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COMMON MARKETING BLUNDERS, ETHICAL MISSTEPS

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At the recent Solo & Small Firm Section Conference in Bedford Springs, I had the opportunity to present “Back to the Basics: Marketing Within Ethical Boundaries” as the opening session.

As often happens, I went off-script so many times telling war stories to illustrate specific points, I failed to get through all my slides. So I thought I would take the opportunity to include some of that information in an article for the *Pennsylvania Bar News*.

What follows are some of the typical missteps I encounter:

- R.P.C. 1.4 [Communication] requires that the client be kept informed, included in the process, and that the client ultimately makes decisions. Unfortunately, some of them may not follow the attorney’s recommendations.

There’s the old saying that people may forget what you said, but they will never forget how you made them feel.

I have occasionally been called upon to survey clients with respect to this point. A too-frequent response is that the attorney was condescending. This is not intentional on the attorney’s part. Understandably, many lawyers are quickly frustrated when clients don’t take their advice. After all, why did the client hire the attorney to begin with, right? But the problem is that some issues are complex, and clients don’t understand why path A is better than path B, despite the attorney’s explanation.

Attorneys need to understand that when this happens, it is usually the teacher who is at fault, and not the student. Repetition is insulting. Showing frustration is usually interpreted as condescension. Keep in mind that it is up to the teacher to

find a new way to present the concepts so that the student can understand, and to do so with patience.

- R.P.C. 1.6 [Confidentiality] I occasionally observe attorneys who ask questions on Listservs or at meetings, which divulge far too much about their client. In some instances the adverse party's attorney may also be on the same Listserv, and knowing the location of the attorney may be sufficient to identify the client, based on the questions or facts posted.

So too, when attorneys encounter a negative online review of their firm, they may respond inappropriately and disclose confidential information that could lead to disciplinary consequences. We have seen news stories about this on occasion.

Another common blunder, although unrelated to marketing per se, is that the attorney may inappropriately share confidential information during social occasions. When a case is particularly interesting, and when the conversation is with close friends or relatives, the attorney may relax safeguards too far. Such was the case with an M&A attorney, whose father and friend were later convicted of insider trading. The attorney suffered termination, and disciplinary consequences.

- Keep in mind that under R.P.C. 5.1, 5.2 and 5.3 [Responsibilities], everyone is responsible for not only his or her own conduct, but those around them and who they supervise. All must adhere to the rules, whether an attorney or not. And ultimately the firm owner(s) take the heat for lapses. When is the last time your firm reviewed the do's and don'ts with staff and associates?
- R.P.C. 1.5 [Unauthorized Practice of Law, or UPL]: This one is a doozy for blunders. There are so many places one can hang out and "participate" on the internet. Whether it's Avvo, LinkedIn, your blog, Quora or special interest groups on Facebook and so forth, you have to be ever mindful of unintentionally crossing the line into UPL.

Participating in these various venues can be smart marketing. It's a way to be "out there" nowadays, reaching people you might never otherwise reach, showing your expertise and enhancing your reputation. And in some venues, like Avvo, it can improve your rating to answer questions.

But to be safe, you should preface your comments and answers with something like "in Pennsylvania, where I am licensed to practice, this is generally how it is handled: *insert explanation*. But of course be sure to ask qualified counsel in your jurisdiction before taking action."

I frequently review attorney websites. I am still amazed how many firms have a contact page which allows prospects to send the firm information, without the prospect first having to check that they have reviewed the disclaimer. The disclaimer should communicate two important points: 1) there is no attorney-client relationship formed by contacting the firm; and 2) there is no attorney-client privilege and nothing confidential should be disclosed or sent.

- R.P.C. 7.1 [Communications Concerning a Lawyer's Service] and R.P.C. 7.4 [Communication of Fields of Practice and Specialization] are the most commonly violated, in my experience. I find violations on law firm home pages, attorney bio pages and in profiles published in such places as LinkedIn.

First, firms must avoid use of subjective or comparative adjectives which can't be substantiated with fact. Words like "best" and "most" and "largest" fit this category. And please, folks, stop saying you're an "expert" or "specialize in" unless your practice area is defined in R.P.C. 7.4(a). I can hardly open Chrome without landing on an attorney bio that proclaims, "I have specialized in real estate — *insert most practice areas here* — for the past *XX years*." You can say you have "concentrated in" or "focused in", but *not* specialized in *nor* are you an expert in, unless it's listed in 7.4(a).

I have to say that violations in this area really raise my blood pressure. Mostly because they're so basic. It's great if your nephew is a computer whiz and created your website for you for pennies on the dollar. It's not so great if you let him write the copy!

- R.P.C. 7.5 [Firm Names and Letterheads]: This is another rule which is frequently violated. I get it that everyone wants their firm name to be memorable and as impressive as possible. But that doesn't mean a solo attorney can add "and associates" to the firm name if there are none. And if your only associate left a couple years ago, and you haven't found a suitable replacement, it's time to change your name so it is not misleading.

The same applies to the word "Offices" instead of Office. If you only have one office, you can't use the plural in your firm name. It's misleading.

And while we're at it, remember that jurisdictional limitations must be disclosed. If you list attorneys on your Pennsylvania letterhead, there is a presumption that they are licensed to practice in Pennsylvania. In order to avoid misleading the public,

you need to disclose if this is not the case. You can disclose it in one of two ways: by putting an asterisk next to any unlicensed-in-Pennsylvania attorney's name and noting at the bottom of the name(s): 1) not licensed in Pennsylvania; or 2) licensed in (other state name(s)) only.

Remember, PBA members have free access to the Ethics Hotline. If you're not sure whether you're in compliance, or you're just getting started, check with Victoria White at 1-800-932-0311, ext. 2214.

PBA members who want to discuss the best marketing strategies for their firm, or anything else on the business side, should not hesitate to get in touch with me. That's my wheelhouse!

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