Navigating the Uncharted Waters of Social Media Marketing and Ethics
By Ethan J. Wall

Lawyers who set sail on the sea of social media must be aware of the ethical issues that lurk beneath the water. As social media sites like Facebook and Twitter develop into mainstream mediums to promote one’s practice, lawyers and law firms must give thought to the ethical implications associated with social media. However, despite the popularity of these new technologies, lawyers’ use of social media is still within its infancy. Published decisions addressing lawyers’ responsibilities for social media marketing are therefore few and far between. As a result, lawyers must navigate the waters of social media without the benefit of established precedent, leading to uncertainty on the appropriate path to chart their course. This uncertainty leads some lawyers to believe that embarking on social media is akin to setting sail into uncharted waters.

This uncertainty is underscored by the lack of charges filed for ethics violations arising out of attorney’s use of social media for marketing and promoting their practice. Instances of lawyers being charged with ethics violations for their marketing activity are seemingly analogous to sightings of the loch ness monster: many lawyers have heard stories about it but there seem to be very few actual “sightings” of charges filed against attorneys for crossing the line with their social media marketing. In fact, a Google search for ethics violations arising out of lawyer social media marketing reveals dozens of articles discussing the potential for ethics violations, but hardly any actual charges were filed based on alleged improper marketing activities.

To date, the most analogous situation may have occurred when a Virginia criminal defense attorney was charged with misconduct for blogging about cases he litigated. The Virginia State Bar claimed that the blog on his firm’s website was actually an advertisement, rather than an avenue to report on informative news and commentary, and therefore must include a disclaimer. Rule 7.2 of the Virginia Bar rules require a disclaimer to prevent members of the public from hiring a lawyer on the belief that the results obtained in one matter will govern future proceedings. While the attorney has challenged the authority of the Virginia State Bar from regulating his blog under the First Amendment, such charges may have a chilling effect on how lawyers market their practice on social media.

While social media posts lack the size offered by blogs for attorneys to provide detailed legal analysis, lawyers still have the ability to report on decisions they or their firms may have obtained in representing their clients on social media. For example, lawyers can easily tweet that they were “successful in protecting their client from a pending foreclosure” in 140 characters or less. Lawyers could just as easily share their success stories through their Facebook newsfeed or LinkedIn updates. Without any specific precedent to rely on for social media marketing ethics issues, where can attorneys find that guiding beacon of light to right their course? The same place they always have – their jurisdiction’s code of ethics.

Since advertising ethics rules govern the message, not the medium, they are equally as applicable to social media interactions as they are to traditional methods of marketing. While some lawyers believe that specialized rules should be adopted for social media, such rules would inevitably become obsolete the
moment a newer technology is introduced. Since technology changes faster than the law can adapt, applying existing ethics rules can help light the way to a safe path through the sea of social media. The Florida Bar’s recently revised advertising guidelines on social media provide a helpful primer for practical application of these rules:

- Social media profiles that are used to promote the lawyer or law firm’s practice are subject to all of the general regulations set forth in Rule 4-7.2, including prohibitions against any misleading information, which includes references to past results, promises of results, and testimonials, and prohibitions against statements characterizing the quality of legal services.

- Unsolicited invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer’s page would be considered solicitations in violation of Rule 4-7.4(a), unless the recipient is the lawyer’s current client, former client, relative, or is another lawyer.

- While a lawyer is not responsible for information posted on their page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules, the lawyer must remove the third party’s’ information about the lawyer’s services from the lawyer’s page if the information does not comply with advertising rules.

While these guidelines provide insight on how ethics rules may apply to social media marketing, it is critical for lawyers to follow the specific guidelines and ethical opinions that may govern their jurisdiction.

Another practical resource to avoid ethical pitfalls in social media marketing is the Social Media Guide for Lawyers. The 2010-11 Meritas Leadership Institute surveyed common social media ethical implications from various jurisdictions across the world and prepared the Guide to serve as a practical resource on how lawyers and law firms can use social media to practically, ethically, and responsibly promote their practice. The Guide features a Best Practices Guide that offers advice on avoiding ethical dilemmas in social media marketing, including preserving client confidentiality and avoiding direct solicitation of social media users with whom the lawyer lacks a previous relationship. The Guide also provides sample Social Media Policies to help educate and protect lawyers and law firms from common social media missteps.

While the waters of social media and ethics are mainly uncharted, they are certainly navigable. With a steady application of existing ethical guidelines, and a little bit of common sense, lawyers and law firms can avoid the rough waters of uncertainty and safely guide themselves through the emerging sea of social media marketing.

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