Legal Ethics and Website Marketing in 2015

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Dan Goldstein is the President and owner of Page 1 Solutions a website marketing firm for attorneys, dentists and doctors.

Dan joined Network Affiliates as General Counsel in 1993 after working as an attorney in Denver and Washington, D.C. In 1994, Dan took over Network Affiliates’ Medical Advertising Division. He directed the Medical Advertising Division until late 2003. In the mid to late 90s, Dan helped a number of clients develop websites and became interested in website marketing and search engine positioning. Since website marketing began yielding exceptional results for clients, Dan created Page 1 as a joint venture with Network Affiliates. In 2003, he purchased the majority interest in Page 1 from Network Affiliates and turned his full attention to Page 1. In 2014, Dan became the sole owner of Page 1.

Dan has written numerous articles and given many presentations on Internet marketing at various conferences for attorneys, physicians and dentists. He remains actively involved in the business of Page 1, focusing on research, content development and search engine marketing.

Dan enjoys karate, traveling, hiking, camping and keeping up on current events.

Larry Bodine

Larry Bodine is the Publisher of The National Trial lawyers, the leading organization of leading plaintiff and consumer attorneys, and Editor in Chief of Personalinjury.com, the leading director of plaintiff attorneys.

He is the former Editor in Chief of Lawyers.com, the top online destination for finding a lawyer and the latest legal news for consumers.

He has 20 years of experience as business development trainer who helped hundreds of law firms generate revenue and get new business. A former litigator, Mr. Bodine has operated several websites, and currently updates the LawMarketing Blog at blog.larrybodine.com.

Larry also worked in the following positions:

- Director of Communications of Sidley, Austin Brown & Wood based in Chicago for eight years in the 1990s.
- 15 years' experience as a journalist, serving as Editor and Publisher of the American Bar Association Journal and other news publications.

He is a cum laude graduate of both Seton Hall University Law School and Amherst College.
Introduction.

Attorney advertising has been an ethical minefield for decades. The foundation for this conversation starts with the intersection of the First Amendment\(^1\) and Commercial Speech combined with the traditional antipathy of many in the legal community toward advertising as being unprofessional. The floodgates opened after the U.S. Supreme Court upheld the right of lawyers to advertise their services in a manner that is not misleading to members of the general public.\(^2\)

Since that time, lawyer advertising (in print and broadcast media) has become prolific (particularly for personal injury lawyers) with a few state Bars attempting to impose limits in the name of preventing advertising that would mislead the public. The attempted limits have included all sorts of things. Following are just a few:

- The prohibition of client testimonials and endorsements
- The requirement of specific disclaimers
- Requiring the submission of all advertisements to the Bar for review
- The prohibition against advertising “past results”
- Limitation on the ability to market lawyers as “specialists”
- The prohibition against using actors in law firm advertisements

These limits and many others have been tested in the courts and the results have helped define the permissible scope of lawyer advertising in states that would otherwise prefer to prohibit it altogether.

Then came the Internet. With the advent of the Internet and law firm websites, law firm marketing and advertising was turned on its head. State Bars previously did not have to worry about consumers outside of their state seeing ads promoting attorney members. Conversely, it was unusual for attorneys to advertise to consumers in other states. However, since the Internet is not defined by borders (at least not state borders within the US) a whole new host of legal and ethical issues relating to lawyer advertising were raised.\(^3\) A few of these include:

- The unauthorized practice of law – where a lawyer’s ad is seen by a citizen of a state where the lawyer is not authorized to practice.
- The extent to which a lawyer is responsible for his or her profile on a legal directory.

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\(^1\) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.


\(^3\) This paper does not address ethical issues not related to advertising such as reviewing jurors’ social media profiles, email correspondence dealing with client matters, or storing client data in the cloud, among others.
• Blogs and other content written by non lawyers both inside and outside of the firm.
• Online reviews about the lawyer – often unsolicited and which the lawyer may not be able to change or control.
• Social media posts by the lawyer – both in a personal and professional capacity – that might be considered self promotional.

This paper briefly covers a few of the many ethical issues relating to attorney website marketing.

The Model Rules of Professional Conduct.

The starting point for any discussion of ethics in legal advertising is Section 7 of the Model Rules of Professional Conduct.

• Model Rule 7.1 -Communications Concerning A Lawyer's Services
  – 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.

• Model Rule 7.2 - Advertising
  – (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

Of course, not all states have adopted the Model Rules and some have modified them, so it is always best to review the applicable rules in your jurisdiction as well as any ethical opinions issue by your Bar or State Supreme Court. The following link lists the states that have adopted the ABA Model Rules of Professional Conduct - http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.

To check your specific state’s Bar Rules, here is a good starting point: http://www.internetlava.com/BarRules.aspx.

Website Content and Blogging.

We have all heard the saying, “On the Internet, Content is King.” That is more true today than ever before. Google continues to reward “high quality content” and to downgrade websites
with thin or duplicate content. So, we all know that producing high quality content is the key to success, but how do you find the time to do it?

Most personal injury lawyers don’t. They hire a website marketing firm or a law student intern to “crank out quality content.” There is an interesting phrase if I ever saw one. Quality content is hard to define, let alone produce, and the idea of “cranking it out” does not suggest “quality content”.

And then you have the other side of the coin – some of the few lawyers who actually do write their own content may be hurting themselves. The reality is that Google wants you to provide content that answers consumer questions. Lawyers aren’t always good at that. Lawyers who do write well, often write in legalese or about arcane points of law that are little or no interest to consumers or prospective clients.

While doing your own blogging may not be the best solution, we strongly recommend that you work with professional bloggers with extensive experience writing for personal injury law firms. Ideally, these professional bloggers have a good understanding of the legal issues that are relevant to your blog posts and they steer clear of offering legal advice. In addition, we recommend that you do not allow any blog posts to be ghost-written under your name unless you have reviewed and edited them prior to posting. Moreover, it is a good practice in general to designate an attorney within the firm review all blog posts on your law firm’s blog prior to or promptly after they have been posted.

**Are Blawgs Legal Advertisements?**

The next question about blogging is whether a law firm’s blog is an “advertisement” that must be submitted for review (in states that require advertising material to be submitted prior to publication) or must include a disclaimer in states that require a disclaimer on all lawyer advertisements. At least one state has found that blogs are advertisements at least to the extent that the blog is being used to market to consumers. See *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), cert denied, 133 S. Ct. 2781 (2013). This matter is not settled. You can read a good discussion on this topic here: [http://www.newyorklawjournal.com/id=1202638013943/Attorney-Advertising-in-the-Digital-Age#ixzz3NlozUqYj](http://www.newyorklawjournal.com/id=1202638013943/Attorney-Advertising-in-the-Digital-Age#ixzz3NlozUqYj)

Note that this issue becomes even thornier when it comes to the question of whether a social media post is considered a legal advertisement. For example, in states that require a disclaimer on all legal ads, how do you fit a disclaimer into 140 characters? Does this eliminate a lawyer’s

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4 Lawyers and many other professionals are coming close to a consensus that ghost-blogging is unethical. [http://kevin.lexblog.com/2014/06/26/near-consensus-ghost-blogging-is-unethical/](http://kevin.lexblog.com/2014/06/26/near-consensus-ghost-blogging-is-unethical/)
ability to use Twitter at all? Does it create a First Amendment issue? This remains to be decided.

Pay Per Lead

The practice of paying per lead is becoming more and more common in the personal injury law arena. Mass torts and the relative ease of setting up lead generation websites have created a market for personal injury lead generation. Reputable companies such as Nolo, Lawyers & Settlements and FindLaw, among others are actively selling leads to attorneys. And lawyers are paying big dollars – sometimes very big dollars – to communicate with potential clients.

(Separate from the question of whether it is ethical to pay for leads, lawyers should also be careful to work with reputable companies that send a lead to only one law firm at a time. Otherwise, you may be paying big dollars for a lead that another law firm already turned into a client.)

The TotalAttorneys ethics complaint was the first shot across the bow in the Pay Per Lead (Performance Based Marketing) arena. This 2012 blog post from TotalAttorneys discusses that case: http://www.totalattorneys.com/attorney-blog/update-on-the-ethics-of-performance-based-marketing/.

The good news for law firms that the comment to Model Rule 7.2 does seem to approve of the “pay-per-lead”).

Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).  

As this article - http://www.attorneyatwork.com/lawyer-advertising-and-marketing-ethics-today-an-overview/ - points out, however, it is important to check your state’s ethics rules as

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5 http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2.html
not every state has adopted the Model Rules of Professional Conduct and still others have only partially adopted them.

“Super Lawyers” and other awards.

As awards such as Super Lawyers® and other awards are being used more and more as credibility enhancement tools on your own law firm’s website as well as attorney profile pages on many directories, you should keep in mind the following:

- Depending on your state’s ethical rules, you may be required to note that a specific award is not recognized by your state’s supreme court or that the advertisement is not approved by your state’s supreme court.
- You may need to disclose that you paid for the “award”.
- Also, you should avoid calling yourself a “Super Lawyer” or a “Best Lawyer” since that may run afoul of the prohibition against unsubstantiated comparisons. Instead, you should reference the fact that “you have received the following awards....”

You can read more about this issue here: http://conversioninsights.net/marketing-ethics-law-firms/

Do Online Reviews Violate State Bar Rules Prohibiting Testimonials?

Larry Bodine addresses one aspect of this issue below when dealing with a lawyer’s response to a negative client review that revealed client confidences. (See #4, below.) However, the basic issue is whether a State can prohibit lawyers from having reviews on online review sites such as Google My Business, Avvo, PersonalInjury.com, LinkedIn, and Yelp, to name a few. Beyond this, you have to consider client testimonials on sites like Facebook that are not even linked to your individual or law firm’s profile.

From a practical perspective, online reviews are an essential part of today’s website marketing strategy. As you probably recognize from your personal experience, online reviews can be tremendously important in customer purchase decisions for all sorts of things, from movies to restaurants to hotels, shoes, and yes, even lawyers. Reputation management is becoming a bigger and bigger part of online marketing today. So, this issue is really important.

The threshold question is whether a review posted by a third party is a “communication” subject to regulation by the Bar. My personal belief is that the answer is “no” since the lawyer did not create that communication and may not be able to change it. Because a rule prohibiting such “reviews” and/or “testimonials” would seem to be both impossible to enforce and impractical since review sites are so prolific and many review sites do not allow you to remove reviews – good or bad, it would seem that if faced with this issue, the courts would
support the lawyer’s perspective rather than that of the state Bar that wants to censure a lawyer for online reviews.

A good discussion of this issue can be seen here: http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=77.

Ethics and Social Media Roundup.


5. **Convictions overturned because of prosecutors’ anonymous online comments on news stories about case.** September 18, 2013. In the New Orleans US Attorney’s office, the office’s top trial lawyer, Sal Perricone, aka "legacyusa" and other handles; and Jan Mann, the first assistant U.S. attorney -- posted disparaging comments anonymously on online news stories about the case.


7. **Sarah Peterson Herr, Kansas Appeals Court Attorney, Fired Over Foul Tweet.** Using her personal Twitter account, she posted the comments about former Attorney General
Phill Kline while he was appearing before the Kansas Supreme Court as part of an ethics investigation.