

PERSPECTIVES

An attorney's guide to insurance and risk management

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Law Firms' Use of the Internet: Websites, E-mail and Ethics

When the ABA approved the Model Rules of Professional Conduct in 1983, few attorneys used computers in their practices, and fewer still used computers as a means of communicating with colleagues and clients. It is therefore not surprising that the Model Rules do not address the propriety of communicating via the Internet.

Although thousands of law firms were marketing their services via the Internet by early 1997, it was not until 1996 that the first two states issued formal ethics opinions regulating attorneys' usage of the Internet for marketing or communication with existing and potential clients.

By early 1998, however, at least ten states had issued opinions on lawyers' on-line communications, and there appears to be agreement among all such jurisdictions that law firms' websites are subject to state bars' regulations and restrictions on advertising.

Another concern, however, is the multi-state nature of Internet advertising – especially for those firms in states where ethics codes limit advertising to a specific geographic area. There are reported cases holding that lawyers were guilty of practicing without a license simply for having implied in *non-Internet* advertising that they were authorized to practice law in a specific state, and it is not difficult to see the applicability of such precedent to cases involving home pages. One expert notes that no state has yet to address the issue of websites maintained by out-of-state lawyers, but that it is likely to come to a head when, for example, a Florida lawyer

loses a Fortune 500 client to a firm in another state whose website did not comply with Florida's rules.

If your firm already has or is considering development of a website, be aware that your state bar probably considers the site an advertisement, with all of the accompanying restrictions.

In addition, many of the same states that have issued guidelines regarding on-line advertising have also defined "solicitation" to include computerized messages. Given that your state may already have or be in the process of developing specific rules relating to home pages and related issues, a call to your state bar's disciplinary committee is a good idea.

If your firm has its own website, your attorneys are probably already using e-mail to communicate with clients. If not, they soon will be, as clients using e-mail in their own businesses will demand the same efficiency in communicating with their attorneys. As with websites, many states have not yet formally addressed the issue, but there is a growing

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INSURANCE BROKERS

1230 Columbia Street, Suite 850

San Diego, CA 92101-3547

Phone: 619-234-6848 ♦ **Facsimile: 619-234-8601**

Website: www.cavignac.com

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consensus that e-mail communications will be afforded no less protection than would be a fax or telephone call when it comes to issues of privilege and confidentiality.

Some state disciplinary committees have opined that e-mail to clients should include the same type of cautionary language regarding confidentiality as commonly appears on a fax cover sheet (“*information contained herein may be privileged and confidential; if received by one other than the addressee, then...*”)

Already, Kentucky’s disciplinary committee has held that because the law is so unclear, a lawyer should not be disciplined for availing him or herself of information inadvertently disclosed via misdirected e-mail.

The real issue is whether or not the inadvertent disclosure of confidential client information will

expose your firm to malpractice liability. Until your state offers guidance, increase awareness of the security issues within your firm, and consider implementing security measures. Such steps may prevent third-party interception, and even if they do not, such actions may demonstrate your reasonable efforts to safeguard confidential information.

Security measures might include password expirations, automatic log-offs, restricting access to confidential information, audit trails, procedural guidelines for terminating former employees’ access, and a system of changing all passwords on a frequent basis.

With increased awareness, your firm will be able to reap the benefits of emerging technologies while avoiding ethical conflicts and potential liability.

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