

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

## Formal Opinion 10-457 Lawyer Websites

August 5, 2010

*Websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply.*<sup>1</sup>

### I. Introduction

Many lawyers and law firms have established websites as a means of communicating with the public. A lawyer website can provide to anyone with Internet access a wide array of information about the law, legal institutions, and the value of legal services. Websites also offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or a law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.

The obvious benefit of this information can diminish or disappear if the website visitor misunderstands or is misled by website information and features. A website visitor might rely on general legal information to answer a personal legal question. Another might assume that a website's provision of direct electronic contact to a lawyer implies that the lawyer agrees to preserve the confidentiality of information disclosed by website visitors.

For lawyers, website marketing can give rise to the problem of unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice. This opinion addresses some of the ethical obligations that lawyers should address in considering the content and features of their websites.<sup>2</sup>

### II. Website Content

#### A. Information about Lawyers, their Law Firm, or their Clients

Lawyer websites may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements. More specific information about a lawyer or law firm's former or current clients, including clients' identities, matters handled, or results obtained also might be included.

Any of this information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1<sup>3</sup> as well as the prohibitions against false and misleading statements in Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, these rules prohibit false, fraudulent or misleading statements of law or fact. Thus, no website communication may be false or misleading, or may omit facts such that the resulting statement is materially misleading. Rules 5.1 and 5.3 extend this obligation to managerial lawyers in law firms by obligating them to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.

<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> We do not deal here with website content generated by governmental lawyers or offices or by non-profit law advocacy firms or organizations. See, e.g., *In re Primus*, 436 U.S. 412 (1978) (discussing how solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and political association constitutes expressive and associational conduct entitled to First Amendment protection, which government may regulate only narrowly).

<sup>3</sup> See, e.g., Arizona State Bar Op. 97-04 (1997), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=480>; California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, 2001 WL 34029609 (2001); Hawaii Sup. Ct. Disc. Bd. Formal Op. 41 (2001), available at [http://www.odchawaii.com/FORMAL\\_WRITTEN\\_OPINIONS.html](http://www.odchawaii.com/FORMAL_WRITTEN_OPINIONS.html); South Carolina Bar Eth. Advisory Committee Op. 04-06, 2004 WL 1520110 \*1 (2004); Vermont Advisory Eth. Op. 2000-04, available at <http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Advertising/advertising.htm>. Many state and local ethics opinions are published online and can be accessed through the ABA Center for Professional Responsibility website at <http://www.abanet.org/cpr/links.html>.

As applied to lawyer websites, these rules allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer's law firm, including contact information and information about the law practice.<sup>4</sup> To avoid misleading readers, this information should be updated on a regular basis.<sup>5</sup> Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the clients or former clients give informed consent<sup>6</sup> as required by Rules 1.6 (current clients) and 1.9 (former clients).<sup>7</sup> Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.<sup>8</sup>

## B. Information about the Law

Lawyers have long offered legal information to the public in a variety of ways, such as by writing books or articles, giving talks to groups, or staffing legal hotlines. Lawyer websites also can assist the public in understanding the law and in identifying when and how to obtain legal services.<sup>9</sup> Legal information might include general information about the law applicable to a lawyer's area(s) of practice, as well as links to other websites, blogs, or forums with related information. Information may be presented in narrative form, in a "FAQ" (frequently asked questions) format, in a "Q & A" (question and answer) format, or in some other manner.<sup>10</sup>

Legal information, like information about a lawyer or the lawyer's services, must meet the requirements of Rules 7.1, 8.4(c), and 4.1(a). Lawyers may offer accurate legal information that does not materially mislead reasonable readers.<sup>11</sup> To avoid misleading readers, lawyers should make sure that legal information is accurate and current,<sup>12</sup> and should include qualifying statements or disclaimers that "may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."<sup>13</sup> Although no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two.<sup>14</sup>

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<sup>4</sup> See, e.g., North Carolina State Bar Formal Eth. Op. 2009-6 (2009) (firm may provide case summaries on website, including accurate information about verdicts and settlements, as long as it adds specific information about factual and legal circumstances of cases ((complexity, whether liability or damages were contested, whether opposing party was represented by counsel, firm's success in collecting judgment)) in conjunction with appropriate disclaimer to preclude misleading prospective clients).

<sup>5</sup> See, e.g., Missouri Bar Inf. Advisory Op. 20060005 (2006) (firm must remove lawyer's biographical information within reasonable time after lawyer leaves firm).

<sup>6</sup> See, e.g., Ohio Advisory Op. 2000-6, 2000 WL 1872572 \*5 (2000) (law firm may list client's name on firm website with client's informed consent). See also New York Rule of Professional Conduct 7.1(b) (2) (2009) (lawyer may advertise name of regularly represented client, provided that client has given prior written consent).

<sup>7</sup> These rules apply to "all information relating to the representation, whatever its source" including publicly available information. Model Rule 1.6 cmt. 3. The consent can be oral or written. Rules 1.6 and 1.9(c) require informed consent, but do not require a written confirmation.

<sup>8</sup> See ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 09-455 (2009) (Disclosure of Conflicts Information When Lawyers Move Between Law Firms) (absent demonstrable benefit to client's representation, disclosure of client identifying information, including client's name and nature of matter handled, is not impliedly authorized under Rule 1.6(a)).

<sup>9</sup> Model Rule 7.2 Comment [1] acknowledges that the "public's need to know about legal services can be fulfilled in part through advertising," a need that may be "particularly acute" in the case of persons who have not made extensive use of, or fear they may not be able to pay for, legal services.

<sup>10</sup> See, e.g., Vermont Advisory Eth. Op. 2000-04, *supra* note 3 (lawyer may use "frequently asked questions" format as long as information is current, accurate, and includes clear statement that it does not constitute legal advice and readers should not rely on it to solve individual problem).

<sup>11</sup> Rule 7.1 Comment [2] provides that a "truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion ... for which there is no reasonable factual foundation."

<sup>12</sup> ABA Law Practice Management Section, *Best Practice Guidelines for Legal Information Web Site Providers* 1 (Feb. 2003), available at [http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/best\\_practice\\_guidelines.pdf](http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/best_practice_guidelines.pdf)

(website providing legal information should provide full and accurate information about identity and contact details of provider on each page of website, as well as dates on which substantive content was last reviewed).

<sup>13</sup> Model Rule 7.1 cmt. 3. See, e.g., ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 2 (website providers should avoid misleading users about jurisdiction to which site's content relates, and if clearly state-specific, the jurisdiction in which the law applies should be identified).

<sup>14</sup> See, e.g., Arizona State Bar Op. 97-04, *supra* note 3 (because of inability to screen for conflicts of interest and possibility of disclosing confidential information, lawyers should not answer specific legal questions posed by laypersons in Internet chat rooms unless question presented is of general nature and advice given is not fact-specific); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2003-164, 2003 WL 23146203 (2003) (legal advice includes making recommendations about specific course of action to follow; public context of radio call-in show that includes warnings about information not being substitute for individualized legal advice makes it unlikely lawyers have agreed to act as caller's lawyer); South Carolina Bar Eth. Advisory Committee Op. 94-27 \*2 (1995), 1995 WL 934127 (lawyer may maintain electronic presence for purpose of discussing legal topics, but must obtain sufficient information to make conflicts check before offering legal advice); Utah Eth. Op. 95-01 (1995), 1995 WL 49472 \*1 ("how to" booklet on legal subject matter does not constitute practice of law).

With respect to context, lawyers who speak to groups generally have been characterized as offering only general legal information. With respect to content, lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner's individual circumstances. However, a lawyer who poses and answers a hypothetical question usually will not be characterized as offering legal advice. To avoid misunderstanding, our previous opinions have recommended that lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.<sup>15</sup>

Such a warning is especially useful for website visitors who may be inexperienced in using legal services, and may believe that they can rely on general legal information to solve their specific problem.<sup>16</sup> It would be prudent to avoid any misunderstanding by warning visitors that the legal information provided is general and should not be relied on as legal advice, and by explaining that legal advice cannot be given without full consideration of all relevant information relating to the visitor's individual situation.

### C. Website Visitor Inquiries

Inquiries from a website visitor about legal advice or representation may raise an issue concerning the application of Rule 1.18 (Duties to Prospective Clients).<sup>17</sup> Rule 1.18 protects the confidentiality of prospective client communications. It also recognizes several ways that lawyers may limit subsequent disqualification based on these prospective client disclosures when they decide not to undertake a matter.<sup>18</sup>

Rule 1.18(a) addresses whether the inquirer has become a "prospective client," defined as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship."

<sup>15</sup> ABA Inf. Op. 85-1512 (1985) (Establishment of Private Multistate Lawyer Referral Service by Nonprofit Religious Organization), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS

1983-1998, at 550, 551 (ABA 2000) (not unethical to prepare articles of general legal information for lay public, but may be prudent to include statement that information furnished is only general and not substitute for personalized legal advice); ABA Inf. Op. 85-1510 (1985) (Establishment of Multistate Private Lawyer Referral Service for Benefit of Subscribers to Corporation's Services), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 1983-1998, at 544, 545 (corporate counsel may author articles of general legal information for corporations' subscriber newsletter, but "good practice" to include a statement that information is only general in nature and not substitute for personal legal advice).

<sup>16</sup> See, e.g., ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 3 (websites that provide legal information should give users conspicuous notice that information does not constitute legal advice). Some state opinions also warn against providing specific or particularized facts in a lawyer's communication to avoid creating a client-lawyer relationship. See also District of Columbia Bar Eth. Op. 316 (2002), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion316.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm) (online chat rooms and listserves); Maryland State Bar Ass'n Committee on Eth. Op. 2007-18 (2008) (lawyer conducting domestic relations law seminars for lay public); New Jersey Advisory Committee on Prof'l Eth. Op. 712 (2008) (Attorney-Staffed Legal Hotline For Members of Nonprofit Trade Association), available at [http://lawlibrary.rutgers.edu/ethics/acpe/acp712\\_1.html](http://lawlibrary.rutgers.edu/ethics/acpe/acp712_1.html) (lawyer staffing telephone hotline); New Jersey Advisory Committee on Prof'l Eth. Op. 671, 1993 WL 137685 (1993) (Activities and Obligations of Pro Bono Attorneys), (lawyer-volunteer at abused women shelter); New Mexico Bar Op. 2001-1 (2001) (Application of Rules of Professional Conduct to Lawyer's Use of Listserve-type Message Boards and Communications) (listserves); Wisconsin Prof'l Eth. Committee Op. E-95-5 (1995), available at [http://www.wisbar.org/AM/Template.cfm?Section=Legal\\_Research&Template=/CustomSource/Search/Search.cfm&output=xml\\_no\\_dtd&proxy\\_stylesheet=wisbar5&client=wisbar5&filter=1&start=0&Site=SBW&q=%22formal+opinion%22+E%2D95%2D5&submit=ethics](http://www.wisbar.org/AM/Template.cfm?Section=Legal_Research&Template=/CustomSource/Search/Search.cfm&output=xml_no_dtd&proxy_stylesheet=wisbar5&client=wisbar5&filter=1&start=0&Site=SBW&q=%22formal+opinion%22+E%2D95%2D5&submit=ethics) (lawyer-volunteer at organization that provides information about landlord-tenant law). The Model Rules defer to "principles of substantive law external to these Rules [to] determine when a client-lawyer relationship exists." Scope cmt. 17.

<sup>17</sup> See, e.g., Arizona State Bar Op. 02-04 (2002), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=288> (lawyer does not owe duty of confidentiality to individuals who unilaterally e-mail inquiries to lawyer when e-mail is unsolicited); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, *supra* note 3 (lawyer may avoid incurring duty of confidentiality to persons who seek legal services by visiting lawyer's website and disclose confidential information only if site contains clear disclaimer); Iowa Bar Ass'n Eth. Op. 07-02 (2007), available at

<http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument> (message that encourages detailed response about case could in some situations be considered bilateral); New Hampshire Bar Ass'n Eth. Committee Op. 2009-2010/1(2009), available at

<http://www.nhbar.org/legal-links/ethics1.asp> (when law firm's website invites public to send e-mail to one of firm's lawyers, it is opening itself to potential obligations to prospective clients); Ass'n of the Bar of the City of New York, Formal Op. 2001-1 (2001) (Obligations Of Law Firm Receiving Unsolicited E-Mail Communications From Prospective Client ), available at <http://www.abcnyc.org/Ethics/eth2001-01.html> (where firm website does not adequately warn that information transmitted will not be treated as confidential, information should be held in confidence by lawyer receiving communication and not disclosed to or used for benefit of another client even though lawyer declines to represent potential client); New Jersey Advisory Committee on Prof'l Eth. Op. 695, 2004 WL 833032 (2004) (firm has duty to keep information received from prospective client confidential); San Diego County Bar Ass'n Eth. Op. 2006-1 (2006), available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1> (private information received from non-client via unsolicited e-mail is not required to be held as confidential if lawyer has not had opportunity to warn or stop flow of information at or before the communication is delivered).

<sup>18</sup> Lawyers do not normally owe confidentiality obligations to persons who are not clients (protected by Rule 1.6), former clients (Rule 1.9), or prospective clients (Rule 1.18).

To “discuss,” meaning to talk about, generally contemplates a two-way communication, which necessarily must begin with an initial communication.<sup>19</sup> Rule 1.18 implicitly recognizes that this initial communication can come either from a lawyer or a person who wishes to become a prospective client.

Rule 1.18 Comment [2] also recognizes that not all initial communications from persons who wish to be prospective clients necessarily result in a “discussion” within the meaning of the rule: “a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a prospective client.”

For example, if a lawyer website specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18, will result when a website visitor submits the requested information.<sup>20</sup> If a website visitor submits information to a site that does not specifically request or invite this, the lawyer’s response to that submission will determine whether a discussion under Rule 1.18 has occurred.

A telephone, mail or e-mail exchange between an individual seeking legal services and a lawyer is analogous.<sup>21</sup> In these contexts, the lawyer takes part in a bilateral discussion about the possibility of forming a client-lawyer relationship and has the opportunity to limit or encourage the flow of information. For example, the lawyer may ask for additional details or may caution against providing any personal or sensitive information until a conflicts check can be completed.

Lawyers have a similar ability on their websites to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors.<sup>22</sup> A particular website might facilitate a very direct and almost immediate bilateral communication in response to marketing information about a specific lawyer. It might, for example, specifically encourage a website visitor to submit a personal inquiry about a proposed representation on a conveniently-provided website electronic form which, when responded to, begins a “discussion” about a proposed representation and, absent any cautionary language, invites submission of confidential information.<sup>23</sup> Another website might describe the work of the law firm and each of its lawyers, list only contact information such as a telephone number, e-mail or street address, or provide a website e-mail link to a lawyer. Providing such information alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship.<sup>24</sup> A lawyer’s response to an inquiry submitted by a visitor who uses this contact information may, however, begin a “discussion” within the meaning of Rule 1.18.

In between these two examples, a variety of website content and features might indicate that a lawyer has agreed to discuss a possible client-lawyer relationship. A former client’s website communication to a lawyer about a new matter must be analyzed in light of their previous relationship, which may have given rise to a reasonable expectation of confidentiality.<sup>25</sup> But a person who knows that the lawyer already declined a particular representation or is already representing an adverse party can neither reasonably expect confidentiality, nor reasonably believe that

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<sup>19</sup> For example, in ABA Committee on Eth. and Prof’l Responsibility, Formal Op. 90-358 (1990) (Protection of Information Imparted by Prospective Client), this Committee considered the obligations of a lawyer who engaged in such a “discussion” in the context of a face-to-face meeting.

<sup>20</sup> Rule 1.18 cmt. 1.

<sup>21</sup> See, e.g., Virginia Legal Eth. Op. 1842 (2008), available at <http://www.vacle.org/opinions/1842.htm> (absent voicemail message that asks for detailed information, providing phone number and voicemail is an invitation only to contact lawyer, not to submit confidential information); Iowa State Bar Ass’n Eth. Op. 07-02 (“Communication from and with Potential Clients”), available at <http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument> (telephone voicemail message that simply asks for contact details does not give rise to bilateral communication, but message that encourages caller to leave detailed messages about their case could be considered bilateral).

<sup>22</sup> See, e.g., Arizona State Bar Op. 02-04 (2002), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=288> (lawyers who maintain websites with e-mail links should include disclaimers to clarify whether e-mail communications from prospective clients will be treated as confidential); Massachusetts Bar Ass’n Op. 07-01 (2007), available at <http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01> (lawyer who receives unsolicited information from prospective client through e-mail link on law firm website without effective disclaimer must hold information confidential because law firm has opportunity to set conditions on flow of information); South Dakota Bar Eth. Op. 2002-2 (2002) (lawyer’s website that invites viewers to send e-mail through jump site creates expectation of confidentiality).

<sup>23</sup> See, e.g., Iowa State Bar Ass’n Eth. Op. 07-02, *supra* note 21 (web page inviting specific questions constitutes bilateral communication with expectation of confidentiality) and Virginia Legal Eth. Op. 1842 *supra* note 21 (website that specifically invites visitor to submit information in exchange for evaluation invites formation of client-lawyer relationship).

<sup>24</sup> E-mails received from unknown persons who send them apart from the lawyer’s website may even more easily be viewed as unsolicited. See, e.g., Arizona State Bar Op. 02-04, *supra* note 22 (e-mail to multiple lawyers asking for representation); Iowa State Bar Ass’n Eth. Op. 07-02, *supra* note 21 (website that gives contact information does not without more indicate that lawyer requested or consented to sending of confidential information); San Diego County Bar Assn. Op. 2006-1, available at <http://www.sdcbba.org/index.cfm?Pg=ethicsopinion06-1> (inquirer found lawyer’s e-mail address on state bar membership records website accessible to the public).

<sup>25</sup> See, e.g., Iowa State Bar Ass’n Committee Eth. Op. 07-02, *supra* note 22 (lack of prior relationship with person sending unsolicited e-mail requesting representation was one factor in determining whether communication’s disclosures were unilateral and whether expectation of

the lawyer wishes to discuss a client-lawyer relationship. Similarly, a person who purports to be a prospective client and who communicates with a number of lawyers with the intent to prevent other parties from retaining them in the same matter should have no reasonable expectation of confidentiality or that the lawyer would refrain from an adverse representation.<sup>26</sup>

In other circumstances, it may be difficult to predict when the overall message of a given website communicates a willingness by a lawyer to discuss a particular prospective client-lawyer relationship. Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in a discussion.<sup>27</sup> Lawyers are therefore well-advised to consider that a website-generated inquiry may have come from a prospective client, and should pay special attention to including the appropriate warnings mentioned in the next section.

If a discussion with a prospective client has occurred, Rule 1.18(b) prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent.<sup>28</sup> When the discussion reveals a conflict of interest, the lawyer should decline the representation,<sup>29</sup> and cannot disclose the information received without the informed consent of the prospective client.<sup>30</sup> For various reasons, including the need for a conflicts check, the lawyer may have tried to limit the initial discussion and may have clearly expressed those limitations to the prospective client. If this has been done, any information given to the lawyer that exceeds those express limitations generally would not be protected under Rule 1.18(b).

Rule 1.18(c) disqualifies lawyers and their law firms who have received information that "could be significantly harmful" to the prospective client from representing others with adverse interests in the same or substantially related matters.<sup>31</sup> For example, if a prospective client previously had disclosed only an intention to bring a particular lawsuit and has now retained a different lawyer to initiate the same suit, it is difficult to imagine any significant harm that could result from the law firm proceeding with the defense of the same matter.<sup>32</sup> On the other hand, absent an appropriate warning, the prospective client's prior disclosure of more extensive facts about the matter may well be disqualifying.

Rule 1.18(d) creates two exceptions that allow subsequent adverse representation even if the prospective client disclosed information that was significantly harmful: (1) informed consent confirmed in writing from both the affected and the prospective client, or (2) reasonable measures to limit the disqualifying information, combined with timely screening of the disqualified lawyer from the subsequent adverse matter. Rule 1.18(d) (2) specifically would allow the law firm (but not the contacted lawyer) to "undertake or continue" the representation of someone with adverse interests without receiving the informed consent of the prospective client if the lawyer who initially received the information took reasonable precautions to limit the prospective client's initial disclosures and was timely screened from further involvement in the matter as required by Rule 1.0(k).

### III. Warnings or Cautionary Statements Intended to Limit, Condition, or Disclaim a Lawyer's Obligations to Website Visitors

Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as

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confidentiality was reasonable); Oregon Eth. Op. 2005-146, 2005 WL 5679570 \*1 (2005) (lawyer who sends periodic reminders to former clients risks giving recipients reasonable belief they are still current clients).

<sup>26</sup> See, e.g., Virginia Legal Eth. Op. 1794 (2004), available at <http://www.vacle.org/opinions/1794.htm> (person who meets with lawyer for primary purpose of precluding others from obtaining legal representation does not have reasonable expectation of confidentiality); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 2001-1 (2001), available at <http://www.abcnyc.org/Ethics/eth2001.html> ("taint shoppers," who interview lawyers or law firms for purpose of disqualifying them from future adverse representation, have no good faith expectation of confidentiality).

<sup>27</sup> See e.g., Massachusetts Bar Ass'n Op. 07-01, *supra* note 22 (in absence of effective disclaimer, prospective client visiting law firm website that markets background and qualifications of each lawyer in attractive light, stresses lawyer's skill at solving clients' practical problems, and provides e-mail link for immediate communication with that lawyer might reasonably conclude that firm and its individual lawyers have implicitly "agreed to consider" whether to form client-lawyer relationship).

<sup>28</sup> Rule 1.18(b) allows disclosure or use if permitted by Rule 1.9. Rule 1.9(c) (2) and its Comment [7] in turn link disclosure to Rule 1.6, the general confidentiality rule, which requires client informed consent to disclosure.

<sup>29</sup> Rule 1.18 cmt. 4.

<sup>30</sup> Rule 1.18 cmt. 3.

<sup>31</sup> See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2) (2000).

<sup>32</sup> Rule 1.18 cmt. 5 also allows lawyers to condition an initial conversation on the prospective client's informed consent to subsequent adverse representation in the same matter or subsequent use of any confidential information provided.

to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created;<sup>33</sup> (2) the visitor's information will be kept confidential;<sup>34</sup> (3) legal advice has been given;<sup>35</sup> or (4) the lawyer will be prevented from representing an adverse party.<sup>36</sup>

Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person.<sup>37</sup> If the website uses a particular language, any waiver, disclaimer, limitation, or condition must be in the same language. The appropriate information should be conspicuously placed to assure that the reader is likely to see it before proceeding.<sup>38</sup>

Finally, a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to its warning.

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<sup>33</sup> See, e.g., New Mexico Bar Op. 2001-1 (2001), available at <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html> (appropriate disclaimers of attorney-client relationship should accompany any response to listserv message board, but any response that would suggest to reasonable person that, despite disclaimer, relationship is being or has been established, would negate disclaimer); North Carolina State Bar Formal Eth. Op. 2000-3, 2000 WL 33300702 \*2 (2000) (Responding to Inquiries Posted on a Message Board on the Web) (lawyers who do not want to create client-lawyer relationships on law firm message board should use specific disclaimers on any communications with inquirers, but substantive law will determine whether client-lawyer relationship is created); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 1998-2 (1998), available at <http://www.abcnyc.org/Ethics/eth1998-2.htm> (disclaimer that "if specific legal advice is sought, we will indicate that this requires establishment of an attorney-client relationship which cannot be carried out through the use of a web page" may not necessarily serve to shield law firm from claim that attorney-client relationship was established by specific on-line communications); Utah State Bar Eth. Advisory Op. Committee Op. 96-12, 1997 WL 45137 \*1 (1997) ("if legal advice is sought from an attorney, if the advice sought is pertinent to the attorney's profession, and if the attorney gives the advice for which fees will be charged, an attorney-client relationship is created that cannot be disclaimed by the attorney giving the advice"); Vermont Bar Ass'n Advisory Eth. Op. 2000-04 (2000), *supra* note 3 (despite website caveat and disclaimers, nonlawyer may still rely on information on website or lawyer's responses; disclaimer cannot preclude possibility of establishing client-lawyer relationship in an individual case).

<sup>34</sup> The Committee does not opine whether a confidentiality waiver might affect the attorney-client privilege. See, e.g., *Barton v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 410 F.3d 1104, 1111-12 (9th Cir. 2005) (checking "yes" box on law firm website that acknowledged providing information in answer to questionnaire "does not constitute a request for legal advice and I am not forming an attorney-client relationship by submitting this information" did not waive attorney-client privilege because confidentiality was not mentioned in attempted disclaimer and questionnaires were nevertheless submitted in course of seeking attorney-client relationship in potential class action). Cf. *Schiller v. The City of New York*, 245 F.R.D. 112, 117-18 (S.D.N.Y. 2007) (although privilege may protect pre-engagement communications from prospective clients, it does not apply to person who completed questionnaires soliciting information from N.Y. Civil Liberties Union to allow it to "effectively advocate for change"). See also David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-Mail from Prospective Clients*, 16 ABA PROFESSIONAL LAWYER 1, 5 (2005) (agreement that waives all confidentiality tries to do too much and might destroy the ability of prospective client who eventually becomes firm client to claim privilege).

<sup>35</sup> See note 15 *supra*.

<sup>36</sup> Rule 1.18 cmt. 5.

<sup>37</sup> See, e.g., California Bar Committee on Prof'l Resp. Op. 2005-168, 2005 WL 3068090 \*4 (2005) (finding disclaimer stating that "confidential relationship" would not be formed was not enough to waive confidentiality, because it confused not forming client-lawyer relationship with agreeing to keep communications confidential).

<sup>38</sup> See, e.g., District of Columbia Bar Eth. Op. 302 (2000), available at [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion302.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm) (lawyers may want to use "click through" pages that automatically direct the reader to another webpage containing disclaimers to ensure that visitors are not misled and other devices such as confirmatory messages that clarify nature of relationship); Virginia Legal Eth. Op. 1842, *supra* note 21 (approving of prominent "click through" disclaimers that require readers to assent to terms of disclaimer before submitting information). Courts have refused to uphold disclaimers or licensing agreements that appeared on separate pages and did not require a reader's affirmative consent to their terms because they did not provide reasonable notice. See, e.g., *Sprecht v. Netscape Communications Corp.*, 306 F.3d 17, 31-32 (2d Cir. 2002). On the other hand, courts have upheld website restrictions that provided actual knowledge by presenting the information and requiring an affirmative action (a click through or "clickwrap" agreement) before gaining access to the website content. See, e.g., *Register.com v. Verio*, 356 F.3d 393, 401-02 (2d Cir. 2004).

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