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CAN LAW FIRMS SPAM?

By **Kevin Michael**¹

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ABSTRACT

The CAN-SPAM Act of 2003 presents a compliance problem for law firms that issue periodic newsletters to clients or prospective clients. While the Act does not expressly include such newsletters, nor define commercial advertisement in a manner that suggests newsletters will be included, the advisory opinions from state ethics boards suggest that newsletters are advertisements. Arguments can be made that newsletters to current clients are not advertisements. However, given the low cost of compliance with the Act, firms should treat these newsletters as commercial advertisements and adhere to the provisions of the Act.

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INTRODUCTION

<1> While lawyers may be happy to represent clients accused of spamming, no lawyer wants to be accused of being a spammer herself. However, under the new federal CAN-SPAM Act ("the Act"), many lawyers might be just that - spammers. Many law firms send out newsletters to clients, former clients, and prospective clients via e-mail. Although client newsletters do not mirror the more familiar types of spam advertising, these communications still fall within the scope of the CAN-SPAM Act.

<2> Newsletters, alerts, and bulletins are a serious compliance concern for law firms in the wake of the CAN-SPAM Act.² Newsletters to clients contain updates on legislation and decisions, information about the firm and its attorneys, and contact information for recipients to use to gain representation.³ These newsletters are typically drafted by attorneys at the firm, using the firm's name, and distributed to clients and, in some cases, non-clients. If legal advice is desired, the recipient is advised to contact the firm. Compliance with the CAN-SPAM Act hinges on whether these newsletters are commercial advertisements. This Article analyzes the commercial nature of newsletters and concludes that the safest and most affordable option to managing client communications is to adhere to the provisions of the Act.

THE CAN-SPAM ACT OF 2003

<3> The principal function of the Act is the regulation of unsolicited "commercial electronic mail messages."⁴ Commercial e-mails are defined as, "...any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service..."⁵ Much of the confusion surrounding the applicability of the Act to legal newsletters stems from Congress' decision not to define the statute's references to "primary purpose," "advertisement," or "promotion." While Congress has assigned the task of further defining these terms to the Federal Trade Commission, until such definitions are promulgated, the status of newsletters is certain to be uncertain.⁶

<4> CAN-SPAM utilizes the opt-out mechanism, rather than the far more restrictive opt-in method preempted in California. Unlike the old California law, previous consent to receive a commercial e-mail is not required by the Act. All companies, including law firms, can send commercial e-mails to any recipient, so long as they comply with the technical requirements of the Act.

<5> A valid commercial e-mail must contain a viable opt-out mechanism. This requires: (1) that commercial e-mails clearly identify themselves as advertisements or solicitations, (2) a notice that the recipient may opt-out of receiving future e-mails, and (3) a valid physical postal address for the sender.⁷ Inherent in this requirement is a valid return e-mail address that is clearly and conspicuously placed to allow recipients to opt-out electronically.⁸ All opt-out requests must be adhered to within ten days.⁹ Finally, a valid commercial e-mail cannot have false or misleading subject headers or routing information.¹⁰

<6> The Act excludes from the definition of commercial e-mail those e-mails that are "transactional or relationship messages."¹¹

The primary purpose of these messages is to (1) facilitate, complete, or confirm a prior commercial transaction; (2) provide warranty, recall, safety, or security information for a product or service purchased by the recipient; (3) provide account information for an ongoing commercial relationship with the recipient; (4) provide current employment or benefit plan information; or (5) deliver goods or services, including updates and upgrades under a prior purchase agreement with the sender.¹²

APPLICATION TO NEWSLETTERS

<7> Liability for law firms turns on whether newsletters are commercial advertising. If newsletters are advertisements, then the Act applies and firms must comply with its provisions. If they are not advertisements, firms are free to send out newsletters as they please, subject only to state solicitation requirements. The Act's language does not help determine whether the Act applies to newsletters. In lieu of federal guidelines, state rules of professional conduct are the primary source of answers for how legal newsletters are to be treated.

<8> A majority of states follow the ABA Model Rules ("Model Rules"), making them the logical place to begin an analysis.¹³ There are three basic rules that govern advertising within the Model Rules. First, an attorney cannot make any false or misleading communications about his/herself or services.¹⁴ Second, the Model Rules expressly allow lawyers to advertise, subject to the limitations found in Rules 7.1 and 7.3.¹⁵ Third, the pertinent section of Rule 7.3 reads:

Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication...¹⁶

These provisions have been interpreted by state bar associations, which in turn offer advisory opinions as to what constitutes advertising. As e-mail newsletters are only just beginning to flourish, analogies must be drawn from advisory opinions based on newsletters sent through the mail. These opinions distinguish newsletters that are directed towards clients from those directed at prospective clients.

<9> It is generally accepted that newsletters sent to prospective clients are advertisements and subject to the requirements of CAN-SPAM. The very purpose of these newsletters is to lure new clients to the firm. "In a general sense, "advertise" means to give notice to; to inform; or to make known to."¹⁷ These newsletters give notice to and inform prospective clients of developments in the law and ways in which the firm can provide assistance. As such, newsletters sent to a targeted group with specific content that relates to that group clearly fall into the advertising category.

<10> Utah is the most recent state to offer an advisory opinion suggesting that newsletters to non-clients are advertisements. The Ethics Committee said, "If the newsletter, alert or brochure encourages the recipient to engage the firm's services or contact the firm for further information, extolls [sic] the firm's expertise, or otherwise contains an offer to provide legal services, then the item constitutes a "solicitation" of professional employment."¹⁸ The Committee further explained that unless the newsletter was sent to a current client, former client, or someone with whom there exists a close personal relationship, the Rules require marking the newsletter as an advertisement.¹⁹

<11> Other states under the Model Rules have come to similar conclusions. Pennsylvania reiterated that newsletters are a permissible form of advertising in 1990.²⁰ Missouri considers these to be advertisements and requires that they be marked as such when sent to prospective clients.²¹ Newsletters must be plainly marked as advertisements when sent to non-clients in Arizona as well.²² The consensus among states under the Model Rules is that newsletters to prospective clients are advertisements.

<12> States using the Model Code of Professional Conduct have come to similar conclusions.²³ The Ethics Committee in Nebraska provides a detailed explanation of the purpose of a newsletter. First, the Committee notes, "the newsletter is a calculated, rather than a spontaneous act."²⁴ The Committee continues,

The purpose of the newsletter is to generate new or additional business for the firm. Each newsletter prominently displays the name of the firm, its address, phone and fax numbers...Each article in each newsletter refers to matters of general or specific interest about which legal advice is commonly sought. While the mailings are not the subject of a general publication, they are targeted to clients, persons who have requested the mailings, or persons that the firm believes are interested in receiving the newsletter.²⁵

For these reasons the Committee concluded that mailing newsletters constitutes advertising.²⁶ Ohio similarly found:

“Newsletters, for purposes of complying with the Code of Professional Responsibility, are a form of advertising.”²⁷

<13> States with unique rules governing advertising and solicitation have also found that newsletters to prospective clients are commercial advertisements. Florida considers newsletters advertisements.²⁸ Maine describes newsletters, “While it might be argued that the newsletter is merely what it purports to be--a publication intended simply to convey general information of a legal nature--it is clear that it is designed to solicit employment for the firm.”²⁹ Newsletters inform clients of a change or development in the law, identify the attorneys who authored the article, and suggest that they be contacted to discuss the issue. This constitutes a subtle form of solicitation.³⁰

<14> The consensus among states under all types of rules indicates that newsletters, alerts, and bulletins, when sent to non-clients or prospective clients do constitute commercial advertisements. As such, compliance with CAN-SPAM is necessary in order to minimize liability.

Newsletters Directed at Current or Former Clients

<15> The tougher question for law firms is whether newsletters sent to current and former clients constitute commercial advertising. Whereas states uniformly seem to regard newsletters to non-clients as advertisements, the consensus is not as clear for clients and former clients. While many states do not differentiate between the two, several advisory opinions suggest that newsletters to clients may not be considered advertisements.

<16> Utah, while declaring newsletters to non-clients advertisements, seemed to open the door for declaring current and former client newsletters non-advertisements. The Committee suggests that newsletters to current clients, former clients, and those that a lawyer has a close personal relationship with do not require *marking* newsletters as advertisements.³¹ A Connecticut firm asked for an advisory opinion on a newsletter meant for current and former clients. The firm alleged that the newsletter was not intended to target clients in need of legal service. The Committee noted that newsletters are promotional by nature and thus governed by the Rules. However, the Committee further noted that if the recipient is not known to need legal representation, then the *labeling* requirement need not be met.³²

<17> In Florida, the Committee, while admitting that newsletters can be advertisements, said that only the information about the law firm and lawyers in it could be considered advertisements. The substantive information was not an advertisement. As such, if the

information on the lawyers and firm did not change, the newsletter need not be submitted to the Committee for pre-approval.³³ Iowa also said that newsletters to existing clients are not the type of advertisements that need to be marked pursuant to state rules.³⁴ While these states have not explicitly advised that a newsletter to a current or former client is not advertising, these opinions give law firms some support when arguing that CAN-SPAM should not apply.

<18> The opinions suggest that communications with existing clients are not advertisements because the firm need not solicit business from them. In these cases the firms are already employed by the client. However, these states are not advising that newsletters to clients are not advertisements. Instead, they hold that newsletters to these clients need not be *marked* as advertisements. The content is the same in either case. Given that so many states do consider all newsletters advertisements, the safest approach is to assume CAN-SPAM applies and therefore adhere to its provisions.

<19> One can imagine a scenario where the “transactional or relationship message” exclusion could apply to newsletters sent to current clients. The exception for facilitating, completing, or confirming a prior commercial transaction may apply in situations where a firm has been retained for general purposes and the newsletters alert clients of new developments which may affect them.³⁵ Whether the exception applies will depend on the nature of both the relationship between the parties and the content of the newsletter. The remaining exceptions seem unlikely to apply to the practice of law. Given the uncertain scope of the exception and its applicability to client newsletters, law firms may well decide to play it safe by complying with the Act.

IS NON-COMPLIANCE WORTH THE RISK?

<20> Many of the requirements of CAN-SPAM are irrelevant to legal newsletters. First of all, many current and former clients will have previously agreed to receive these newsletters and will appreciate receiving them. It is doubtful that the subject headers will be deceptive. It is equally as unlikely that the routing information from these firms will be incorrect. Indeed, this would defeat the very purpose of such newsletters. The Act fails to require that subject headers include “ADV” to mark advertisements. Without this requirement, spam filters should not remove these newsletters from inboxes, thus not reducing readership.

<21> What costs will law firms incur if they do adhere to the Act? There are two considerations. The first is advertisement retention, as required by many states. Many states require that all advertisements be retained by the lawyer/firm for one to nine

years. By considering electronic newsletters commercial advertisements, the retention laws would become applicable. While this produces a slight hassle for firms, it is not overly burdensome to file newsletters away for the required period.

<22> The second consideration is the opt-out procedure. The Act requires that advertisements clearly place near the top of the advertisement an address and instructions to opt out of receiving further e-mails.³⁶ The Act further requires that opt-out requests are adhered to within 10 days of the initial request.³⁷ Undoubtedly, it is sound business procedure to adhere to such requests regardless of statutory compulsion. Firms should willingly remove unwanted recipients from their mailing lists. Certainly there is a cost involved in operating an opt-out mechanism, but given the relatively small number of total recipients, the cost of such an operation is minimal.

CONCLUSION

<23> Most newsletters are undoubtedly commercial advertisements and should therefore adhere to CAN-SPAM requirements. While there may be an argument that newsletters to current clients are not within the scope of the Act, the cost of voluntarily expanding the scope and accepting potential over-compliance is negligible relative to the risk of deemed noncompliance. The effects of lost readership is minimal. Retaining copies of advertisements for a period stipulated by state rules also requires only minimal costs. Finally, opt-out mechanisms should be used regardless of statutory requirements. As such, the safest policy for law firms is to adhere to the requirements of the CAN- SPAM Act under all circumstances.

PRACTICE POINTERS

- Insure all firm newsletters identify themselves as advertisements, provide an opt-out mechanism, and a street address for the law firm
- Insure that subject lines could not be considered fraudulent or deceptive and that a valid return email address for opt-out requests is clearly and conspicuously displayed in the newsletter
- Insure that systems are in place to process opt-out requests within 10 days of receipt
- Insure that systems are in place to prevent any further newsletters being sent to anyone who has opted out; one such system is to maintain a centralized "suppression list" of email addresses for which opt-out

requests have been received

- Insure that all applicable state retention rules are followed.

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FOOTNOTES

1. Kevin Michael, University of Washington School of Law, Class of 2005. Thanks to Ira Rubenstein and Parag Gheewala for feedback on a draft of this article.
2. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (2003).
3. For example, many firms distributed newsletters after the passing of the CAN-SPAM Act alerting clients to the compliance issues in the Act and suggesting the firm be contacted for further assistance.
4. 15 U.S.C. § 7702 (2)(A). *See also* §7701(b).
5. *Id.*
6. *Id.* at (2)(C) (The Act gives the FTC 12 months to further define "primary purpose").
7. *Id.* at § 7704(a)(5)(A)(i)-(iii).
8. *Id.* at (a)(3)(A).
9. *Id.* at (a)(4)(A).
10. *Id.* at (a)(1), (2).
11. *Id.* at § 7702 (2)(B).
12. *Id.* at (17)(A)(i)-(v).
13. American Bar Association, *Links to State Ethics Rules Governing Lawyer Advertising, Solicitation and Marketing*, at <http://www.abanet.org/legalservices/clientdevelopment/adrules.html#> (last viewed on Mar. 6, 2004)(showing 37 states that either follow the ABA Model Rules or base their rules closely on the Model).
14. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2002).
15. *Id.* at 7.2.
16. *Id.* at 7.3(c).
17. Advisory Comm. to the Neb. State Bar Ass'n, Advisory Op. 95-2 (1995) (citing *Bissell Carpet Sweeper Co. v.*

- Masters Mail Order Co. of Washington, D.C., 140 F. Supp. 165 (Md. 1956)), *available at* <http://court.nol.org/ethics/lawyers/opinions/1990s/95-2.htm>.
18. Ethics Advisory Opinion Comm. to the Utah State Bar Ass'n, Advisory Op. 02-02 (2002) *available at* http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_02.htm.
 19. *Id.*
 20. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 90-136 A&B (1990).
 21. Legal Ethics Comm. of the Mo. State Bar, Informal Op. 960295 (1996) *available at* <http://www.mobar.org/opinions/search.htm> (and enter 960295 in the "Opinion Number" search field).
 22. State Bar of Ariz., Ethics Opinions, Formal Op. 90-07 (1990), *available at* <http://www.azbar.org/EthicsOpinions/Data/90-07.pdf>.
 23. American Bar Association, *Links to State Ethics Rules Governing Lawyer Advertising, Solicitation and Marketing*, at <http://www.abanet.org/legalservices/clientdevelopment/adrules.html#> (last viewed on March 6, 2004) (showing 4 states following the ABA Model Code).
 24. Advisory Comm. to the Neb. State Bar Ass'n, Advisory Op. 95-2 (1995) *available at* <http://court.nol.org/ethics/lawyers/opinions/1990s/95-2.htm>.
 25. *Id.*
 26. *Id.*
 27. Bd. of Comm'rs on Grievances & Discipline, The Supreme Court of Ohio, Ethics Op. 88-022 (1988) *available at* http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1988/Op%2088022.doc.
 28. Fla. Bar Standing Comm. on Adver., Op. A-99-1 (2000) *available at* <http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS.+OPINION/99-1?opendocument>.
 29. Prof'l Ethics Comm'n of the Bd. of Overseers of the Me. Bar, Ethics Op. No. 85 (1988) *available at* <http://www.mebaroverseers.org/PDF/85.pdf>.

30. *See Id.*
31. Ethics Advisory Opinion Comm. to the Utah State Bar Ass'n, Advisory Op. 02-02 (2002) *available at* http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_02.htm (emphasis added).
32. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-49, (1999) (emphasis added).
33. Fla. Bar Standing Comm. on Adver., Op. A-99-1 (2000) *available at* <http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS.+OPINION.99-1?opendocument> (The Florida Bar Association requires that newsletters be pre-submitted for approval by the Committee on Advertising before being sent to clients).
34. Bd. of Prof'l Ethics & Conduct, The Supreme Court of Iowa, Ethics Op. 95-36 (1996).
35. 15 U.S.C. § 7702 (17)(A)(i).
36. 15 U.S.C. §§ 7704(a)(5)(A)(i)-(iii), (a)(3)(A).
37. *Id.* at (a)(4)(A).

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