

The Internet provides both opportunities and challenges to the practice of law. It gives you the ability to provide better services to your clients in a timely matter and it makes it possible to effectively offer information to prospective clients. The Internet gives you the ability to collaborate on difficult issues with other attorneys and experts. It provides you with the means to conduct legal research easily and inexpensively, and it can provide you with an inexpensive forum to publish information which can be read by anyone who has access to the Internet.

However, the Internet also presents challenges to attorneys who choose to take advantage of the Internet. Some of these challenges include conducting the attorney-client relationship in an electronic world, avoiding professional negligence in an electronic environment where the identity of person could be difficult to authenticate, and protecting the confidentiality of client information in an open environment accessible from potentially unlimited locations.

The Attorney-Client Relationship in an E-World

The attorney-client relationship is the core of the legal profession. Initiating and managing the attorney-client relationship in an electronic world can be difficult. Attorneys who choose to take advantage of the Internet must be able to avoid inadvertently creating an attorney-client relationship, avoid creating conflicts of interest, maintain client confidences and keep clients' electronic property secure.

Inadvertently Initiating the Attorney-Client Relationship

Exposure to potential clients online can help you develop your law practice; however, some online forums can put you in compromising situations and expose you to liability. An online conversation with an individual may create an attorney-client relationship whether you intend to enter into the relationship or not.

For Example, suppose the Mickey Mouse is looking for free legal advice. He posts a message to the Gigalaw distribution list asking the question, "Are Covenants Not to Compete enforceable?" Huey Dewy, a new young lawyer who is eager to take advantage of the opportunity to demonstrate his knowledge, answers, "Generally, Covenants Not to Compete are enforceable." Relying on Huey's advice, Mickey, the owner of a Dot.com startup, drafts and negotiates a contract with Goofy that includes a Covenant Not to Compete that a court later holds unenforceable because the terms of the covenant are unreasonable and unconscionable. Goofy leaves Mickey's Dot.com and starts his own Dot.com indirect competition with Mickey. Mickey's Dot.com fails and he loses a considerable amount of money. Mickey sues Huey for legal malpractice for giving him legal advice without knowing all the relevant and material facts. Huey has completely forgotten about the innocent message he replied to on the Gigalaw list. Huey never intended to create an attorney-client relationship with Mickey, but Mickey thought Huey was acting as his e-lawyer.

Disclaimers to Avoid Initiating an Attorney-Client Relationship

Many lawyers use disclaimers on their Web site, in e-mail, and in other communications to avoid inadvertently creating an attorney-client relationship. It can be argued that the value of disclaimers is limited since courts normally attach more weight to the substantive content of the communication and the circumstances in which it is made. However, it may be a good policy to use them if properly designed and clearly displayed, because they can help you establish that you did not intend to offer free legal advice and that reliance on your online communication as legal advice tailored to a particular problem was objectively unreasonable. It is important to note that the effectiveness of this type of disclaimer has yet to be tested in court or in any disciplinary proceedings.

The rules and regulations regarding disclaimers vary among states. Iowa does not require this type of disclaimer. However, the following statements may be used in electronic communications to avoid inadvertently creating an attorney-client relationship.

1. Content is provided for general information purposes only.
2. No attorney-client relationship is created by use of this content.
3. Content is not legal advice.
4. Laws may vary in the jurisdiction where you reside or work.
5. You must consult an attorney licensed to practice in your jurisdiction.
6. If you wish to retain the service of an attorney contact this office to set up an appointment.

7. [attorney's name] may have a conflict of interest or other ethical problem that would prevent her or her firm from representing any individual reader in litigation or transactions.
8. Use or reading of this information is conditional upon your agreement to read and agree to all the terms and conditions of the disclaimer; defend [attorney's name] and her firm, hold them harmless, and indemnify them from all harm, injury, or damages arising out of your use or reading of the information; and upon your agreement not to sue [attorney name] for professional negligence or for any other cause of action upon any legal theory arising out of your use or reading of the information.

Conflicts of Interest

An attorney must avoid creating conflicts of interest while using the Internet. Expanding on the previous example where Huey Dewy inadvertently creates an attorney-client relationship with Mickey Mouse through an innocent exchange of general advice, suppose Mickey Mouse has an employment contract dispute with Goofy. Goofy is a current client of Huey. Goofy files a state disciplinary complaint against Huey for breaching his fiduciary duty to Goofy, by advising Mickey regarding a matter adverse to Goofy's interests.

This scenario illustrates the importance of being aware of potential sources of conflicts of interest when communicating on the Internet. You can easily establish an e-relationship with someone whom you know very little about. Even if you do not advise someone of his or her rights in opposition to the rights of one

of your current clients, you should be alert to potential sources of conflicts of interest online. Some common sources of potential conflicts are:

1. You are communicating with a person who is an adverse party or a potentially adverse party in litigation in which you currently represent a client.
2. You are communicating with a person who is likely to leak information to an adverse or potentially adverse party in litigation in which you currently represent a client.
3. You are communicating with a current client in the setting of a prohibited business transaction with a client.

Iowa Code of Professional Responsibility for Lawyers

Cannon 5 - A Lawyer should exercise independent professional judgment on behalf of a client.

Ethical Considerations 5-1, 5-7, 5-14, 5-15 and 5-18.

ABA Model Rules of Professional Conduct

- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.8 Conflict of Interest: Prohibited Transactions
- Rule 1.9 Conflict of Interest: Former Client
- Rule 1.10 Imputed Disqualification: General Rule
- Rule 1.13 Organization as Client

Iowa Disciplinary Rules and ABA Model Code of Professional Responsibility

- DR 5-101 Refusing Employment When the Interest of the Lawyer May Impair His Independent Professional Judgment.
- DR 5-103 Avoiding Acquisition of Interest in Litigation
- DR 5-104 Limiting Business Relations with a Client
- DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

There are two areas to consider when you use the Internet to conduct the attorney-client relationship. You should keep clients informed and maintain confidentiality.

Keeping Clients Informed

You must keep clients informed about general matters that may be of interest to them and of specific, private matters in which you are representing them.

General Matters

General matters are matters of interest to your clients that may concern or affect them, but do not relate to a specific legal matter. For general matters you can use general-purpose online communications such as placing a news section on your web site to give clients updates about the issues that concern them. You could link your web site to proposed revisions to statutes and cases that would affect potential liabilities of your clients. You could also use a mailing list or

electronic newsletters to send or post updates to clients who are interested in a particular area of law.

Private Matters

Private matters are matters in which you are representing particular clients. To keep clients informed about the status of their cases or transactions you can use e-mail directed to the particular client with whom you wish to communicate, allow a client to access information related to his or her transactions or cases through a secure Intra or Extranet. However, for private matters you need to take more care to avoid disclosing confidential information.

Confidentiality

You must be careful to maintain the confidentiality of attorney-client communications when you use the Internet to communicate with clients, just as you would use more traditional means. In protecting confidentiality, you must consider the types of communications you seek to protect, the methods of Internet communications you use, and how you can protect confidentiality.

Types of Communications

There are three types of confidential communications that you must protect. You have a duty to protect communications containing attorney-client privileged material, attorney work product, and material containing clients' confidences and secrets.

The Attorney-Client Privilege

An Illinois Supreme Court case defined the common law attorney-client privilege. In People v. Adam, 51 Ill.2d 46, 280 N.E.2d 205 (1972), the Illinois

Supreme Court stated that "the attorney-client privilege exists in order that one who is, or seeks to become a client, may consult freely with counsel without fear of compelled disclosure of information communicated by him to the attorney whom he has employed, or seeks to employ."

The Attorney-Client Privilege is codified under Iowa Code §622.10. In Moyers v. Fogarty, 119 N.W. 159, 140 Iowa701 (1909), the Iowa Supreme Court stated that it is essential to a privileged communication between an attorney and client that the professional relation exist when the communication is made, that it be made on account of that relationship, and that it be necessary or relevant to enable the attorney to properly perform his duties.

You must be careful to protect any information clients provide to you in confidence in order to preserve this privilege. You must also advise clients to protect this information from unintentional disclosure in Internet communications.

The essentials of its creation and continued existence have been defined as follows: where legal advice of any kind is sought from an attorney in his capacity as a legal advisor, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the attorney unless waived by the him.

Attorney Work Product

The attorney work product privilege protects the lawyer's mental impressions regarding litigation from disclosure in court. Work product can be preserved in e-mail or in an electronic file. Be careful that you do not accidentally disclose this information.

Clients' Confidences and Secrets

You must protect clients' confidences and secrets; or information that might embarrass or legally damage the client from online disclosure.

For example, a client comes to you to ask about his employment rights under the Americans with Disabilities Act (ADA). The client is concerned that his employer is discriminating against him because he suffers from a disorder, for which he is receiving treatment. The condition from which he suffers does not affect his job performance. The client is very sensitive about his condition. This information is a client confidence that you must protect from disclosure.

The most secure method of assuring confidentiality in these types of communications are to verify independently the identity of the person with whom you are communicating, and to use encryption to secure communications with those persons.

Protecting Communications

To protect confidential communications, you can verify independently through some other non-Internet medium the identity of the person with whom you are communicating, use encryption, or avoid using online communications for confidential information.

Historically, states have use caution regarding online communications and have required confidential information to be encrypted or require the lawyer to ask the client to consent expressly to unencrypted communications, after a full disclosure of the relevant risks of possible disclosure of information online. To date, no state has formally announced any specific standards to govern the level

or method of protection attorneys must use to protect online communications. However, a consensus seems to be emerging that no special protection is required for online communications that would not be indicated for traditional means of communications. Specifically, if a matter is so sensitive as to require special security precautions if communicated by regular mail or an ordinary telephone call, then you should use special precautions, such as encryption, to communicate the matter online. However, for other communications, special protections are probably unnecessary.

The ABA's Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion entitled, *Protecting the Confidentiality of Unencrypted E-mail* (ABA Opinion). The ABA Committee first examined the other means that lawyers use to transmit confidential client information, including: postal mail, land-line telephones, cordless telephones, cellular telephones, and faxes.

The ABA Committee reviewed the variety of e-mail systems available, including e-mail sent directly from one computer to another computer; private system e-mail such as e-mail provided by intranets and extranets; e-mail provided by Internet service providers, such as Earthlink and American Online; and Internet e-mail.

The ABA Committee compared traditional means of communication with e-mail and observed that e-mail, including unencrypted e-mail sent over the Internet, posed no greater risks of interception or disclosure than the more traditional means of communication, and e-mail transmissions enjoy legal protections under the Federal Electronic Communications Privacy Act 18 U.S.C

§§ 2511(a)(1)(2); 2701(a)(1)(2). ABA Committee on Ethics and Professional Responsibility, Formal Op. No. 99-413 (1999).

The ABA Committee did not consider the confidentiality of e-mail systems provided by Application Service Providers (ASP's) that provide web based virtual offices, deal rooms and document repositories. These services may be attractive to sole practitioners and small law firms who may not be able to justify the costs of building an internal network for their computers. However, these e-mail services are comparable to those e-mail services provided by Internet Service Providers. Because users of e-mail provided by Internet Service Providers enjoy a reasonable expectation of privacy in communications they send and receive through such services, it is likely that a reasonable expectation of privacy exists in web-based e-mail provided by ASP's.

The ABA Committee determined based on its findings that lawyers and clients who use unencrypted e-mail enjoy a reasonable expectation of privacy in the contents of their e-mail transmissions. Therefore, lawyers may use unencrypted e-mail to communicate confidential information related to representing a client. However, lawyers should use special measures to protect highly sensitive client information that requires extraordinary means of ensuring confidentiality. The lawyer should discuss with clients the risks of disclosure and comply with clients' requests that the lawyer use a particular means to protect the confidentiality of the client's information.

Although this ABA Opinion does not have the force of law in any jurisdiction, it is persuasive and will likely influence the development of ethical

rules governing lawyers' duties of confidentiality when they communicate on the Internet. The ABA Opinion cites to and relies on the state bar opinions that have considered the issue of confidentiality.

Iowa Code of Professional Responsibility for Lawyers

Cannon 4 - A Lawyer should preserve the confidences and secrets of a client.

Ethical Considerations 4-1, 4-2, 4-4, 4-5.

ABA Model Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

Iowa Disciplinary Rules and ABA Model Code of Professional Responsibility

DR 4-101 Preservation of Confidences and Secrets of a Client

Lawyer Advertising

The numbers of lawyers advertising online is growing. As with any type of advertising for legal services, online advertising raises ethical issues.

State Bar Ethics Opinions

At present, state regulation of lawyer advertising varies a lot from one state to the next. Some states require minimal deviation from the regular advertising rules.

Some states require disclaimers, registration and filing of attorney web pages. You should be aware of not only Iowa rules relating to online advertising, but also that of other states because of the global nature of online advertising.

Unresolved Legal Issues

The general rules governing attorney advertising and online solicitation of clients seem relatively straightforward. In principle, online advertising, by web pages or otherwise, should not be treated differently than other means available for lawyers to promote their services. However, the fact that the Internet ignores geographic boundaries complicates the matter by raising a number of jurisdictional and choice of law problems.

Consider the following questions:

1. Which state or states should regulate attorney advertising?
2. Must a law firm that practices law solely in Iowa comply with Minnesota's rules governing attorney web sites, if they differ from Iowa's rules? If so, why?
3. How should conflicts of rules or ethics decisions among the various states be resolved?

These questions suggest at least two possible approaches to resolving the conflicts. One, attorney web sites must comply with all regulations of all states, and two, attorney web sites must comply only with the rules of the states where the lawyer is licensed to practice law.

Compliance with Regulations of All States

One way to resolve the problem of conflicting regulations is to require lawyer regulations to comply with the advertising and solicitation rules of all states. Such an approach is appealing because of its simple. You avoid conflict by mandating compliance with all rules. This methodology assumes that states

have the right to regulate attorney advertising outside their geographic territories. The argument supporting extraterritorial regulation of lawyer advertising is based on the following premises. Each state has the sovereign right to regulate the practice of law within its borders. Each state has the duty to protect its citizens from false and misleading advertising by lawyers. Unethical advertising by lawyers from other states may undermine the public's confidence in the state. The due process test for personal jurisdiction over out-of-state lawyers is satisfied because attorneys may obtain the indirect benefits of referrals from attorneys in all the states where their web site can be read. While this methodology appears desirable it is deceptive, it creates a set of complex and inconsistent regulations.

Compliance with Regulations of Iowa Only

The second way to resolve the issue is to treat Internet advertising as other advertisements are treated. This method would require lawyers to comply with only those ethics rules prescribed by the states in which they practice law. Regulating out-of-state attorneys' advertising violates due process because the state lacks jurisdiction over the out-of-state lawyers' conduct. There is a lack of minimum contacts with the regulating state and no purposeful availment of benefits and protections of attorneys not practicing law or soliciting clients there. Attorney Web pages are comparable to Yellow Pages advertisements, which are not subject to extraterritorial regulation. Attorneys routinely advertise in Yellow Pages telephone directories. The Yellow Pages of cities in other states are accessible to anyone who requests them from the telephone company and to

patrons of public libraries. This fact alone does not give other states the right to regulate the content of the attorneys' ads because the attorneys have no control over how their ads will be disseminated throughout the United States, much like advertising online.

It is unreasonable to expect attorneys to comply with all regulations of all 50 states. Some regulations may be in conflict. Requiring multi-state compliance for attorney web sites reduces the content on those web sites to the lowest common denominator. This type of regulation unnecessarily burdens and chills constitutionally protected commercial speech.

Requiring multi-state compliance places an undue burden on interstate commerce. The Courts have traditionally defined interstate commerce broadly. State regulation of out-of-state attorney advertising on the Internet concerns interstate commerce. States may overreach their authority if they tried to regulate attorney advertising that occurs wholly outside the state's geographic borders. The burdens the state law imposes on interstate commerce may exceed the local benefit of allowing the state to regulate the practice of law within its borders.

Regulation of out-of-state lawyer advertising on the Internet unconstitutionally subjects lawyers' interstate use of the Internet to inconsistent and conflicting regulations, such that a given lawyer could not comply with all of the applicable ethics regulations.

If inconsistent regulations among the states are a concern, I suggest that you may want to work with the Iowa State Bar to promote rules that will protect you and the other lawyers in your state from such inconsistencies.

Iowa Code of Professional Responsibility for Lawyers

Cannon 2 - A Lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

Ethical Considerations 2-10,2-11,2-12,2-13,2-14,2-15,2-16,2-17,2-18.

ABA Model Rules of Professional Conduct

- Rule 7.1 Communications Concerning a Lawyer's Services
- Rule 7.2 Advertising
- Rule 7.3 Direct Contacts with Prospective Clients
- Rule 7.4 Communication of Fields of Practice
- Rule 7.5 Firm Names and Letterheads

Iowa Disciplinary Rules and ABA Model Code of Professional Responsibility

- DR 2-101 Publicity
- DR 2-102 Professional Notices, Letterheads and Offices
- DR 2-103 Recommendation of Professional Employment
- DR 2-104 Suggestion of Need of Legal Services
- DR 2-105 Description and Limitation of Practice