CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2016 CLM Boston Conference
July 14-15, 2016
Boston, MA

"*Ripped from the Headlines: Don't Let Your Firm Be Next*"

I. Professionals are increasingly turning to social media to promote their business and to further it.

Social media is increasingly being used as a tool for professionals. It is used as a platform to promote and market a professional's business and as a tool to gather information in furtherance of that business. The various social media tools that most professionals will use that include, Facebook, Instagram, Snapchat, Twitter, LinkedIn, Blogs, Webpages and YouTube videos.

Licensed Real Estate agents likewise may use forums available through the National Association of REALTORS® and/or their local associations to promote their business, brokerages or otherwise address their profession.

Lawyers and real estate agents are but two examples of professionals utilizing these services. All trades and profession are on-line. And, it makes sense. Social media provides exposure and information.

In turn, the questions are abound. Are professionals utilizing these services properly? Can they avoid potential pitfalls that range from sanctions from their own governing bodies to civil litigations? And, if problems arise, will their respective errors and omission insurance policies, or other policies, provide sufficient coverage?

II. How are Professionals falling short when it comes to use of social media?

A. Real Estate Brokers

Advertising in General.

1. **Compliance with State Advertising Rules:** Blogs and other social media platforms are increasingly being used as an advertising vehicle for licensees. Yet, many states require real estate licensees to include specific disclosures on all advertisements – for example, the firm name; licensee name; city and state of main/branch office. Some states require licensed agents to "prominently" display its Broker's logo and name on all advertising.

Hypothetical: If a real estate agent posts on his or her Facebook page a picture of a home with the following text: "Just listing this beauty for my clients, I am sure it will get a lot of activity". Is this advertising? Does it matter how many "friends" the agent has on Facebook? Does it matter if the Facebook page is a personal one or a business related page?

What if the same is done on a daily blog that an agent uses to promote his or her business?

As social media becomes more of an outlet to generate business for licensed real estate agents, states are increasingly scrutinizing social media cites and are taking the position that these types of posts are indeed advertising.

Compliance with the National Association of REALTORS® Code of Ethics relating to Advertising. Article 12 of the Code mandates that:

> REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional.

Assuming a licensed agent also holds a REALTOR® designation, that licensed agent's "posts" can run afoul of the Code.

Potential Ramifications. Violations of State rules can result in fines, suspensions and/or license revocation. Violations of the Code of Ethics can result in fines, restrictions to Association privileges and/or loss of membership.

Practice Pointer for Insured Professionals: Here, real estate brokers/licensees should view all social media platforms as traditional advertising forums when posting anything relating to their trade.

2. **Trademark issues.**

Social media platforms allow users to post comments, pictures, speeches, music, and videos with ease. This functionality obviously has benefits, but it also creates liability risks: It allows members and staff to publicly share information that does not belong to them and potentially infringe on another's intellectual property rights.

Intellectual property can be broadly defined, but it most often refers to copyright, patent, and trademark rights. Examples of intellectual property that can be protected include articles, books, photographs, speeches, software code, and music (copyright); a new machine (patent); and an association logo (trademark). Registration of copyrighted works is not necessary to confer ownership, so the lack of a copyright mark does not mean that material found on the Internet is unprotected and can be used freely.

Hypothetical: A real estate licensee downloads music to play in the background on their web page. Is that a potential copyright infringement? Yes.

Practice Pointer for Insured Professionals: Brokerages/law firms/CPA firms, etc. must take steps to prevent intellectual property infringement on their social media sites. Internally, they should have a social media policy that clearly outlines do's and don'ts. Posting material that these entities/persons do not own without permission should be high on the list of don'ts. Employers should frequently train employees/independent contractors on social media policies and intellectual property issues generally.

Potential Ramifications. Federal and State Trademark enforcement actions are possible. And the holder of the Trademark has a private right of action. Fines and penalties depend upon the nature of the violation and the frequency, but, can be significant.

3. Antitrust Violations.

Associations are especially vulnerable to antitrust liability because they constitute a group of competitors that cooperate for some purpose. Typically, this cooperation is meant to advance the industry generally, and most of this activity complies with the law. However, activity that attempts to interfere with competition is a potential violation of antitrust law—including, for example, price fixing, anticompetitive membership restrictions, and improper standard-setting or certification conduct. Violations can carry severe penalties, both civil and criminal.

A violation can be inferred from an actual or informal agreement to restrain trade. For example, imagine a membership meeting in which a member stands up and suggests that all members should charge a certain commission. If members later start setting the same price for their commissions, it is possible that an antitrust violation may have occurred.

Practice Pointer for Insured Professionals. Associations/Professional groups must monitor their social media sites for antitrust red flags. Such as, a member might post a comment on an association blog suggesting that all members refrain from doing business with a certain company. Even if no one agrees publicly, staff should encourage users of the site to (in antitrust parlance) "loudly dissociate" from the comment, stating their disagreement and saying they want no part of a boycotting conspiracy. The anticompetitive post should also be deleted as soon as possible.

Other protective measures associations should implement:

- The association should have an antitrust policy.
- The policy should be linked or displayed on all association sites.
- Staff and volunteers should be trained on antitrust law, especially those responsible for monitoring social media platforms.

B. Lawyers

1. Advertising in general.

Many states have special requirements for lawyer advertising, such as filing with a reviewing authority pre-publication; inclusion of basic office information, labels that the post is an “advertisement” or “disclaimer” information, advertisement retention and the like.

Will social media posts constitute advertising for lawyers? Some may, some may not.

The Tennessee Board of Professional Responsibility, for instance, regards LinkedIn profiles as advertising. Yet, Texas takes the opposite view.

Hypothetical. A LinkedIn profile has a field for "specialties." Further, contacts can categorize a lawyer as such when recommending the professional. Yet, ABA Model Rule 7.4(d) and most state rules prohibit a statement that a lawyer is a specialist without an actual State sanctioned accreditation. Can this lead to disciplinary action against the lawyer/attorney? In many states, yes.

Hypothetical. An attorney successfully defends a lawsuit at trial and posts about the results on his/her Facebook page. Could this be considered an advertisement? Could it be considered a guarantee of results? Could it run afoul of the advertising rules in a particular state? In many state, yes.

Breaching client confidentiality.

The casual nature of social media can lure attorneys to unintentionally breach client confidentiality. In a tweet a lawyer wrote, "had to fire a client today who totally lied to me about all the facts." Since the date and time of the tweet gets posted, it has the potential of revealing information to someone who might know that the client was meeting with the lawyer that day.

Solicitation by real-time electronic contact.

Twitter has such open conversation and rapid interaction capability that a lawyer must keep ABA Model Rule 7.3(b) (or the local equivalent) in mind. The Rule provides that:

A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

So, if on Twitter someone posts they are "about to go through an ugly divorce" and a lawyer responds that "you have no chance to do well in that unless you hire a great divorce attorney like me," Rule 7.3(b) could be implicated.

YouTube Videos

Attorneys often make educational YouTube videos. If they go beyond that, and indicate the services the firm provides and the like, then advertising rules may apply. Even if they do not, and the video is strictly educational, some states require advertising disclaimers.

2. Use of Social Media to Advance a litigation/case.

Lawyers who investigate jurors and opposing parties online may cross the ethical line.

Your Profile Has Been Viewed

Bar groups are divided on the question of whether lawyers violate ethics rules when they view the public profiles of jurors, judges or represented persons on social media platforms—such as LinkedIn—that automatically alert users to the fact that their profiles have been viewed. Some ethics committees have said such notifications may constitute "communications," and that passive browsing may thus violate state variants of ABA Model Rule 3.5(b) (ex parte contacts with judges and jurors), Model Rule 4.2 (communications with represented persons) and Model Rule 4.3 (communications with unrepresented persons).

Which Professionals will advertising rules impact?

Virtually all professionals – those containing licenses – have advertising restrictions through their respective governing bodies. For our purposes, real estate licensees, lawyers, accountants and insurers face the most challenges.

III. Private Rights of Action.

Hypothetical. On a real estate agent's Facebook page, she notes that she is listing a house "that was just completed by ABC construction." That was incorrect as the builder was really the owner of the property. He had previously worked for ABC construction, but, built this house in his private capacity. The home was sold and later had foundation issues. The buyers filed suit against the agent claiming that they purchased the home in part because they believed it was built by "ABC construction" – a licensed contractor. Their suit is based upon a Consumer Fraud Statute that prohibits a "merchant" from providing false information in advertising.

The legal issues include whether the Facebook post was an advertisement? Was the real estate agent considered a merchant under the Statute? Would one of the buyers have had to be a Facebook "friend" of the agent for a violation to have occurred? In this matter, the answer to each question was Yes.

IV. What are the insurance implications relating to social media claims?

Will standard Errors & Omissions Policies provide coverage for enforcement actions by regulatory bodies governing advertising violations? Most policies provide coverage to professionals for allegations and wrongful acts that arise out of "professional services." Yet, standard E&O policies also exclude coverage for illegal acts. And, so, depending on the "advertising" and if it were deemed illegal by the governing board, could there be coverage issues?

Even if a violation of a regulatory body rule or statute, most policies will extend sub-limit coverage for regulatory actions brought against the insured. That sub-limit policy is typically for defense only and is of a small amount (e.g. $10,000).

The question for the insured is should they seek additional coverage relating to advertising and what is available. The panel will address those issues and seek comment from attendees as well.

Other insurance issues arise depending on the nature of the claim. A Federal Trademark Claim, even one that gives rise to a private cause of action, may have limitations in coverage. A consumer fraud claim, based upon intentional conduct, may have limitations in coverage. A defamation claim arising out of a social media post could have limitations. Again, the panel will address these issues and solicit discussion.

How should carriers and defense counsel approach the defense of these matters?

Because coverage can be limited and only include a fixed sum for defense costs, carriers and defense counsel must be judicious with how these claims are handled. The insured must be advised of the possibility that (1) the sub-limit defense costs may not fully cover the entirety of the defense and (2) that any fine or penalty will not be covered. In addition, normal reporting guidelines (including full assessment reports, budgets and the like) should be curtailed or streamlined in order to preserve as much of the defense funds as possible.