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LEGAL ETHICS IN
THE DIGITAL AGE

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Michael Kaiser is president of the Kaiser Legal Group and founder of Seattle Legal Research, a company focused primarily on discovery and legal research. Seattle Legal Research's work has been integral to success at both the state appellate and federal levels. Seattle Legal Research also has been part of groundbreaking litigation, including a series of upcoming national cases seeking to redefine animals' standing in court. Mr. Kaiser also has reported on legal-affairs for local radio, and has been a law-school guest speaker on the subject of how different court systems address those suffering from mental illness. In addition, Mr. Kaiser has worked with local judges and members of the King County Bar Association's Judiciary and the Courts Committee to draft new rules for King County Superior Court. Mr. Kaiser also has served on the King County Bar Association's Judicial Evaluation Committee. He earned his B.A. degree from the University of Washington in Seattle, and his J.D. from Seattle University.

Program Topics

- 1) American Bar Association (ABA) Formal Opinion 10-457, “Lawyer Websites.” August 5, 2010.
- 2) ABA Commission on Ethics 20/20 revised proposal, “Technology and Client Development.” September 19, 2011.
- 3) ABA Commission on Ethics 20/20 issue paper concerning “Lawyers Use of Internet Based Client Development Tools.” September 20, 2010.

ABA Model Rule 1.1-- Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model Rule 1.1--Competence

Comment (6)—To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Commission on Ethics 20/20 revised proposal, “Technology and Confidentiality.”
September 19, 2011.

“The [ABA] Commission [on Ethics 20/20] decided that technology is changing too rapidly to offer detailed guidance as to the specific precautions a lawyer should take [to protect clients’ confidences]” within the context of ABA Rule 1.6 Confidentiality of Information.

ABA Commission on Ethics 20/20 revised proposal, “Technology and Confidentiality.”
September 19, 2011.

“Lawyer Websites”

ABA Formal Opinion 10-457

Standing Committee on Ethics and
Professional Responsibility. August 5, 2010.

Purpose of Opinion 10-457 is to address the ethical quandaries related to the problems inherent today in web interactions between the public and lawyers and the confusions that can arise on both sides as a result of lack of both understanding and clarity of expression.

Update Website Regularly

- ⦿ Make sure information is current.
- ⦿ Do not want to be accused of materially misrepresenting yourself or firm.
- ⦿ Specific information identifying current or former clients may be included, with the informed consent of the client, as required by Rules 1.6 (current clients) and 1.9 (former clients).

Disclaimers

- ⦿ Information should include qualifying statements or disclaimers that “may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.”
- ⦿ Disclaimers or statements can be written so as to avoid a misunderstanding that:
 - (1) an attorney-client relationship has been created;
 - (2) the visitor’s information will be kept confidential;
 - (3) legal advice has been given; or
 - (4) the lawyer will be prevented from representing an adverse party.

- ⦿ “Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person.”
- ⦿ “Imprecision in a web-site message and failure to include a clarifying disclaimer may result in a web-site visitor reasonably viewing the web-site communications as a first step in a discussion.”

Disclaimer stating that a “confidential relationship” would not be formed was not enough to waive confidentiality, because it confused not forming client-lawyer relationship with agreeing to keep communications confidential.

California Bar Committee on Professional Responsibility Opinion 2005-168.

Legal Information vs. Legal Advice

- ⦿ Context and content are useful barometers. Speaking to groups is typically viewed as imparting legal information. However, answering a fact-specific legal question may be characterized as offering personal legal advice depending upon the circumstances.
- ⦿ Recommended that legal professionals state the information provided in an on-line forum is general in nature and not a substitute for personal legal advice unless the setting clearly is one in which personal legal advice is the goal of the setting.

Defining the Formation of an Attorney-Client Relationship

- ⦿ When a website visitor responds to a lawyer website that specifically requests or invites submissions concerning possible formation of an attorney-client relationship, a Rule 1.18 “discussion” is often the result.
- ⦿ However, if a website visitor submits unsolicited information, it is the lawyer’s response that will determine the contours of the relationship.

ABA Commission on Ethics 20/20

Revised Proposal—Technology and
Client Development. September 19,
2011.

Proposed changes to
Model Rule 1.18—
Duties to Prospective Client

- (a) A person who ~~discusses~~ communicates with a lawyer about the possibility of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 [Duties to Former Clients] would permit with respect to information of a former client.

Proposed New Comment (3) to Model Rule 1.18

“When a person initiates a communication with a lawyer, the reasonableness of the person’s expectations that the lawyer is willing to consider forming a client-lawyer relationship may depend on a number of factors, including whether the lawyer encouraged or solicited inquiries about a proposed representation; whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive, or disclaim the lawyer’s obligations; whether those warnings or cautionary statements were clear and reasonably understandable; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautionary statements.

Proposed New Comment (3) to Model Rule 1.18 (con't)

For example, if a lawyer's website encourages a website visitor to submit a personal inquiry about a proposed representation and the website fails to include any cautionary language, the person submitting the information could become a prospective client. In contrast, if a lawyer's website does not expressly encourage or solicit inquiries about a proposed representation and merely offers general information about legal topics or information about the lawyer or the lawyer's firm, such as the lawyer's contact information, experience, and areas of practice, this information alone is typically insufficient to create a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship."

Proposed changes to comments section of Model Rule 7.2—Advertising

Comment (1)

“To assist the public in obtaining and learning about legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.”

Comment (3)

“Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication ~~is~~ now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public.

Comment (3)—(con't)

Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.”~~

Comment #5

“Lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer’s services. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet based pop-up advertisements, and group advertising.

Comment #5 (con't)

A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or Client development services, such as publicists, public-relations personnel, business- development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(e) (division of fees) and Rule 5.4 (professional independence of the lawyer), and the lead generator's communications to potential clients are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, the lawyer must ensure that the lead generator discloses that the lawyer has paid a fee in exchange for the lead and that the lead generator does not state or imply that it has analyzed the potential client's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers. ~~Who prepare marketing materials for them.~~

Proposed changes to
Model Rule 7.3—
Direct Contact with Potential ~~Prospective~~ Clients

And that is your one change to the rule. In all instances in which the term “prospective” client(s) is used, the term is replaced with “potential” client(s).

However, there are substantial changes to the comments, including the addition of a new Comment #1.

New Comment #1

A solicitation is a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

New Comment #2 (Former #1)

There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in- person, live telephone or real-time electronic contact by a lawyer with a potential ~~prospective~~ client known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject the potential client ~~layperson~~ to the private importuning of the trained advocate in a direct interpersonal encounter. The potential ~~prospective~~ client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

New Comment #3 (Former #2)

This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications, can which may be be mailed, or autodialinged, or transmitted by email or other electronic means that do not involve real-time contact and do not violate other law governing solicitations. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential ~~prospective~~ client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the potential client's judgment.

New Comment #4 (Former #3)

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to potential client ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

New Comment #7 (Former #6)

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. ~~a prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

ABA Commission on Ethics 20/20

Issue Paper Concerning Lawyers' Use of
Internet Based Client Development Tools.
September 20, 2010.

Blurry Line Between Personal Communications and Lawyer Advertising

Facebook, Twitter, and LinkedIn, for example, are social networking sites that lawyers often use for both personal and professional purposes. Questions can arise as to whether announcements on such forums are subject to the usual ethical restrictions on advertising and solicitation.

Inadvertent Lawyer-Client Relationships Resulting From Social Networking

“[L]awyers who use networking sites may not be able to control the flow of information from prospective clients. For example, lawyers may not be able to include disclaimers and other protections against receiving the kind of information that could trigger ethical obligations under Model Rule 1.18 (duties to prospective clients).”

Gathering Info Through Networking Websites

Some lawyers gather information about adverse parties and witnesses by asking those individuals for access to their profiles without clearly indicating the purpose of the request or by using deceptive means. Could this implicate Model Rule 4.1 (Truthfulness in Statements to Others), 4.2 (Communicating With Persons Represented by Counsel), 4.3 (Dealing With Unrepresented Persons), 5.3 (Responsibilities Regarding Nonlawyer Assistants), and 8.4 (Misconduct)? Other ethical issues?

Lawyer Blogs and Discussion Boards

One key in determining to what extent lawyer blogs and discussion boards are governed by ethics strictures is to what extent the blogs and discussion boards are designed to market and advertise. Is your ultimate goal to end up with a client or that the blog or discussion board fairly directly leads to such?