to protect client confidences and secrets that are transmitted by e-mail. It found that the transmission of unencrypted e-mail after consultation with the client and advising the client of the risks involved was a reasonable way to exchange client information. Importantly, the Committee considered the fact that there are risks associated with the way attorneys handle all forms of electronic client communications -- telephones, fax machines, and the like. The opinion tacitly recognizes that requiring encryption would be unreasonable, subjecting many of the ways attorneys share their information with clients and each other to radical changes.

Thus, it appears that lawyer may, ordinarily, use un-encrypted Internet e-mail to transmit client confidential information -- certainly in Utah, without violating that State’s Rules of Professional Conduct. Utah 00-01 (3/9/01).

Lawyers sharing electronic office systems also poses ethical problems. District of Columbia Ethics Opinion 303 (2/20/01) notes that it is “impermissible for unaffiliated attorneys to have unrestricted access to each other’s electronic files (including e-mail and word processing documents) and other client records. If separate computer systems are not utilized, each attorney’s confidential client information should be protected in a way that guards against unauthorized access and preserves client confidences and secrets.” Similar concerns are raised by sharing a single fax line. The opinion also notes that
shared computer resources likely involve sharing of employees or third-party contractors for technical support who must be instructed regarding their obligations to maintain client confidences and secrets and the lawyers must ensure that this occurs.

Finally, at least one ethical question about confidentiality remains unanswered: how technically competent do new-age “e”-lawyers have to be? In an era when most office computer systems have at least some form of anti-virus protective software, are we ethically charged with a duty to install some form of computer “firewall” to prevent unauthorized access to sensitive client information -- whether the invasion is by a snooping law firm staffer, office visitor or computer “hacker?”

**Chat Rooms/Bulletin Boards**

The general concern here is that whenever, wherever, and however a lawyer participates in an electronic bulletin board, the lawyer’s action is a *per se* solicitation. To be sure, an attorney may not solicit prospective clients through Internet chat rooms, defined as real-time communications between computer users. Florida Bar Adv. Op. A-00-1. (8/15/00). But a *per se* rule would not only raise serious free speech issues, such a ban would seem to run counter to the social function that lawyers serve by contributing to the public good of everyone in society, not just clients.

Closer to the ethical line are concerns that lawyers who post electronic messages may be practicing law without a license because the Internet crosses jurisdictional lines. Of course, the question turns on whether such a lawyer is actually engaged in the practice of law by virtue of merely “chatting” with the public about legal issues. The answer
seems to be that so long as the lawyer is merely providing information, which happens to
be of a legal nature, then no ethical issue is raised. It is not the practice of law on-line
merely because the information is delivered digitally, as opposed to at a cocktail party.