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Thwarting Ethical Violations With Web Site Disclaimers

BY WALTER A. EFFROSS

Over the past few years, many lawyers and law firms have created sites on the World Wide Web to publicize their practices and attract new clients. The American Bar Association and the ethics committees of state bars are increasingly finding such sites subject to existing—or new—professional responsibility rules with regard to attorney–client relationships, advertising, and confidentiality.

For example, in Opinion 302 (2000) the Legal Ethics Committee of the District of Columbia Bar concluded that lawyers could use web sites to disseminate information about their practices “provided that such communications comply with our general rules governing lawyer communications with clients.” In that opinion the committee focused on Rule 7.1(a) of the D.C. Rules of Professional Conduct, which prohibits lawyers from making “false or misleading” communications about themselves or their services.

This restriction on members of the D.C. Bar also applies to communications made to potential clients, because the District has no rule concerned specifically with advertising or solicitation. However, not all lawyers have evaluated whether their web sites comply with ethical requirements, even though embarrassing and potentially costly problems might be prevented by simple and inexpensive modifications to their sites.

One of the easiest and most effective ways for a law firm to prevent ethical violations that might arise from the operation of its web site is to display disclaimers on the site. This article reviews the most popular of such disclaimers and discusses the ways in which they may be featured on a law firm’s web site for maximum effect.

Terms and Conditions

The terms-and-conditions pages of law firm web sites often contain a group of related disclaimers concerning the existence of the attorney–client relationship. First, the firm commonly declares that by transmitting information through the site, or by allowing the visitor to receive such information, the firm is not rendering legal advice or providing legal services.

Second, a firm typically states that the availability of its site is not intended to create an attorney–client relationship between the firm and visitors to the site, and that no such relationship has been created merely by a visitor’s accessing, browsing through, or sending e-mail through the pages of the site. Some firms also insist that their sites do not operate as advertising, as offers to represent the visitor, or as invitations for an attorney–client relationship to be formed.

These disclaimers can be taken to unusual and somewhat amusing lengths. For instance, the terms-and-conditions page of one firm, whose site provides a panoply of pages on its practice groups, lawyers, and publications, nonetheless insists that the site is intended only to provide “general information to law students and others who are considering a career at [the firm] or are interested in the firm.” Similarly, another firm claims that “[t]his website is primarily intended for use by law school students considering a career at our firm.”

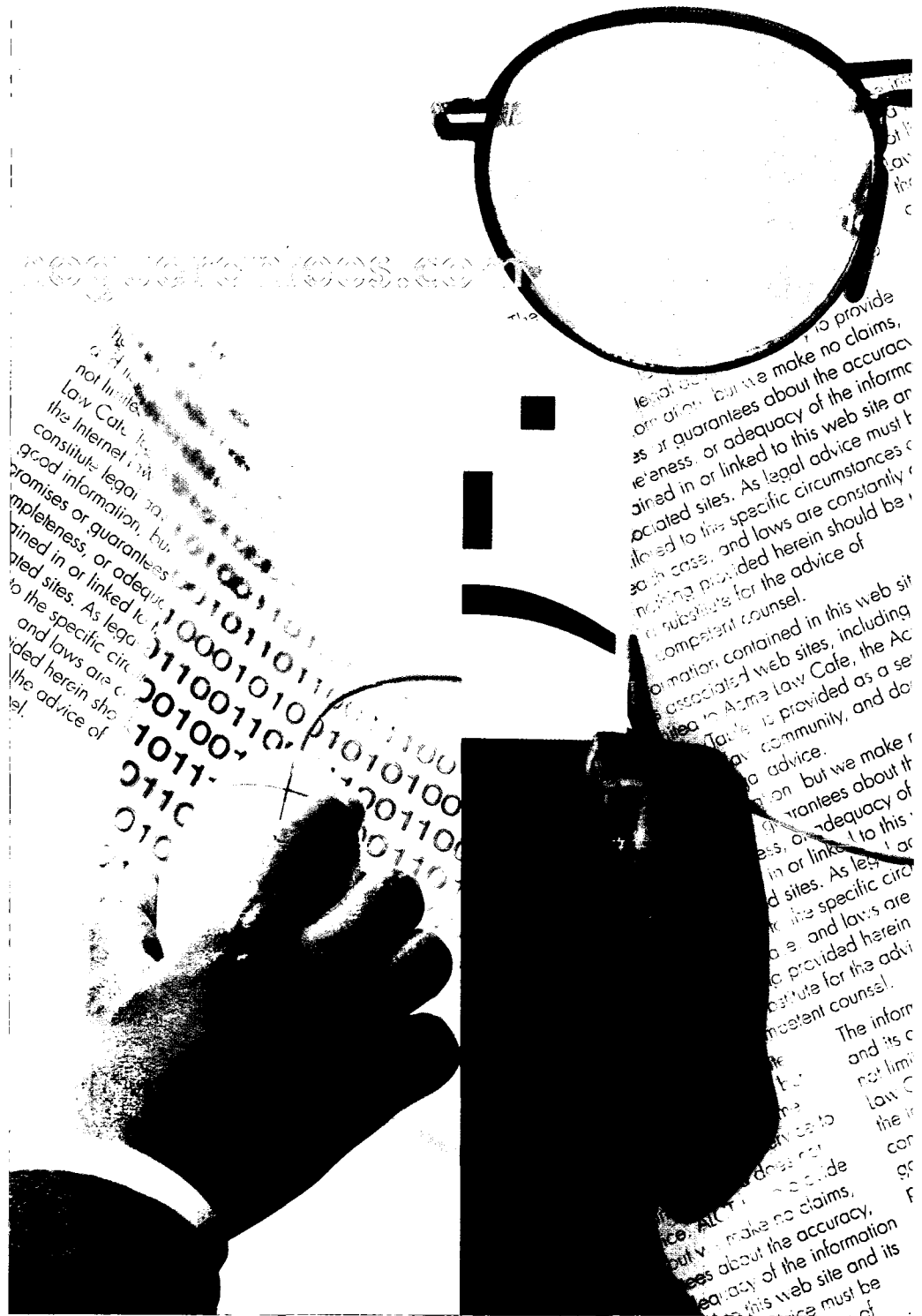
Third, just in case the this-is-not-advertising statement fails, a firm can assert that, although the site’s information may be considered advertising in the state that a visitor is browsing from, the firm does not wish to (and, some say, will not) represent anyone who is viewing the site from a state whose laws and ethical rules the site does not fully comply with.

Thus, one firm’s disclaimer warns that its site should not be accessed “by residents of countries, states, or other lo-

calities in which [the firm] is not licensed as may be required by applicable national, state or local laws or regulations." Another firm "makes no representation that the materials on [its] web site are appropriate or available for use in jurisdictions other than [four specified jurisdictions], and accessing them from jurisdictions where their contents are illegal is prohibited"; it proceeds to warn such visitors that they access the site "at their own risk and are responsible for compliance with local laws and regulations." A third threatens, "Your use of this Site is void where prohibited by laws in jurisdictions to which You are otherwise subject, and You agree that You shall not visit or use this Site in any such circumstances."

Ensuring that the site not be considered advertising is a serious concern, since the specific ethical rules of different states with regard to advertising vary widely. Among the different requirements that can be imposed by states on firms operating web sites are that the firm retain printed copies of the site's home page; that it submit hard copies of the pages to the bar; that the site contain certain disclosures (including "This is an advertisement") on different pages; that the site explicitly disclaim any representation that the firm's legal services are better than those of other firms; and that the site warn visitors not to select a lawyer on the basis of advertisements alone.

However, if a web site is found not to meet the relevant rules of a certain state with regard to advertising, it is uncertain whether a this-is-not-advertising disclaimer—particularly one lurking behind a tiny link, at the very bottom of the site's home page, to legal terms and conditions or disclaimers—will actually immunize the firm. In fact, by claiming (however inconspicuously) that their sites are not to be used by visitors



By claiming (however inconspicuously) that their sites are not to be used by visitors from other states, law firms appear to be less sophisticated than the operators of adult web sites.

from those states, law firms appear to be less sophisticated than the operators of adult web sites, who require that visitors affirm that they are of legal age to view adult materials and that they are not accessing the site from any country or locale where adult material is prohibited by law, or that their viewing of explicit materials “does not violate the standards of my community, town, city, state, or country.”

In both situations, the onus is allegedly on the visitor to determine whether he or she should really be looking at the web site. In both cases the visitor probably has little notion of what the relevant local criteria for viewing legal advertisements or adult material are, and the site itself does not provide any help in this regard. Yet adult web sites generally install their access conditions as “click-wrap” on their home pages: in order to access further areas of the site, the visitor, having been duly advised of the applicable (though vague) restrictions, must click on a certain area of the home page to indicate his or her compliance with them. (Generally, another link is provided for those who do not agree to the terms and who thus wish to exit the site.)

With this example in mind, a firm might choose to implement a number of practices that would enable it to conform, at least partially, to the requirements of different jurisdictions. For instance, instead of confining to its terms-and-conditions page the disclaimers mentioned above, a firm might on its home page prominently identify the states in which it practices. Potential clients from such states could be advised by the home page to click on the name of the relevant state, which could be linked to a separate page that features the relevant set of disclosures required by that state, followed by information about the firm’s attorneys licensed to practice in that state, their specializations recognized by that state, and the firm’s offices and practice group leaders in that state. The firm could also identify, and provide an e-mail link to, the attorney in charge of the web site. Firms might also offer to provide, upon request, written materials about their practice and attorneys.

Visitors from “all other states” could be advised to follow a separate link that would take them to a page noting that the firm does not—at least, as of the current date—practice in states other than those identified, and that the firm does not intend that the site be construed as advertising in those states.

Qualifying the Information

Beyond asserting that the material provided by a site is not legal advice, many terms-and-conditions pages further insist that the site’s information—which can include reprints of the attorneys’ articles and “client alerts” discussing recent developments in different practice areas—is provided “for informational purposes only”; that it is not to be relied on by the visitor; and that it is not a substitute for a lawyer’s personal advice about the visitor’s own unique legal situation. A careful firm may also warn that references on its site to successful representations are not intended as guarantees or predictions of similar results for other clients.

In addition, a number of terms-and-conditions pages indi-



cate that the material on the corresponding sites is provided “as is,” and is not necessarily accurate, complete, or updated. Firms have also disclaimed both express and implied warranties for the information provided, including the implied warranties of merchantability, fitness for a particular purpose, and noninfringement. (One firm even extends this disclaimer to the biographical and bar admittance information about its lawyers.)

It would certainly be more effective not to confine such warnings to the terms-and-conditions pages, but instead to repeat them on each page of the site that links to such articles, or to install a click-wrap screen that pops up when the visitor clicks on such links. The disclaimers could also be embedded conspicuously in the pages containing the articles themselves, since these pages might be cut and pasted into a computer file, saved in their en-

tirety as computer files, printed out, or bookmarked on the visitor’s Internet browser. The visitor might also e-mail to a colleague the web address of that particular page, allowing the colleague to reach the page directly without passing through a click-wrap screen.

In addition, a firm could add to each web page containing an article or flyer the date when the document first appeared, as well as an indication of whether and when the version on this site has been updated. Warnings that this information is not offered as legal advice and that it may not reflect the current state of the law could also appear on each of these pages.

If a site indicates a date on which it was last updated, care should be taken to warn visitors that not every page in the site was updated at that time. Perhaps separate update notices could be put on each time-sensitive page.

Firms might also consider adding to each of these pages, instead of relegating to the terms-and-conditions page, the statement that views, perspectives, or conclusions espoused in articles, speeches, or client alerts featured on the site do not necessarily reflect the views of the firm or of any of its lawyers or clients.

Communications and Confidentiality

Law firms’ web sites generally caution visitors not to send confidential information by e-mail through their web site until an attorney-client relationship has been established. They also indicate that the firm will not treat such information as confidential until this relationship has been created. At least one site cautions that this concern applies not just to e-mail, but also to unsolicited postal mail and facsimile messages. A law firm might also mention voice mail messages in this context.

Some sites briefly advise the visitor that before agreeing to represent the visitor the firm needs to conclude that the representation would not create an actual or potential conflict with existing or former clients. A number of sites refer specifically to the requirement that the firm and the potential client sign an engagement or retention letter.

A preferred position may be the preemptive statement that the firm cannot determine by e-mail whether to represent someone, accompanied by an encouragement of the visitor to call the firm to

discuss possible representation. One firm's site indicates plainly, "We will not consider any e-mail regarding new client representation other than a request for a personal interview." Another firm adds that if the visitor calls one of the telephone numbers provided, "[a]n attorney will first take you through our conflict of interest procedure and see that you are put in touch with the lawyer best suited to handle your matter." Of special note is a third firm's warning, in block-capital letters, that it may, "in its discretion," decline to accept the representation of any person or entity even if its check for conflicts of interest does not reveal a conflict.

Careful firms could specify that these restrictions apply not only to potential new clients, but also to potential new matters that an existing or former client would like to discuss with the firm.

In this context, it might be an ethically questionable practice to allow visitors to e-mail the firm's attorneys directly through an e-mail link featured on the site (for instance, on an attorney's individual page) without interposing a click-wrap box that contains such warnings as those above, and requiring the visitor to click "I agree" before actually composing and sending the e-mail. The box could also specify the jurisdictions in which the attorney in question is licensed to practice, and could state that visitors from other jurisdictions should not contact that attorney for representation. One firm states in such a click-wrap box, "Our policy is not to return e-mail regarding a specific legal matter from anyone who has not already engaged the firm."

Even if such click-wrap boxes appear when a visitor attempts to send e-mail to an attorney through the site, the site should not display the attorney's e-mail address, since a visitor could merely write it down or cut and paste it into the address line of an e-mail form generated by the visitor's own e-mail program, and thereby avoid the warnings entirely.

In addition, exposing a lawyer's e-mail address on the site could make that person vulnerable to spam, or worse, to harassing e-mail, as one prominent New York law firm discovered in 1999 after it began to display photographs of its partners and associates. A number of the female associates started receiving unwelcome personal e-mail (and also discovered that their physical appearances were being discussed on an Internet discussion board for New York associates). Given these concerns, as well as the risk that a lawyer involved in a controversial matter may be stalked, a firm may wish to have its lawyers agree in writing before displaying photographs of them on its site, and to allow them to approve any images of themselves that are to be used.

Some firms, presumably to comply scrupulously with the ethical prohibitions of misrepresentations, have even specified on their terms-and-conditions pages that "[p]ersons depicted in photographic portrayals are not clients" and "[u]nless otherwise indicated, images of individuals in this site are not of individuals associated with [the firm] or associated with clients of [the firm]."

Although some state ethics committee opinions have concluded that the use of cell phones by lawyers does not impermissibly compromise client confidentiality (even though the phone transmissions might be intercepted), some click-wrap boxes triggered by attempts to e-mail an attorney caution that, in general, e-mail communications may not be technologically secure and that the client or potential client bears the risk of the loss of confidentiality in the transmission to the firm. Law firms might also consider enhancing the confidentiality of their clients' communications to them by warning that if the information is very sensitive, it might be better for the client to communicate it in person or (live, not by voice mail) over the phone.

Alternatively, a firm could mention its ability to read e-mail

encrypted by certain technologies, such as PGP ("Pretty Good Privacy"). Without specifying which encryption technologies the firm uses, though, it would probably not be a good idea to adopt the policy of one firm that a client "should not send sensitive or confidential e-mail messages unless you are certain that you have adequately encrypted them."

Firms might also wish to warn visitors who are about to send them e-mail that the use of wireless Internet connections may enhance the risk that a message will be intercepted, and that the visitor might not wish to send e-mail from an account that his or her employer or spouse could monitor. It might also be wise to caution clients, as a general matter, not to use cell phones, or perhaps even the new methods of communicating by voice over an Internet connection, if they are concerned about confidentiality.

Once the e-mail is received by the firm, how secure will it be? Firms are understandably reluctant to specify their internal security methods, or to issue any guarantees. Some approaches include "We also take reasonable precautions that the data we collect is accessible by only those employees with a need to know basis and may not otherwise be reviewed" and "We maintain physical, electronic, and procedural safeguards that comply with our professional standards."

Clients should be informed that, in this age of "phishing," or fraudulent impersonation online, the firm and its lawyers will never send them e-mail asking for such sensitive information as their social security numbers or bank account numbers, or directing them to an area (purportedly) of the firm's site so that they could supply this information electronically.

Firms could advise visitors that potential e-mail, even if time-sensitive, will not necessarily be read or responded to immediately, so that the visitor might wish to telephone the firm if the matter is urgent. One firm takes such a warning one step further, noting that although it makes "every reasonable effort" to read its e-mail, it "reserves the rights not to read or respond to any unsolicited communications."

How will a firm know whether its e-mail system is working correctly, and that messages addressed to its lawyers are actually reaching the intended recipients? There might be a duty for a firm to test its own e-mail system periodically. Of course, as Opinion 302 suggests, the site or click-wrap box might indicate that when the message is received the site will automatically generate a confirmatory e-mail to the sender, and that the sender should not consider the message to have been delivered until he or she receives that confirmation.

Maximum Protection

As with any commercial web site, considerations of how best to display terms and conditions in a binding fashion balance legal factors with those of aesthetics and ease of use. Would it really benefit a law firm to install many conspicuous disclaimers and click-wrap boxes, or would that approach unnerve or annoy potential (and existing) clients?

Each firm must, of course, find its own balance of these issues. Though they may make the visitor more apprehensive, or less comfortable in navigating the site, prominent disclaimers and click-wrap boxes could be well worth it if they help to insulate the firm from ethical problems. Even a visitor put off by these features would have to admit, if not admire, that the firm's lawyers are determined to protect themselves and their current—and prospective—clients.

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