

Social Media Marketing

Worth the Risk?

By Jessica Brown and Scott Campbell

As lawyers, our proclivity is to avoid risk. But sometimes the biggest risk is missing the opportunity to market our services. The questions facing many lawyers and law firms these days are whether social media presents a substantial marketing opportunity, and whether the cost of missing this opportunity outweighs the potential risks associated with engaging in social media. Perhaps prodded by the success of their clients — nearly every Fortune 500 company now has an active social media marketing strategy — or perhaps spurred to action by a few entrepreneurial employees, more and more law firms seem to be deciding that social media is a risk worth taking. This risk can be managed if law firms give careful consideration to their own social media/marketing strategy, and implement policies to ensure that any online content posted on the firm's behalf or by firm representatives is consistent with their strategy.

SOCIAL MEDIA MARKETING FOR LAW FIRMS

At first glance, one might wonder whether social media has any role in marketing legal services at all, particularly the legal services provided by law firms that generally represent institutions rather than individuals. One of the primary advantages of social media is its ability to

quickly reach a large and diverse group of people. This is of seemingly little use when your target audience consists of a few high-level corporate executives. But in fact, the primary advantage of social media is not its ability to reach everyone, but rather its ability to make information available to all those who have a specific interest in it. Most people don't care about the Dodd-Frank Act's impact on compensation clawback liabilities, but social media provides a prime avenue to engage with those who do. The beauty of social media is that those people can and will find you, rather than you finding them, if you are providing valuable information.

The good news for law firms with specialized practices is that they are in a great position to provide valuable information. In fact, your firm is probably already producing it. Even if you don't have a blog or a Twitter account, your firm likely expends considerable resources creating alerts, updates, and other materials keeping clients and potential clients apprised of significant legal developments. Engaging in social media can mean no more than redirecting this information into a new venue, where more people can directly access and engage with it in a user-friendly format.

POTENTIAL RISKS

The source of this valuable information, of course, is your firm's employees. And allowing, and in fact encouraging, these employees to engage in social media rightfully makes firm managers nervous. As employment lawyers know well, online actions by employees can and do

lead to problems, and sometimes even legal liability for employers. Some common claims resulting from social media use, such as those alleging discrimination or harassment, are likely distinct from any attempt by the firm to distribute information. Others, however, may be more closely entwined.

Breach of client confidentiality is probably the biggest fear. Attorneys are routinely entrusted with their clients' most closely held confidences and business secrets. While it should go without saying that lawyers should not discuss privileged or confidential information online, a defense attorney in Illinois was recently charged with misconduct for posting confidential client information on her blog, including claims that one client appeared in court under the influence of cocaine and that another lied to the tribunal. To make matters worse, these posts included sufficient information, including first names and jail identification numbers, to easily identify the client. *See In the Matter of Peshek*, No. 6201779 (Ill. Atty. Reg. & Disc. Comm'n, Aug. 25, 2009). And while these posts were certainly detrimental to her clients, the damages resulting from these violations pale in comparison to what could happen if crucial trade secrets were disclosed online, intentionally or inadvertently. At least one court already has held that rights to business secrets may be lost permanently after the information spends only a few hours on the Internet. *See Religious Tech. Ctr. v. Netcom On-line Comm'n Servs., Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995).

Even when attorneys know enough to stay away from revealing client confi-

Jessica Brown is a Litigation partner in the Denver office of Gibson Dunn & Crutcher LLP. Scott Campbell is an associate in the same office.

dential information online, they may not be savvy enough to know when to avoid writing about certain matters that their clients may not wish to have publicized, or strategies that their clients may not want to be disclosed. Many companies have strict rules about use of their names in attorney marketing materials. Others may just have a strong negative reaction to seeing something about themselves or their matters in an online blog they do not control.

And it's not just talk about clients that can get firms into trouble. If an attorney, on behalf of the firm, states a broad legal position online, this can prove problematic if the lawyer or a colleague subsequently takes a contrary position on that issue, *e.g.*, in litigation. Statements about opposing counsel and/or their clients can also raise significant issues. Cisco Systems learned this lesson the hard way when it was sued recently for comments made by one of its in-house counsel, Richard Frenkel, on his popular Patent Troll Tracker blog. The comments accused two Texas lawyers of engaging in criminal activity in a case they brought against Cisco; the latter ultimately settled the resulting defamation suit in January 2010. *See Ward v. Cisco Systems, Inc.*, No. 08-4022 (W.D. Ark. filed Mar. 13, 2008).

Writing settlement checks isn't the only way a firm may feel it is paying for social media use by its attorneys. Every hour spent updating the blog or responding to posts may be, after all, an hour that is not being billed to clients. Given the already high demands on attorney time, and particularly the time of senior attorneys, firm managers may very sensibly believe that scarce resources are not best devoted to delving into a new marketing arena, the value of which is at best unproven.

POSSIBLE BENEFITS

But while some skepticism of social media's marketing value is probably warranted, it's difficult to fault those who take a more optimistic view. The risks associated with social media may be manageable where the scope of employee engagement is limited. As suggested above,

preliminary engagement through social media does not necessarily involve much, if any, additional associate or partner time. Where lawyers are already generating substantive content like legal summaries and analyses, social media merely represents a new avenue for distributing existing work product. Such work product, moreover, often drafted and reviewed by multiple attorneys, is much less likely to include unintentional violations of client confidences or defamatory statements than are off-the-cuff tweets or responses to comments on blogs. And the more subtle risks of annoying clients by discussing them or their matters, or of stating broad legal positions that the attorney or another member of the lawyer's firm may later oppose, are more easily managed with respect to these types of materials as well.

After all, these risks are all present when an attorney authors and publishes an article in traditional media or submits written materials in connection with a Continuing Legal Education program. Yet the benefits of distributing marketing materials via social media, either in addition to or instead of more traditional avenues, are not insubstantial. First, it is simpler to tweet than to deliver alerts via an e-mail blast. With social media, there is no reason to decide who to include and who to exclude; your audience does that for you. Second, with their "viral nature" of a tweet or post, the audience is potentially much broader than the typical mass mailing. Several large law firms have developed followings including well over 1000 people, and if a number of those thousand people respond to or "like" or "Digg" or retweet those firms' posts, all of those people's followers are exposed to the original message as well (and can read, respond, retweet, etc., and so on). And since clicking "like" or "retweet" is easier and less selective than choosing to forward an email and hand-picking particular contacts, information posted on social media can make its way to a larger audience of potentially interested readers in a manner that is faster, less cumbersome, and more easily tracked than a mass email.

Besides serving as a potentially more efficient and effective delivery mechanism for existing marketing efforts, social media can also open the door for people to learn more about your services outside of what is conveyed by any particular post, analysis, update, or alert. When firms post an article or update on Twitter or Facebook, what they are posting is almost never the actual text, but a link. That link points the follower or fan to the text, which can be and often is hosted on the firm's Web site. In short, using social media rather than e-mail is a way to drive traffic to your site. This, in turn, creates the opportunity to sell your firm's services, and not just those related to the initial opinion or analysis that caught the reader's attention.

Which raises another point — social media provides significant opportunities for cross-marketing. A client may be well aware of your expertise in handling matters relating to compliance with the Foreign Corrupt Practices Act (FCPA). Indeed, the client may wait anxiously for your semi-annual update on the subject to arrive. However, the same client may be totally unaware of your firm's experience handling false claims or government fraud cases. Once clients are on your site, you have the opportunity to demonstrate your capacity and sell your services relating to similar issues that clients or potential clients need to address. Likewise, the very format of social media favors cross-marketing of services. Your compelling and informative posts on cases decided by the Supreme Court each term may be the initial impetus for potential clients to follow your feed, but once they sign up, they receive all of the information your firm puts out, related or wholly unrelated to the primary topic of interest. This is a prime opportunity to showcase your firm's expertise, and to put materials in front of potential clients that they would otherwise never see.

Another way to demonstrate expertise is through a blog. More and more practice area-specific blogs are popping up every day as more attorneys use them to keep abreast of developments in their field.

While many of these blogs are run by professors or professional bloggers, law firms and partners are increasingly getting into the mix. In fact, many firms now run multiple blogs on everything from labor relations to climate change law, and at least one large law firm now hosts over twenty separate subject-specific blogs. Internet-savvy executives or in-house counsel may run a Google search or two when they think they have a problem before they decide who to call, and archived blog posts on specific issues increasingly provide a treasure trove of information on particularly important court decisions or legislation. And when companies are searching for help with a legal issue, it certainly isn't bad for business if they are reading your work product (and it may be very bad for business if your clients are reading someone else's work product).

In other words, blogging can be an effective law-firm marketing tool if the blog is taken seriously and executed effectively. Effective blogging creates both the perception and the reality of expertise on a particular topic. It creates the perception of expertise because, as you routinely put out good content analyzing developments in a certain area of the law, people start to rely on you as their primary source of information on that topic. It creates the reality of expertise because routinely putting out good content requires that you stay abreast of all important developments, and study them closely enough to effectively analyze them in writing. The result is that potential clients believe the leading bloggers are on the cutting edge, and, in fact, they likely are. But law firms do need to remind bloggers that they must be careful what they post, especially concerning the firms' clients. Law firms should ensure that bloggers and tweeters are familiar with the firm's policies on social media use and that they comply with those policies.

ETHICAL IMPLICATIONS

As lawyers increasingly use new technology to market their services, ethical rules governing attorney advertising have

struggled to keep up. Many states have recently made efforts to update and tailor their ethical rules governing attorney advertising to account for online activity, but the jury is still out on the scope and constitutionality of many of these rules. For example, proposed changes to the Louisiana rules governing professional conduct were set to be put into effect in October of last year. In August 2009, however, the provision governing internet advertising was preemptively struck down by the United States District Court for the Eastern District of Louisiana.

The provision at issue applied certain disclosure requirements to "computer-accessed communications concerning a lawyer's or law firm's services" where a significant factor motivating the communications is the attorney's pecuniary gain. The court found that the rule violated the First Amendment because the state could point to no evidence demonstrating that the rule was narrowly tailored to directly advance a state interest. In so finding, the court carefully distinguished the internet from other forms of advertising, concluding that "the Internet presents unique issues related to advertising, which the State simply failed to consider in formulating this Rule." *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 558-59 (E.D. La. 2009).

In short, the ethical implications of social media marketing are still largely unknown, though any attorneys thinking of starting a blog, Facebook, or Twitter account for business purposes should certainly familiarize themselves with the rules governing attorney advertising in their state. In absence of specific direction, social media communications should err on the side of caution, carefully disclosing the author of each post and ensuring that it is clear that the substance is meant to be informative, but does not constitute legal advice. And while many practitioners would argue that labeling their blog posts as "advertisements" detracts from their content and what they consider to be a contribution to the legal community, in truth any post that is

well-executed both should and does in fact function as an advertisement for that attorney's services. Thus, it should be labeled as an advertisement.

CONCLUSION

Engagement with social media raises tricky ethical, legal, and business issues that may give many law firm managers pause before turning employees loose to produce legally related content on the Web, particularly since the value of such content in generating business is still unknown. But there are good reasons to believe that social media represents the next frontier in effective legal marketing, and many competitors have already hit the ground running.