

The Federal Lawyer In Cyberia

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Time to Audit Your Firm's Website? Yes!

Last August, the American Bar Association released a long-awaited formal opinion that will have an impact in Cyberia and therefore deserves the attention of every law firm in America that either currently hosts a website or is thinking of doing so. That ethical guideline, ABA Formal Opinion 10-457, can be found online at www.abanet.org/cpr/pdfs/10-457.pdf. Although the opinion does not break much new ground, it does provide an impetus for firms to review their approach to marketing and client outreach on their websites. The document is almost a ready-made checklist of concerns that every private firm with a web presence needs to address.



The rise of the Internet, as we all know, raised fundamental questions about the extent to which the ABA's Model Rules of Professional Conduct can and should be applied to lawyers' use of new marketing tools like their firms' websites. In response to questions and after more than a little confusion, the ABA formed its Commission on Ethics 20/20 Working Group to deal with the implications of Cyberian technologies, including, but not limited to, websites. One of the stated goals of the ABA and its commission was to identify areas of uncertainty and to offer proposals to clarify the ethical obligations of lawyers in a technological environment—obligations that are consistent with freedom of expression under the First Amendment.

Even though the ABA provided welcome guidance through its new formal opinion, the association was quick to point out that the laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling on ethical matters. (Many ethics opinions issued by state and local bar associations are published online and can be accessed through the ABA's Center for Professional Responsibility website at www.abanet.org/cpr/links.html. It is wise to review the standards of each state and local bar association in the area where a firm may solicit business or where its statements regarding the law may be used by lay people.)

It should be emphasized here that the ABA's new formal opinion targets lawyers in private practice only. The document specifically disclaims any applicability to governmental lawyers or to the offices of nonprofit law advocacy firms or organizations.

To quote from the opinion's preamble:

Many lawyers and law firms have established websites as a means of communicating with the public. A lawyer website can provide to anyone with Internet access a wide array of information about the law, legal institutions, and the value of legal services. Websites also offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or a law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.

The obvious benefit of this information can diminish or disappear if the website visitor misunderstands or is misled by website information and features. A website visitor might rely on general legal information to answer a personal legal question. Another might assume that a website's provision of direct electronic contact to a lawyer implies that the lawyer agrees to preserve the confidentiality of information disclosed by website visitors.

For lawyers, website marketing can give rise to the problem of unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice.

Law firms' websites, of course, inevitably begin with biographical information about the firm's lawyers, including their educational background, their experience, their area of practice, and their contact information (almost always including telephone numbers and e-mail addresses). So far, so good, provided the information is not misleading.

However, the ABA notes that many law firm websites also add information about the firm, such as its history, experience, and areas of practice, including general descriptions of prior engagements. Sometimes, more specific information about a lawyer or a law firm's former or current clients—including clients' identities, matters handled, or results obtained—is also included.

The ABA has found that this information constitutes a "communication about the lawyer or the lawyer's services," and that it is therefore subject to the requirements of ABA Model Rule 7.13 as well as the prohibitions against false and misleading statements

in Model Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, the ABA notes, these rules prohibit false, fraudulent, or misleading statements of law or fact. Thus, the ABA has now held that no website communication may be false or misleading or omit facts such that the resulting statement is materially misleading.

ABA Model Rules 5.1 and 5.3 extend this general obligation to managerial lawyers in law firms by obligating them to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that all the firm's lawyers (and their assistants who are not lawyers) will comply with the rules of professional conduct for lawyers. Thus, managerial lawyers become their brothers' and sisters' keepers.

Communications About the Firm, Its Lawyers, and Its Clients

Generally speaking, the same constraints apply to lawyers' websites as to lawyers' print advertising. A firm may include accurate information that is not misleading, including contact information and information about the nature of the firm's practice. The ABA's Formal Opinion admonishes lawyers to avoid misleading readers on a continuing basis by ensuring that this basic information is updated regularly. (How many firms have failed to remove the biographical information relating to lawyers who have moved on? The opinion cites with apparent approval a Missouri Bar Association advisory opinion that states that a lawyer's biographical information must be removed from the former firm's website within a reasonable time after the lawyer leaves the firm.)

In addition, specific information that identifies current or former clients or the scope of their matters also may be disclosed, provided that the clients or former clients have given informed consent. The committee notes that website disclosure of information that identifies clients information is not normally to be implicitly authorized (given that the attorney/client relationship has been already disclosed in documents that are a matter of public record) because, generally speaking, the website disclosure is not being made to carry out the representation of a client (as it would be, for example, during litigation), but to promote the lawyer or the law.

Information About the Law

The formal opinion issued in August 2010 also addresses situations where lawyers may be thought to provide specific legal advice on their firms' websites: "Although no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two." The opinion addresses a fairly common law firm website situation

where the site either invites inquiries and provides tailored answers or allows for Internet-based contact that is short of a one-on-one interview. Under such circumstances, it is possible that a lawyer could inadvertently create a "prospective client" relationship that could be fraught with peril.

Presumably, such situations would occur only on sites where interaction is encouraged, such as sites that provide a means to "click here" and ask a question. Or such situations might occur on sites that operate as, or like, blogs. However, Formal Opinion 10-457 suggests that any site that offers commentary on the law ought to include a disclaimer stating in plain English (or the primary language of the website itself) that is "reasonably understandable, properly placed, and not misleading" that the statement of the law is intended to be general, that it should not be applied to a specific situation without specific legal advice, and that no lawyer/client relationship is to be presumed in the absence of a contractual relationship.

However, as a final caveat, the ABA's Formal Opinion 10-457 advises that even a well-crafted website disclaimer can be negated if a firm's lawyer "acts or communicates contrary to its warning."

Conclusion

It is good that the ABA has provided this formal opinion. Every lawyer in private practice—and certainly every "managerial lawyer"—should read it and take it under advisement. However, Formal Opinion 10-457 is, without a doubt, not the last word on this troublesome topic. See you next month in Cyberia.

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