

Law Firms On The Web - *Myth v. Reality*

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Author's note: In preparation for this article, NYPRR examined the web sites of six Manhattan law firms. Of the six, five were firms with a principal office in New York. The sixth has its principal office in another state, but with a New York branch office.

The firms included one firm which advertises its work in the area of intellectual property, one firm which stresses its financial and corporate law practice, one firm which claims wide experience in all areas of practice important to business, one firm which cites its commitment to practice in virtually every corner of the world, a full service firm involved in sophisticated transactions and complex litigation, and one firm which listed the subject areas in which it practices and stated that these areas were organized on a firm-wide multi-office basis. All the firms except one listed multiple offices in several states. Some of the firms listed offices in other countries.

In 1995, Charles W. Wolfram (now Senior Professor, Cornell Law School) wrote a far-sighted article entitled "Sneaking Around in the Legal Profession: Intejurisdictional Unauthorized Practice by Transactional Lawyers." (South Texas Law Review, November 1995).

The target of his discussion was "the increasingly interstate nature of the law practice of an increasing number of transactional and litigation lawyers. He cited as reasons for the increase: the responsibility of a lawyer to serve clients who have extensive commercial interstate and international interests; the national reputation of some lawyers and law firms, which leads to inquiries from distant clients; the development of multi-state, multi-office legal behemoths; and innovations in telecommunications and transportation which enable instant contact anywhere in the world.

Professor Wolfram wrote his article before the development of the sophisticated law firm web site, before the explosive spread of American law firms into offices in Europe and the Orient, and before the invasion of accounting firms into the practice of law by hiring and controlling the work of entire staffs of lawyers. These changes only confirm his conclusion that radical changes are needed in the judicial and administrative approach to interstate lawyering.

Because of its ubiquity, the law firm web site has had profound influence on extending law practice beyond the narrow confines of state lines. The result is the pressing need to reexamine the entire structure of law practice and to modify or eliminate rules which threaten discipline whenever a lawyer crosses the border into another state.

The dilemma facing New York lawyers is illustrated by NYSBA Ethics Opinion 709 (issued September 16, 1998 and summarized in the December 1998 NYPRR). This was the first New York ethics opinion to deal with lawyer use of the

The Six Web Sites We Studied

Each of the six web sites we studied trumpets the virtues of its firm. Although advanced in technology and sophisticated in technique, all six are clearly advertisements in the same sense as advertising in any public medium. As such, they are permitted "as long as the advertising is not false, deceptive or misleading and otherwise adheres to the requirements set forth in the Code." DR 2-101, DR 2-102, EC-210.

Without exception, all the web sites we examined had an initial blurb describing the work of the firm. None of these suggested that the work of the firm was limited to either New York State matters or New York State clients. On the contrary, the Sites stressed that the firms could and did handle interstate transactions.

All six sites provided access to biographies of partners and associates. Only two of the sites routinely listed the state(s) of license for each attorney. Two listed them for some attorneys; and two did not list them for any of the lawyers.

Here's what the NYSBA Opinion provides:

[Any Internet advertisement should inform a potential client of the jurisdiction in which the attorney is licensed, and should not mislead the potential client into believing that the attorney is licensed in a jurisdiction where the attorney is not licensed. See DR 2-102(D); ABA/BNA Lawyers Manual on Professional Conduct 81:551, at 75 (lawyer's Web page should clearly identify those states in which he is licensed to practice)...

In the real world, therefore, the rule is the myth and the actual practice is the reality. On a web site that stresses that a law firm has offices in many states and describes its work as both national and international, how can anyone reasonably conclude that lawyers within the firm will stop at state borders, even if the individual lawyer lists his state of license? (In a large firm in which the many lawyers list their individual state(s) of license, the large number of states represented suggests in itself a firm's interstate character.)

Almost all the web sites we studied contain other elements which inevitably suggest that the firm places no limits on where it will go and what its lawyers will do.

The sites contain a list and description of the firm's offices, the text of publications written by its lawyers, press releases by and about the firm, media stories about the firm and its activities, and a description of specific transactions or litigation conducted by the firm, many of them clearly involving other states than New York.

The reader concludes that each firm is an octopus, with tentacles extending in all directions from a central mass of lawyers able and willing to solve legal problems everywhere.

Representation Of Clients Outside New York

Consider also the NYSBA Opinion's directives on services by a New York lawyer to clients outside New York:

DR 3-101(B) provides that a lawyer "shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

Thus, whether a lawyer licensed only in New York may render legal opinions over the Internet to clients who reside outside of New York depends on whether the attorney's conduct constitutes the unauthorized practice of law in that jurisdiction. That question is beyond the scope of this Committee's jurisdiction, though we note that lawyers licensed in one state may appropriately render services to clients resident elsewhere in many circumstances.

What's a lawyer to do? On the one hand, he may not practice in a state which says he mustn't practice there; on the other hand, the Committee thinks he may give some advice to some non-residents sometime. Significantly, the Committee has no opinion on whether advice on the web constitutes the unauthorized practice of law in any other state. But it also tells us that California and Florida have both reached decisions inimical to incursions by out-of-state lawyers.

Isn't it time to face the real issue raised by Professor Wolfram almost four years ago? The rules we lawyers live under are in many ways no longer relevant to the law as it's practiced. The rules anticipate that each lawyer will pick a state in which he will live and in which he will practice. If he wishes, he may apply in another jurisdiction if he has occasional need to handle a matter there. But, at least in theory he's not supposed to tread in any state other than his state of license.

But the world — especially the world of the Web — no longer functions in the way the rules intended. Transactions start and end everywhere. Litigation begins wherever the plaintiff dictates; counsel for the corporate defendant has a duty to follow and take charge.

Professor Wolfram reviewed several possible solutions to the problem, but he rejected all but one. The first possibility was universal state-by-state lawyer registration." Each state would create a system which would require every out-of-state lawyer intending to practice there to register his name and principal office and to consent to discipline by the state. He rejected this possibility because of the many inherent administrative problems, especially in states like New York and California, which would be apt to draw itinerant practitioners by the thousands.

The second possibility was a truly national bar under federal legislation and a federal administrative apparatus. All lawyers would practice under a federal license. Professor Wolfram dismissed this possibility, which he labeled poor, if not absurd. He suggested that a federal licensing scheme might be unconstitutional and, would, in any event, be an unacceptable threat to lawyer independence. We have only to look at Congress' misadventure in passing the Granny Advisor Law and Janet Reno's insistence in appealing from the decision declaring the law unconstitutional to appreciate Professor Wolfram's wisdom in rejecting this possibility.

Case By Case Analysis

The solution favored by Professor Wolfram is a case-by-case analysis by the disciplinary authorities—especially the courts—of the circumstances surrounding the intrusion into another state by the local lawyer. He would ask such questions as: Is the out-of-state lawyer working from a permanent in-state office? How many in-state clients does the out-of-state lawyer have? Is the matter in which the out-of-state lawyer is involved a purely local matter, or does it have “significant interstate aspects?” Are the client’s needs met best by intervention and control by the out-of-state lawyer?

But Professor Wolfram recognized that many states —e.g., Illinois and California — have adopted rules which either prohibit compensation to an out-of-state lawyer or preclude an out-of-state lawyer from practicing law in the state at all.

Nearly four years have passed since Professor Wolfram published his article. In the interim, the practice of law has escaped forever from the confines of any one state.

We would suggest that the first step in controlling advertising on the Web is to discard language which is impractical to administer and impossible to interpret. The organized-New-York-bar-should stop paying lip service to the fiction of one-state practice and build its instructions to the practitioner and the law firm on the realities dictated by the commercial and industrial world.

New York can lead the way because it is home to the greatest number of firms practicing law across state and national borders. It is also the state which draws the greatest number of out-of-state firms to set up branch offices. Recently, New York has even begun to attract the in-state offices of firms with bases in England and continental Europe.

We need some new and refreshing insight into a problem which is admittedly complex but cries out for solution. It’s time to recognize the reality of our multi-state legal system. Use of the web by lawyers will only grow.

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