

KBA Bench & Bar, January 2006, Volume 70, Number 1**Lawyer Website Disclaimers – Fact or Fiction?****By Del O’Roark**

A while back I got an anonymous letter enclosing a lengthy disclaimer printed from a Kentucky law firm website.^[ii] The disclaimer provided that the website was informational only, was not legal advice, and that contact with the website or with any lawyer of the firm by e-mail did not create an attorney-client relationship. There was much more. The writer asked whether this disclaimer was worth anything describing it as “hilarious overkill.” He asked the question: “If I give somebody legal advice by e-mail, or on my website (at the cybercurb so to speak) I am their attorney, like it or not, right?” The short answer to the question is yes, but as in all things involving professional responsibility and malpractice exposure there is a lot more to it than meets the eye -- and just maybe disclaimers are a good thing.

This article addresses briefly the ethics considerations when posting a lawyer website on the Internet and in more detail the malpractice risk. It concludes with an analysis of the risk management factors in designing a website and the use of disclaimers to reduce the risk of a malpractice claim.

Lawyer Website Professional Responsibility and Risk Management Issues

Lawyer websites vary considerably in design. Some include only bare-bones basic information about the firm with contact information. Others offer a variety of features including practice areas, list of firm clients, interactive bulletin boards, automated client intake forms, online legal advice, press releases, and reference links to other websites. The more elaborate the website the more sensitive it becomes to invoking professional responsibility duties and exposing the firm to a malpractice claim. The one purpose they all have in common is to attract clients. With this in mind I have identified the following website professional responsibility and malpractice exposure considerations:

- Do the Kentucky Rules of Professional Conduct (KRPC)^[iii] governing advertising apply to lawyer websites?
- Does a website violate KRPC 7.09 prohibiting direct contact with prospective clients?
- Does the website contain false and misleading information in violation of KRPC 7.15?
- Does the website permit a lawyer to establish an attorney-client relationship by giving specific legal advice to a website visitor, consenting to provide legal advice, or failing to decline giving legal advice when the visitor is reasonably expecting the lawyer to respond?
- Does the website inadvertently permit the establishment of an implied attorney-client relationship with a prospective client website visitor?
- Does the website create the reasonable belief that information submitted by a website visitor is confidential and subject to the lawyer-client privilege rule of evidence?
- Does the website permit receipt of information from a website visitor that may result in a conflict of interest precluding the lawyer from accepting a client adverse to a website visitor or disqualifying the lawyer from continuing to represent a client adverse to a website visitor?
- Does the website violate professional responsibility rules of other states in which it may

be viewed?

- Does the website constitute the unauthorized practice of law in other states in which it may be viewed and in which the lawyer is not licensed to practice?

Kentucky Website Marketing Professional Responsibility

In 1998 the KBA Ethics Committee in KBA E-403 made it clear that the KRPCs apply to websites. The following extract from the opinion succinctly covers the question:

“Question: Is the creation and use of an Internet “web site” containing information about the lawyer and the lawyer’s services that may be accessed by Internet users, including prospective clients, a communication falling within Rules 7.09 (Prohibited Solicitation) or 7.30 (Direct Contact with Prospective Client)?^[iii]

Answer: Unless the lawyer uses the Internet or other electronic mail service to direct messages to a specific recipient (in which case the rules governing solicitation would apply), only the general rules governing communications regarding a lawyer’s services and advertising (Rules 7.10, 7.20, and the so-called advertising rules set forth at Rule 7.01-7.08) should apply to a lawyer’s ‘web site’ on the Internet.”

Lawyers that are careful to comply with the advertising KRPCs and avoid using a website in a way that may violate the direct contact with prospective clients prohibition^[iv] (think interactive bulletin boards and chat rooms on the website) should have no trouble complying with website marketing professional responsibility. The key consideration in avoiding the accusation of putting false or misleading information on a website is to recognize that anonymous visitors to a website can possess any level of sophistication about legal matters. The posted information must be geared to the least sophisticated visitor. Is a bare statement that no attorney-client relationship can be established by visiting the website enough? This means a great deal to a lawyer, but a website visitor may be more puzzled than informed by this assertion.

Website “Whoops” Clients and Prospective Clients

A lawyer’s worst nightmare is to have a client and not know it. It never fails that the lawyer learns of this situation right after the statute of limitations has run on the matter. Websites introduce one more way that this can happen – the “Whoops” implied in fact attorney-client relationship. The Kentucky Supreme Court in *Lovell v. Winchester*^[v] gave this explanation of how an implied in fact attorney-client relationship can be formed:

“Consultation with a lawyer may ripen into a lawyer/client relationship that precludes the lawyer from later undertaking a representation adverse to the individual who consulted him. The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client’s reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer.”^[vi]

The first principle, therefore, in website risk management is to preclude any reasonable understanding by a site visitor that an attorney-client relationship is formed either by

agreement or by implication unless that is what the lawyer intends. Many lawyers manage this issue by providing clear instructions on how to retain the lawyer – often by requiring a signed letter of engagement, telephone contact, or an in-office consultation.

Even when no attorney-client relationship is formed by a website visit there is the risk that the firm will owe at least the duty of confidentiality to a site visitor. It is well established that prospective clients are owed a duty of confidentiality unless the duty is waived. In 1987 the KBA Ethics Committee in KBA E-316 answered the question whether a firm could represent the party adverse to a former prospective client if no confidences and secrets were obtained that could be used to the advantage of the adverse party. In answering yes to the inquiry the Committee cautioned:

“... a lawyer may be precluded from accepting employment adverse to a prospective client who did not retain the lawyer, if the prospective client revealed to the lawyer confidences and secrets about a matter in a good faith effort to secure legal counsel.”

In 1997 in *Lovell* the Supreme Court buttressed KBA E-316 with this ruling:

“KRE 503 (a)(1) defines a client as ‘a person ... who is rendered professional legal services by a lawyer, **or who consults a lawyer with a view to obtaining professional legal services from the lawyer.**’ This definition makes it clear that an individual who consults a lawyer is entitled to the [lawyer-client] privilege even though representation does not subsequently occur.... This gives rise to a conflict of interest”^[vii] (*emphasis added*)

Websites are most problematic for prospective clients because the very purpose of a website is to attract prospective clients to the firm regardless of how passive the site is. Accordingly, even greater care is required on websites than in traditional prospective client contact settings to avoid creating the false impression with a site visitor that an attorney-client relationship is formed or that information received is confidential.

Website Disclaimers – What Do They Really Mean?

My anonymous letter writer is not the only one who doubts the efficacy of a website disclaimer. Many believe that disclaimers are of little effect and only serve to give comfort to lawyers who do not appreciate the website malpractice risk. The ABA Annotated Model Rules of Professional Conduct cites three decisions when disclaimers were found ineffective either because of the brevity of the disclaimer, the disclaimer was in small type at the bottom of letterhead, or it was “buried in links several clicks removed from main pages.”^[viii]

I know of no Kentucky authority on point and there are relatively few cases or ethics opinions from other states that address lawyer website disclaimers. This in itself may be some evidence that disclaimers work. A persuasive case for use of disclaimers is made by Professor David Hricik who believes that courts will likely enforce a proper agreement with a prospective client:

“For practical reasons, the presence of a firm on the web increases the need for these disclaimers. Having a website gives any person connected to the Internet the easy means to transmit unsolicited information to law firms, since it can be done unilaterally and even over the objections of the lawyer. Further, a lawyer who

receives an unsolicited telephone call can simply stop the prospective client from disclosing additional information as soon as the lawyer recognizes a conflict exists. An e-mail is sent instantaneously, and is opened in full at once.”^[ix]

The following three recent decisions support Professor Hricik’s position that website disclaimers will be considered by the authorities when ruling on claims by website visitors that a lawyer owed them a duty:

 In answering the question whether an attorney-client relationship can be created as the result of the unilateral act of a prospective client transmitting confidential information by e-mail to a lawyer’s website the Nevada Bar ethics committee opined:

“The ... analysis changes somewhat if the communication from the prospective client is in response to an advertisement or a solicitation contained on the attorney's web-site..... [A] communication received from a prospective client in response to an advertisement or a web-site cannot be deemed to be unsolicited, and an attorney who places advertisements or solicits e-mail communications has a heightened duty to ensure that prospective clients do not interpret the advertisement or solicitation as the attorney's agreement that the attorney-client relationship is created solely by virtue of the prospective client's response.

Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship.This should be effective, since no one responding to the web-site could - in the face of such an express disclaimer - reasonably believe that an attorney-client relationship had been created.

And what, then, of the unsolicited material sent by the prospective client, either directly to the attorney or communicated through the web-site? Assuming that no attorney-client relationship is created, what, if any, are the duties of the attorney respecting the information which was provided by the prospective client?

Nevada Supreme Court Rule 156 [KRPC 1.6] requires that an attorney preserve the confidentiality of information received from a ‘client,’ which presumes the existence of the attorney-client relationship. This includes attorney-client relationships which arise by implication ... and the duty also applies to and protects discussions between an attorney and prospective client pertaining to representation where no such relationship ensues.... The rationale underlying this principle is clear: persons seeking legal advice should be ‘encouraged to seek legal assistance and to communicate fully and frankly with the lawyer,’ ... and such communications will be encouraged if the person knows that they will be kept confidential.

In sum, an unsolicited communication to an attorney from a person having no reasonable expectation that the attorney is willing to form an attorney-client relationship does not give rise to the duty of confidentiality; however, such a duty may be implied where the communication is in response to an advertisement or web-site. Attorneys who advertise or maintain websites should therefore take appropriate precautions such as warnings and disclaimers.”^[x]

 The California Bar ethics committee provided the following guidance on disclaimers:

"ISSUE: Does a lawyer who provides electronic means on his web site for visitors to submit legal questions owe a duty of confidentiality to visitors who accept that offer but whom the lawyer elects not to accept as clients, if the attorney disclaims formation of an attorney-client relationship and a 'confidential relationship'?

DIGEST: A lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an 'attorney-client relationship' or 'confidential relationship' is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either." [xi]

 In a different context the U.S. Ninth Circuit Court of Appeals in *Barton v. United States District Court*^[xii] considered a law firm disclaimer used with a questionnaire posted on the Internet "seeking information about potential class members for a class action the law firm contemplated." The website disclaimer included a box to be checked by a responder "to acknowledge that answering the questionnaire did not constitute a request for legal advice and that an attorney-client relationship was not formed by submitting information." Four responders to the questionnaire then became clients of the firm and plaintiffs in a suit against SmithKline Beecham Corporation claiming injuries from the drug Paxil. SmithKline then sought the questionnaires through discovery. Plaintiffs resisted producing the questionnaires on the basis of attorney-client privilege. The trial judge rejected the plaintiffs' assertion of the privilege because the disclaimer showed that the questionnaires were not confidential and that checking the box by the responders constituted waiver.

On appeal the Ninth Circuit reversed the District Court's order compelling production of the questionnaires. The Circuit Court reviewed the questionnaire disclaimer noting that:

"The 'yes' box acknowledgment states, in full:

I agree that the above does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information. I understand that I may only retain an attorney by entering into a fee agreement, and that I am not hereby entering into a fee agreement. I agree that any information that I will receive in response to the above questionnaire is general information and I will not be charged for a response to this submission. I further understand that the law for each state may vary, and therefore, I will not rely upon this information as legal advice. Since this matter may require advice regarding my home state, I agree that local counsel may be contacted for referral of this matter."

The Court observed: "What is 'new' about this case is attorneys trolling for clients on the

internet and obtaining there the kind of detailed information from large numbers of people that used to be provided only when a potential client physically came into a lawyer's office. Two things had to happen to bring this about: the change in law in the 1970s that permitted attorney advertising and the sufficiently widespread use of the internet within the past five or ten years that makes internet advertising worthwhile."

(footnotes omitted)

The Court then analyzed the questionnaire and disclaimer provisions in detail and found the overall effect to be confusing and ambiguous:

"First, the district court based its conclusion on a misunderstanding that the law firm had made 'a disclaimer of confidentiality.' It did not. Neither the word 'confidentiality' nor the substance of a disclaimer of confidentiality can be found in the online questionnaire. The text in the checked box to which the court referred is potentially confusing to clients (as their ambiguous responses suggest) and the law firm should have spoken clearly to the laymen to whom its website was addressed about what commitments it did and did not make. A risky and expensive trip to this court could have been avoided by a plain English explanation on the website. But the vagueness and ambiguity of the law firm's prose does not amount to a waiver of confidentiality by the client. Our focus is on the clients' right, not the lawyers.' And the words just do not say what the district court thought they said, that 'confidentiality' was waived."

It is paradoxical that its confusing and ambiguous website disclaimer saved the law firm from having to produce client information to the client's detriment. The firm was also saved from a probable malpractice claim as well. Few lawyers are fortunate enough to prosper from their own errors.

Based on these recent decisions, it is my opinion that disclaimers on lawyer websites can be effective, will be at least considered by courts and bar disciplinary authorities, and that every lawyer website should have a prominent and carefully crafted disclaimer tailored to its content. While disclaimers may not always protect lawyers posting websites on the Internet, they are good risk management.

Lawyer Website Risk Management

I had hoped to come up with some model disclaimers for this article, but it soon became apparent that there is no one size fits all. Given the uncertain status of disclaimers and the continuing development of new ways to deliver legal services over the Internet, I concluded that providing you the key information my research located on website risk management was the most useful thing I could do in this article. My disclaimer is that it is then left up to you to evaluate this information for its validity and applicability to your website. I can offer no guarantees in such a fast changing environment.

Best Practice Guidelines for Legal Information Web Site Providers

The "Best Practice Guidelines for Legal Information Web Site Providers" was developed by the Elawyering Task Force and the ABA.^[xiii] It has a specific disclaimer "that compliance with these guidelines does not constitute approval or certification by the American Bar Association of the content and operation of the web site and no one is authorized to represent that it does.

Instead, the guidelines encourage publishers of legal web sites to provide information about the legal content of their sites that assists a user in making a judgment on the quality of the legal information that appears on the site.”

Even without the ABAs unequivocal approval the Guidelines provide a helpful checklist for good website management. As Margaret Hensler Nicholls describes them in her excellent article “A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers”: The Guidelines’ scope encompasses legal information only, not legal advice or interactive features.... [T]he Guidelines present ten conventions for developing and maintaining websites to enable a user to determine authorship, currency, and timeliness, the relevant jurisdiction, and the scope and limits of information.^[xiv]

What follows are the Guidelines without Task Force comments:

Contact Information: A web site providing legal information should provide full and accurate information on the identity and contact details of the provider of the site. The person(s) or organization(s) responsible for the information on a site is (are) clearly indicated on all pages of the site. Providers should include full contact details, including name, mailing address, telephone, and/or e-mail address. A government agency or court with limited resources to reply may choose to omit a telephone contact or e-mail address, but as a minimum should list a mailing address.

Dating Material: Web site providers should include information about the dates on which the substantive content on their sites was prepared or last reviewed.

Jurisdiction: Web site providers should avoid misleading users about the jurisdiction to which the site's content relates. If the legal content is clearly state-specific, the jurisdiction in which the law applies should be identified within the content of the information or otherwise.

Limits of Legal Information: When a site provides only legal information, the provider should give users conspicuous notice that legal information does not constitute legal advice.

Links: Sites should link to other resources that are likely to assist users with their problems.

Legal Citations: When appropriate, sites should contain links to relevant case law and legislation.

Referrals: Where appropriate, sites should provide users with information on how and where to obtain legal advice and further information.

Permissions: Providers should obtain permission to use content from other providers.

Terms and Conditions: Sites should clearly and conspicuously provide users with information about the provider's terms and conditions of use.

Privacy Statement: Sites should clearly and conspicuously provide users with their privacy policies and policies on security of communications.”

Website Risk Management Guidelines

- Prepare and keep on file a written firm policy on the purpose of the website, what it is supposed to do, and what it is not intended to do. Include detailed guidance on specific features of the site and how they are to function. Specifically, how legal advice, if any, is to be provided through the website. This guidance should include how information is to be displayed that avoids misleading site visitors into believing they are getting legal advice for their matter; how terms and conditions and disclaimers are prominently featured to assure that site visitors assent to them; and how prospective client e-mail is managed to avoid issues of attorney-client relationships, confidentiality, and failure to respond to an e-mail.
- Keep a complete paper and disk copy of each iteration of the website for at least five years. Be sure it reflects how site visitors manifest assent to terms and conditions and disclaimers. Use “click wraps” or “click throughs” that require a site visitor to click on a disclaimer to show affirmatively the visitor’s assent before accessing the website and before information can be sent to the firm. Be sure that the site visitor cannot finesse the click wrap procedure. Click wraps may be appropriate for several of the website pages.
- Use plain English in drafting disclaimers – think in terms of the least sophisticated site visitor. Do not assume that terms such as “attorney-client relationship” or “confidential,” that have specific meaning for lawyers, are understood by site visitors.
- Be sure that disclaimers are prominently displayed on the home page. While it may be undesirable to pepper the disclaimer notice on every page of the website, that is the percentage way to go. Rulings that have not accepted disclaimers as effective often note their brevity or inconspicuous display on a website. Use click wraps liberally.
- Use letters of non-engagement in response to prospective client e-mails when the firm declines representation. Respond to all e-mails – do not leave a site visitor dangling. Advise site visitors not to consider that their e-mail was received until they receive a confirming e-mail from the lawyer. Save e-mails to disk just as you would file written correspondence from and to potential clients. It is hard to defend against a claim without some record of what occurred.
- Design prospective client information intake procedures so that only the minimum information necessary to perform a conflict of interest check is initially received. Use a click wrap to warn site visitors about sending too much information initially and to protect the firm from a conflict of interest issue if the site visitor does not comply.
- In managing information received from prospective client site visitors consider the teaching point of *Barton* that a website disclaimer of confidentiality can lead to problems of waiver of the lawyer-client privilege and client confidentiality if the prospective client’s matter is accepted by the firm. Conversely, accepting the information as confidential may lead to a conflict of interest issue if the prospective client is declined. Professor Hricik offers this disclaimer language as one way of dealing with this issue:

“By clicking ‘accept’ you agree that our review of the information contained in the e-mail and any attachments will not preclude any lawyer in our firm from representing a party in any matter where that information is relevant,

even if highly confidential and could be used against you, unless that lawyer had actual knowledge of the content of the e-mail. We will otherwise maintain the confidentiality of your information.” [xv]

Hricik points out that this disclaimer is a fair balance between a prospective client’s interest and the firm’s by not disqualifying the entire firm. It should work in Kentucky because screening lawyers to prevent imputed disqualifications is permitted by KRPC 1.10, Imputed Disqualifications. To be absolutely sure call the KBA Ethics Hotline.

- Recognize that a website can be visited from anywhere in the world. Complying with the advertising and unauthorized practice rules of every jurisdiction is impossible. Websites disclaimers should clearly indicate that the lawyer is seeking site visitors only in certain jurisdictions and that the website is inoperative in any jurisdiction that has rules different from those of the lawyer’s jurisdiction. Another way to accomplish this is to accept e-mails only from persons residing in specified zip codes in named jurisdictions. [xvi] Admittedly, this is flimsy, but it is the best fix available at this stage of development of Internet ethics.
- Links to other websites require disclaimers of responsibility for their content and currency. Links require routine maintenance to assure that they are still operative and relevant.
- The website should not contain links that serve as referrals to other lawyers that a site visitor can unilaterally choose other than bar referral services. Referral to another lawyer is a malpractice risk and should be done only after sufficient information is received to competently evaluate the site visitor’s matter – preferably by telephone or an in-office consultation.

Summing Up

This is one of those articles that did not shape up as I expected when I began it. Website ethics and risk management are developing concepts and core principles are elusive. [xvii] I am a long way from having all the answers, but can share with you much of the current thinking on lawyer website ethics and risk management. You may be interested to know that in the course of my research I visited several Kentucky lawyer websites. It was surprising how few of them came close to observing the considerations covered here. Ironically, the best site I visited was the very one my anonymous writer described as hilarious overkill. If you have a website, I urge you to review it using this article as a guide – perhaps hilarious overkill is better than benign neglect.

- [i] There is no consistency in spelling website in the materials on this subject. I use website in the text of this article because it appears to be the current best usage. In quoted materials, I use web site if that is how the author spelled it.
- [ii] The KRPCs are in SCR 3.130.
- [iii] In 2002 KRPC 7.09 and 7.30 were combined into 7.09 Direct Contact with Prospective Clients.
- [iv] The current rule on direct contact with prospective clients is KRPC 7.09.
- [v] 941 S.W.2d 466 (1997).
- [vi] *Id.* at 468.
- [vii] *Id.* at 467.
- [viii] 5th Ed. at page 536.
- [ix] David Hricik, Mercer University School of Law, “Whoops! I Did It Again! What Britney Spears Can Teach Us About the Ethical Issues Arising From the Intentional Transmission of Confidences From Prospective Clients to Firms,” E-Ethics Vol. III, No. I (May 2004).
- [x] State Bar of Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 32 (March 25, 2005).
- [xi] The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion Interim No. 03-0001(2005).
- [xii] No. 05-71086 (June 9, 2005).
- [xiii] Elawyering Task Force and ABA (February 10, 2003). See, www.elawyering.org/tools/practices.shtml (last viewed on 11/14/2005).
- [xiv] Hensler, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 Geo. J. Legal Ethics 1021, 1024 (2005).
- [xv] David Hricik, Mercer University School of Law, “Whoops! I Did It Again! What Britney Spears Can Teach Us About the Ethical Issues Arising From the Intentional Transmission of Confidences From Prospective Clients to Firms,” E-Ethics Vol. III, No. I (May 2004).
- [xvi] D.C. Legal Ethics Committee Opinion 302 (11/21/2000).
- [xvii] For those interested in delving deeper into website ethics see generally, Deadly, *Cyberadvice: The Ethical Implications of Giving Professional Advice Over the Internet*, 14 Geo. J. Legal Ethics 891 (2001); and Westermeier, *Ethics and the Internet*, 17 Geo. J. Legal Ethics 267 (2004).