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15 Tips for Reducing Online Dangers and Liabilities

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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.

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, following are 12 tips for minimizing liability exposure. Note that while I reference the ABA Model Rules of Professional Conduct, the law in various jurisdictions may differ in material ways.

1. Write only what is true. 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.

More 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.

2. Don't write about clients without consent. Ethics rules and fiduciary obligations limit what a lawyer may say about a representation without a client's consent. Perhaps the most (in)famous example involved an Illinois public defender who blogged about her criminal defendant clients. This and related conduct resulted in a 60-day suspension.

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.

3. Limit investigations to publicly available information. In addition to protecting their own and their clients' confidences, lawyers should avoid improper access to adversaries' confidences. Lawyers sometimes guess at or determine other ways to circumvent passwords. One Kentucky firm was sued recently for allegedly using spyware to capture an adversary's e-mails.

Philadelphia Bar Ethics Opinion 2009-02 cautions against using a third person to seek access to an adversary's social networking site. While this opinion may push the limits of Model Rule 4.4, in numerous instances lawyers have faced lawsuits, disciplinary complaints or sanctions for guessing passwords or otherwise improperly gaining access.

Instead of trying to trick or force their way into nonpublic areas, lawyers should use proper means, such as sending a subpoena, to gain access to e-mails, nonpublic Web sites and other protected information.

4. Keep evidentiary information around. Clients sometimes post information that may harm their legal interests. The most common example is a client charged with driving while intoxicated who later posts photos involving drinking on a social networking site.

Lawyers seeking to limit the damage from such posts can certainly advise the client not to post *additional* damaging information. However, they should be careful to avoid suggesting taking down a site or page because this may violate Model Rule 3.4 or constitute spoliation of evidence. Applicable law may limit a client's ability to remove relevant and damaging material, at least when that material is not preserved in some comparable format (such as on disk).

5. Avoid answering legal questions. 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. 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).) 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.

6. Protect your own online 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.

7. Keep sites updated and accurate. 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. 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.

8. Avoid announcing competency standards.

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.

9. Avoid unconsented use of trademarked or copyrighted information. Lawyers sometimes include corporate names or trademarks on their sites, or post information that others have copyrighted. In at least one instance, an immigration law firm effectively pirated the blog and other resources of another immigration firm. Use of protected information without permission may result in expensive claims that are not covered by professional liability insurance.

Some law firms are also paying for ad words so that their advertisements appear when someone uses a search engine to look for *another* law firm, or for information about targets of claims the firm files. While these ad word purchases likely do not violate the law or ethics rules, they may result in bad publicity or claims—particularly when the ad words used are a competing lawyer's name or firm.

10. Beware what others say on your site. The Internet has made it easy for anyone to broadcast a message, and that includes comments to posts. 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.

11. Be careful what you say about others. 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.

12. Presume everyone will know everything said or done. 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.

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