

## **The Trouble with Email, Part One**

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Email can certainly be a great time saver. One no longer needs to run to the post office for stamps nor wait several days for snail mail to complete the delivery. Documents and messages can be exchanged instantaneously at the click of a button and for some situations a response is only moments away. Are there any downsides to this great time saver for the law office? In short, yes. Here are a few of the significant ones.

Can an attorney/client relationship be unintentionally created via email? The answer isn't as clear as one would hope. Consider this. An individual is browsing the Internet looking for an email address of an attorney, any attorney. Once found, this individual submits a legal question. Is this individual manifesting and intent to create an attorney/client relationship? If the attorney responds, has the attorney manifested a similar intent and does the attorney know or could she reasonably foresee that the advice would be relied upon? Does it make a difference if the email address was obtained from a site such as Martindale Hubble's or was found at the firm's web page where a banner reads "free online consultation?"

There are far too many variables that can be thrown into this scenario and no developed case law that would allow for a clear answer here. The best advice is to proceed with caution when unsolicited emails arrive at an attorney's desk. The delete button is effective, but more and more this may not always make the most business sense. The prominent placement of disclaimers on a web site and/or using a firm email address in advertising and having all incoming emails screened by a non-attorney addresses this concern to some degree.

If the decision of the firm is to answer unsolicited questions, the challenge becomes limiting the exposure to a negligent advice claim. Giving advice in a vacuum is never wise and the limited information provided in emails makes this a mistake that can occur far too easily. With a phone call, the attorney has the ability to ask questions and there is much more control over what information is provided. If the decision is to answer legal questions from web site directed traffic, consider waiting 24 hours before responding. Take the time to consider if additional information is needed, to decide what qualifications should be included and to think through the answer. Advice given on the fly can too easily miss the mark.

The larger a firm becomes the greater the possibility that there is an attorney who fails to utilize the technology and thus never checks for email. If questions for the site are encouraged, every attorney must routinely review their incoming email. The possibility of a statute getting blown while an individual waits for a response to her submitted question, particularly in the absence of a thorough disclaimer on the site, could be a real problem.

If questions are going to be encouraged on a site and a fee collected however, a disclaimer will likely be completely ineffective, as attorney actions are inconsistent with a disclaimer that states an attorney-client relationship cannot be formed. One solution would be to require that before a question is submitted, the client must agree to the terms of a click-through agreement that clearly sets forth the terms of the limited engagement and definitively limits the scope of representation to a question and response or at least documents that the disclaimer has been read. A click-through agreement typically is used to specify the terms and conditions that apply to the purchase of a product or service from the web site. The buyer will explicitly assent to the terms by clicking on an "I agree" button after having the opportunity to review the terms. Be aware that these agreements may not be enforceable if the terms are too overbearing or harsh.

Conflicts of Interest are a related concern. When questions come into the firm the individual often details the facts of their specific situation. When these emails come directly to the attorney, regardless of the creation of an attorney-client relationship, should this information be tracked in a conflict database? I can easily foresee clients trying to conflict a competent opposing attorney out of the case simply by asking general questions about the specific case via email with opposing counsel hoping to force a withdrawal. Is this far fetched? Many law firm web sites fail to ask for name and address of the individuals submitting the email. How would the firm ever be able to prevent this from happening? Add to this the real possibility of questions coming into the firm from jurisdictions in which no attorney is licensed to practice. In this situation the response from the attorney may be viewed as the unauthorized practice of law, particularly when the advice given was completely inappropriate for that jurisdiction and a claim is presented.

In light of these possibilities alone, the web site should have language present at the attorney email hyperlink/s specifically stating that no email will be reviewed or responded to unless the individual has submitted their name and address. A state-of-the-art conflicts check requires that the firm only obtain the names of all parties involved in the matter and the type of matter at issue at first contact and nothing else. Contacts from the Internet need not alter this approach. The reality is, however, that many firms do not conduct the conflicts check at this level and do routinely allow for the presentation by the individual of their legal concern. Given this reality these contacts must be tracked in the database regardless of the creation of an attorney-client relationship, meaning declinations as well. Just as one party to a divorce has been known to try to taint every firm in a given area via phone contact, the Internet can be similarly used.

The Internet really hasn't created any new malpractice exposures, simply a need for different solutions to the new ways in which these exposures can arise. This discussion will be continued in part two and will address such issues as misdirected communications, confidentiality and professionalism as they apply to email. Stay tuned.