

ETHICS, THE INTERNET AND ATTORNEY MARKETING

(PART TWO IN A THREE PART SERIES ON ETHICS AND SOCIAL MEDIA)

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Attorney Advertising and Client Solicitation in the Internet Age

In today's age of social media where Twitter posts are a source of breaking news, Facebook sometimes replaces face-to-face communications and email, and LinkedIn offers a virtual, on-going networking event, it is not surprising that attorneys are finding more and new ways to advertise their practices and solicit clients on the Internet. However, unlike most communications on the Internet and social media sites, attorney communications and solicitations are governed by specific rules of attorney conduct - - rules that were written to address marketing pursued through written communications, print media, radio and the television. The Internet presents a whole new set of complications. A print or television ad reaches an audience within certain boundaries; an Internet posting reaches an audience in any state and even in other countries. What is more, the Internet and social media open up new avenues of communication and in so doing more traps for the unwary.

How is social media being used for attorney advertising and solicitation?

By some reports, the Internet, not the white pages or word of mouth, is the first place people look to find an attorney. This reality changes the landscape for attorneys marketing their practices. Attorneys are writing blogs, posting to Twitter, maintaining profiles on sites like LinkedIn and Facebook and engaging in Internet communication to get their names, and their practices, into the public domain. Most law firms maintain websites which advertise the firm, its practice areas and its attorneys. Some sites allow clients and potential clients to email the firm or specific attorneys. Many social media sites, as well as some ratings and referral sites, allow others to post comments and recommendations about listed attorneys.

In all arenas of Internet and social media communications, existing professional conduct rules still apply. Attorneys must be aware of Rule 7.1: Communications Concerning a Lawyer's Services; Rule 7.2: Advertising; Rule 7.3: Direct Contact with Prospective Clients; Rule 7.4:

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Communications of Fields of Practice and Certification; and Rule 7.5: Firm Names and Letterheads, to name a few.

To complicate matters further, the rules of ethics vary by state. Sometimes these variations are minor, but other times they are not. At this point in this developing area of law, it is not clear in every state which rules the courts and bar committees will apply to these communications. In New Hampshire, Rule 8.5(a) of the Rules of Professional Conduct provides some guidance by stating that an attorney who is “admitted to practice” in New Hampshire, is subject to discipline in New Hampshire “regardless of where the lawyer’s conduct occurs.” However, Rule 8.5(b) (2) also states that an attorney is subject to the rules of professional conduct of the jurisdiction “in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” Accordingly, while it has always been the case that a New Hampshire-licensed attorney can be disciplined in New Hampshire for violations of the rules of professional conduct of another state, internet marketing greatly expands the jurisdictions whose rules may apply in any given disciplinary proceeding.

So, while it may not be possible to know and comply with the rules of every state, attorneys should endeavor to know and comply with the rules of the states in which they practice and to which their communications are targeted; and should consider expressly and visibly limiting internet advertising to those jurisdictions in which they are licensed to practice.

Below, we review selected ethics opinions and rules of professional conduct that address these emerging issues.

South Carolina Bar Ethics Advisory Committee Advises on Responsibility for Communications Attorney Places or “Claims” on the Internet

A website offers a free service which provides information about attorneys nationwide. The website obtains information through FOIA requests to state courts and bar associations and creates entries for the attorneys on whom information is received. The website also generates an internal rating for each listed attorney. Attorneys themselves are not involved in this process nor do they know that it is occurring, but once the profile is complete and published, attorneys can “claim” their profiles and update their information. The website also allows peer endorsements which are displayed on the attorney’s profile and “client ratings” which can be submitted by anyone about any listed attorney. An attorney may invite current and former clients to submit ratings. These client comments are prominently posted on the attorney’s profile. Attorneys are not able to control who endorses or rates them.

In deciding whether attorneys are responsible for postings on a third party’s unsolicited web based profile or even on sites such as LinkedIn, a recent South Carolina Bar Ethics Advisory Committee opinion found that:

Lawyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated

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for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct. . . . However, a lawyer is not responsible for statements about the lawyer or the lawyer's practice that are not placed or disseminated by the lawyer. Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf."

See Op. 09-10, S.C. Bar Ethics Advisory Comm., Dec. 2009. The opinion noted that while peer ratings are permissible, these ratings must be "presented in a non-misleading way and [be] independently verifiable." Id. Additionally, the opinion stated that when an attorney "claims" a profile, client comments, such as testimonials and superlative statements, on a website can also violate ethical rules. Id. In South Carolina, an attorney cannot solicit or allow publication of a client testimonial or of an endorsement "unless it is presented in a way that is not misleading nor likely to create unjustified expectations." Id. Similarly, in New Hampshire, Rules 7.1 and 7.2 of the Rules of Professional Conduct prohibit attorneys from paying for testimonials and from making statements which are "likely to create an unjustified expectation about results that the lawyer can achieve."

Massachusetts Bar Association's Committee on Professional Ethics Opines on Required Use of Disclaimers on Firm Websites

A law firm maintains a web site that describes the firm's history and areas of legal expertise and also includes biographies for each of the firm's attorneys. Next to the biographical information for each attorney is a link permitting someone viewing the biography to send an e-mail directly to the attorney. When a visitor to the web site uses the link to send an e-mail, there is no warning or disclaimer regarding the confidentiality of the information conveyed.

Using the link provided on the web site, a prospective client sent an e-mail to one of the firm's attorneys indicating that it wanted to retain the lawyer to bring a claim against another company and providing information about the claim. After receiving and reviewing the email, the attorney discovered that other attorneys in the firm represent the other company in unrelated matters and promptly declined to prospective representation.

In response to the firm's inquiry, the Massachusetts Bar Association's Committee on Professional Ethics issued an opinion that found that while an attorney client relationship had not been formed, a duty of confidentiality had arisen with respect to the information conveyed by the prospective client. It stated that because the website lacked the proper disclaimers, the lawyer who received the email must maintain the confidentiality of the information furnished by the prospective client. See Op. 07-01, Mass. Bar Assn.'s Comm. on Prof. Ethics, May 23, 2007. The opinion also stated that if protecting the confidential information would

“materially limit” the firm’s ability to represent the existing client, then the firm must end its representation of that client as well. Id.

The New Hampshire Rules of Professional Conduct, which have adopted the ABA’s model rule relating to obligations to “prospective clients”, now allow a firm to continue to represent a client if the attorney who reviewed the confidential information from a prospective client is “timely screened from any participation in the matter and is apportioned no part of the fee therefrom.” Rule 1.18(d)(2)a (effective January 1, 2008). New Hampshire has not, however, opined on or amended the rules to address the issue of website disclaimers in this context.

New Hampshire Rules of Professional Conduct, Rule 7.4

Hypothetical: An attorney creates a public LinkedIn profile and completes the pre-made sections for Professional “Headline,” Current and Past Positions, Summary, Specialties, Experience and Brief Description of Experience. In her summary, the attorney states that she focuses on general corporate and securities law, including mergers and acquisitions and corporate financing. Under “Specialties,” the attorney lists “start-up formation and financing, mergers and acquisitions, venture capital financing, and securities compliance.” In her profile, she also lists that she is interested in “expertise requests, business deals and reference requests.”

New Hampshire’s Rule 7.4, like similar rules in other states, prohibits an attorney from stating or implying that he or she is “a specialist,” except for designations such as “patent attorney” (Rule 7.4(a)); “admiralty,” or “proctor in admiralty” (Rule 7.4(b)); and those practices areas in which specialist certification is available by an organization accredited by the American Bar Association (Rule 7.4(c)). An attorney may, however, communicate the particular fields of law in which he or she practices.

While the issue of whether statements on social media profiles regarding practice areas, or “specialties,” violate the rules of professional conduct has not been decided, the use of these forums to create a profile highlights the need for attorneys to be mindful of the rules of professional conduct when presenting themselves on the Internet or in social networking forums. What may seem like an innocuous fill-in-the-blank could raise ethical considerations.

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What is the moral of this evolving story? At a minimum, attorneys must always comply with the rules of ethics for the states in which they practice and to which they are targeting their communications; and should be careful to affirmatively clarify the jurisdictions in which they are licensed to practice. Attorneys must also be vigilant in protecting against any third party communications that may state anything misleading about the attorney or services they provide. They must also guard against the transmission and disclosure of confidential information, protect against

the unintended creation of an attorney-client relationship, and recognize the professional duties that we owe to “prospective clients” even when a formal attorney-client relationship is not established. Finally, because all states have different rules - - including unauthorized practice of law rules - - attorneys should be aware of, and comply with, the advertising rules and ethics opinions in the jurisdictions in which they intend to seek work.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.