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Hanging a Shingle on the Information Superhighway

Legal Advice on the Internet and the Problems of Prohibited Client Solicitation and Unintended Attorney-Client Relationships

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INTRODUCTION

¶1 Need legal advice? Don't call your lawyer. Save yourself the expense and hassle of an in-person consultation by submitting your question at www.ask-a-lawyer.com. For just \$20, cyberlawyer Peter R. Stone will give you an e-mail answer within seven days or your money back.¹

¶2 Sound too good to be true? Not anymore. As the Internet demonstrates its financial potential, computer-savvy lawyers have begun to cash in on the cyberspace trend, offering Web sites that provide legal advice via e-mail, online discussion groups moderated by lawyers,² and even live one-on-one chat with an attorney.³ The Web sites respond in part to concerns regarding the cost of traditional legal consultation,⁴ as well as a desire by some to limit their direct involvement with an attorney. The ventures, however, raise many ethical issues, including the limits of

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¹ See Peter R. Stone, *Ask-A-Lawyer*, at <http://www.ask-a-lawyer.com/USA/ca.htm> (last visited December 10, 2000).

² See, e.g., *PrairieLaw.com, Ask A Question About...*, at <http://prairielaw.askme.com/op/> (last visited December 10, 2000).

³ See, e.g., *USLaw.com, Inc., Ask a Lawyer*, at <http://www.uslaw.com/ask-a-lawyer> (last visited December 10, 2000).

⁴ See, e.g., Peter R. Stone, *Ask a Legal Question for \$20.00*, at <https://www.ask-a-lawyer.com/USA/Attorneys/CA/Civil%20Litigation/Peter%20Stone.htm> (visited December 10, 2000) ("Due to the fact that access to legal consultations on many matters is too expensive for most people, I am attempting to fill a void by providing a short answer to a short legal question over the internet for a small fee of \$20.00."); cf. Bruce A. Green, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 *FORDHAM L. REV.* 1713, 1731 (1999) (discussing the provision of limited legal advice over the Internet as a cost-efficient way to assist low-income people with legal problems).

allowed attorney advertising and the unintended creation of attorney-client relationships. What are lawyers doing on the Internet, and how legal and ethical are their schemes? This paper outlines the different legal services available on the Web and examines the ethical issues these schemes raise and how states are trying to regulate them.

THE CYBERLAW LANDSCAPE

¶3 Law firms have hosted Web sites since March 1994, when the Baltimore firm of Venable, Baetjer and Howard, LLP launched www.venable.com, “the first major law firm website.”⁵ Since then, most large law firms have followed Venable’s model, providing “noninteractive” Web sites that include the firm’s history, a lawyer directory, recruitment information, attorney publications, and news releases. Generally, bar associations have treated noninteractive Web sites as advertisements, subject to the ethics rules on attorney advertising.⁶ So long as they comply with conventional advertising rules, noninteractive Web sites have not posed a significant problem for bar association ethics committees.⁷

¶4 More recently, however, a few law firms and Internet startups have pushed the envelope further, offering Web sites that provide such “interactive” features as e-mailed advice, discussion groups, and chat rooms. One such site is www.USLaw.com, launched in November 1999.⁸ In addition to the “Find a Lawyer” directory and “Build a Document” service, USLaw.com offers a \$9.95 single-use (\$24.95 annual-subscription) “Ask a Lawyer” feature that lets users have “private one-on-one live chats with licensed lawyers.”⁹ The lawyer “helps the user to understand what area of law may be involved with a user’s question, and provides information about the legal process that typically is relevant as well as useful resources.”¹⁰ However, the site warns that the attorney will provide only “legal information, not legal advice,” and that the lawyers “are carefully trained not to cross the legal line from information to legal advice.”¹¹ USLaw.com retained the services of University of Pennsylvania legal ethics professor Geoffrey Hazard, who gave the Web site a clean ethical bill of health.¹²

¶5 Some legal Web sites charge users an “administration fee” for their services. Participating lawyers do not receive any money, but get free advertising and prospective clients from answering users’ legal questions. One such site is

⁵ Venable, Baetjer and Howard, LLP, *So You Want to Be on the Internet*, at <http://www.venable.com/Internet/index.htm> (last visited December 10, 2000); see also Robert J. Ambrogi, *Should Your Firm Have a Site on the Internet?*, 39 RES GESTAE 50, July 1995.

⁶ See J.T. Westermeier & Leonard T. Nuara, *Ethical Issues for Lawyers on the Internet and the World Wide Web*, in WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET 265, 273-74 (PLI Intell. Prop. Course Handbook Series No. G-565, Summer 1999).

⁷ See, e.g., Ill. State Bar Ass’n Op. No. 96-10 (1997) (“[O]nly the general rules governing communications concerning a lawyer’s services and advertising should apply to a lawyer ‘web site’ . . .”).

⁸ See USLaw.com, Inc., *Background*, at <http://www.uslaw.com/about-us/background.html> (last visited December 10, 2000).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

www.legalopinion.com, where visitors can get legal advice for \$39.95 a question.¹³ The user provides information for a conflicts check, specifies a practice area and geographic region, chooses from a list of participating lawyers, types in a question, and enters credit card information. When the lawyer completes the reply, legalopinion.com e-mails the user a link to a password-protected site within legalopinion.com, where the user can access the reply at any time.¹⁴ Legalopinion.com asserts that the Web site conforms to the pertinent ethical guidelines.¹⁵

¶6 Other sites, like www.ask-a-lawyer.com above, turn a profit for the attorney. At the LegalEase Home Page (www.rlglobal.com), Indiana attorney Richard Loiseau charges visitors \$25 to answer their immigration law questions.¹⁶ The Web site promises “specialized legal advice” on immigration problems delivered to the user’s e-mail inbox within three days.¹⁷

¶7 These and similar Web sites¹⁸ raise a host of ethical issues, many of which are just beginning to be addressed by state bar associations. This paper examines two of the most salient issues—solicitation rules and the unintended creation of attorney-client relationships.

SOLICITATION RULES

¶8 Compared to telephone directories, television, and radio, Web sites offer attorneys a particularly cost-effective method of advertising.¹⁹ As such, attorney Web sites can be regulated by state bar associations,²⁰ subject to the Supreme Court’s commercial speech cases.²¹ The new interactive Web sites, however, arguably go beyond mere advertising into the realm of solicitation. While a visitor to a legal Web site may just want legal advice, the answering attorney is often hoping to gain a new client.²²

¹³ See legalopinion.com, *Home Page*, at <http://www.legalopinion.com> (last visited December 10, 2000).

¹⁴ See legalopinion.com, *Get an Opinion*, at <https://www.legalopinion.com/opinion> (last visited December 10, 2000).

¹⁵ See legalopinion.com, *Becoming a Participating Lawyer*, at <https://www.legalopinion.com/become/faq> (last visited December 10, 2000).

¹⁶ See LegalEase, *Home Page*, at <http://www.rlglobal.com> (last visited December 10, 2000).

¹⁷ See *id.*

¹⁸ See generally *Cyberlawyers Must Chart Uncertain Course in World of Online Advice*, 16 *Law. Manual on Prof’l Conduct* (ABA/BNA) 96 (Mar. 15, 2000) [hereinafter *Cyberlawyers*] (summarizing the different legal Web sites).

¹⁹ See GREGORY H. SISKIND & TIMOTHY J. MOSES, *THE LAWYER’S GUIDE TO MARKETING ON THE INTERNET* 7 (1996).

²⁰ See Michael P. Malakoff & David W. Snyder, *Lawyer Advertising on the Internet*, in 1 *CONSUMER FINANCIAL SERVICES LITIGATION* 131, 159-84 (PLI Com. L. & Prac. Course Handbook Series No. A-772, Apr.-May 1998) (reproducing Internet opinions and regulations from Florida, North Carolina, Pennsylvania, South Carolina, Texas, and Utah); see also note 7 *supra* and accompanying text.

²¹ See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that states may prohibit lawyer advertising that is false, deceptive, or misleading, and may place reasonable restrictions on time, place, and manner); see generally Brian G. Gilpin, Note, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 *J. MARSHALL J. COMPUTER & INFO. L.* 697, 699-712 (1995) (tracing the history of attorney advertising regulations).

²² See, e.g., legalopinion.com, *Becoming a Participating Lawyer*, at <https://www.legalopinion.com/become/faq> (last visited December 10, 2000) (promising that “in many cases, the consumer may choose to retain the lawyer for further services after the initial legal opinion has been rendered”).

¶9 Applying the *Central Hudson*²³ commercial speech test, the Court has distinguished protected advertising from unprotected solicitation by asking “whether the mode of communication poses a serious danger that lawyers will exploit [a potential client’s] susceptibility”²⁴ or whether the communication is “inherently conducive” to “undue influence . . . and other forms of ‘vexatious conduct.’”²⁵ Likewise, the American Bar Association Model Rules of Professional Conduct note the coercion inherent in “subject[ing] the layperson to the private importuning of the trained advocate in a direct interpersonal encounter.”²⁶ Interactive Web sites implicate all of these concerns. Site visitors are a diverse group of people, many of whom are confused and overwhelmed by profound personal and familiar problems ranging from divorce²⁷ to immigration status.²⁸ The participating lawyers, in contrast, have often been enticed to join these services with explicit promises that “in many cases, the consumer may choose to retain the lawyer for further services”²⁹ or of “generat[ing] significant business from their involvement.”³⁰ The mismatch in motivations and expectations is arguably ripe for the “undue influence, intimidation, and over-reaching” that the American Bar Association sought to avoid in Model Rule 7.3.³¹

¶10 The potential for undue influence is probably greatest in legal chat rooms.³² Although less coercive than a face-to-face, in-person conversation, a chat room exposes a prospective client to the persuasive powers of a trained advocate. The prospective client might find it difficult to leave the conversation and may feel pressured to explain his reluctance to obtain legal representation. As such, a chat room resembles a live telephone call, for which Model Rule 7.3 prohibits solicitation.³³

¶11 As a result, the state bar associations which have addressed the issue have tended to draw the line between permissible and impermissible communications at public chat rooms.³⁴ Responding to a user’s legal question by private e-mail

²³ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980) (asking whether the speech concerns lawful activity and is not misleading, there is a substantial government interest, the regulation directly advances the interest, and the regulation is more not extensive than necessary).

²⁴ *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 474 (1988) (holding state may not completely prohibit direct mail solicitation).

²⁵ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462, 464 (1978) (upholding state’s categorical prohibition of in-person solicitation).

²⁶ MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (1999).

²⁷ See, e.g., bulletin board postings at <http://www.divorcenet.com>, which also offers a lawyer directory and chat rooms.

²⁸ See, e.g., visitor comments at <http://www.immigration.com>, operated by the Law Offices of Rajiv S. Khanna.

²⁹ [legalopinion.com](http://www.legalopinion.com), *Becoming a Participating Lawyer*, at <https://www.legalopinion.com/become/faq> (last visited December 10, 2000).

³⁰ [DivorceNet.com](http://www.divorcenet.com), *Lawyer-to-Lawyer*, at <http://www.divorcenet.com/lawyer-to-lawyer.html> (last visited December 10, 2000).

³¹ MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (1999).

³² See generally Gilpin, *supra* note 21, at 723-24 (discussing undue influence in chat rooms).

³³ MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (1999).

³⁴ See, e.g., Ill. State Bar Ass’n Op. No. 96-10 (1997) (“[I]f a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3.”); Mich. Prof’l Jud. Ethics Op. RI-276 (1996) (“A lawyer may not solicit legal business during an interactive electronic communication unless ethics rules governing in-person solicitation are followed.”); Utah State Bar, Ethics Adv. Op. Comm., Op. No. 97-10 (1997) (“Attorneys’

probably would not constitute improper solicitation under these ethics opinions.³⁵ State bar associations, however, do not appear to have addressed the issue of solicitation in *private* chat rooms, such as those offered by USLaw.com. Although these private chats are initiated by the user rather than the attorney, they give rise to a similar possibility of undue influence as do public chats because the user is expecting legal advice, not a solicitation. States, therefore, should consider regulating private chat rooms as they do public chat rooms.

¶12 Moreover, even e-mailed replies to user questions raise concerns of undue influence. The Web sites attract users with legal problems who might be very susceptible to lawyer solicitations. The sites build on this susceptibility by inviting visitors to obtain an “objective” opinion from an attorney. The e-mailed replies thus go beyond the targeted, direct-mail solicitations allowed in *Shapiro v. Kentucky Bar Association*³⁶ because the initial invitation establishes a certain trust between the lawyer and user. Even if the practice is protected from state regulation, the companies who operate such sites are not bound by Court precedent and should monitor their attorneys for ethical behavior.

UNINTENDED CREATION OF ATTORNEY-CLIENT RELATIONSHIPS

¶13 E-mail advice, discussion groups, and live chat also raise a concern that online attorneys are unintentionally creating attorney-client relationships with Web site visitors, but without fulfilling the duties of competence, conflict-free representation, and zealous advocacy that arise from that relationship.³⁷ According to the *Restatement (Third) of Law Governing Lawyers*:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . .

. . . .

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services³⁸

¶14 An attorney-client relationship, therefore, does not require an explicit agreement; it may arise by implication from a Web site visitor's reasonable expectation of legal representation and the online attorney's failure to dispel those expectations.³⁹ In California at least, courts examine several factors in determining whether an attorney-client relationship has been created by an implied agreement, among them:

participation in ‘chat groups’ is considered to be an ‘in person’ communication and subject to the restrictions of rule 7.3(a).”).

³⁵ See *Cyberlawyers*, *supra* note 18.

³⁶ 486 U.S. 466, 474 (1988).

³⁷ See generally Joan C. Rogers, *Ethics, Malpractice Concerns Cloud E-Mail, On-Line Advice*, 11 Law. Manual on Prof'l Conduct (ABA/BNA) 3 (Mar. 6, 1996) (discussing the creation of attorney-client relationships by lawyers who answer legal questions on-line).

³⁸ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 26 (Proposed Final Draft No. 1, 1996); see also Law. Manual on Prof'l Conduct (ABA/BNA) 31:103 (1989) (stating that attorney-client relationship test is subjective and focuses on client's belief that relationship exists).

³⁹ Cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (looking at “reasonable expectations” to determine whether attorney-client relationship exists with corporate affiliate of client).

Whether confidential information has been disclosed by the putative client;

Whether the client reasonably believed he or she was consulting the attorney in the attorney's professional capacity;

Whether the attorney acted or indicated by statements he or she was representing the client;

The amount of contact between attorney and client;

Whether the client furnished the attorney with any information and sought the attorney's advice; and

Whether the attorney actually rendered legal advice to the client.⁴⁰

In short, an attorney-client relationship may arise where the prospective client has "manifested the intent to seek legal advice and has a reasonable expectation that he or she is consulting a lawyer in a professional capacity."⁴¹

¶15 The "reasonable expectation" factors listed above suggest that interactive Web sites can and are creating unintentional attorney-client relationships with the attendant duties of confidentiality, loyalty, and zealous advocacy. Regarding the disclosure of confidential information, even though some sites explain that "[t]he use of this web site, and the sending or receipt of information does not create an attorney-client relationship between you and the attorney,"⁴² users might nevertheless divulge confidential information because they do not know what should be kept confidential, or reasonably expect that lawyers in general are bound by a duty of confidentiality. Some legal Web sites, like www.askthelawyers.com, actually advertise that "[c]ommunication with an attorney through this web site will be kept confidential."⁴³ Either way, users might reasonably expect the information they disclose to be subject to an attorney's duty of confidentiality. In addition, Web features with such names as "Ask a Lawyer"⁴⁴ and "Chat with a Lawyer"⁴⁵ openly suggest that the online attorney is acting in a professional capacity. Moreover, even though many legal Web sites caution that they provide "legal information, *not* legal advice,"⁴⁶ it may be "almost impossible"⁴⁷ to distinguish between the two. For example, suppose a New York driver asks an online attorney, "I broke my arm in a car accident that was not my fault. What should I do?" The lawyer responds, "New York has a no-fault system, but you can sue if your injury is serious, like a fracture." Has the lawyer provided information or advice? The answer is not clear. What is

⁴⁰ PAUL W. VAPNECK ET AL., CALIFORNIA PRACTICE GUIDE PROFESSIONAL RESPONSIBILITY ¶ 3:45 (1999).

⁴¹ *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (holding that attorney-client relationship can arise when company submits confidential information to lawyer with reasonable belief that lawyer is acting as company's attorney); *see also* *Beery v. State Bar*, 43 Cal. 3d 802, 811 (1987) ("When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie.") (quoting *Perkins v. West Coast Lumber Co.*, 129 Cal. 427, 429 (1900)).

⁴² *AskTheLawyers.com, Disclaimer Information*, at <http://www.askthelawyers.com/info/disclaimer.asp> (visited December 10, 2000).

⁴³ *Id.*

⁴⁴ *See* *USLaw.com, Inc., Ask a Lawyer*, at <http://www.uslaw.com/ask-a-lawyer> (last visited December 10, 2000).

⁴⁵ *See* *TheLaw.com, Home Page*, at <http://www.thelaw.com> (last visited December 10, 2000).

⁴⁶ *See* *USLaw.com, Inc., Disclaimer*, at <http://www.uslaw.com/disclaimer.tcl> (last visited December 10, 2000) (emphasis added).

⁴⁷ *Cyberlawyers*, *supra* note 18 (quoting Peter Jarvis, Oregon attorney).

clear is that the user will likely rely on the information in deciding how to proceed and, thus, an attorney-client relationship might be created.⁴⁸

¶16 This discussion raises some deeper issues. If providing advice online does not create an attorney-client relationship, should lawyers nevertheless be allowed to answer questions over the Internet without offering the additional help and follow-up assistance that attorneys generally provide?⁴⁹ And if the lawyer does provide advice that would normally establish an attorney-client relationship, may the lawyer prevent one from arising by placing a disclaimer on the Web site?⁵⁰ These issues are somewhat unique to Internet advice because of the impersonal, anonymous nature of online communications and the ability to set up detailed click-through agreements and other disclaimers.

¶17 The answers are not obvious. On the one hand, the ready availability of confidential online legal advice might increase the legal system's accessibility to people unfamiliar with and intimidated by the law. In addition, providing limited legal advice over the Internet might be a cost-efficient way to assist low-income people who might not otherwise have the resources to consult an attorney. Studies show that cost is a great barrier to legal assistance,⁵¹ and free or low-cost Internet advice might improve the distribution of legal services.⁵² Initial in-person consultations, however, are usually free. More significantly, partial advice might be more harmful than no advice at all. Given partial information, people may misinterpret their legal problems and, believing they understand the law, act in ways that are detrimental to their interests. We purportedly have unauthorized practice of law statutes because the law is too complex for lay people to fully comprehend,⁵³ and it would arguably be negligent to let attorneys provide partial information to people without assuming the duties of an attorney-client relationship.

RECOMMENDATIONS AND CONCLUSION

¶18 Interactive lawyer Web pages raise several ethical issues, only two of which—solicitation and attorney-client relationships—are analyzed here. Chat rooms, in particular, pose a problem of prohibited client solicitation, and state bar associations should clarify whether their anti-solicitation rules extend to private chat rooms as well as public chat rooms. E-mail advice also implicates the solicitation rules, and bar associations should urge Web site owners to carefully monitor attorney conduct. Moreover, Internet advice may give rise to unintended attorney-client relationships and, even if they don't, cyberlawyers should owe their questioners a duty of competent, conflict-free, confidential service. Finally, bar associations should pay

⁴⁸ A few state and local bar associations have addressed the issue of unintentional attorney-client relationships in cyberspace. See, e.g., Ill. State Bar Ass'n Op. No. 96-10 (1997) (concluding that recipients of personalized legal advice from lawyers in chat groups or other online services are clients); Phila. Bar. Assn. Prof'l Guid. Comm. Ethics Op. 98-6 (1998) ("[I]n the course of an interaction with any person on the Internet an attorney/client relationship may begin . . .").

⁴⁹ Cf. *Cyberlawyers*, *supra* note 18 (discussing "unbundled" legal services, where the lawyer's representation is limited to a discrete task).

⁵⁰ See generally Rogers, *supra* note 37 (discussing the effectiveness of legal Web site disclaimers).

⁵¹ See, e.g., CONSORTIUM ON LEGAL SERVS. AND THE PUBLIC, AMERICAN BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 15 (1994) (finding that "[t]he predominant reasons for low-income households not seeking legal assistance were a sense that it would not help and that it would cost too much").

⁵² See note 4 *supra* and accompanying text.

⁵³ *But see* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) ("Although the organized bar has always justified its campaign against lay competitors in terms of public protection, the historical record suggests that other, somewhat less altruistic forces have been at work.").

special attention to fee-based services, as users will more likely expect a continuing relationship if they pay.