

Materials for

Ethical Risks of Law Firm Websites and Blogs Staying on the Right Side of the Ethics Line

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Law Firm Websites and Ethics in 2007

Successful and Safe Ways to Navigating the Ethical Waters Around Legal Websites

In January, 1995, eight law firms had web pages. Now, are there even eight law firms who do NOT have websites? In 1995, there were an estimated 30 million users of the World Wide Web and over 48 million people with e-mail addresses. Now, users number in the BILLIONS. In 1995, there was no Google, or any other search engine as we now know them. Now, some contend that Google ranking is the most important issue for your website.

Much has changed in twelve years.

In 1995, lawyers did not have clear answers to all the ethical questions raised by law firm websites. Now, although the picture is clearer, lawyers still do not have clear answers to all the ethical questions raised by law firm websites. There was a general consensus in the mid to late 1990s that ethics regulators would take a "wait and see" attitude toward law firm websites. And they largely have until the last few years. For many reasons, commonality in approach to websites, widespread adoption by large and prominent firms, and generally professional approach to websites, there has been little regulatory enforcement on law firm websites to date. More importantly, however, is the fact that most law firm websites present informational and educational content and standard information about firms and lawyers. They simply do not look or "act" like traditional advertisements, primarily due to the near-universal focus on informational content.

The regulatory environment has started to change as state bars have reacted (or perhaps over-reacted) to the growth in the use of blogs by lawyers in the last year or so. As much as we hear about blogs, it's useful to remember that there are perhaps 2,000 legal blogs as of this time, so there are good reasons for taking a "wait and see" approach at this early stage in blogging.

Nonetheless, the regulatory waters around website ethics have become choppy and unsettled in the last year or so. Broadly written rules targeted toward certain types of television ads and direct mail campaigns have, probably unintentionally, caused confusion and ambiguity in connection with traditionally uses of law firm websites.

This article takes a step back and looks at the current state of law firm website ethical regulation in light of its history. The article takes a big picture view and highlights some of the key trends, developments and outstanding issues in this area. It ends with some best practices and steps you should consider as you move forward with your website.

1. A Short History of the Ethical Regulation of Websites.

In the mid-1990s, pundits proclaimed, "The Internet changes everything." In many ways, it has. Back then, the now simple act of creating websites created a big concern about legal ethics. The flurry of activity around blogging today echoes those early years. Everything was new and there were serious questions whether this new technology was so different that a completely new set of rules needed to be created, or whether reasonable analogies applied and the existing rules would largely cover websites. Law firm websites raised a laundry list of thorny issues, many of which still exist today.

Here is a list of issues I made for a presentation of law firm website ethics in 1996:

1. Do existing advertising rules apply to web pages? How? What rules, if any, do apply? Does it matter that a viewer of a web page must affirmatively choose to see the web page?
2. What about "puffing" or overbroad statements? A listing of hourly fees? Statistical data about cases won? Size of verdicts?
3. Which rules apply? A web page is viewable by people all over the world. Do the ethical rules of the state in which you are licensed to practice govern or do the rules of the state where the viewer of the page is located?
4. Unauthorized practice of law issues from giving legal advice to a person in a state in which you are not licensed to practice or not complying with the advertising rules of another state.
5. Confidentiality issues with respect to e-mail and other communications.
6. Does the sending of an e-mail to an attorney create an attorney/client relationship? Can the sending of unsolicited factual information to an attorney create a conflict situation?
7. Are there liability concerns about failing to remove, update or disclaim the accuracy of outdated articles and comments?
8. Issues arising out of the acceptance of certain types of referrals from Internet sources.

The same questions are still with us today.

In these early days, the primary debate was over three distinct approaches to ethical regulation.

1. Argue that the ethical rules on advertising are not applicable (i.e., a web page is not advertising and is not covered by any rule).
2. Strict compliance with the rules of all 50 states.
3. Compliance with the laws of the state(s) in which you are licensed to practice, and the use of disclaimers.

Approach #1 has never been treated as a realistic option, although the argument occasional still gets raised and it is not without some basis. Approach #2 was treated as a serious option (primarily by law professors), but it rapidly became clear that it was impossible to comply with contradictory and burdensome rules for each individual state.

The third approach has carried the day for many years. It is reasonable and practical. Most law firm websites carry one or more disclaimers. I believe making a good faith effort to comply with the regulations of the state(s) in which you are licensed to practice and putting an appropriate disclaimer on your page(s) is a reasonable and logical approach to take with law firm websites.

2. Compliance with What Rules?

Any law firm or lawyer with a website must be familiar with the requirements and guidelines of Rule 7 of the Model Rules of Professional Conduct (as adopted by your state). Some states have very specific rules for websites, ranging from types of disclaimers to retention of copies. (See Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (April 15, 2007) - http://www.abanet.org/cpr/professionalism/State_Advertising.pdf)

The ethical regulation of lawyer advertising and marketing, as with other ethical requirements, has always been state-specific and state-based. As states allowed membership in multiple state bars and law firms opened offices in many states, questions and issues arose about this state-based approach. However, those issues were nothing compared to what the Internet raised. A law firm website can be seen anywhere in any state and in any country around the world, and simultaneously, and at any time, day or night.

The recent reassertion of detailed regulation of web-based advertising by states like New York, Missouri and others have raised the question of whether a state-based approach, especially where free speech issues may be present, is appropriate in the Internet era. There are rumblings that the Federal Trade Commission has become interested in state regulatory activities in this area. The FTC has sent a clear message that it is possible for states to go too far in this type of regulation. Some commentators, including me, have suggested that either we might be at a time where a federal approach is warranted or that the states have all but invited the FTC in as a result of recent regulatory initiatives.

The general consensus today is that law firms want to comply with the ethical rules of every state in which they have offices and every state in which they have lawyers licensed. Some state rules, such as New York's, aggressively take the approach that marketing directed into the state is subject to its regulation. In that case, firms that actively market to potential clients in states in which they are not licensed will need to consider whether they are required to comply with the rules of those states.

3. Does Your Audience Matter?

In my opinion, some of the difficulties in regulation of websites (and blogs) arise from the assumption by regulators that websites are purely a form of advertisement directed to potential clients. The fact is that most law firm websites have many target audiences, and potential clients might not be one of them, or potential clients might be only an incidental audience.

Consider these audiences:

1. Potential employees.
2. Current clients.
3. Other lawyers.
4. Journalists.
5. Editors and events planners looking for speakers.
6. The public at large in the case of education materials.
7. Others in your firm or firm alumni.
8. In the case of blogs, other bloggers.

One of the most effective uses of a website is to establish you or your firm as an authority on a topic and increase the likelihood that other lawyers will refer business to you. In certain areas of practice, material directed to this audience is dramatically more likely to bring in new work that a lawyer wants than will material targeted directly to "potential clients." Websites historically work far better as a form of indirect marketing and awareness creation than as direct marketing or traditional advertising. The rules simply do not consider these nuances.

4. The Active vs. Passive Distinction.

In the early days of websites, lawyers and regulators looked for analogies with existing rules and existing technologies that would be helpful. One approach that was popular and has stood the test of time is what is known as the "active/passive distinction."

As an example, in 1996, Missouri Informal Opinion 960151 offered the following:

Question: Attorney has a web page. Must attorney include the "ADVERTISING DISCLAIMER?"

Answer: If, by the term "web page," Attorney means a site which others must affirmatively access, it will not be necessary for attorney to include the advertising disclaimer required by Rule 4.7.3.

However, if Attorney will be actively engaged in sending the information to the individuals, by any means, it is possible that the advertising disclaimer requirement would be triggered. If Attorney is planning to actively send the materials, as opposed to establishing a passive site, Attorney will need to provide more information about Attorney's plans.

If someone goes to a law firm web page, he or she undoubtedly has either typed the URL into his or her browser or clicked on a hyperlink to that page. That requires a visitor to take an active role. Compare that to direct mail or direct emailing where a person passively receives marketing material from a law firm with no active effort on his or her part.

It's a simple analogy, perhaps too simply, and it may not accurately describe exactly what happens in online or offline world, but it has served as a basis for the relatively light hand regulators have taken with law firm websites.

5. Are Law Firm Websites Advertising?

The safest approach for lawyers is to assume that websites are advertising and use appropriate disclaimers. I personally take the approach of stating that my website and blog are NOT intended to be advertisements (my target audience is definitely not potential clients), but that I recognize that it could be considered advertising and I give the required disclaimers (and some that are not required) and otherwise comply with the advertising rules.

In general, over time, the assumption for regulation has been that websites are advertising. You can certainly argue that advertisements are direct "calls to action" placed in a third party "publication" for which you pay money for the placement. Law firm websites and blogs rarely, if ever, would meet that definition. However, I'll let you be the defendant in the test case.

Interestingly, on the Web itself, Google AdWords and other click-through ads are seen as advertising, while the website or blog on which they are placed would not be seen as an advertisement.

If you take a look at the Missouri or New York or similar advertising rules, you'll see that the rules generally (and ironically) require that lawyers violate every principle of effective advertising. My favorite rules say that marketing materials sent by mail must be labeled conspicuously with something like "THIS IS AN ADVERTISEMENT," which, of course, is the practical equivalent of labeling with "PLEASE DO NOT OPEN. THROW DIRECTLY INTO TRASH."

More important, however, is that other specific rules come into play with advertising. These may include pre-approval, retention requirements, and prohibitions on using testimonials, case results, comparisons, actors, and certain images.

A general principle that seems to have arisen is that you have an advertisement if you say that you are available for hire. That's not as simple as it seems. If I write a law review article, it seems to be educational, not advertising. If I send out copies to a thousand people, was the law review article an ad after all?

As an aside, some law firms make their contact information so difficult to find that I wonder whether their websites can be ads because people will give up on trying to contact them.

6. No "False or Misleading" Information.

In my opinion, we could all live well with the simple rule that you cannot place false or misleading information on a law firm website. That is the core principle of Rule 7 and the one you should live by.

We do have some guidance on how this principle should be interpreted. In general, watch out for:

1. Infringing, plagiarized or illegal materials.
2. Unsupported claims.
3. Selective results.
4. Setting unjustified expectations.
5. Unsupported testimonials.
6. Omissions of material information (e.g., "no fees," without explaining that expenses must be paid).
7. Statements about specialization.

Results in this area vary from state to state. The word "specialize" might raise issues, but "focuses on" would not. There's been a lot of discussion and rules recently about mentioning that you are listed in "Best Lawyers" or "Super Lawyers" directories. The term "full service" or "national practice" might be considered to raise unjustified expectations or be misleading.

As you evaluate and monitor your website, this area is the one to focus on.

7. Some Thorny Issues.

While ethical regulation of law firm websites has been a sleepy little area for the most part, there are a number of intriguing issues that arise from time to time. Here is a short list of some of them:

- How quickly must a law firm remove the name of a lawyer who leaves the firm from the list of attorneys?
- Can a clever domain name raise ethical issues because it raises unjustified expectations (www.milliondollarverdictsguaranteed.com) or might be found to be unprofessional or offensive to some (www.mofo.com)?
- Can a website list professional awards, verdicts or transactions and how must they be referred to?
- How do you retain "copies" of web pages that are generated on the fly by databases?
- What information and self-serve features can you offer before your website raises unauthorized practice of law issues?
- Are websites (and blogs) really any different from brochures offered in your reception area, print newsletters, public speaking, writing articles, joining civic organizations, or other activities geared toward getting your name out or other marketing benefits?

8. Disclaimers.

If anything is clear about ethical regulation of law firm websites in 2007, it's that you need to use disclaimers. Law firms use a variety of general and specific disclaimers. In general, most states helpfully set out required disclaimers.

There has been a generally understanding about the way people use websites and linking to a specific disclaimer page from each of the pages on your site should be adequate. There should be no need to clutter your website with lengthy disclaimers on each page. Note that in the early days of the Web, there was serious discussion about requiring the placement of large, bolded disclaimers at the top of each page on a law firm website. Thankfully, a more reasonable approach prevailed.

You will want to make sure that you comply with the disclaimer requirements of each state in which you are licensed to practice. I've noticed that Findlaw and Martindale have standard disclaimer language on each of the websites they design and host for law firms. I figure that it can't hurt to use that same disclaimer language.

9. Designer Issues.

There is a definite split between what good web design is and what makes for effective marketing materials and what is allowed under legal ethics rules. Web designers are likely to add images, design features and marketing copy that will run afoul of the ethics rules. You must keep a sharp eye on what web designers and marketing professionals produce (hey, it's your responsibility and your license, not theirs) and be especially wary of designers who do not have significant experience and expertise on law firm websites.

10. What We Know Works. Probably.

Here is my short list of what you should be sure that you are doing on your website:

1. Comply with all of the specific rules of each state in which you have an office or a lawyer licensed to practice.
2. Prominently mention the state(s) in which a lawyer is licensed to practice.
3. Prominently list each geographic location of your offices.
4. Give the name and contact information for the person responsible for your website.
5. Use disclaimers.

Conclusions and Action Steps.

Until the last few years, regulation of law firm websites was a relatively sleepy area. The advent of blogs has changed that for reasons that are baffling to those who started out early in both websites and blogs. Law firm websites, however, are here to stay and are well-regarded, standard approaches to an online presence for lawyers and law firms. With regular attention and an educated approach, you should be able to navigate the waters of the ethical rules safely.

I'll close with some action steps based on the best practices I've seen.

- 1. Get a solid understanding of the ethical rules, especially the advertising and solicitation rules (note that the solicitation rules might raise more difficult questions over time than the advertising rules do now). All of the rules apply to websites.*
- 2. Keep up with developments in this area - many states are looking to change their advertising rules to make them more restrictive. Websites might be the victims of unintended consequences of rule changes that are primarily focused on television ads and direct mail, but written very broadly. See the following article by Tom Mighell and me as a starting point.*
- 3. Comply carefully with the rules of the state(s) in which you are licensed to practice.*
- 4. List the states in which lawyers are licensed and where offices are located prominently on your website. Since you should make it easy for people to contact you from your website, this is also a good standard practice.*

5. Avoid the known problems unless you want to be a pioneer in a test case. Among other things, placing pictures of pit bulls, featuring racy or provocative photos, using "Best Lawyers," making comparisons with other lawyers, and using outcome-oriented testimonials all will raise red flags with regulators.

6. For better or worse, use of well-drafted disclaimers is still the best way to go on law firm websites.

- Dennis Kennedy

Strongest Links: Ethics

by [Tom Mighell and Dennis Kennedy](#)

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[ABA Center for Professional Responsibility](http://www.abanet.or/cpr/home.html) (<http://www.abanet.or/cpr/home.html>) – easily the most feature-laden site of the bunch, the CPR is the home to the ABA's Model Rules of Professional Conduct. In addition to rules regulating lawyers, you'll also find codes of judicial conduct and client protection, as well as ETHICSearch, a feature that allows you to ask ethics questions, many times for free. The site also offers links on multidisciplinary and multijurisdictional practice. Some resources require you to be a member of the Center; subscribers have access to all ABA formal ethics opinions, the member directory, and two quarterly publications.

[ABA Standing Committee on Lawyers' Professional Liability](http://www.abanet.org/legalservices/lpl/home.html) (<http://www.abanet.org/legalservices/lpl/home.html>) – The Committee provides information on legal malpractice claims statistics, insurance for lawyers, and malpractice prevention information and help – issues that go hand-in-hand with any discussion of legal ethics. It offers a number of useful resources and a newsletter.

[American Legal Ethics Library](http://www.law.cornell.edu/ethics/) (<http://www.law.cornell.edu/ethics/>) – this terrific site provides links to most of the professional responsibility codes in the country. You can use the Listing by Jurisdiction to get right to the rules of any particular state; 18 of them (17 states plus the District of Columbia) have narratives on their professional conduct law. Even better, the Topical Overview allows you to see the differences between specific code provisions in these eighteen jurisdictions.

[Boundaries of Legal Marketing](http://www.law.cornell.edu/ethics/) (<http://www.law.cornell.edu/ethics/>) - Will Hornsby is one of the leading authorities on legal ethics, especially on how the rules apply to Internet activities. He's recently started a blog that will cover legal ethics topics. Highly recommended.

[Freivogel on Conflicts](http://www.freivogelonconflicts.com/) (<http://www.freivogelonconflicts.com/>) - Bill Freivogel keeps this very simple site, designed as a "practical online guide to conflicts of interest for lawyers with sophisticated business and litigation practices." There aren't any outbound links to other ethics sites, but there's no need for that; the information provided here stands quite well on its own. The site is regularly updated with new case law and other information.

[LegalEthics.com](http://www.legalethics.com) (<http://www.legalethics.com>) - billing itself as "The Intersection of Ethics and the Law," this site is maintained by Mercer Law professor David Hricik and Peter Krakaur. Just select a category and a topic, and you're off. Many of the resources deal with "cyber-ethics," or how not to commit malpractice by using technology. Like the other sites, you'll also be able to access ethics materials by state. David Hricik also has his own [Legal Ethics and Risk Management Page](http://www.hricik.com/business.html) (<http://www.hricik.com/business.html>) that provides other articles, links and discussions on the subject.

[Legal Ethics Forum](http://legalethicsforum.typepad.com/blog/) (<http://legalethicsforum.typepad.com/blog/>) - three law school educators from different parts of the country have joined together to create a terrific weblog featuring constantly-updated materials on issues in legal ethics. Recent topics include interviewing jurors, conflict checks, disciplinary

review, and lawyer advertising. The sidebar also contains some great ethics resources, especially the academic sites and journals.

[LegalEthicsBlog](http://cowgill.blogs.com/legaethics/) (<http://cowgill.blogs.com/legaethics/>) - Kentucky lawyer Ben Cowgill served as Kentucky bar counsel, and now he's blogging about legal ethics and the laws governing lawyers. He already has 1,500 pages of reference material, and you can also find other links of interest. [Interestingly, Ben's blog has been relatively silent since this article first appeared; he has been involved in discussions with the Kentucky Bar regarding the regulation of law-related weblogs.

[Legal Ethics Opinion Summaries](http://www.mcguirewoods.com/services/leo/) (<http://www.mcguirewoods.com/services/leo/>)- McGuire Woods attorney Tim Spahn has prepared summaries of Virginia and ABA Legal Ethics Opinions, and made them available free of charge. You can search the summaries by topic, date, or by keyword.

[Neoethics](http://www.edicta.org/NeoethicsBucklin/Neoethics.htm) (<http://www.edicta.org/NeoethicsBucklin/Neoethics.htm>) - is a "new word for the new world of legal and corporate ethics -- the combination of legal rules and moral philosophy." It's a great collection of articles on a wide variety of legal ethics issues. The Neoethics column, edited by Leonard Bucklin, is found on [eDicta.org](http://www.edicta.org/) (<http://www.edicta.org/>) - a collection of law and insurance resources produced by the ABA's [Tort Trial & Insurance Practice Section](http://www.abanet.org/tips/home.html) (<http://www.abanet.org/tips/home.html>).

[State Ethics Links](http://www.hricik.com/StateEthics.html) (<http://www.hricik.com/StateEthics.html>) – this site from David Hricik provides links to ethics opinions, rules of professional conduct, and other ethics resources from all fifty states.

[sunEthics](http://www.sunethics.com/) (<http://www.sunethics.com/>) - although this site is primarily geared to Florida lawyers (and the Florida resources are great!), there's also a page of state-by-state ethics links, as well as national ethics sites.

[Virtual Chase Legal Ethics Guide](http://www.virtualchase.com/topics/ethics.shtml) (<http://www.virtualchase.com/topics/ethics.shtml>) - Genie Tyburski's wonderful Virtual Chase site is the host for this research guide on legal ethics. This pathfinder will lead you to federal agencies, state ethics sites, and other top resources in legal ethics.

[WEX - Legal Ethics](http://www.law.cornell.edu/wex/index.php/Legal_ethics) (http://www.law.cornell.edu/wex/index.php/Legal_ethics) - WEX is Cornell's version of a legal Wikipedia. It's an online legal encyclopedia created by a volunteer group of contributing authors. It's relatively new and we're very interested to see how it grows and evolves. Compare it to the entry on legal ethics on the [Wikipedia](http://en.wikipedia.org/wiki/Legal_ethics) (http://en.wikipedia.org/wiki/Legal_ethics) from time to time to get an idea about how the different approaches taken by Wikipedia and WEX will work over the long term.

[The Ethics of Online Client Development](http://practice.findlaw.com/law-practice-management-articles/lawyermarketing-ethics-whitepaper.pdf) (<http://practice.findlaw.com/law-practice-management-articles/lawyermarketing-ethics-whitepaper.pdf>) - This excellent white paper covers many aspects of online legal marketing and provides a great summary of the key issues along with some practice steps for lawyers to take.

[Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct \(April 15, 2007\)](http://www.abanet.org/cpr/professionalism/State_Advertising.pdf) (http://www.abanet.org/cpr/professionalism/State_Advertising.pdf) - Just what the title says.

[Links to State Ethics Rules Governing Lawyer Advertising, Solicitation and Marketing](http://www.abanet.org/legalservices/clientdevelopment/adrules/) (<http://www.abanet.org/legalservices/clientdevelopment/adrules/>) - Useful single source for links to rules for lawyers with advertising questions.

[What's New in Lawyer Advertising \(www.abanet.org/cpr/professionalism/lawyerAd.html\)](http://www.abanet.org/cpr/professionalism/lawyerAd.html) - Handy list of current developments in lawyer advertising rules.

The ethics resources currently available on the Internet are somewhat limited, but are undeniably useful and important. The sites mentioned here should definitely be kept handy whenever you have a question in your own practice.

About the Authors

Dennis Kennedy is a well-known legal technology expert, technology lawyer and blogger. His [blog](http://www.denniskennedy.com/blog/) (<http://www.denniskennedy.com/blog/>) and his [web page](http://www.denniskenedy.com) (<http://www.denniskenedy.com>) are highly-regarded resources on technology law and legal technology topics. He is member of the ABA Law Practice Management Section's Council and Webzine Board.

Tom Mighell is Senior Counsel and Litigation Technology Support Coordinator at Cowles & Thompson in Dallas. He is a frequent speaker and writer on the Internet and legal technology issues. He has published the Internet Legal Research Weekly Newsletter since 2000, and the Internet legal research weblog [Inter Alia](http://www.inter-alia.net) (<http://www.inter-alia.net>) since 2002. He is also a contributor to the blog [Between Lawyers](http://betweenlawyers.corante.com) (<http://betweenlawyers.corante.com>). He is a member of the 2006 and 2007 ABA TECHSHOW Planning Boards and chair of the 2008 ABA TECHSHOW Planning Board, and of the ABA Law Practice Management Section's Council. He received both his B.A. and J.D. degrees from the University of Texas at Austin.

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Dennis Kennedy (dmk@denniskennedy.com) is a St. Louis lawyer who both practices computer law and provides technology consulting services for law firms and corporate legal departments. His blogs, DennisKennedy.Blog (<http://www.denniskennedy.com/blog/>) and Between Lawyers (<http://betweenlawyers.corante.com/>), are among the longest-running, best-known and most influential of the legal blogs. In 1995, Dennis became one of the first group of lawyers with a web page, and he has frequently spoken, written and been quoted on Internet marketing issues, including the use of blogs by lawyers and other professional services providers.

An award-winning author with hundreds of publications to his credit and a frequent speaker, Dennis was recently named Named a Top 100 global legal technology leader in 2006 by London's CityTech magazine, and received awards as the 2001 TechnoLawyer of the Year and 2003 Contributor of the Year from TechnoLawyer.com for his role in promoting the use of technology in the practice of law. His website (www.denniskennedy.com) has long been considered a highly regarded resource on legal technology and technology law topics, including electronic discovery and legal technology trends.

He is also a co-founder of LexThink!, a conference and consulting group that focuses on innovation in the professional services industry (<http://www.lexthink.com>). Dennis also co-writes a popular column on electronic discovery at DiscoveryResources.org. He is a member of the ABA Law Practice Management Section's Council and is an editor and board member of the Law Practice Today webzine (<http://www.lawpracticetoday.org>).

Dennis received his J.D., cum laude, from the Georgetown University Law Center in 1983 and B.A., magna cum laude, from Wabash College in 1983.

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