

LEGAL ETHICS OPINION 1842

OBLIGATIONS OF A LAWYER WHO  
RECEIVES CONFIDENTIAL  
INFORMATION VIA LAW FIRM  
WEBSITE OR TELEPHONE  
VOICEMAIL.

The Committee generated this opinion in response to numerous questions posed regarding the duties a lawyer or law firm owes to prospective clients. The opinion also addresses the resulting disqualification in situations where a lawyer or law firm receives confidential information via a law firm website or by telephone voicemail. These questions most commonly arise in the following hypothetical scenarios:

(A) Lawyer A, a solo practitioner in a small town, advertises in the local yellow pages. The advertisement details Lawyer A's areas of practice and also includes Lawyer A's office address and telephone number. After returning from court one afternoon, Lawyer A retrieves a voicemail message from an individual seeking representation in a criminal matter. The caller also provides information about the multiple felony drug charges he incurred as one of several co-defendants in a local drug ring. The caller provides his name and requests a consultation with Lawyer A, who realizes, after running a conflicts check, that he already represents one of the other co-defendants.

The Committee believes Rule 1.6 governs its analysis throughout this opinion. Rule 1.6 deals with the issue of client confidentiality.<sup>1</sup> Also pertinent to the Committee's analysis is The Preamble to the Virginia Rules of Professional Conduct, which states that "...there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer *agrees to consider* whether a client-lawyer relationship shall be established" (italics added).<sup>2</sup>

The question presented is whether a caller who contacts a law firm via telephone using a public listing in a directory and who leaves a detailed message in the firm's voicemail reasonably expects that such information will be kept confidential?<sup>3</sup> Standing alone, publication of a telephone number in a yellow pages advertisement cannot reasonably be construed as an invitation by the lawyer or firm to an individual to submit confidential information. Thus, it would be unreasonable for a person leaving a voicemail to have an expectation that the information will be maintained as confidential. Therefore, the

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<sup>1</sup> Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

<sup>2</sup> Scope, Pt. 6, § II, Rules of Virginia Supreme Court.

<sup>3</sup> See LEOs 1453, 1546, 1601 and 1794 that established the Committee's determination of the duty of confidentiality at the time of initial consult and which are referenced later in this opinion.

Committee believes that the lawyer who receives such information is under no ethical obligation to maintain its confidentiality and further, may use the information in representing an adverse party.

(B) Law Firm B maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail but the website does, however, provide contact information for every lawyer in the firm, including e-mail addresses in the biographies of each lawyer in the firm. One of the domestic lawyers in the firm receives an e-mail from a woman seeking a divorce from her husband detailing the circumstances surrounding the demise of the marriage, including her affair with another man. The lawyer reads the e-mail before he discovers that he is already representing the woman's husband.

The Committee believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the Committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

In reaching this conclusion, the Committee looks to two factors: (1) whether the law firm, by merely publishing contact information on its website that includes an e-mail address, creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information; and (2) whether it is reasonable for the person providing the information to expect that it will be maintained as confidential.

Whether or not it is reasonable for a person to expect that information transmitted by e-mail or left on a voicemail will be maintained as confidential depends in part on whether the lawyer said or did anything to create the impression that he was inviting information or simply publishing his contact information.<sup>4</sup> The Committee is of the opinion that including an e-mail address on a law firm's website or publishing a telephone number in a yellow-page advertisement, without more, is not the solicitation of confidential information from a prospective client. In these circumstances, the publication of such

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<sup>4</sup> Other jurisdictions have opined on what constitutes a solicited versus an unsolicited e-mail. See Association of the Bar of the City of New York, Formal Opinion 2001-1 (concluding that information submitted by e-mail to a law firm via the firm's website was unsolicited; simply including an e-mail link on a law firm's website does not amount to an invitation to transmit confidential information); Iowa State Bar Association Op. 07-02 (evaluated whether the lawyer said or did anything to prompt the potential client to provide confidential information to the lawyer, noting that a lawyer's "request to contact" is not the same as a request for information); Massachusetts Bar Association Op. 07-01 (concluding that a website is a marketing tool by which a prospective client may identify which lawyers have the expertise necessary to handle a particular case, and that the publication of such information could reasonably lead a prospective client to conclude that, when sending information to the firm via an e-mail link, the firm and its lawyers have implicitly "agreed to consider" whether to form an attorney-client relationship. However, this opinion further states that it would be unjust to allow the prospective client to unilaterally impose a duty of confidentiality on an unsuspecting lawyer when contacting the lawyer by an e-mail address that was obtained on the internet and that is equivalent to a listing in a telephone directory.)

information is more appropriately viewed simply as an invitation to contact the firm and not an invitation for a prospective client to submit confidential information. The mere inclusion of an e-mail address on a web-page is not an agreement to consider the formation of an attorney-client relationship; rather, the lawyer is simply advertising his or her general availability and how he/she may be reached.

Generally speaking, when communicating with a prospective client, the lawyer not only consents to the receipt of information but may be able to control the amount of information received. The lawyer can also avoid receipt of information that would create a conflict for that lawyer representing an adverse party. Conversely, a lawyer who unilaterally receives information via an e-mail communication has no opportunity to control or prevent the receipt of that information and risks the creation of a conflict to the representation of an existing client or another adverse party. The Committee believes that it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client, simply because the lawyer lacks ability under the circumstances to control the nature and extent of information being provided. Based on the foregoing analysis, Law Firm B should be permitted to continue representing the husband of the woman who contacted the lawyer by e-mail and to use the information acquired thereby for the benefit of the husband.

In addressing the circumstances presented in both Hypotheticals A and B, the Committee recognizes that, in addition to the mere publication of the lawyer's contact information, other factors or circumstances may exist which *could* give rise to a reasonable expectation of confidentiality on the part of the prospective client. Among these factors may be the specific nature and content of the invitation to contact the firm, including language in the advertisement or on the website that would imply the lawyer is agreeing to accept confidential information or an invitation in the lawyer's outgoing voicemail message asking the caller to provide as much detailed information about his/her case as possible. Therefore, an examination of the totality of the circumstances on a case-by-case basis is necessary to determine whether it is reasonable for a prospective client to believe that the information he/she provides will be maintained as confidential.

(C) Law Firm C maintains a website where prospective clients are invited to fill out an on-line form outlining the factual details of their accidents and injuries. In exchange for this information, Law Firm C's website offers to provide prospective clients a free evaluation of their claims. Mrs. X, an accident victim, fills out the form and provides information about her accident involving a two-car collision, including the fact that she consumed three glasses of wine in one hour before getting behind the wheel. One of Law Firm C's lawyers, after reviewing Mrs. X's online information, asks his legal assistant to run a conflicts check. The legal assistant does so and advises the lawyer that Law Firm C is currently representing a client who was the guest passenger in Mrs. X's vehicle at the time of the accident. The lawyer tells the legal assistant, "That's not a problem. I'll just tell Mrs. X we can't take her case."

In Hypothetical C, the lawyer's website specifically invites Mrs. X to submit the information in exchange for an evaluation, thereby inviting the formation of an attorney-

client relationship for the purpose of providing a case evaluation. Even if the lawyer ultimately declines representation of Mrs. X, Rule 1.6(a) imposes upon that lawyer a duty of confidentiality with respect to the information received.

This analysis is consistent with prior legal ethics opinions imposing a duty of confidentiality on a lawyer when consulting with a prospective client. Even in the absence of an attorney-client relationship under such circumstances, it is reasonable for a prospective client to expect that the information provided to the lawyer will be maintained as confidential based on the mutual exchange of information. [See Legal Ethics Opinions 1453, 1546, 1601, and 1794.]

Although the representation of Mrs. X is limited to providing her with an evaluation, her situation more closely parallels the scenario of a lawyer interviewing a prospective client. Because the lawyer has an ethical duty to keep Mrs. X's information confidential, the lawyer's obligation to Mrs. X "materially limits" the lawyer's representation of the party adverse to her. Rule 1.6 would prohibit the lawyer from thereafter using that information to the detriment of Mrs. X or from sharing that information with a party whose interests are adverse to her. Because the lawyer is prohibited from using that information, Rule 1.7(a)(2) imposes a material limitation conflict on the lawyer, limiting his ability to represent an adverse party by the duty of confidentiality that is owed Mrs. X.<sup>5</sup> As a result, in Hypothetical C, the lawyer must not only decline the representation of Mrs. X but must actually go so far as to withdraw from the representation of an existing client whose interests are adverse to those of Mrs. X.

Finally, to avoid any inference that an attorney-client relationship has been established or that the information a prospective client provides will be kept confidential, a law firm may wish to consider the inclusion of a disclaimer on the website or external voicemail warning the person to not disclose confidential or sensitive information. The website disclaimer might also state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential.<sup>6</sup> In addition, the Committee recommends the use of a "click-through"(aka "click-wrap") disclaimer, which requires the prospective

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<sup>5</sup> Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

<sup>6</sup> California Formal Ethics Op. 2005-168 (concluding that terms of the disclaimer should defeat the sender's reasonable expectation of confidentiality. Language which merely states that "no confidential relationship is being formed" by submitting the information is "potentially confusing.")

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client to assent to the terms of the disclaimer before being permitted to submit the information.<sup>7</sup>

This opinion is advisory only, based only upon the facts presented and not binding on any court or tribunal.

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<sup>7</sup> David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, 16 Prof. Lawyer 1 (2005) (indicating that “Click wraps are the only certain way to ensure that a court will hold that the prospective client manifested assent to the term. Without manifested assent, the term is not binding on the prospective client. Thus, a firm website should be structured so that the client must assent to the term in order to transmit e-mail.”).