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Facebook's Flipside

By Frances M. O'Meara and Allan Colman

As we write, there are hundreds, probably thousands of lawyers, marketers and business development counselors - in other words, the people who incite and implement firm-wide client growth initiatives - discussing and debating the social media as a way to cull new contacts and reinforce existing ones.

They're no doubt fretful that competitor firms will jump on the Facebook and Twitter trains first and more effectively. After all, their firms have fallen behind the curve in the past and they're hoping to do better on this latest marketing front.

With lawyers involved, the flip side of the discussion is, as it should be, the dangers of this open, hard-to-control and even potentially scandalous venue. Firms are getting in trouble all the time because their lawyers have posted something stupid. So how do we exploit the assets and eliminate the liabilities?

So far, so good - these firms ought to be engrossed in just such a marketing and management review of social media utilization. But there is a fundamental negative in the digital equation that has not yet been sufficiently observed.

In fact, social media can significantly reduce the scope and quality of professional service marketing.

Younger attorneys in particular may use participation in social networking sites as an excuse not to actively market. Actively marketing means significant exertions: presentations, articles, provision of intellectually and professionally valuable ideas and resources to clients and prospective clients. And follow-up as well: the phone calls after the seminar ends, the market research, the immersion of lawyers in the business realities of the

industries they service.

Actively marketing means a lot more than the assiduous tending of Internet sites. It's also about a thousand and one steps that lawyers and marketers need to be taking, both online and off.

Younger lawyers sometimes say there's no need for them to build and update a contact list. "We're on Facebook," is their knee-jerk rationale for why they don't. Such rationales are dangerous even if concerns are confined to simple list-building. At this level alone, over-reliance on social media is pernicious.

After all, whom do they expect to visit them on Facebook? Mitsubishi's associate general counsel? Microsoft's chief patent lawyer? Shouldn't we be training our younger attorneys on the importance of expanding their reach beyond some current group of law school chums who typically comprise social networking forums?

Even if those chums all grow up to be decision-makers, the marketing benefits are deferred by eight or 10 years if the only networking our lawyers do is with their contemporaries. At this point in time, do these lawyers who represent the future of our firms remember what customer relationship management systems are? They'd better.

Let's take a look at what social networking ostensibly accomplishes. Digital pundits say its primary advantage over previous electronic communication is its reciprocity; it is a proliferating message-machine that integrates multiple tools in concerted back-and-forth outreach campaigns. After all, e-blasts, electronic newsletters and tailored individual communiquÃ©s to clients and contacts did not have automatic response mechanisms built in, as do Facebook, Twitter and blogs by definition.

The problem with this thinking is in the word "automatic." Automatic is OK as far as it goes. But proactively making additional efforts to solicit responses, via individualized e-mails or phone calls, is a whole lot better - not because it is necessarily efficient, but because it ensures personal, real-time contact with people who may not even know what Twitter is, but who do make decisions on multimillion-dollar legal spend.

In the November/December 2007 issue of Diversity & the Bar, the most memorable quote by one of its 10 Rainmakers of the Year came from Victor Vital, a partner with Baker Botts. He said, "master your practice area; create a buzz about themselves by publishing, speaking and presenting; and never overlook anyone."

Indeed, social media may even obviate the fundamental premise of professional services marketing in general and lawyer marketing in particular, which is all about follow-up. If an e-mail is sent to clients and contacts with a copy of a recent court opinion or pending legislation, find out personally if the information was helpful. Even in terms of efficiency, a couple of quick calls per week consume a lot less time than the hours typically invested in a preferred social network.

Social network gurus also advise that, the greater the frequency with which users participate, the greater the value received. Again, though, the impact of that frequency is circumscribed, both by the demographic limits of the media (younger lawyers, school chums, in-house lawyers who are not yet decision-makers, etc.), as well as by the content.

On the one hand, are the contacts lawyers make at conferences or CLE programs represented on Facebook? When, after a presentation, audience members ask for more information, do they really want to be referred to a Facebook page?

Even more significant, the value of old-school marketing collaterals like client newsletters is lost. How many lawyers post in-depth analyses of the Wyeth decision on their social media pages?

Resurrect the old saw, about how most new business derives from existing business. That formula is based on day-to-day service performed, value delivered and relationships expanded. The most effective marketing communications are not ultimately viral. They are deeply personal. The marketing value of technology may support, but it does not define the relationship. In other words, superior technology is vital to superior service - the best e-discovery, the best document management, the best research, etc. - but it is ancillary to the relationship itself.

Social media does, of course, present its own marketing potential. In fact, every law firm ought to plan on how best to leverage the opportunities.

Firms should be concerned, however, that, just as lawyers typically found convenient excuses not to market even before there was an Internet (e.g., "We have a marketing director, let her do it"), so too will a new generation rely on a busy but relatively painless - too painless - way to talk to the marketplace.

Comparison to the legal profession's past failures is appropriate for an additional reason: Both then and now, a pronounced clubbiness curtails the real impact of services marketing. Then, it was the "old boy's network," in

which a bunch of rich white guys who already knew one another marketed to one another. Now, it's the slick social media in which young people who think like one another read about one another.

All of which is fine, but it is just the thin surface of the marketplace that growth-oriented organizations must penetrate. Do not let your young lawyers labor under the delusion that they can build a strong book of business by scampering giddily at the cutting edges of technology. Remind them of the legions of potential clients and referral sources who do not use social media and probably never will.

Most important, define for them the value equation that drives all marketing: Are they providing something of ongoing and substantive value regardless of whether their audience members immediately become clients?

If not, the medium doesn't matter. It's all just talk.

Navigating the Hidden Traps

Almost 50 percent of lawyers responding to the recent 2008 Network's Counsel Survey, commissioned by LexisNexis and Martindale Hubbell, participate in online social networks, and more than 40 percent believe the networks can potentially change the business and practice of law over the next five years. An exciting frontier, no doubt - but there remain persistent ethical traps for anyone who promotes or provides legal counsel on the Internet. Here are a few red flags:

Attorney-Client Relationships

Online networking sites allow users to post and answer questions that can look like good marketing opportunities, but be careful not to give any legal advice on the site. An attorney-client relationship can arise from consultation with a prospective client or the consultation itself can raise an issue of fact in a subsequent lawsuit. Social or casual contacts have led to claims, typically when the lawyer is asked or volunteers an opinion or "advice." Preventive measures include simple disclaimers advising contacts that they are not yet clients.

Unlicensed Practice

You could be exposing yourself to criminal liability for practicing law in jurisdictions where you are not licensed. In *Douglas v. Monroe*, the California Supreme Court opined in dicta that a lawyer may be engaging in "unauthorized practice of law" when an out-of-state lawyer advises a

California client on California law by means of "telephone, fax, computer, or other modern technological means." A logical solution is to inform potential clients that you are only registered to practice law in certain states and suggest they find licensed attorneys where their legal actions are to be taken.

State-by-State Advertising and Solicitation Rules

Cyber-lawyers have no control over where any of their marketing information will show up, and those who appear to be soliciting clients from other states may be asking for trouble. Certain states require that an advertisement "has certain content and specific disclaimers." For example, New York requires that any advertisement on any Web site and other medium shall be labeled "Attorney Advertising" on the first or home pages. Research other jurisdictional restrictions on advertising as cross-border practice to ensure compliance before aggressively marketing and providing legal services via the Internet. Or, keep your professional and social online activities as separate as possible, even though that might vitiate the vaunted marketing potential of social media.

Attorney-Client Confidences and Privileges

Case law is finding that entries on Facebook or MySpace do not have a reasonable expectation of privacy and, as such, are subject to disclosure and/or production in subsequent litigation. In *Beye v. Horizon*, the court ordered plaintiffs to turn over e-mails, diaries and other writings that were "shared with other people," including entries on Web sites such as Facebook or MySpace. There is a lowered expectation of privacy when the person asserting a right of privacy is the same person who made the information public in the first place. Facebook's own policy emphasize the potential for public disclosure, while the court's proclivity to order production underscores the idea of individual responsibility when using social networking sites.

Unauthorized Hyperlink Referrals

Attorneys should be careful about linking through referral service Web sites. Many states require those services to be registered or prohibit them altogether. Accepting business from the service can also be an ethical violation if the referral service is not registered.

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