

just being social*

facebook

Facebook helps you connect and share
with the people in your life.



* but make sure you aren't creating a premature lawyer/client relationship, making claims of success or offering misleading advice

ABA Ethics Opinion addresses law firm websites, but not emerging social media.

BY JAY D. STROTHER

Little more than 30 years ago, rules banned lawyers from advertising to solicit business in any way:

A lawyer shall not publicize himself ... through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

– 1976 Disciplinary Ruling, Arizona State Bar

Oh, how times have changed. Ads for legal services are everywhere: on buses, on billboards, in newspapers and on television. And that old ruling could not have foreseen what is the 21st century's No. 1 business development source: the Internet. However, as each of these marketing and advertising tools emerged, the same ethical questions remain:

- Are firms promising too much?
- When does the lawyer/client relationship begin?
- Can firms tout their successes? Or does doing so imply similar results for prospective clients?

“No matter the medium, the same rules would apply,” said Oklahoma State University visiting assistant business ethics professor Edward G. Lindsey, a Tulsa attorney. “Ethics surrounding business development are constant – and they usually are based on common sense.” Fishman Marketing, Inc. CEO Ross Fishman agrees: “The medium isn’t the message – the content of the message is. As a friend of mine says, the rules are technology-agnostic. It doesn’t matter where you say it, it’s what you say: Is your communication beckoning business or simply voicing an opinion?”



“Put someone specific in charge. Make it someone’s clear responsibility to **stay current on the rules** and keep the firm in compliance. Someone has to **own this issue**. Few lawyers understand the nuances of these rules, so it’s **our responsibility** to help **protect** the firm.”

THE ABA ETHICS OPINION

As law firms’ use of the Internet evolves well into its second decade, websites’ inherent pitfalls and opportunities for legal organizations have crystallized. Late in 2010, the ABA Standing Committee on Ethics and Professional Responsibility addressed the problems law firm administrators, marketers and ethics attorneys had already wrestled. Formal Opinion 10-457 cites differences between Internet-based business development and its non-electronic predecessors:

- immediacy of access
- direct interaction with legal providers
- disclaimers
- depth of information available

Firm websites are much more than ads. They can be educational tools. They can house very real information. The opinion cites how problems can arise from website marketing and provides guidelines for how to avoid these issues. (Read the complete opinion on the ABA website. An additional resource is ABA’s EthicSEARCH division. Search the ABA site for “Recent ethics opinion: Lawyer websites” by Peter Geraghty.)

“I can’t imagine why it took the ABA so long to issue this opinion,” Fishman said. “The application of old-media ethics rules to the Internet and new media tools has been confounding law firm marketers for a long time. It allowed individual states to create their own conflicting rules and created more confusion than necessary.”

Indeed, some states are ahead of the bar – and their guidelines are even more restrictive, said the director of marketing and business development at Hunton & Williams in Washington, D.C., Kim A. Perret. “There’s a lot of frustration right now and it is going to take some discussion to get the

right formula [for restrictions and policies],” said Perret, who is also a former president of the Legal Marketing Association. “Prospective clients want to get the information they need on the web, but protecting the firm from liability or ethical breaches may keep that from happening.”

However, Perret thinks that – especially for corporate firms – there exists a sophisticated level of firm website user: They can discern among real information, marketing language and advertising. But even if some states are more restrictive of web-based marketing and information, those state bar organizations may have the ability to more nimbly react to changes and new media. Many of these entities already had clear website guidelines. Now they are tackling the emerging tools that are causing legal administrators to fret: social media.

In that light, some experts think that the ABA website opinion is too little, too late. “The old rules should cover new media tools like Facebook and blogs, but it would be helpful if the ABA clarified this point directly,” Fishman said. “However, my primary qualm with the ABA’s ethics policy isn’t that it is debating how or whether to apply the Rules to the Internet and the evolving new technologies. In my opinion, the real problem is that it doesn’t distinguish between corporate and consumer practices.”

Another marketing expert, Jayne Navarre, echoes Fishman’s sentiment: “These rules are written for consumer-based law firms that are actually selling to clients on the web. Traffic, personal injury and retail firms do sell through their sites.” These firms’ use of contact forms and query fields is directly addressed in the opinion. “I’ve seen in the last year more law firms using blogs to get leads, whereas sophisticated firms don’t use their websites as lead generators,” said Navarre, who is a Florida-based director of

ABA WEBSITE ETHICS OPINION: HOW TO REMAIN COMPLIANT

The experts are aligned: Firms need to have formal guidelines for how their attorneys and staff use the web to market their services – whether via a website or social media. The following are suggestions on actions administrators can take in their firms to comply:

1. Have a go-to reviewer.

Designate someone in the firm as a gatekeeper of website information. Ensure that this individual is knowledgeable about the ethics rules. “Many firms update their online materials regularly,” said Fishman Marketing, Inc. CEO Ross Fishman. “Put someone specific in charge. Make it someone’s clear responsibility to stay current on the rules and keep the firm in compliance. Someone has to own this issue. Few lawyers understand the nuances of these rules, so it’s our responsibility to help protect the firm.”

2. Train your staff.

Train all your staff people: They need to know what is allowed on your website and in their personal use of social media. Make it clear how seriously the firm considers these issues.

3. Employ the right disclaimers.

Know what disclaimers you need to protect against misleading information or the assumption of a client/lawyer relationship. But keep in mind that these disclaimers will limit your liability only so much. “Yes, you need disclaimers but they really aren’t the issue,” Fishman said. “‘Our lawyer violated our policy’ isn’t much of an answer when your firm is embarrassed on the front page of the *Washington Post*, or circulated all over the Internet. It’s better to educate people and ensure that they stay in compliance to the degree necessary.”

4. Create a clear policy – and make sure your staff knows what it is.

“Create a clear social media policy and ensure that everyone at the firm knows what their individual responsibilities are both at work and in their personal lives,” Fishman said. “The lines are blurring, and even activities that would seem to be personal and off-the-clock can still have a disastrous effect to the firm.” However, there are other ways to approach the policy issue. Jayne Navarre of Law Gravity suggests giving employees a permission-based policy: “Please do promote our firm in this way ...” “Please do read and respond to blogs, but be careful not to ...”

Of course, she said, there always have to be some don’ts: “Don’t use your employer’s name on anything derogatory or clearly inflammatory. Don’t use the firm’s equipment for anything questionable. Everything leaves a trail and any ‘don’t’ policy about social media and the web should remind employees of that fact,” she cautions.

LawGravity, LLC. “Corporate law firms mostly use their sites as an education portal. Most law firm sites are placeholders. Pretty tame stuff.”

THE EXPOSURE

Regardless of their opinions about the timing and usefulness of the formal ABA Opinion, marketers and administrators agree that websites create a lot of gray ethical boundaries – and firms must be ready to address these issues. “This rule said to me that firms have to take every precaution,” said Navarre, who published the book *Social.Lawyers: Transforming Business Development*. “There is interaction and immediacy inherent in the web. Firm managers must ensure they are filtering the website through layers of protection.”

Websites themselves may be easier to keep under control. The real issues come from the new technologies. Practitioners are creating their own blogs. They are active on Twitter. They have LinkedIn and Facebook accounts that reflect their employer and profession. These media open up new challenges, ones that Navarre said require you to have really honest lawyers who tell the firm how they are using these tools. “Social media: That’s where the line gets a little fuzzy,” she said. “When we interact online, are we providing legal advice? When someone reads an article online there is a disclaimer.” But Twitter posts and blogs are independent of the firm’s site.

Navarre’s solution is to ensure that lawyers and staff know how to handle requests that come in via these media. “One lawyer I worked with discusses broader intellectual property issues via Twitter,” she said. “But when he receives any specific IP questions through direct message, he replies, ‘I’ll be happy to discuss this with you offline once you establish a formal relationship.’ Really any time your lawyer is communicating anything with an @ sign, hash tag or via e-mail, add that disclaimer.” Additionally, Navarre suggests that those who do use Twitter can include a disclaimer link with any tweet by creating a Tiny or Bit.ly URL.

Attorney Ed Lindsey agrees that the lawyer/client relationship needs to be clarified immediately. “I’ve had people who know I’m an attorney contact me via my own personal site – not necessarily through my practice website. But I view this as being just like

a phone call: I'm communicating in real-time with people. But we have to apply the same rules about when the attorney/client relationship has begun. Just because we have new technologies doesn't mean that it has to be complicated. Apply the same rules."

Navarre cautions legal managers to be realistic about their employees' use of social media. "It's very important for administrators to understand why their employees like social media: It gives them a voice, one that used to be only available via a one-on-one conversation," she said. "Tell your employees that you understand that they have this voice. But remind them that while they're behind a computer, they may still be connected to the firm in some way."

Personal Facebook and LinkedIn pages should not include the firm name or tie the individual to the firm. Employees should use good judgment about who they are associated with via these sites: Avoid "friending" anyone who could cause a conflict to arise. If others can see employees' "friend" networks, they can assess if employees are indiscreet in their associations. Employees need to remember not to post anything derogatory about their employers, their clients or their coworkers as that may also constitute an ethical breach. "Employees need to understand how powerful social media tools are," Navarre said. "One stray footprint can have repercussions on the employee and the firm. I often equate electronic communication histories to one's permanent record from school: It's dreaded and it never goes away."

THE SOLUTIONS

- ***Develop policies and disclaimers.***

Your firm probably already has many safeguards in place that directly address the ABA opinion: website policies, client intake procedures, ethics guidelines. Law firm administrators, managers and marketers know the importance of implementing these types of policies – regardless of a formal ABA opinion. It is time to add a social media policy to that mix. (See sidebar on p. 38.) "Ethics are always a huge deal,"

said Sally Brashear, former director of marketing for Pullman & Comley in Bridgeport, Connecticut. "Of course, many large firms already have a lot of website safeguards and policies in place. But there is some exposure everywhere, not just in medium and small firms, because some firms can be slow to react."

Brashear, now a Denver-based marketing/business development consultant, experienced the problems inherent in marketing a firm online and in how lawyers were embracing emerging social networking technology. But creating policies and guidelines – even at the firm level – can reflect the overly cautious pace of the industry. The process shows that the bar association is not the only entity that moves slowly: "Even though we knew it was important, it took me two years to get a Web 2.0 policy installed," she said. The policy at her Connecticut firm addresses the Internet and blogs. Brashear turned to her administrator and marketing peers to establish this new firm tool. She surveyed what others were doing and visited firms' sites to get an idea of disclaimer language and to level the playing field. Brashear reports that her firm's malpractice insurer also was a helpful resource. Navarre said visiting other sites and surveying your peers is a great place to start. While the disclaimers are pretty basic ("This site is for information purposes only and does constitute legal advice ...," "This communication does not constitute the establishment of a client relationship with our firm ..."), it's the disclaimers' use that must be honed. "In the old days, when cold calls would come in to the firm, receptionists would contact the practice group leader or the marketing department to vet the call," Navarre said. "Even then, people wanted to give you too much information. That could automatically conflict the firm."

She said that electronic communication through websites could succumb to the same pitfall. Firms should not provide prospects with an open-reply field to write about their issue or concern. If the site allows direct contact with attorneys via e-mail, Navarre suggests firms program in a pop-up



BE SURE TO CATCH JAYNE NAVARRE'S SESSION, "IS THE MEDIUM THE MESSAGE? SOCIAL MEDIA AND MARKETING" (LI34) AT THE ALA ANNUAL CONFERENCE ON MAY 25.

SAMPLE WEBSITE/SOCIAL MEDIA POLICY



There is no need to reinvent the wheel when it comes to a social media use policy. While the ABA Ethics Opinion issued in 2010 does not directly address social media ethics, firm managers, marketers and administrators can take the next step to protecting their organizations. Here is a sample policy courtesy of L. Russell Lawson, marketing director at Sands Anderson in Richmond, Virginia.

CODE OF ONLINE SOCIAL MEDIA PARTICIPATION

Sands Anderson PC defines online social media as any online tool (excluding private e-mail systems) that allows users to post content (text, photo, video, audio), respond to posted content and engage in conversation with other users via content exchanges. Common social media tools include (but are not limited to) Facebook, LinkedIn, Twitter, Flickr, YouTube, blogs, and Wikis. (A partial list of currently identifiable online social media tools can be found at "Social Media Landscape" W1165430.)

1. Sands Anderson PC encourages employees, who are licensed attorneys, to participate in online social media as a networking and business development method, provided such participation complies with Sands Anderson's Internet, E-Mail and Computer policy.
 2. Be aware that you are personally liable for all communications and information that you publish online. Our law firm may be held responsible for online activity that uses firm assets, your firm e-mail address or any e-mail address that can be traced back to the firm's domain address, requiring that you comply at all times with this Code.
 3. Sands Anderson PC employees that participate in online social media on behalf of the firm will:
 - a. Identify their affiliation with the firm.
 - b. Behave responsibly and in a manner consistent with the reputation and perception of a leading law firm.
 - c. Comply with the applicable rules of professional conduct governing lawyers, including the rules governing communications about legal services.
 - d. Refrain from posting photos, audio recordings, video or other content related to specific individuals affiliated with the firm (employees, attorneys, clients, partners, business contacts, etc.) without their permission to do so.
 - e. For industry-related activity (blogs, commentary and comment postings), include an approved disclaimer that complies with the applicable rules of professional conduct governing lawyers and explains that content posted online reflects the opinion and views of the individual who posted the content, not the opinion or views of Sands Anderson PC.
 - f. Comply with copyright laws and fair-use standards.
 - g. Not reveal confidential information and information protected by the attorney-client privilege.
 - h. Quickly acknowledge and correct mistaken information communicated through social media.
4. When posting content to online social media, Sands Anderson PC employees will exercise their best judgment and keep the best interests of the firm at the center of decision making. Online postings should be considered a permanent record and can be potentially subject to legal discovery.
 5. Employees will notify the Marketing Department of their participation in online social media for business networking and business development. If required, employees should be prepared to provide online identities and usernames. Sands Anderson PC may survey online social media sites and review posted content.
 6. Employees may be subject to disciplinary action up to and including termination for a violation of this Code.

Sample disclaimer: "This commentary is informational only, is not legal advice and does not establish an attorney-client relationship. Views expressed are of the individual user and do not represent the views of Sands Anderson PC, its owners or its management. Each legal matter is subject to a unique set of facts and issues, and results on a particular case cannot predict the outcome of any other case. You should seek appropriate and properly licensed legal advice before making any decisions based on these comments."



Of course, many large firms already have a lot of **website safeguards and policies** in place. **But there is some exposure everywhere**, not just in medium and small firms, **because some firms can be slow to react.**

disclaimer: *Your e-mail does not constitute a lawyer relationship and it is not confidential. The firm may take more than 48 hours to respond.* "It's not hard. It just takes a little bit of savvy," Navarre said. "You cannot take a conversation without a disclaimer – no matter the medium: on the phone, via website, by e-mail."

Other modes of client contact require more nuanced disclaimers. Website and social media policies are the norm, but firms may need to create a menu of disclaimers for blogging and tweeting. "Blogging is different," Navarre said. "Your attorney bloggers should include intellectual property disclaimers. There should be specific language about repurposing content from the blog and giving credit."

Navarre suggests that some blogs may require a "Terms of Use" line: "Make sure it is clear that readers cannot use content in any way, if that is what you want to limit. And, include the standard lines about information not being intended as legal advice and that the blog should in no way be interpreted as forming an attorney/client relationship," she said. "Some blogging discussions may even require a child protection disclaimer – 'For mature audiences only.'" Hunton & Williams' Perret sees law firms' use of Twitter as an even bigger issue. "Twitter is a little bit problematic: Disclaimers won't fit in 140 characters," Perret said. "Lawyers who choose to communicate using this medium need to be self policing."

- **Educate attorneys and staff.**

That self-policing is just one sign of an educated, social-media-savvy staff. There are already self-taught experts in firms who have struggled with how to walk the ethical narrows. Brashear turned to people in her firm who already perfected their use of social media – and these in-house gurus help set the bar for others. One source for Brashear was

a firm lawyer who already was an active blogger about Connecticut employment law.

"One thing that made it easier for him is that he was smart enough to keep the focus of his blog narrow – just our state," Brashear said. "He does everything you should do: He is out in front on clarifying relationships. He developed an entire social media cycle including tweeting and webinars." This lawyer's success showed Brashear that it was imperative to embrace social media – but cautiously, intelligently and ethically. To help train the rest of the staff, she added social media conversations to the firm's regular lunch-and-learn sessions.

While Pullman & Comley's business law attorney was using the blog for professional conversations, more attorneys than ever are using social media for personal communication. "Even older lawyers are reconnecting with friends, veteran clients and other colleagues. And, by extension, these tools are generating business," Brashear said. However, as that business develops – even through personal sites and other social media – attorneys need to remember to implement the guidelines and to communicate the necessary disclaimers.

This is where an informed attorney is a safe attorney. "You can write a highly detailed policy that clearly lays out the dos and don'ts," Navarre said. "But the problem remains that the policy is seen and then forgotten. Or, if it's received by attorneys and staff not yet up to speed on social media, it's Greek to them."

Navarre recommends regular discussion of these issues, including an educational component about the ethics and disclaimers that reach employees when they are ready for it: as they create a new blog or Twitter feed. One of the best ways to keep the policies at the forefront is to videotape a social media policy training session and then rescreen it for staff regularly. "You could even post it on YouTube," she joked.

- **Police your policies.**

While website and social media policies seem to be the norm, Navarre offers a little different tactic: Do not create *policies*, create *guidelines*. "If it's a policy, it needs to be policed," she said. "But if you call them 'guidelines' the onus is on the individual."

But this syntax change does not absolve firm managers from acting as the disclaimer and policy police: Navarre said that firms do need to have some formal policies but they can be at more of an executive-summary level. Then firms can use other tools to monitor staff social media use. "Firm administrators and marketers can set up social media alerts by hand for every person in their firm," Navarre said. And, firms can also use social media monitoring services like *tehrigy.com* to track use. These providers can generate a dashboard of firm mentions in social media – and they can trace who generated content via blogs, Twitter and other outlets. "Even if firms do not want to track social media use that closely," Navarre suggests, "they should do a survey every six months about who at the firm is active with these tools. Then the firm can have a database of who's participating where."

WHAT'S NEXT?

Just as that 1976 lawyer advertising ruling could not anticipate the Internet, there are changes coming to firm websites, social media and mobile devices that

no early 21st-century ABA ethics opinion can cover: What are the next areas law firm administrators, managers and marketers will need to police?

"What's next really depends on the type and size of law firms," Navarre said. "It seems to me that there will be many client confidentiality discussions about cloud computing in small firms. This could be a real security issue."

But large law firms are already grappling with the inherent issues of things like private social networks. These tools allow virtual work teams that may include a firm's attorneys and clients working across an array of offices. And PSNs may be created for many different firms working on aspects of a case for a corporate client. "These networks are a place to go so firms can work together. They can get out of the silo and create virtual workspaces," Navarre said. "This type of collaborative communication could eliminate e-mail for work teams, but it would open up many new ethics and confidentiality issues." ✱

about the author



Jay Strother is the former editor and associate publisher of *Legal Management*. He is now a Chicago-based independent writer, editor and marketing consultant. Reach him at jstrother@wowway.com.

ON THE HORIZON: ABA COMMISSION TACKLES NEXT BIG THING

While the 2010 ABA Ethics Committee report focused on law firm website issues, the organization is not ignoring other pitfalls inherent in new technologies. In 2009, then ABA President Carolyn B. Lamm created the ABA Commission on Ethics 20/20 to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.

In late September 2010, the commission released two issues papers for comment entitled "Client Confidentiality and Lawyers' Use of Technology" and "Lawyers' Use of Internet Based Client Development Tools." The Commission's Working Group on the Implications of New Technologies developed these papers. Responses from industry experts and other law-related organizations like the Legal Marketing Association are available online: www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.