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PROFESSIONAL CONDUCT

Professional Conduct in Cyberspace: Proceed with Caution

BY ELLEN C. BROTMAN
AND MICHAEL B. HAYES

Special to the Legal

Technology is advancing so rapidly that, in many respects, it's gone beyond our ability to prepare for and think through all the moral, ethical and practical consequences. Are our children better off having a global library at their fingertips or were we better off getting on our bikes and riding down to the public library? Was the practice of law more respectable and professional before the advent of the information age?

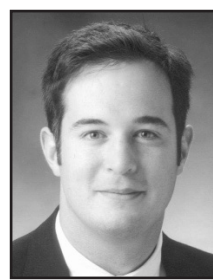
Whatever the answer to these questions, it's a safe bet that sometime during the last year at least one prospective client or referral source has checked your reputation on the Internet. In short, you've been Googled! If you're savvy, you've taken steps to actively manage your Web presence. In fact, whether you practice as a solo or in a big firm, it's likely that you have a Web site touting your legal services. But now you need to think carefully about the ramifications of placing your worldwide advertising on the World Wide Web. In this column, we will examine some of the issues raised by law firm Web sites in Pennsylvania, New Jersey and on a multijurisdictional basis.

As far back as 1996, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued an informal opinion concluding that attorney Web pages constitute attorney advertising



BROTMAN

ELLEN C. BROTMAN serves as of counsel to Montgomery McCracken Walker & Rhoads' white-collar crime and government investigations group and chairwoman of its professional responsibility group, after several years of being a principal in the firm of Carroll & Brotman. Brotman is also a former assistant federal defender with the Philadelphia Community Defenders Organization.



HAYES

MICHAEL B. HAYES is a senior litigation associate with the firm and is a member of the firm's professional responsibility practice group. Prior to joining the firm, Hayes served as a law clerk to Justice Russell Nigro of the Pennsylvania Supreme Court.

subject to the Rules of Professional Conduct. Rules 7.1 through 7.7 of the Pennsylvania Rules of Professional Conduct relate to lawyer advertising. Rule 7.1 states the general rule that advertising cannot be misleading. This is clear on its face: Don't misrepresent your practice, your abilities or your experience. It is also worth mentioning that the comment to the rule warns even truthful reports of prior positive results can be misleading if not accompanied by the appropriate disclaimer. We

advise that any page of your Web site that discusses past results, including the individual attorneys' pages, should include an appropriate disclaimer, such as "prior results do not guarantee a similar outcome."

In addition, there is one "housekeeping" requirement. Rule 7.2(b) provides that a "copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content." While we have never seen a case or an ethics opinion discussing this requirement as it pertains to Web sites, we believe this rule can be easily complied with by recording screen shots of the Web site and then maintaining a log of the changes with the name of the responsible attorney.

If your Web site solicits contact and possible case information from prospective clients, you could be inadvertently creating attorney-client relationships. A disclaimer relating to the lack of intent to form an attorney-client relationship should be prominently displayed at the top of any "Contact Us" type of form. Even such a disclaimer, however, will not eliminate your obligation to keep any information elicited confidential. You should treat any information you receive as subject to Rule 1.18, which provides prospective clients with protection for confidential communications and can, under limited circumstances, create a disqualifying conflict.

If an issue arises over your Web site, the good news is that a violation of Pennsylvania's advertising rules rarely results in public discipline unless the advertising crosses the border to intentional misrepresentation or fraud. If advertising is otherwise objectionable, the Office of Disciplinary Counsel has regularly provided attorneys with an opportunity to pull the offending advertisement and replace it with an appropriate one. As in all things, use your common sense: Don't push the line and respect the public image of our profession.

Across the river in New Jersey, things are a little different. New Jersey RPC 7.2 expressly permits use of the Internet for advertising as long as the content is chiefly informational. A copy of the Web site content must be retained as a record for three years. However, in New Jersey, not only do prior results create a problem but also an advertisement may not create "unjustified expectations." Phrases and terms such as "pre-eminent," and "proven reputation" can create problems. New Jersey Rule 7.1 prohibits false or misleading communication, in particular a communication "likely to create an unjustified expectation about results the lawyer can achieve" or "compar[ing] the lawyer's services with other lawyers' services." In New Jersey, it's best to avoid superlatives and stick with the facts.

New Jersey Attorney Advertising Guideline 2 governs contact with prospective clients initiated by the lawyer. Because it is less than clear whether the launching of a Web site is a contact initiated by the attorney, we advise that you assume it is. In written direct mail solicitations, New Jersey requires that the word "Advertisement" appear in large font ("at least two font sizes larger than the largest size used in the advertising text") at the top of the first page.

The guideline also requires a notice at the bottom of the last page stating:

"Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision," and, "You may, if this [letter] is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625." If you are practicing in New Jersey, stay on the safe side and include this information in your Web site.

New Jersey also restricts the use of testimonials. The New Jersey Committee on Attorney Advertising has held that "testimonials as to legal effectiveness of an attorney do not serve the ultimate end of attorney advertising: truthful communication of factually relevant information which gives the lay public a competent basis to judge whether a particular lawyer has the requisite knowledge, skill, competence and ethical qualities to better serve in a particular area of law or in a specific matter."

However, the committee does permit testimonials that describe "the satisfaction of the client based on the interaction between lawyer and client, for example, that the lawyer was sympathetic or concerned, returned calls, communicated frequently, was prompt in responding to client requests or was professional in their dealings." In our view, the simple fact that a lawyer promptly returns calls is not exactly something to brag about, but if you want to include it, New Jersey allows it.

Now comes the truly sticky part of law firm Web sites: multijurisdictional practice. If your Web site is available throughout the United States, with which states' rules must you comply? At a minimum you should look at the jurisdictions in which the lawyers in your firm are admitted. In states that adopt a version of Model Rule 5.5, out-of-state lawyers are permitted to practice for limited purposes.

Assuming that the "practice" of law that takes place on the Web site is the "interview" of a prospective client through the various intake forms and the provision of information about potential claims, the Model Rule protects this activity. However, both Pennsylvania and New Jersey prohibit lawyers from practicing "law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Therefore, if your Web site violates another state's rules, it will also be a subject for discipline in Pennsylvania and/or New Jersey.

This is a rapidly evolving area of the law, and you need to keep your eye on it. Luckily, there are some great Web sites and blogs out there that are doing just that. Our favorites are "Boundaries of Legal Marketing" at www.willhornsby.com and "Legalethics.com," conveniently found at www.legalethics.com.

In the meantime, at a minimum, you should do the following:

- Check that your Web site complies with the rules in all the states in which the lawyers in your firm are admitted;
- List each geographic location of your office and on each individual lawyer's page, their states and courts of admission;
- Use appropriate disclaimers; and
- Provide a contact for your Web master.

The ability to "Google" has made the Internet the ultimate source for weather, news, recipes, shopping and anything else you never knew you wanted to know about. It's also a major source of information about your practice. Your Web site should be the first site that a prospective client turns to when they conduct their inevitable Internet quest for information about your skills and reputation. So until next month — see you in cyberspace!

Associates Karen M. Ibach and Macavan Baird contributed to the research and drafting of this article. •