



# Are you inadvertently creating a duty of confidentiality?

Law firm websites are designed to be helpful, but their primary purpose is to generate business. To that end, many law firms, in addition to setting forth information about the firm and its various attorneys, include a “**Contact Us**” link. There, the firm may ask individuals viewing the firm website to provide their names, contact information and a brief description of their legal issue. Some sample questions found on firm websites are as follows:

- *“Please provide a brief description of your legal issue”*
- *“Please provide a brief description of your injury”*
- *“Please tell us about your case”*

The firm website may include a disclaimer, sometimes in very small font, generally denying the formation of any attorney-client relationship and advising the inquirer “not to send any confidential or time sensitive information” through the website. But is such a disclaimer enough to avoid any duty of confidentiality? In addition, could the inquirer be considered a “prospective client”?

## **Duties of Confidentiality to Prospective Clients**

While not necessarily creating an attorney-client relationship, the firm may still be required to treat website visitors as prospective clients with an expectation of privacy and confidentiality.

ABA Model Rule 1.8 discusses duties to prospective clients and offers some guidance in determining confidentiality obligations. It provides in pertinent part, as follows:

“... (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

In accordance with ABA Model Rule 1.18 regardless of whether an attorney-client relationship is formed, a lawyer may still owe a certain level of confidentiality to a prospective client. Further, while individuals visiting a firm’s web site are generally not regarded as “prospective clients” under ethical rules, once the firm virtually engages that individual, the analysis becomes more complicated. The comments to ABA Rule 1.18 specifically address the issue as follows:

“[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response...”

A recent ethics opinion addressed this concern. See, The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion, No. 2005-168. Specifically, a wife searched the internet and found a divorce firm. The firm’s website asked for her name, contact information and a statement of facts.

The firm's web site contained Terms, which read as follows, in pertinent part:

*I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship.*

The wife agreed to the terms and provided a narrative that included details of a past extra-marital affair of which her husband was unaware. The next day, the firm informed the wife that it could not represent her in the divorce proceeding due to a conflict with a present client. *The firm, as it turned out, was already representing her husband.* The ethics committee analyzed the situation as follows:

- The committee determined that there was no attorney-client relationship. Even in the absence of an attorney-client relationship, however, an attorney may take on a duty of confidentiality to a prospective client.
- The committee found that the wife was acting as a prospective client when she submitted her narrative, in that she had a reasonable belief that she was consulting an attorney in a professional capacity.
- The committee found the disclaimer to be potentially confusing to a layperson and felt that the firm should have used plainer language, such as "I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm".
- The committee found that the law firm might be disqualified from representing the husband should a court conclude that the information provided by the wife was material.

Disqualification is obviously of great concern to law firms. ABA Rule 1.18 addresses the issue of disqualification, in terms of prospective clients, in pertinent part, as follows:

"(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful..."

Based upon the above rule, it is certainly possible that a firm could obtain material information through its website and that, consequently, the firm could be forced to resign from a representation.

### **Risk Management Tips**

- 1. Law firms should never assume that a disclaimer will be effective if the law firm's actions indicate a willingness to enter into a legal engagement.
- 2. When disclaimers are used, they should be written in plain language, formatted and placed so as to be easily seen and read.
- 3. Law firms may want to reconsider placing a "**contact us**" link on their website page if the legend requests a narrative regarding specific legal issues. While this exchange may still be insufficient to establish an attorney-client relationship, it may create an expectation of confidentiality.
- 4. To the extent that law firms maintain a "**contact us**" link, they may want to consider obtaining just enough information from the web site visitor to conduct a proper conflicts check.

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