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YOUR ETHICS EXCLUSIVE

CARR MALONEY'S QUARTERLY LEGAL ETHICS NEWSLETTER

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Presented By:
Eileen Garczynski, Ames & Gough / McLean
Dennis Quinn, Carr Maloney / Washington, DC

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"Socially Acceptable vs. Ethically Unacceptable"

By Dennis J. Quinn and Kimberly Ohanuka

Over the years, social media has grown to be an effective marketing tool for all businesses including law firms. Many social media apps, such as Instagram, LinkedIn, and Twitter, provide specific tools for attorneys to grow their clientele. But attorneys must remain mindful of the content they post on social media and make they comply with the ethical rules. Specifically, attorneys should adhere to the rules regarding confidentiality and advertising when using social media to market their services. Unfortunately, the ABA Model Rules do not address social media specifically. And while the ABA issued Formal Opinion 18-480 in 2018, it only covered a few of the potential ethical problems lawyer could face in using social media. This article will focus on some other areas and offer three tips to stay ethically compliant when advertising your legal services on social media: (1) avoid catfishing your social media followers; (2) avoid paying social media influencers; and (3) avoid sliding into potential clients' DMS.

First, when establishing a social media presence present your authentic brand. Rule 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading. Thus, the first step when creating your firm's social media account is to avoid "catfishing" your social media followers. The colloquial term "catfishing" refers to the process of luring someone into a relationship through a fictional online persona. In this context, lawyers should avoid presenting a fictional social media persona to draw in clients. For instance, a lawyer should not give the impression she has a nationwide practice when she is only admitted in one jurisdiction and rarely practices beyond her hometown.

All of your or your firm's personal social media posts must present truthful statements. The most common example is being honest and transparent about your outcomes. For instance, if a new attorney only tried and won one case in front of a jury, she cannot "tweet" that she is an "undefeated" trial attorney. Why? Although the statement is truthful, it is also misleading because the attorney failed to share that she only tried one case. Thus, the tweet or social media post violates the ethical rules.

As it relates to your "social media persona," the firm's social media handle and profile description should be accurate and truthful. The social media handle is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. In addition, your social media profile should not state or imply that a lawyer is certified as a specialist in a particular field unless the lawyer has been certified as a specialist by an organization approved by the state bar or has been accredited by the ABA and the name of the certifying organization is identified in the communication.

Hence, social media handles like @theemploymentlaw_specialist, @criminaldefense_specialist, @deptofedu_legalservices, @johnnycochran_legal, or anything similar are not appropriate social media handles. We recommend keeping the social media handle and profile description simple such as using the firm's name or using your first and last name.

A social media influencer is a person who has a large following on social media and can influence their followers to purchase a service or product. Though it may seem enticing to pay for someone to recommend your legal services by sharing your social media page, it may not be ethically acceptable. Rule 7.2 provides that a lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services. Many businesses pay "social media influencers" or people with a large social media following to recommend that business's product or service. While there is no ethical rule that specifically forbids the use of social media influencers the plain language of Rule 7.2 would seem to prohibit paying them for their services.

There are other methods to advertise your legal services on social media such as purchasing an ad on Instagram or Facebook. The advertisement costs must be reasonable according to Rule 7.2(b)(1). In addition, the ad's content must include the name and contact information of at least one lawyer or law firm responsible for the ad.

Finally, sometimes people use social media to vocalize their frustrations or issues related to potential legal matters, but a lawyer should not take advantage of their social media follower's expression. Rule 7.3 provides that a lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain. "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or well can be understood as offering to provide, legal services for that matter.

Sliding into potential client's direct messages or "D.M.s" may be considered to be live person-to-person contact. The colloquial phrase "sliding into the D.M.s" means to send a direct message a stranger or acquaintance using a social networking platform. Essentially, attorneys should avoid direct messaging strangers or acquaintances to solicit business. For example, a lawyer sees his social media follower posts that she is "having a difficult time, understanding how to probate her mother's will." Then, the attorney sends a direct message to the social media follower to inform her that he is an estate attorney with tremendous experience in probate court and may be able to help. The attorney's conduct probably violates Rule 7.3. However, suppose the social media follower messaged the attorney to ask about his estate planning experience. In that case, the attorney may answer the question and provide professional contact information to continue with a consultation at the social media follower requests, but do so off of the social media platform.

Also, attorneys should proceed with extreme caution when messaging a potential client on social media to avoid creating an inadvertent attorney-client relationship. If the potential client shares confidential information via a direct message, the attorney has an obligation to protect that information pursuant to Rule 1.6, even if the client never hires the lawyer. If a potential client DMs you about your services or seeks legal advice, you should immediately direct them to your office's contact information and schedule a consultation.

Social media is a constantly evolving medium. Attorneys must do their best to comply with the ethical rules until the rules catches up to technology.

For more information about the ethical issues discussed in this article, or for legal ethics counseling, contact Dennis Quinn at 202-310-5519 or djq@carrmaloney.com.

Legal Ethics Opinion No. 1878

Virginia State Bar's Standing Committee on Legal Ethics proposed Legal Ethics Opinion No. 1878 was passed in February 2021 and in May 2021, the Supreme Court of Virginia amended the opinion stating a successor lawyer must charge a reasonable fee and must adequately explain said fee to the client. The amendment is effective immediately.

Legal Ethics Opinion 1878 generally addresses the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a quantum meruit basis against the proceeds of a recovery.

In this opinion, the committee concluded that successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel should address in her written contingent fee agreement the client's potential obligation to pay fees to discharged counsel, as well as that successor counsel's fees might need to be adjusted in view of predecessor counsel's quantum meruit lien, so as to ensure that successor counsel's fee is reasonable using the factors identified in Rule 1.5(a). Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or the client gives informed consent to a potential conflict under Rule 1.7(b).

To read the full Legal Ethics Opinion 1878 on Virginia State Bar's website, please click here.

Upcoming Events

“Common Ethics Issues for Small and Medium Sized Firms”

Carr Maloney will be hosting its first ever legal ethics seminar titled, “Common Ethics Issues for Small and Medium Sized Firms” presented by Carr Maloney’s Legal Ethics Counseling Practice Group discussing practical advice to help those who attend focus on problem areas that so often lead to complaints. This informational session will cover the following topics:

- What’s a conflict of interest and what isn’t
- Choose your clients wisely
- Non-engagement letters
- The basics of engagement agreements
- Handling a client’s money: the ins and outs of trust accounts

Time and date of this event is TBD. Stay connected for an invite to the event by signing up for Carr Maloney’s legal ethics alerts and newsletter.

“Virginia CLE’s 10th Annual Legal Malpractice Seminar 2021”

Date: September 17, 2021, 11:00 AM- 1:00 PM EST

Credits: 2.0 Ethics Credit Hours

Malpractice suits not only cost firms money, they also rob the firm’s leadership of valuable time they need to spend with clients or to address other management issues. They can also inflict enduring damage to a firm’s reputation. This course is designed to educate attorneys on measures that can be taken to better serve the interests of their clients; and to encourage lawyers to establish and maintain standards in their law practice to meet their responsibilities to their clients. During this 2-hour interactive seminar, Eileen Garczynski and Dennis Quinn will provide both new and experienced practitioners with an overview of the most common legal malpractice claims (and related risks, such as cyber, management, and employment-related claims), and how to avoid them. They will also explain how to avoid the errors that frequently occur and how to respond appropriately to risky situations with a dive deep into the ethical issues associated with these risks. Attendees should be able to come away from this session with ways to reduce risk while also making the firm eligible for favorable Lawyers’ Professional Liability Insurance pricing and coverage.

Topics of discussion will include:

- Update on Legal Malpractice Claim Statistics
- Most likely types of legal malpractice claims arising out of the economic downturn and how to avoid them
- Lateral hires and associate training issues during and Post-Covid
- Identifying potential conflicts of interest among affiliated companies
- Recognizing which clients to take and which to avoid
- Tips for better engagement and disengagement letters
- Protecting client confidences and communications

Click here to register for event.