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**Volume 14, Number 2 - November/December 2004**

### **Spam and your law practice**

*Are those e-mailed newsletters legal*

By L. Elizabeth Bowles

Spam is hard to take for all of us. But what if your law firm wants to send out "helpful information" to its clients?

When the exciting potential of the Internet was just being discovered, no one dreamed that one day the phrase "You've got mail!" would come to mean "You've got spam (and lots of it)." It's annoying, bothersome, irritating, distracting and expensive. Consumers hate it, Internet Service Providers (ISPs) pay for it, and businesses lose time and productivity over it. Spam threatens to bring to a screeching halt the Internet (and e-mail) as we know it.

In an attempt to deal with the increasing problem of spam, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM), in late 2003. Although intended to target spammers, CAN-SPAM also swept into its purview many e-mail communications — such as legal e-newsletters — that had not traditionally been considered "spam." Therefore, anyone who sends out an e-mail newsletter or any e-mail solicitation must be aware of the act's mandates. This includes lawyers, law firms and legal organizations.

The CAN-SPAM Act became effective on Jan. 1, 2004. Congress named the Federal Trade Commission the primary agency for its enforcement. Although the FTC has yet to issue its final rulemaking, the act is currently in force, and anyone using e-mail to communicate with potential clients should be aware of its requirements.

The FTC defines spam as any "unsolicited commercial e-mail" (UCE), and this is also the commonly understood definition of spam. So how did UCE come to be called "spam?" Blame the lawyers. In 1994, two Phoenix lawyers hired a programmer to write code to send a message to every newsgroup on USENET about their services. Tens of thousands of members of these newsgroups received the lawyers' message. The newsgroup participants started calling the commercial message "spam" in honor of the famous Spam skit by the British comedy troupe Monty Python. In this skit, every menu item included Spam luncheon meat — whether or not the customer wanted it. The term "spam" came to mean something that a person does not want but is constantly offered.

It should be noted that not all unexpected e-mail is spam. Spam, by definition, is *unsolicited commercial* e-mail, which means that the e-mail must be both commercial in nature *and* unsolicited in order to qualify as spam. A newsletter distributed to those who request it is not spam because the e-mail is not unsolicited. Unsolicited e-mails sent by individuals as a form of personal communication are not spam because they are not commercial. The CAN-SPAM Act only regulates *commercial* electronic mail messages. Therefore, defining what e-mail is commercial is critical under CAN- SPAM.

The act defines "commercial" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose)." The key language in this definition is "primary purpose." If the primary purpose of the e-mail is not commercial, then CAN-SPAM does not apply. For lawyers who send out e-newsletters to clients and potential clients, it is critical to determine whether the primary purpose of these e-mails is "advertising or promotion of a commercial product or service."

Few would argue that legal bulletins and e-newsletters have *no* commercial purpose; after all, if there were no business development to be gained from sending out legal newsletters by e-mail, few lawyers would bother. In fact, legal newsletters serve to provide information about the lawyer or firm, to promote the lawyer or firm's expertise, knowledge or utility in a particular area of law, and to remind clients and potential clients that the lawyer is there to serve the individual's legal needs.

Those state ethics committees that have addressed the question have found that newsletters sent to prospective clients *are* ads. However, these e-newsletters also serve another purpose — to inform and educate about current developments in the law.

Asked to define the terms contained in CAN-SPAM, the FTC issued an Advance Notice of Proposed Rulemaking (ANPR) in March of 2004 that addressed, among other matters, the definition of "primary purpose." The FTC suggested seven different possible criteria, including one that would consider an e-mail commercial if the "commercial advertisement or promotion in an e-mail is more than incidental to the e-mail." Following comment on the ANPR, the FTC issued a Notice of Proposed Rulemaking (NPR) on Aug. 13, 2004. The NPR suggests the following three-part definition of "primary purpose":

An e-mail will be considered to be commercial, if

1. "... [A]n e-mail message contains *only* content that advertises or promotes a product or service;"
2. The e-mail message contains both commercial content and "transactional or relationship content" [a communication directly related to the transaction such as completion or facilitation, warranty information, notifications regarding terms, standing or account balance, employment, and delivery]. Such "transactional or relationship" messages are considered commercial where a recipient reasonably interpreting the subject line of the message would conclude it to be advertising a product or service *or* "the message's transactional or relationship content does *not* appear at or near the beginning of the message;" and

3. The e-mail message contains both commercial content and noncommercial content and a recipient reasonably interpreting the subject line of the message would conclude it to be advertising a product or service or "a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service."

Comments on the NPR closed on Sept. 13, 2004, and the FTC is required to issue its final rulemaking by Dec. 16, 2004.

The ultimate definition of primary purpose is very important, since many legal e-newsletters would arguably fall under the third definition above. CAN-SPAM requires any e-mail whose "primary purpose" is advertising or soliciting to comply with certain rules, and the penalties for failing to comply with these requirements range from fines to jail time, depending on the egregiousness of the violation.

If legal e-newsletters are deemed to fit the definition of "commercial e-mail," then lawyers and firms will need to be certain that their e-newsletters comply not only with the Rules of Professional Responsibility, but with CAN-SPAM as well.

It is generally understood that the ethics rules covering advertising apply to e-newsletters sent to nonclients or potential clients. However, informational e-newsletters that do not contain direct promotion of the lawyer's services pose a more-difficult ethical question, especially when sent to current clients. Some ethics boards have found that e-newsletters sent to current clients are solicitations, while others have determined that they are not.

Enter CAN-SPAM. Depending on the content and subject line of the e-newsletter, the FTC's proposed definition of "primary purpose" may cause informational e-newsletters to be categorized as "commercial," regardless of to whom they are sent. If so, these e-newsletters will have to make clear that they are ads or solicitations, even if sent to existing clients, and might ultimately have to include a required label, such as ADV (for "advertisement").

While the ethics rules and CAN-SPAM share certain requirements, they are not co-equal, and CAN-SPAM may apply even where the ethics rules do not. A lawyer should fully understand the requirements of both before sending out unsolicited e-mail.

Under the Model Rules of Professional Responsibility, which have been adopted by the majority of the states, lawyers may advertise (following Model Rule 7.2), subject to the limitations of Rules 7.1 and 7.3. Model Rule 7.1 regulates the content of the communication. It states that a lawyer may not make a false or misleading statement, may not make a statement that contains a material misrepresentation of fact or law — including a misleading omission — and may not create unjustifiable expectations of the results the lawyer can obtain.

The relevant provision of Model Rule 7.3 provides that "every written, recorded or electronic communication from a lawyer soliciting professional employment . . . shall include the words advertising material'. . . at the beginning and ending of any electronic communication," unless the recipient is a lawyer or has a family, close personal or prior professional relationship with the lawyer.

CAN-SPAM layers on another set of requirements. Whereas Rule 7.1 regulates the content of a lawyer's message, CAN-SPAM regulates not only the truthfulness of the content, but the "truthfulness" of the structure of the e-mail message itself. Furthermore, CAN-SPAM's definition of a commercial e-mail does not contain any exemption for family, friends or current clients, and the FTC's proposed definition of "primary purpose" would not allow for any such blanket exception except to the narrow extent of a "transactional or relationship message."

Therefore, any e-newsletter, whether sent to current or prospective clients, must comply with CAN-SPAM, even if the lawyer would not be required to identify the e-newsletter as an ad or solicitation under Rule 7.3.

The act provides that each commercial message must comply with the following:

- Transmission information may not be materially false or materially misleading. This includes the header information as well as the "from" line;
- the subject line may not be false or misleading as to a material fact regarding the message's content;
- each solicitation must clearly and conspicuously include a functioning return e-mail address or other Internet-based mechanism that allows a recipient to opt out of receiving future mailings;
- anyone who requests removal must be removed within 10 business days of the request; and
- each commercial message must contain clear and conspicuous identification that the message is an ad or solicitation (unless the recipient gives prior affirmative consent), clear and conspicuous opportunity to opt out, and a valid "physical postal" address of the sender.

Lawyers need to be especially careful of these requirements, since many rely on in-house IT departments or outside vendors to handle their computer systems. Technically accurate header information that is nonetheless "obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading," as is header information obscured because the mailer used another computer to relay the message in order to disguise its origin.

In practical terms, this means that the lawyer is responsible for ensuring that accurate header information is transmitted by whomever the lawyer is using to send out the e-newsletter, whether it is the firm's own mail servers or a third party. This is especially critical when using a third-party mailer, since some newsletter services will provide legitimate e-mail services to one set of clients while at the same time engaging in spamming behavior on behalf of others.

The requirement that anyone who asks to be removed from the e-mail distribution list be so removed also may present problems for lawyers or firms who have not designated a single point of contact for e-newsletter opt-out requests. This could be a particularly difficult problem where individual lawyers are responsible for communications with shared clients. An opt-out of an e-newsletter generated by one member of a firm is equally applicable to the remaining members of the firm. It is therefore advisable that lawyers put in place procedures to insure that accidental violations of the CAN-SPAM Act do not occur because of an internal failure of communication.

The problems created by spam will not be going away anytime soon. Spam is cheap to create, easy to send and hard to regulate. CAN-SPAM will do little to change these facts. Nonetheless, the act's requirements for unsolicited commercial e-mail will necessarily change the behavior of legitimate marketers, and the legislation has affected many unsuspecting professionals who use e-mail to communicate.

Lawyers using e-newsletters to communicate with clients and nonclients alike would be advised to comply with the act's requirements in addition to the Rules of Professional Responsibility. If there is any doubt about the commercial nature of the message, lawyers should err on the side of caution.

#### **Some practical advice**

- Include an Internet-based opt-out (a direct click to opt-out or a link to a Web site) in each and every e-newsletter.
- Honor opt-out requests within 10 business days.
- Create a centralized system for handling opt-out requests.
- Ensure that all transmission information is accurate, whether sent by you, your

firm, or by a third party.

- Ensure that the subject line is completely accurate and is not materially misleading.
- Include clear and conspicuous identification that the message is an ad or solicitation, even if the content of the message is primarily informative rather than commercial.
- Ask clients to agree in advance to receive e- newsletters. If everyone on the e-mail list has "opted in" (agreed to receive the communication), you are not required to state that the e- newsletter is an advertisement or solicitation.
- Provide a physical (street) address on each e-mail sent.
- Consider using double opt-in by sending an e-mail to recipients requesting that they confirm their desire to receive the e-newsletter.
- Consider including in the e-newsletter information about how you got the recipient's e-mail address. Although not required by CAN-SPAM, this practice is good public relations and is required by some ISPs before they will deliver your e-mail to their users.

— Elizabeth Bowles

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