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Attorneys must understand, avoid risks in social media marketing

Many of my clients are now fully engaged in social media marketing. In counseling my clients on such marketing plans, I have come across some legal pitfalls that bear consideration by attorneys as well as firms and companies of all sizes. Awareness of the potential risks outlined below can help prevent mistakes that can lead to needless litigation.

Attorneys must comply with applicable ethics rules governing attorney advertising. Be mindful of any applicable ethics rules that govern advertising, including what may be permissible to publish regarding your practice or your clients. Rules of Professional Conduct that may be implicated include 1.6(a), which prohibits revealing client confidences without informed consent and 7.1 through 7.5, which govern attorney advertising.

Avoid comments regarding third parties. Any statement regarding a third party has the potential to lead to liability for various tort claims under Illinois law, such as defamation or intentional infliction of emotional distress. Take care to avoid potentially false statements or statements that shed a negative light on other companies or individuals.

Consider any applicable intellectual property. Ensure that your postings do not violate applicable trademarks or copyrights. Likewise, be mindful that postings could result in a waiver of your own intellectual property rights, trade secrets or confidential information.

Be wary of any endorsements.

If you must engage in endorsements as a method of promotion, those endorsements must be in compliance with Federal Trade Commission guidelines, which require that any endorsements be truthful and not misleading. Connections between the endorsers and marketers should be disclosed if it would affect how people might value the endorsement.

With employment issues, statements made by employees who disclose their affiliation with a company may be considered as being made on behalf of the company, which could result in liability. At the same time, terminations or discipline of employees for online statements regarding their employment can run afoul of their rights to discuss and improve working conditions under Section 7 of the National Labor Relations Act (NLRA). Statements that may fall under the NLRA's protection include complaints relating to wages, benefits and other working conditions. Such

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complaints must not be so outrageous as to lose protection.

With litigation risks, be aware of the possibility that anything you post online could be used by adverse parties for information gathering to support potential lawsuits or claims. Scrutinize anything you post online before it goes viral to confirm that the posting could not be misconstrued or used against you in any context. Social media and online marketing are not the place for sarcasm or jokes. Anything you say can and will be taken literally. The same goes for statements regarding you or your company's expertise or abilities.

What can you do to avoid these pitfalls? Below are some action items to take now in order to protect you or your company from liability:

- Create a specific plan for any social media marketing you

undertake that limits the use of social media to uses that you can monitor and control;

- If you are an attorney, make sure you have carefully reviewed and are always in compliance with the applicable ethics rules for attorney advertising;

- Become familiar with the terms and conditions of any sites you choose to use for promotional purposes; and

- Develop and implement social media policies for your company. Social media policies should be disseminated in writing and on the company computer system, where they can be viewed by all employees. Social media policies should prohibit the distribution of the intellectual property or trade secrets of the business or third parties. To ensure compliance

with the NLRA, social media policies may not include requirements that could be deemed to discourage free discussion of workplace conditions, such as an absolute prohibition on disparaging or unprofessional comments regarding the workplace. However, social media policies may require employees to comply with company policies of nondiscrimination by prohibiting harassing or vulgar communications. Finally, procedures should be put in place for monitoring compliance with the social media policy and for periodic training on the policy for you and/or your company's employees.

Understanding and avoiding the potential legal pitfalls outlined above ensures that social media marketing will remain a powerful and useful tool for attorneys and their clients.