Top Ten Web Marketing Mistakes

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Recently some lawyers have made front-page news by engaging in a wide variety of online foolishness. Their conduct has resulted in lawsuits, discipline and even prosecutions. It has also undermined reputations and relationships with clients. What’s more, it’s the law firm, not the insurer, who typically must pay the bill.

This submission is adapted from a prior article “12 Tips for Reducing Online Liabilities” by this same author, published in Law Practice, Volume 36, Issue 4, July/August 2010.
When lawyers get in trouble online, their actions often are not covered by professional liability policies, which generally only cover problems with “professional services.” Thus, the lawyers or firms must pay all legal costs, settlements and damages from their own funds.

To help you and your firm avoid such potentially expensive and distracting online foibles, the following are 10 Web Marketing Mistakes to know so that you can readily avoid them.

**Mistake 1 – Exaggerate your Qualifications.**

Ethics rules—in particular Model Rules 4.1, 7.1 and 8.4—require lawyers to avoid misrepresentations. These requirements apply to communications including Web sites, chat room posts and blog comments.

Particularly dangerous for professional liability purposes are misstatements that exaggerate a lawyer’s experience and abilities. Individuals making claims against lawyers often use online boasting as exhibits in depositions and cases to suggest the lawyer was dishonest or misled a client, perhaps in support of a fraud claim or to suggest the lawyer is lying about other matters.

One common misstatement is listing practice areas in which the lawyer does not actually practice. False claims of expertise can be particularly damaging in a malpractice case. In addition, underwriters sometimes review law firm sites to see if the practices described (and corresponding risks) match information listed in an application. Inconsistencies between a firm site and application may affect the availability and cost of professional liability insurance. Listing a practice on a Web site but not on an insurance application may also impact insurability for claims arising from that practice.

**Mistake 2 – Write About Your Clients, but Don’t Tell Them.** Ethics rules (in particular, Model Rule 1.6) and a lawyer’s fiduciary obligations limit what a lawyer may say about a representation without a client’s consent. In perhaps the most (in)famous example of a violation of these standards, an Illinois public defender blogged about her criminal defendant clients. This and related conduct resulted in a 60-day suspension. See *In re: Disciplinary Proceedings Against Peshek*, 334 Wis. 2d 373 (2011).

Such stories should cause lawyers to pause before writing anything about clients or client matters. Lawyers should also run conflict checks before posting materials about pending legal matters to ensure their firm does not represent a party involved in the matter.

**Mistake 3 – Answer Questions Online.** Many sites, in particular social networking sites like LinkedIn, allow people to post or answer questions. When lawyers post answers, this can create numerous dangers.

Providing substantive answers to online questions is almost always a bad idea. Those receiving answers often believe they are receiving legal advice. See Model Rule 1.18 (noting duties that may be triggered by communications with a prospective client). Yet the lawyer often has very little information about the client and the client’s situation. Also, often the lawyer is not licensed where the recipient is located, increasing the risk of unauthorized practice or inaccurate advice.

If a lawyer feels compelled to help, the lawyer could instead advise what type of lawyer to seek, or perhaps offer contact information, as long as the jurisdiction’s rules allow it. See Model Rule 7.3(b) (addressing restrictions on soliciting professional employment from prospective clients). This would allow the lawyer to follow normal intake procedures, such as conducting a conflict check, and obtain adequate information before trying to provide legal advice.

**Mistake 4 – Too Much Information.** Lawyers often use social networking and similar sites for personal and professional reasons. They may want to share professional updates with other lawyers, clients and potential clients, or personal information with friends. The danger is in unwittingly exposing client contacts to competitors, or allowing professional colleagues to see private photos or information. I have seen a public LinkedIn profile of a senior partner that contained information more appropriate for an online dating service.
While such content is likely not a liability concern, it can be a significant practice development concern. Lawyers should be careful about what they are posting, consider who can see such posts, and pay careful attention to the online services’ privacy settings. This concern particularly arises when lawyers are lax about who they accept as friends or connections on these sites.

**Mistake 5 – Failure to Update.** When lawyers provide legal resources on their Web sites, such as statutes, rules and articles, they should ensure that such information remains updated and accurate. See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Opinion 10-457 (2010) at 2 (noting that Model Rules “allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer’s law firm” but “[t]o avoid misleading readers, this information should be updated on a regular basis”). It seems unlikely someone would file a claim against a law firm for posting outdated information, particularly if the firm included appropriate disclaimers regarding when the information was last updated and that viewing the information does not create a lawyer-client relationship. But providing outdated information certainly will undermine any effort to convince a viewer of the firm’s expertise.

**Mistake 6 – Announce Competency Standards That You Don’t Follow.** Law firm sites often propose best practice standards. Lawyers creating these standards should be careful to avoid saying what a prudent lawyer would do unless these lawyers always satisfy such standards themselves. A better approach is to list what a lawyer “may” or “often should” do. This leaves room to explain why those actions were not appropriate considering the particular circumstances of a matter.

**Mistake 7 – Forgetting to Watch What You Say On Your Site.** The Web’s informality makes it very easy to say something inappropriate about the lawyer or client on the other side of a matter. Aggressive or nasty comments made in an unguarded moment or in the heat of a contentious litigation matter could result in a defamation claim. The circumstances in which the comments were made can determine whether there is coverage under your malpractice policy. Making a nasty comment on a blog in the course of providing professional services to the client isn’t worth it.

**Mistake 8 – Forgetting to Watch What Others Say On Your Site.** Law firms with sites that allow comments should be aware that they are likely to be held responsible for what others say about the firm, or post, on its Web site.

South Carolina Ethics Opinion 09-10 warns lawyers that they will be responsible for any content they directly or indirectly place, disseminate or endorse. Thus, a lawyer who endorses or disseminates a client testimonial will be responsible for the testimonial’s contents. Although not discussed in the opinion, it also seems likely a lawyer may be responsible if a client posts materials about pending litigation when such posts violate Model Rule 3.6, or criticize judges in violation of Model Rule 8.2.

Recent media reports also suggest it is more common for people to bring suits and subpoenas to pursue the identity of defamatory commenters. To avoid such subpoenas and claims, lawyers should take care to control what others place on their sites. This includes monitoring and either blocking or removing defamatory blog comments or social network site posts.

**Mistake 9 – Assuming The Same Rules Apply Everywhere.**

While I reference the ABA Model Rules of Professional Conduct throughout this article, the law in various jurisdictions may differ in material ways. Advertising, in particular, can create issues with local disciplinary authorities. Determining which jurisdiction’s rules apply may be tricky as well. Model Rule 8.5(b) provides that conduct that isn’t before a tribunal will be governed “by the rules of the jurisdiction in which the lawyer’s conduct occurred” unless the “predominant effect of the conduct is in a different jurisdiction.” But lawyers who practice in more than one jurisdiction, or who are admitted pro hac vice under terms that require them to abide by the rules of a different jurisdictions might be well advised to keep the most restrictive jurisdiction’s rules in mind.
Mistake 10 – Forgetting that Online Equals Public.

Finally, lawyers should presume that everything they do or say online will become public. When I read stories of lawyers getting in trouble online, I often wonder, “What were they thinking?” Too often the obvious answer appears to be, “They weren’t.”

While the Internet offers great assistance in representing clients and building a practice, it also offers many ways for lawyers to get into trouble. Hopefully this list will help you avoid problems the next time you’re thinking of doing something potentially dangerous online.