

10-1-2008

## Ethical Duties to Prospective Clients Who Send Unsolicited Emails

Nicole Lindquist

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjlta>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Nicole Lindquist, *Ethical Duties to Prospective Clients Who Send Unsolicited Emails*, 5 SHIDLER J. L. COM. & TECH. 8 (2008).

Available at: <https://digitalcommons.law.uw.edu/wjlta/vol5/iss2/3>

This Article is brought to you for free and open access by UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Law, Technology & Arts by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

## ETHICAL DUTIES TO PROSPECTIVE CLIENTS WHO SEND UNSOLICITED EMAILS

Nicole Lindquist<sup>1</sup>

©Nicole Lindquist

### Abstract

Recent Iowa and Massachusetts ethics opinions declared that an attorney may owe ethical obligations to prospective clients who send the attorney just a *single email* regarding legal assistance. These ethics opinions are part of a trend whereby jurisdictions are extending the duty of confidentiality to prospective clients who send unsolicited emails to attorneys, when those persons reasonably believe that the conveyed information will be held in confidence. These opinions highlight the importance for all attorneys to disclaim duties of confidentiality and representation, particularly when advertising online. This article discusses ethical opinions regarding prospective clients who send unsolicited emails and concludes by providing pointers to help attorneys avoid unintentionally extending ethical duties.

### Table of Contents

#### [Introduction](#)

[Iowa Applies "Duties to Prospective Client" to Unsolicited Email Sender When Reasonable Expectation of Confidentiality Exists](#)

[Iowa Rule 32:1.18](#)

[Massachusetts Applies Duty of "Confidential Communication" to Potential Clients Where Reasonable Expectation of Confidentiality Exists](#)

[Reasonable Belief of Confidentiality and Conflict of Interest Under Massachusetts Rules of Professional Conduct: 1.6, 1.17\(b\),](#)

[1.10\(a\)](#)

[Prior Ethics Opinions: San Diego, Arizona and New York City Extend Limited Duties to Attorneys Who Receive Unsolicited Emails from Potential Clients](#)

[San Diego and Arizona Refrain from Extending Duties to Attorneys, but Not Without Controversy](#)

[New York City Finds Duty of Confidentiality but Does Not Limit a Firm's Ability to Represent Other Clients](#)

[Impact of 2007 Opinions for Attorneys and Firms that Advertise Online: Disclaim, Disclaim, Disclaim](#)

[Conclusion](#)

### INTRODUCTION

<1>Two recent state bar ethics opinions ratcheted up attorneys' ethical obligations to prospective clients who send unsolicited email communications.<sup>2</sup> The Iowa State Bar Association Committee on Ethics and Practice Guidelines ("Iowa Bar") and the Massachusetts Bar Association Committee on Professional Ethics ("Massachusetts Bar") applied their respective rules of professional conduct to reach the same result:<sup>3</sup> when prospective or potential clients send unsolicited email(s) seeking legal assistance,<sup>4</sup> reasonably believing that the information sent will remain confidential, recipient attorneys will be bound to hold the information in confidence and may face disqualification from representing other clients in related matters.<sup>5</sup>

<2>The Iowa and Massachusetts Bar Associations extended duties to attorneys upon receipt of unsolicited emails similar to three previous ethics opinions.<sup>6</sup> The San Diego County Bar Association ("San Diego Bar"), the State Bar of Arizona Committee on Rules of Professional Conduct ("Arizona Bar") and the Association of the of the City of New York Committee On Professional and Judicial Ethics ("New York Committee") issued opinions regarding like matters, but extended varied duties to attorneys in relation to unsolicited emails.

Published by UW Law Digital Commons, 2008

<3>The combination of the five opinions forms a general guideline for attorneys who receive unsolicited emails from potential clients regarding legal services. Where a potential client has a reasonable expectation that his or her unsolicited email to an attorney will

remain confidential, receipt of such email triggers certain ethical duties depending on the jurisdiction and circumstances. However, when a potential client does not have a reasonable belief of confidentiality, an attorney owes fewer obligations to that potential client, if any at all. Given that Iowa and Massachusetts ethical rules<sup>9</sup> reflect those in most states,<sup>10</sup> these new opinions may influence other jurisdictions with respect to potential clients who send unsolicited emails.

<4>This article discusses the Iowa and Massachusetts Bar opinions and previous opinions addressing the issue of prospective client obligations, and considers their potential significance for other bar associations and practitioners.

#### IOWA APPLIES "DUTIES TO PROSPECTIVE CLIENT" TO UNSOLICITED EMAIL SENDER WHEN REASONABLE EXPECTATION OF CONFIDENTIALITY EXISTS

<5>In August 2007, the Iowa Bar became the first state bar association to provide guidance on applying Model Rule of Professional Conduct 1.18<sup>9</sup> to persons who send unsolicited emails regarding legal assistance.<sup>10</sup> The Iowa opinion concluded that an attorneys' ethical obligations may be triggered upon opening an email if the sender has a reasonable belief that the email will remain confidential.<sup>11</sup> Given that most states proposed to adopt or adopted Model Rule 1.18, the Iowa Bar's decision may guide other bar associations when considering this issue.<sup>12</sup>

#### Iowa Rule 32:1.18

<6>To qualify for protection in Iowa, an email sender must qualify as a prospective client under Iowa Rule 32:1.18. This rule defines a prospective client as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter . . . ."<sup>13</sup> Once a person becomes a prospective client, attorneys' discussions, including emails, with said prospective client are confidential as if the client was a former client pursuant to Iowa Rule 32:1.9.<sup>14</sup> In addition, attorneys and their firms are prohibited from representing clients with interests materially adverse to those of a prospective client in the same or substantially related matter.<sup>15</sup> However, this limitation likely only applies when a prospective client has shared information that "could be significantly harmful to" the opposing party.<sup>16</sup>

<7>The prospective client protection is further limited by Iowa Rule 32:1.18(d). Attorneys who have received disqualifying information from prospective clients may overcome the disqualification in two ways. First, an attorney may avoid disqualification by receiving written and informed consent from both the affected party and the prospective client.<sup>17</sup> Second, an attorney that received the disqualifying information may establish: (a) that he or she took "reasonable measures" to avoid exposure to more information than reasonably necessary to determine whether the attorney may represent the prospective client; (b) the attorney is timely screened from participating and does not receive any part of the fee; and (c) written notice is promptly given to the prospective client.<sup>18</sup>

<8>To determine whether Iowa Rule 32:1.18 protects persons who send a single unsolicited email requesting counsel, the Iowa Bar compared the terms "unilateral communication" and "unsolicited communication."<sup>19</sup> Unilateral communications are those in which the communicator does not have a reasonable expectation that an attorney-client relationship will form and are therefore not protected under Iowa Rule 32:1.18.<sup>20</sup> However, unsolicited communications are not necessarily unilateral.<sup>21</sup> The Iowa Bar indicated that attorneys who actively invite potential clients to submit information about legal issues are inviting bilateral communications from persons who view the invitation. An example of such an invitation is an attorney's Web site that encourages viewers to submit emails about possible claims. Absent a proper disclaimer, a potential client needs to send only *one* unsolicited email to that attorney to establish a bilateral communication.<sup>22</sup> The Iowa Bar compared receipt of an email from a firm's poorly disclaimed Web site to a voicemail message that "encouraged the caller to leave a detailed message" about his or her claim, which the Iowa Bar also considered a bilateral communication.<sup>23</sup>

<9>To clarify the difference between non-confidential "unilateral communication" and confidential "unsolicited communication" protected by Iowa Rule 32:1.18, the Iowa Committee devised two factors to determine if ethical duties are owed. The two factors are as follows:

- 1) Examine and identify all communication to the public in general and prospective client in particular to determine if it can be interpreted to create a reasonable expectation that the lawyer or law firm was willing to discuss the possibility of representation,

- 2) Determine if the lawyer or law firm did, said or published anything that would lead a reasonable person to believe that

they could give or share factual or other confidential information with the lawyer without first meeting the lawyer and establishing a client-lawyer relationship.<sup>24</sup>

Lindquist: Ethical Duties to Prospective Clients Who Send Unsolicited Emails

<10>The Iowa Bar concluded that if both factors are answered affirmatively, an attorney or law firm is obligated to hold the information communicated in confidence and may be limited in representing other clients in a related matter.<sup>25</sup> Thus, when a prospective client sends an unsolicited email with a reasonable belief the information will remain confidential, the recipient attorney owes that prospective client duties under Iowa Rule 32:1.18 unless the attorney has followed either of the two exceptions pursuant to Iowa Rule 32:1.18(d).

#### MASSACHUSETTS APPLIES DUTY OF "CONFIDENTIAL COMMUNICATION" TO POTENTIAL CLIENTS WHERE REASONABLE EXPECTATION OF CONFIDENTIALITY EXISTS

<11>The Massachusetts Bar opinion addressed the issue of what duties are owed to potential clients who send unsolicited emails and reached a similar result as the Iowa Bar. Massachusetts, however, has not yet adopted Model Rule 1.18. Instead, the Massachusetts Bar applied Massachusetts Rules of Professional Conduct 1.6, 1.7(b) and 1.10(a).<sup>26</sup> Therefore, the Massachusetts Bar opinion could impact jurisdictions that have not adopted Model Rule 1.18, including California, because the Massachusetts formula offers a slight variation from the standard approach.<sup>27</sup>

<12>Unlike the Iowa Bar, however, the Massachusetts Bar issued an opinion in response to a specific scenario: a potential client emails an attorney from a link on the law firm's Web site that makes no disclaimer regarding confidentiality. In the correspondence, the email sender expresses interest in bringing a claim against another party that the firm happens to represent in an unrelated matter. The attorney, upon discovering the dilemma, declines to represent the potential client. The Massachusetts Bar addressed whether the information communicated by the potential client is confidential to the attorney who received it.<sup>28</sup>

#### Reasonable Belief of Confidentiality and Conflict of Interest Under Massachusetts Rules of Professional Conduct: 1.6, 1.17(b), 1.10(a)

<13>The Massachusetts Bar applied the aforementioned ethical rules to protect potential clients' email communications.<sup>29</sup> First, the Massachusetts Bar applied Rule 1.6—"Confidentiality of Information"<sup>30</sup>—to persons who send emails seeking legal advice via law firm Web sites that are not properly disclaimed.<sup>31</sup> Massachusetts Rule 1.6(a) states, "[a] lawyer shall not reveal any information related to representation of a client unless the client consents after consultation," with certain exceptions.<sup>32</sup> The opinion asserts that an improperly disclaimed Web site creates a reasonable belief that an attorney or firm has "implicitly agreed to consider" forming an attorney-client relationship with the email sender. Although an attorney-client relationship may never form, an attorney is obligated to hold all information relating to representation in confidence, as if the attorney had personally consulted with the email sender.<sup>33</sup>

<14>Second, the Massachusetts Bar determined that attorneys and their firms might also face limits when defending a retained client in similar matters due to conflicts of interest. Massachusetts Rule of Professional Conduct 1.7(b)—"Conflict of Interest: General Rule"—prohibits attorneys from representing clients when such representation would bring the attorney into a conflict of interest with a third party.<sup>34</sup> For example, if an attorney is obligated to hold an unsolicited email in confidence because of Massachusetts Rule 1.6, and maintaining that confidence would materially limit that attorney's ability to represent a retained client, the attorney and the firm would be disqualified from representing either client.<sup>35</sup>

<15>Therefore, unlike Iowa, Massachusetts varies the traditional attorney-client privilege and extends only some duties to potential clients who send unsolicited emails with a reasonable belief that the email will be held in confidence.

#### PRIOR ETHICS OPINIONS: SAN DIEGO, ARIZONA AND NEW YORK CITY EXTEND LIMITED DUTIES TO ATTORNEYS WHO RECEIVE UNSOLICITED EMAILS FROM POTENTIAL CLIENTS

<16>The 2007 Iowa and Massachusetts Bar opinions follow the San Diego Bar, Arizona Bar and New York City Committee ethics opinions, which extended varied duties to potential clients who send unsolicited emails. The reasoning in these earlier opinions suggests that a prospective client's reasonable belief, whether labeled as such or not, will be protected in at least in some circumstances. The opinions cumulatively establish a trend of jurisdictions protecting the reasonable beliefs of prospective clients who send unsolicited

### San Diego and Arizona Refrain from Extending Duties to Attorneys, but Not Without Controversy

<17>The San Diego County Bar and the Arizona Bar refrained from extending duties to prospective clients who send unsolicited emails when an attorney's contact information alone prompted the communication.<sup>36</sup> These bar associations addressed fact patterns where an attorney received an unsolicited email as a result of a bar association Web site,<sup>37</sup> or where an attorney's email address was published online, giving rise to the unsolicited email.<sup>38</sup> The bar associations found that no reasonable belief of confidentiality existed in such instances. Therefore, attorneys in those jurisdictions in those circumstances do not owe duties to email senders under each state's respective ethical rules.<sup>39</sup> However, both opinions establish some concern about what constitutes a reasonable belief.<sup>40</sup> The implication in these opinions is that *if* presented with a scenario where a reasonable belief of confidentiality existed, these bar associations would likely reach a similar conclusion as the Iowa and Massachusetts Bars.<sup>41</sup>

### New York City Finds Duty of Confidentiality but Does Not Limit a Firm's Ability to Represent Other Clients

<18>Unlike the San Diego and Arizona opinions, the New York City Committee held that unsolicited emails sent from potential clients may create a duty of confidentiality in certain circumstances when a belief about confidentiality is "ill-conceived or even careless."<sup>42</sup> As the first bar association to confront the topic in 2001, the New York City Committee responded to a scenario where an attorney receives an unsolicited email from a potential client as a result of the law firm's Web site that fails to disclaim confidentiality.<sup>43</sup> The information disclosed by the potential client brings the firm into a conflict of interest with a retained client. In such scenarios, New York ethical rules require attorneys who receive such good faith emails to hold the information in confidence.<sup>44</sup> Despite the confidentiality requirement, the attorney and the firm the attorney works for would not be disqualified from representing the retained client because there was no opportunity to reject the unsolicited email.<sup>45</sup>

<19>The New York City approach can be further distinguished from the other approaches in several ways. First, the New York City opinion only addresses the duty of confidentiality when there is a conflict of interest created. There is no guidance on unsolicited emails sent from prospective clients who do not create a conflict of interest within a firm. Second, the language in the opinion does not refer to reasonable or unreasonable beliefs regarding confidentiality, but instead hinges on a prospective client's intention to ensure confidentiality and good faith belief in seeking legal advice.<sup>46</sup> This belief appears to be broader than a reasonable belief referred to in the 2007 opinion because of the qualifying phrase "a [protected] belief may be ill-conceived or even careless . . ."<sup>47</sup> Third, New York City would not require disqualification in an instance where a solicitor intentionally creates a conflict of interest via an unsolicited email in order to prevent adversarial representation by the receiving attorney or firm.<sup>48</sup>

<20>Despite these differences, the New York City approach highlights the importance of properly disclaiming duties to potential clients to prevent "ill-conceived or even careless" beliefs that information will remain confidential.<sup>49</sup> While not using the phrase "reasonable belief," the reasoning of New York City Committee is similar to that in the 2007 opinions: when a prospective client sends an unsolicited email to an attorney, absent a disclaimer on the attorney or firm's Web site, there may be ethical duties that attach upon receipt of the email depending on the client's beliefs regarding confidentiality.

### IMPACT OF 2007 OPINIONS FOR ATTORNEYS AND FIRMS THAT ADVERTISE ONLINE: DISCLAIM, DISCLAIM, DISCLAIM

<21>The 2007 opinions present two new approaches that confront potential ethical duties to unsolicited email senders. Under the rules established by Iowa and Massachusetts, which are reinforced by San Diego, Arizona and New York City, a potential client's reasonable beliefs about confidentiality may trigger an attorney's obligations to hold the information emailed in confidence. Attorneys must be on notice of communications with potential clients that could bind them under the rules of professional conduct and must also actively disclaim duties of confidentiality to avoid inadvertently extending ethical obligations.

<22>The major challenge confronting attorneys is deciding whether an email sender has, or could have, a reasonable belief that an attorney-client relationship could form. These opinions offer some guidance on when a belief may be reasonable. First, the Iowa Bar listed two factors in attempts to clarify when an email sender's belief of confidentiality may be reasonable. Second, the opinions posit

that an attorney who maintains a Web site inviting people to send emails regarding representation, *without proper disclaimers*, is always obligated to potential clients who send unsolicited emails. Both bar associations consider Web sites “marketing tools” that create reasonable expectations that an attorney will hold information communicated in confidence.<sup>49</sup>

<23> Likewise, the opinions also give guidance on when a “belief of confidentiality” may not be reasonable such that prospective clients may not “foist a duty of confidentiality on an unsuspecting lawyer.”<sup>51</sup> A belief of confidentiality is not reasonable, for example, when an attorney’s contact information alone leads a potential client to send an email.<sup>52</sup> An attorney must act to prompt a response from a potential client, giving rise to a reasonable belief of confidentiality.<sup>53</sup> Moreover, the Virginia State Bar Committee recently issued an opinion and found that there is no reasonable belief of confidentiality in certain circumstances which provides additional guidance. There, the Committee addressed the following scenario: a law firm maintains a passive Web site that includes information about the practicing attorneys, including email addresses, but does not encourage viewers to email confidential information or to contact the attorneys via email.<sup>54</sup> As noted, the Virginia Bar found that “including an email address on a law firm’s Web site or publishing a telephone number in a yellow-page advertisement, without more, is not the solicitation of confidential information from a prospective client.”<sup>55</sup> While the line may be blurred regarding when a belief of confidentiality is reasonable, attorneys should properly disclaim duties, particularly on Web sites, as one strategy to prevent unintentionally extending the duty of confidentiality.

<24> A second challenge confronting attorneys is effectively disclaiming obligations. This includes writing proper disclaimers to avoid fostering reasonable beliefs about confidentiality and creating a process for obtaining effective consent.<sup>56</sup> Online disclaimers present a unique challenge because viewers can easily ignore, skip or misunderstand them.<sup>57</sup> Professor Hricik and Mr. Scott assert that passive disclaimers online that claim “no attorney-client relationship” are not enough to defeat claims of confidentiality.<sup>58</sup> Alternatively, a firm using an “appropriately worded no confidentiality approach” in its disclaimer may avoid confidentiality,<sup>59</sup> but may also destroy any future claim of privilege if that email sender becomes a client.<sup>60</sup>

<25> Despite the difficulties in writing disclaimers, a disclaimer should be clearly written in terms that people can easily understand.<sup>61</sup> Once an online disclaimer is valid, commentators suggest that disclaimers should require some sort of assent, particularly in the form of “clickwrap” which requires a viewer to physically click in order to assent.<sup>62</sup>

<26> Attorneys must be particularly attuned to these new ethical rules because of the challenges technology imposes on the practice of law. As technology changes how people communicate, the online forms of communication may become, if they have not already, a substitute for the initial client interaction. Although there is never a personal conversation, or a “meeting of the minds,” an attorney may have “agreed to consider” or “discussed” significant legal matters with a potential client by opening an email.<sup>63</sup> These modes of communication are not limited to Web sites, but may also include attorney chat rooms, blogs, online advertising and virtual business cards. Moreover, practitioners should be aware of the impact of their statements on social-networking sites where they could be “advertising” their services or encouraging prospective clients to email regarding legal assistance. As the opinions highlight, disclaiming as clearly and as frequently as possible remains important.

## CONCLUSION

<27> By extending the duty of confidentiality and limiting attorneys from representing other clients in similar matters, the Iowa and Massachusetts Bar opinions will likely become influential in numerous jurisdictions as email remains a dominant form of communication.<sup>64</sup> These opinions establish a somewhat ambiguous standard for when an attorney is ethically obligated to a potential client who sends an unsolicited email. When faced with an ethical dilemma, the deciding factor regarding duties seems to be whether there is a reasonable belief of confidentiality. There appears to be a general rule: where an attorney has done no more than publish contact information, in a phone book or online directory for example, an expectation of confidentiality would likely be unreasonable. However, when attorney does more to entice a potential client to contact the attorney, for example, by creating a Web site that does not properly disclaim the duty of confidentiality, a potential client may have reasonable expectations. In all cases, the message of the ethics opinions is clear: disclaim confidentiality and other obligations where possible, particularly on Web sites and other forms of advertising that invite communication from potential clients.

1. Nicole Lindquist, University of Washington School of Law, J.D. program Class of 2009, Thank you to Professor Anita Ramasastry of the University of Washington School of Law, *Washington Journal of Law, Technology & Arts*, Vol. 5, Iss. 2 (2008), Art. 3 and Jeff Bashaw for their invaluable help and feedback on this article. Thank you also to Catherine Sanders Reach and Joshua Poje of the American Bar Association Legal Technology Resource Center.
2. The term “unsolicited communication” refers to when an attorney or law firm does not request or solicit the transmission of information. See Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2001-1, 2 (2001), available at [www.westlaw.com](http://www.westlaw.com) (2001 WL 1870203) (“The fact that the law firm maintained a Web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm’s Web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm’s general availability to accept clients . . . .”).
3. Iowa State Bar Ass’n Comm. on Ethics and Practice Guidelines, Op. 07-02 (2007) [hereinafter Iowa Ethics Opinion], available at [http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d/\\$FILE/ISBA%20Ethics%20Opinion%2007-02%20Prospective%20Client%20Comment%202.pdf](http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d/$FILE/ISBA%20Ethics%20Opinion%2007-02%20Prospective%20Client%20Comment%202.pdf); Mass. Bar Ass’n. Comm. on Prof’l Ethics, Op. 07-01 (2007) [hereinafter Massachusetts Ethics Opinion], available at <http://www.massbar.org/for-attorneys/publications/ethics-opinions/2000-2009/2007/opinion-07-01>.
4. The terms potential and prospective client will heretofore be used interchangeably for purposes of this article. See Iowa Ethics Opinion, *supra* note 3 (using the terms potential and prospective interchangeably).
5. Duties owed to prospective clients have increased in the past several decades but the extent of these duties remains unclear. See Douglas K. Schnell, Note, *Don’t Just Hit Send: Unsolicited E-mail and the Attorney-Client Relationship*, 17 HARV. J.L. & TECH. 533, 540-41 (2004), available at <http://jolt.law.harvard.edu/articles/pdf/v17/17HarvJLTech533.pdf>.
6. See San Diego County Bar Ass’n, Eth. Op. 2006-1 (2006) [hereinafter San Diego Ethics Opinion], available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1>; see also State Bar of Ariz. Comm. on Rules of Prof’l Conduct, Op. 02-04 (2002) [hereinafter Arizona Ethics Opinion], available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=288>; see also Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2001-1 (2001) [hereinafter New York Ethics Opinion], available at <http://www.westlaw.com> (2001 WL 1870203).
7. Iowa applied its ethical rule, which follows ABA Rule 1.18, to certain unsolicited email senders; Massachusetts applied its ethical rule modeled after ABA Rule 1.6 in addition to other rules concerning conflicts of interest, to similarly positioned email senders. See MODEL RULES OF PROF’L CONDUCT R. 1.18, 1.6, 1.9 (2002).
8. Charlotte K. Stretch & Susan M. Campbell, *State Committees Review and Respond to Model Rules Amendments*, 15 No. 1 PROF. LAW 14 (2004), [http://www.abanet.org/cpr/jclr/review\\_art.pdf](http://www.abanet.org/cpr/jclr/review_art.pdf) (last updated November 30, 2007).
9. Iowa Rule of Professional Conduct 32:1.18 is modeled after ABA Rule 1.18. See MODEL RULES OF PROF’L CONDUCT R. 1.18 (2002).
10. See Iowa Ethics Opinion, *supra* note 3.
11. See *id.*
12. Iowa is one of thirty states and the District of Columbia to adopt Model Rule 1.18, in addition to eight states that have proposed its adoption. See Stretch & Campbell, *supra* note 8, at 7 (“All states except Mississippi and Virginia have proposed or adopted this new rule regarding duties to prospective clients. California has not yet reviewed this rule. North Dakota’s rule refers to ‘potential’ clients.”). As more states adopt this Rule, a standard approach may evolve across jurisdictions faced with potential duties arising out of unsolicited emails from prospective clients.
13. IOWA RULES OF PROF’L CONDUCT R. 32:1.18 (2005).
14. “Even when no client-lawyer relationship ensues, a lawyer who has had discussion with a prospective client shall not use or reveal information learned in the consultation, except as Rule 32:1.9 would permit with respect to information of a former

client." IOWA RULES OF PROF'L CONDUCT R. 32:1.18(b) (2005).

15. IOWA RULES OF PROF'L CONDUCT R. 32:1.18 (2005).  
Erdquist, Ethical Duties to Prospective Clients Who Send Unsolicited Emails
16. David Hricik & Chase Edward Scott, *Avoiding Conflicts from Client E-mails*, 11 No. 3 J. INTERNET L.1, 1, 1 (2007).
17. See IOWA RULES OF PROF'L CONDUCT R. 32:1.18(d) (2005).
18. *Id.*
19. Iowa Ethics Opinion, *supra* note 3, at 2-3.
20. See IOWA RULES OF PROF'L CONDUCT R. 32:1.18 cmt. 2 (2005) ("Not all persons who communicate information to a lawyer are entitled to protection under this 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' within the meaning of paragraph (a).").
21. Not all bar associations have made such a distinction between unilateral and unsolicited communication. For example, New Hampshire's Rule 1.18 protects all persons who "in a good faith search for representation, provide information *unilaterally* to a lawyer . . . . This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other *unilateral* forms, and in the process disclose confidential information that warrants protection." N.H. RULES OF PROF'L CONDUCT R. 1.18 cmt. 1 (2008) (emphasis added).
22. "[A]n Internet [W]eb page that is designed to allow a potential client to submit specific questions of law or fact to the lawyer for consideration would constitute bilateral communication with an expectation of confidentiality." Iowa Ethics Opinion, *supra* note 3, at 3.
23. See *id.*
24. Iowa Ethics Opinion, *supra* note 3, at 3-4.
25. *Id.* at 4.
26. Massachusetts' rules are similar to the correspondingly numbered Model Rules. See MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.7, 1.10 (2008), available at [http://www.abanet.org/mrpc/mrpc\\_toc.html](http://www.abanet.org/mrpc/mrpc_toc.html).
27. See Stretch & Campbell, *supra* note 8.
28. See Massachusetts Ethics Opinion, *supra* note 3.
29. However, not all states apply confidentiality rules similarly. See Va. State Bar Comm. on Legal Ethics, Op. 1842 (2008) [hereinafter Virginia Ethics Opinion], available at <http://www.vacle.org/opinions/1842.htm>. The Virginia Committee instructed that its Rule of Professional Conduct 1.6 does not protect an individual who sends an email to a law firm that maintains a Web site, which does not invite viewers to submit confidential information. See *id.* Indeed, the "lawyer does not owe a duty of confidentiality to a person seeking representation who unilaterally transmits unsolicited confidential information via email to the firm using the lawyer's email address posted on the firm's Web site . . . . The Committee believes that it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client, simply because the lawyer lacks ability under the circumstances to control the nature and extent of information being provided." *Id.* The Virginia Bar posited that the duty of confidentiality to prospective clients will be determined on a case-by-case basis with regard to whether a prospective client has a reasonable belief that the information emailed will remain confidential. See *id.* However, if the Web site asked clients to fill-in a form detailing their legal issues online, a different ethical duty would apply. See *id.*
30. MASS. RULES OF PROF'L CONDUCT R. 1.6 (2008).
31. See Massachusetts Ethics Opinion, *supra* note 3.
32. MASS. RULES OF PROF'L CONDUCT R. 1.6 (2008).  
Published by UW Law Digital Commons, 2008
33. See Massachusetts Ethics Opinion, *supra* note 3 (citing State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 02-04 (2002)); see also MASS. RULES OF PROF'L CONDUCT R. 1.6 (2008)



34. "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person of whom the lawyer's own interests are not (1) the lawyer reasonable believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of common representation and the advantages and risks involved." MASS. RULES OF PROF'L CONDUCT R. 1.7(b) (2008).
35. "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9." MASS. RULES OF PROF'L CONDUCT R. 1.10(a) (2008).
36. See San Diego Ethics Opinion, *supra* note 6; see also Arizona Ethics Opinion, *supra* note 6.
37. See San Diego Ethics Opinion, *supra* note 6. The San Diego Bar responded to the following scenario: a car accident victim emails an attorney seeking representation. *Id.* The victim found the attorney's email on a state bar Web site and submits confidential information to the attorney, who coincidentally, has already interviewed another potential client involved in the same accident. *Id.*
38. See Arizona Ethics Opinion, *supra* note 6. The Arizona Bar responded to the following scenario: an employee intends to submit a complaint against his employer and finds several employment attorneys online. *Id.* The employee emails confidential information and one of the emailed attorneys happens to be outside counsel for the employer; the attorney does not maintain a Web site or advertisement but instead, has a published email address somewhere on the Internet. *Id.*
39. San Diego County applied California Rules of Professional Conduct 3-310(e) and 3-500. See CAL. RULES OF PROF'L CONDUCT, R. 3-310, 3-500 (2008). Arizona applied Arizona Ethics Rule 1.6, 1.7 and 1.8, which are modeled after ABA Rules 1.16, 1.7, 1.18. See MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.7, 1.10 (2002). However, it is important to note that Arizona has since adopted Rule 1.18. AZ. RULES OF PROF'L CONDUCT R. 1.18. (2008) which is modeled after ABA Rule 1.18. See MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002). At the time the Arizona Bar Opinion was published, Arizona courts considered the following factors when determining if an attorney's duties had been triggered: "(1) the would-be client sought and received advice/assistance from a lawyer; (2) the nature of the services rendered; (3) the circumstances under which confidences were divulged; (4) the client's reasonable belief that an attorney-client relationship existed; (5) the client's expectation of confidentiality; and (6) the payment of a fee." Arizona Ethics Opinion, *supra* note 6 (emphasis added).
40. See San Diego Ethics Opinion, *supra* note 6; see also Arizona Ethics Opinion, *supra* note 6.
41. The San Diego County Bar posited that if a potential client found "an e-mail address at the bottom of a . . . yellow page telephone listing under an 'attorney' category, without disclaimers" could give rise to a reasonable expectation of confidentiality which would appear to be protected under California ethics rules. San Diego Ethics Opinion, *supra* note 6; see also, Arizona Ethics Opinion, *supra* note 6.
42. See New York Ethics Opinion, *supra* note 6, at 6.
43. The New York Ethics Opinion does not establish what type of, if any, disclaimers exist on the Web site in the scenario addressed by the Committee. *Id.* at 1. However, it can be inferred that the conclusion reached by the Committee applies to non-disclaimed Web sites and those "whose warnings are insufficient." *Id.* at 8. The Committee provided the following rationale for the rule, "we believe that the strong policy of encouraging clients to seek legal advice . . . warrants protecting the information in this case – especially given the absence of any warning against the disclosure of confidential information posted on the Web site." *Id.* at 7.
44. See New York Ethics Opinion, *supra* note 6, at 6 (noting that even though a potential client's belief "may be ill-conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her.").
45. See New York Ethics Opinion, *supra* note 6, at 3-4.

46. *Id.* at 8.

47. *Id.* at 6.

48. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-02 (2006), available at [www.westlaw.com](http://www.westlaw.com) (2006 WL 1662502). It should also be noted that New York proposed adopting New York Rule of Professional Conduct Rule 1.18, which would place the duty on prospective clients who send unsolicited emails.
49. New York Ethics Opinion, *supra* note 6, at 6.
50. See Virginia Ethics Opinion, *supra* note 29; see also Iowa Ethics Opinion, *supra* note 3; see also Massachusetts Ethics Opinion, *supra* note 3.
51. Massachusetts Ethics Opinion, *supra* note 3.
52. See *id.*; see also Iowa Ethics Opinion, *supra* note 3.
53. An attorney's contact information, including name, address, phone number, do not constitute an invitation for bilateral communication or a reasonable belief of confidentiality of shared information. See Iowa Ethics Opinion, *supra* note 3; see also Massachusetts Ethics Opinion, *supra* note 3.
54. See Virginia Ethics Opinion, *supra* note 29.
55. *Id.*
56. See Hricik & Scott, *supra* note 16, at 12-15.
57. See Schnell, *supra* note 5, at 558.
58. Hricik & Scott, *supra* note 16, at 14.
59. *Id.* (citing State Bar Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. Interim No. 03-0001 (2005) (finding the following disclaimer sufficient to defeat reasonable beliefs of confidentiality: "I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm.")).
60. See *id.*
61. See Schnell, *supra* note 5, at 556-58.
62. See Hricik & Scott, *supra* note 16, at 13 (citing Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d Cir. 2002) (explaining that "[c]lickwraps are the only certain way to ensure that a court will hold that the prospective client manifested assent to the terms."); see also Schnell, *supra* note 5, at 561 (internal citations omitted).
63. See Schnell, *supra* note 5, at 537-38. Attorneys must also be aware that the absence of a contract does not preclude the existence of an attorney-client relationship. *Id.*
64. See generally John Westenkamp, Note, *The Impact of E-mail on Attorney Practice and Ethics*, 34 McGEORGE L. REV. 135 (2002) (discussing email use among attorneys).