

# Ethics and the Internet

## The Online Legal Marketplace

By Robert D. Aicher and Victoria Vuletich

**T**he Internet demands an ongoing rethinking of the obligations lawyers owe their clients and third parties. Each iteration of the instantaneous, anonymous, ubiquitous mass communication it affords creates new questions regarding ethics.

Now lawyers face another online development: third-party websites specializing in the delivery of legal services—so-called “online legal marketplaces” in effect acting as intermediaries between lawyers and those who want to obtain legal services.

Of course, definitive answers to ethical questions arising from the delivery of legal services online remain a study in progress. In the interim, what follows is a list of considerations to assist you in determining whether the online legal marketplace you are considering provides an ethically compliant environment.

### MRPC 5.5 Unauthorized practice of law

The specifics of the rule are nuanced, but the concept is simple: you can’t practice where you aren’t licensed unless you qualify for one of the limited exceptions. There is no exception simply because you are communicating with a person over the Internet. Does the site make clear where you are located and from where your advice is being given?

### When does the attorney-client relationship arise?

Does the site clearly disclose to potential clients when an attorney-client relationship arises? It is not unreasonable for unsophisticated consumers to believe that if they communicate with a lawyer over the Internet, they have an attorney-client relationship

with that lawyer. Does the site disabuse the consumer of this notion? Does the site help you clarify precisely when you intend the formal attorney-client relationship to begin? If you have procedures you wish to follow for client intake (for example, requiring a signed engagement letter) or that you must follow (clearing conflicts), does the site provide you with a way to make this clear to potential clients?

### MRPC 1.6 Does the site facilitate the preservation of confidentiality of information?

From the potential client’s point of view

Does the site explain to the potential client *before the client transmits the information* that information transmitted over the Internet may not be entitled to a client-lawyer privilege? Depending on how data is handled by the site, there is a risk that information the client considers confidential may not, in fact, be kept confidential or entitled to privilege. The current Internet environment has created a culture that values openness and immediacy. As such, it would not be unusual for potential clients to reveal intimate details on or through the site. The problem is that in this context, openness could be a first step down a road that leads to a loss of confidentiality and

privilege; once the message is sent, it may be impossible to undo.

From your point of view

Lawyers must exercise reasonable care to prevent those whose services they are using from revealing client confidences or secrets. Presumably, this includes an online legal marketplace. Request from the site an account of the encryption and other protections it has in place and examine the information flow to assure that the site is exercising reasonable care to safeguard information.

If a client gives you a critical review, you are not necessarily permitted to defend yourself by revealing the client’s confidential information. Does the site help you manage your response to critical reviews by warning that the use of confidential information in responding to a critical review—even if the information is crucial to explaining the inaccuracy or unfairness of the review—is problematic?

### Conflicts arising in the pre-engagement process

Certain practices—such as family law in the context of divorce—have a peculiar susceptibility to conflicts. It is not uncommon, especially in locations with few family lawyers, for an aggrieved spouse to either

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accidentally or deliberately create a conflict within the local divorce bar by approaching more than one lawyer to discuss a potential engagement, and in the process reveal confidential information. Whether done intentionally or by accident, the result is to cause the other spouse the inconvenience and expense of engaging a divorce lawyer in a distant location. Lawyers in practices susceptible to this risk frequently structure their client intake to minimize the possibility of creating conflicts through the pre-engagement process. If you have structured your intake process to account for this risk, consider whether the site's handling of communications with potential clients undermines the protections of your intake process. If you have concerns, does the site permit you to opt out of its communication features or take other steps to address them?

### MRPC 1.5 Fees as a general matter

MRPC 1.5 provides a series of rules regarding fees: they may not be clearly excessive; if the lawyer does not regularly represent the client (as is typically the case with clients acquired over the Internet), the basis for the fees must be clearly communicated to the client; division of fees between lawyers must be disclosed; etc. If the site handles the negotiation or collection of fees between lawyers and potential clients, does it provide mechanisms to comply with MRPC 1.5? As a simple example, if a fee quote is provided through the site, is there an opportunity for you to give potential clients any information required by MRPC 1.5?

### MRPC 1.15 Safekeeping property

MRPC 1.15 stipulates a series of rules that govern the possession by a lawyer of property of a client or third party. If a site offers

services that include the handling of property of clients or third parties on behalf of a lawyer, including retainers, carefully consider the applicability of MRPC 1.15. RI-344 discusses the ethical implications of the payment of fees by credit card generally, although not in the context of payments over websites. RI-366 indicates that "coupon" type arrangements in which consumers pay legal fees in advance to the online entity pose serious compliance concerns with lawyers' obligations regarding handling client funds, sharing fees with nonlawyers, conflicts, and confidentiality. Before entering into any agreement with an online marketer, you should evaluate the specific manner in which the marketer handles property.

### MRPC 6.3 and 7.2(c) Fees for referring services

MRPC 7.2(c) provides that a lawyer shall not give anything of value to a person for recommending the lawyer's services, with certain exceptions such as advertising or not-for-profit lawyer referral services as described in MRPC 6.3. The rules here are complex regarding what constitutes a referral service and advertising, and whether the fee paid to the site is proper. The decision may hinge on whether the site exercises judgment in determining which lawyers it refers, the comfort given by the site to the potential client concerning having found the "right" or "best" lawyer for him or her, etc. If the site goes beyond simply providing a platform for lawyers to advertise, carefully consider whether the site constitutes a for-profit referral service and if the fees paid to it are proper.<sup>1</sup>

### MRPC 7.1 and 7.2 Communications concerning a lawyer's services and advertising

Simply stated, before you use an online legal marketplace, you must consider MRPC

7.1 and 7.2, which are the bedrock rules governing statements pertaining to lawyers' services. If you take nothing else away from this article, read MRPC 7.1 and 7.2. These rules define how you may communicate with the public as a general matter and specifically what you may say in advertising. The information you provide must not be false, fraudulent, misleading, or deceptive. You may not create an unjustified expectation about the results you can achieve. You must not compare your services with another lawyer's services unless you can factually substantiate the comparison.<sup>2</sup>

Although these rules seem obvious on their face, they are not necessarily easy to apply in practice. As an example, a recent Indiana opinion held that a lawyer engaged in misconduct by participating in an online legal marketplace.<sup>3</sup> Statements made by the site violated similar rules in Indiana. It was noted that the lawyer did not directly make the statements and that his personal website was ethically compliant. The problematic site was maintained by the American Association of Motorcycle Injury Lawyers, Inc. and used the trade name "Law Tigers." The site offered a search function that identified the lawyer as the exclusive Law Tigers source for legal services in Indiana. The court stated that:

The Law Tigers website contained examples of previous results obtained by "Law Tigers Motorcycle Accident Lawyers," boasting "Exceptional Results: Settlements and Verdicts." A tab led to "Client Testimonials" from persons who claim to have utilized Law Tigers in seeking advice and/or representation regarding a motorcycle-related legal matter. Such testimonials included: "Law Tigers changed my life in a big way and my family received our fair share of justice." "Law Tigers went above and beyond! The settlement was more than expected!" "The legal services were fast and painless and the best experience I have ever had with lawyers and lawsuits." Although none of the settlements, verdicts, or testimonials related to Respondent, the website did not disclose that they did not relate to Respondent.<sup>4</sup>

The court ultimately found "that the average viewer would not differentiate between

Respondent and the statements about Law Tigers on the [] website” and that the respondent violated the rules through his association with the website.<sup>5</sup>

Although we are not aware of a similar holding in Michigan, prudence would seem to dictate that you not only carefully consider what you say on the site, but also assess what the online legal marketplace conveys to the public.

### Commentary to MRPC 7.1 and reviews

Many online legal marketplaces permit the posting of reviews of lawyers on their sites. The comments to MRPC 7.1 discussing the prohibition on statements in communications with the public state, “[this prohibition] would ordinarily preclude advertisements containing client endorsements....” How this commentary applies to reviews in a lawyer’s online profile is unclear. It seems unreasonable to interpret the comments in a manner that restrains the publication of unsolicited opinions of consumers. In addition, if a lawyer has no part in posting reviews other than that the site provides a place for it to occur, this does not appear to be sufficiently affirmative on the part of the lawyer to constitute a “communication” within the meaning of the rule. If you are concerned that this interpretation is too aggressive and that reviews may be subject to this prohibition, be sure to determine whether the online legal marketplace you are considering allows you to opt out of the review feature.<sup>6</sup>

### MRPC 7.3 Solicitation

MRPC 7.3 prohibits a particular type of contact with the public defined as “soliciting.” It is easy to confuse general advertising—which, subject to compliance with MRPC 7.1 and 7.2, is not prohibited—with soliciting, which is. To paraphrase the rule, soliciting is directly contacting prospective clients by prohibited methods, which include in person, live telephone, or real-time electronic. The relevance of the topic here is that there is no exclusion for communication

through the Internet except for real-time electronic methods like chat rooms or instant messaging in which lawyers respond to questions and do not initiate communication without invitation. Soliciting does not include (among other exceptions not relevant here) letters addressed or advertising circulars distributed generally to persons not known to need legal services in a particular matter, but who are in a position to find the services useful. The term “solicit” also does not include “sending truthful and nondeceptive letters to potential clients known to face particular legal problems” as elucidated in *Shapero v Kentucky Bar Ass’n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).<sup>7</sup>

It appears that solicitation does not include posting material to an online legal marketplace that any user may view by simply visiting the site.<sup>8</sup> However, if the site offers a service to distribute your material to a mailing list it has collected, before you use the service consider whether the distribution fits an exception in MRPC 7.3. RI-276 is helpful in this regard, drawing a distinction between mass communications sent by e-mail—comparable to postcard mailings, which are probably permissible—and immediate electronic conversations initiated by lawyers, such as in chat rooms, which are probably not permissible. Also, note that Michigan’s emphasis on who initiates the conversation is not necessarily a point of distinction under the analogous solicitation rules of the American Bar Association or the rules of other states, which may put an emphasis on the conduct of the attorney more generally and whether it is overreaching.

### MRPC 7.2(b) Record retention requirements

MRPC 7.2(b) requires that you keep a record of any advertisement or communication for two years after its last dissemination along with a record of when and where it was used. How to apply this rule to advertising material placed on the Internet is not clear. Ask your provider/host about its policy concerning copies of the site as well as when backups are made, how they are maintained, how long they

are kept, and whether you have a right of access, if needed.<sup>9</sup> ■



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### ENDNOTES

1. See RI-365; see generally Joy & McMunigal, *Internet Marketing*, 28 Crim Just 43 (Summer 2013).
2. Useful analysis of these rules in a non-Internet setting may be found in RI-142 (advertising bankruptcy certifications), RI-173 (offering services under a common name none of the lawyers possess), RI-221 (offering services under a trade name), RI-341 (advertising as a “Super Lawyer”), and RI-353 (advertising using a firm name of a lawyer not licensed in Michigan).
3. *In re Anonymous*, 6 NE3d 903 (Ind, 2014).
4. *Id.* at 904.
5. *Id.* at 906.
6. See Harvey, McCoy & Sneath, *10 Tips for Avoiding Ethical Lapses When Using Social Media*, *Business Law Today* (January 2014) <[http://www.americanbar.org/publications/blt/2014/01/03\\_harvey.html](http://www.americanbar.org/publications/blt/2014/01/03_harvey.html)> (accessed April 4, 2015).
7. MRPC 7.3(a).
8. See RI-276.
9. See generally Levitt, *Internet Ethics and Netiquette for Attorneys and Law Firms* <<http://www.netforlawyers.com/page/internet-ethics-and-netiquette-attorneys-and-law-firms>> (accessed April 4, 2015).