

Firms Cannot be Silent About Social Media Pitfalls

By Stuart Teicher, Esq.

Social media is an ethical minefield. Attorneys, firm managers and administrators who use platforms like Facebook and LinkedIn face a myriad of disaster areas that must be navigated, lest they cause damage to themselves and their firm. Some dangers are obvious and others may be hidden, but one thing is clear-- the ethics rules place a duty upon firms to warn their personnel about the danger zones.

There are a host ways that a lawyer could violate the rules of professional conduct when using social media, whether by communicating with a person represented by counsel or improper solicitation of a potential client. There are likewise innumerable bad moves that a non-lawyer may make, such as tweeting about a confidential visit by a client. To insulate themselves from these problems, many firms simply stay away from social media; they believe they're protected so long as they don't condone the use of social media in the workplace. But silence could be dangerous because supervisory lawyers might be running afoul of RPCs 5.1 and 5.3 if their firm fails to warn its personnel about the ethical dangers of using social media.

Rule 5.1 sets forth the responsibilities of a supervisory lawyer and states that lawyers who have managerial authority in a firm must make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." Similarly, Rule 5.3 deals with the responsibilities regarding non-lawyer assistants and states that lawyers who have managerial authority must make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." The "silent approach" adopted by most firms seems incompatible with those rules.

Every lawyer knows that their colleagues and support staff are using social media on a daily basis. Thus, we all know that each of those individuals could potentially step on an ethical landmine at any time. Consider our somewhat distorted logic: We know that the dangers exist; we know that there is an ethical obligation to take reasonable efforts to ensure that the firm takes steps to give reasonable assurance that our people are behaving consistent with proper standards, yet many firms purposefully choose to remain silent about the dangers. That silence appears to be in direct contravention of Rules 5.1 and 5.3.

It appears that the only way a firm can take "measures that give reasonable assurance" that its personnel are behaving in accordance with the rules when using social media is if they actually educate those personnel about the behaviors they should be avoiding. Thus, I believe that in order for supervisory attorneys to comply with the requirements of Rules 5.1 and 5.3, their firms must provide guidance to both lawyers and non-lawyers about the dangers of using social media both inside and outside of the workplace.

Stuart Teicher, Esq., is a professional legal educator who focuses on ethics law.