The InTerneT, and particularly what is called “Web 2.0,” presents new challenges to lawyers, as well as old challenges in new forms. This article discusses some of the less intuitive ethical issues that arise from lawyer’s use of the Internet, including those that arise from using social networking sites to solicit clients or otherwise market legal services. (On August 5, 2010, the ABA released an ethics opinion, ABA Formal Ethics Op. No. 10-457 (2010) that generally addresses law firm webpages.) If there is a single lesson to be learned from what follows, it is this: bar associations and courts are only beginning to analyze how legal ethical rules designed for the real world apply online, and sometimes they are creating “Internet only” rules that would never be applied off-line. As a result, lawyers need to be particularly careful when using the Internet to communicate with or search for prospective clients or otherwise marketing legal services on the Internet.

**Linking To And From Law Firm Websites**

One benefit of the Internet is the ability to provide hypertext links from one webpage to another. These links can take many forms, ranging from internal links within a law firm’s website, to links from the law firm’s site to those of third parties, to third party links to a firm’s site. They
can be used to make a firm’s webpage a starting point for legal research, and so drive traffic to the firm’s webpage. They also can create ethical issues.

a. Ethical Issues. Law firm webpages can link to other pages. Obviously, a link that only takes a visitor to a different page in a law firm website does not create additional issues beyond the fact that the linked-to page must comply with the same rules that apply to all pages of a firm website. See S. Ct. Ohio Bd. of Comm’rs on Grievances & Discipline, Ohio Adv. Op. 2000-6 (Dec. 1, 2000). However, a link on a law firm website that takes a visitor from the law firm’s website to websites that are either independently operated by a third party, or owned or controlled by the firm or an entity controlled by the firm, can create ethical issues. Conversely, independent third parties can also link to the firm’s webpage. A client who, for example, is particularly happy with a firm could post a link in a blog post extolling the virtues of the firm. Perhaps between the two, the firm could create a site that it controls, but which does not on its face appear to be a law firm website, that contains links to the law firm’s website.

This section identifies the ethical issues that arise when a firm links to other pages, as well as when other sites link to a firm’s webpage. Linking raises many ethical questions, even in something as common as email. For example, if an attorney sends an otherwise innocuous email, but it contains a link to the attorney’s firm, do the advertising rules and federal statutes concerning spam email kick in? See William R. Denny, Electronic Communications with Clients: Minding the Ethics Rules and the CAN-SPAM Act, 62 Bench & B. Minn. 17, 21 (Dec. 2005) (concluding that if the primary purpose of inclusion of the link in the email was “commercial,” then the CAN SPAM act would apply, as would advertising provisions in the ethics rules).

At the outset, it is important to emphasize that nothing in the disciplinary rules does, or can, regulate what a client or third party may put on its website, or how the client may otherwise describe a lawyer. However, the rules govern not only the conduct of lawyers, but of efforts by lawyers to circumvent the rules through the acts of others. See Model Rule 8.4(a) (stating that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”). Thus, a line exists between unilateral actions of a client or third party — which the lawyer is not responsible for — and those actions which the lawyer is responsible for, which include acts of third parties that the lawyer induces. Though somewhat easily stated, in the context of linking, the boundary is not always clear.

b. Links With No Commentary (Bare Links). Bare links with no commentary are proper, so long as they are not referrals. A simple descriptive link from a third party site to the law firm’s site — e.g., a link on a third party’s page that, without payment from the lawyer or any other contact, simply says “click here to go to BakerBotts.com” — would not create any apparent issues if there is no comment made about the firm. Thus, for example, a client’s placement of a firm’s logo on its webpage would not constitute a violation of the ethics rules (assuming no payment or improper referral arrangement). Sup. Ct. Ohio Bd. of Comm’rs on Grievances & Discipline Op. No. 2004-7 (Aug. 6, 2004) (“Communication to the public of a law firm’s name and logo on a business client’s website is acceptable because it is not a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement); Ethics & Prof’l Resp. Comm. of the Cincinnati B. Ass’n Op. No. 96-97-01 (1997) (“A client of an attorney or law firm may list the attorney or law firm on the client’s Internet Home Page and may provide a link to an attorney’s or law firm’s Home Page on the client’s Internet Home Page if the attorney or law firm does not request the link and does not provide
compensation or anything of value to the client in return for the client listing the attorney or law firm as their attorney or law firm and providing the link on the client’s Internet Home Page.”) At least where the link to the firm’s site consists of nothing more than the law firm’s name or logo and is truly placed by an independent party who gratuitously links to the firm’s page, the authorities are recognizing that the lawyer is not subject to discipline. See Fla. R. Prof’l Conduct R. 4-7.6, cmt. (“This rule is not triggered merely because someone other than the lawyer gratuitously links to, or comments on, a lawyer’s Internet website”).

c. Difficult Questions. When the third party makes statements about the firm that the firm could not make itself (“Smith & Jones is the best and most reliable patent law firm in the universe, so click here to visit its site”) difficult issues can arise. While the Internet did not create the ability of third parties, such as clients, to make statements that a lawyer could not ethically make, it certainly has increased the ease with which such statements can be made and viewed. See generally, Kathryn A. Thompson, Client websites and the Lawyer Ethics Rules: What Your Client Says About You Can Hurt You, 16 Prof. Law. 1 (2005). As a result, the difficulty that lawyers face in policing them has increased, if they need to police them.

In part the content posted by a third party with a link to the firm’s website (or without, for that matter) turns on whether the posting is truly that of a third party, done unilaterally, or instead whether it is induced by the lawyer. This section now turns to that issue. Importantly, the authority discussed here can arguably be distinguished from general postings on Internet webpages, but not easily so. The opinions from South Carolina and Ohio below deal with lawyer “claiming” their name on various lawyer rating sites, among other things, and their responsibilities when other participants on those sites make statements about the lawyer. It is difficult, however, to see why the conclusions the bar associations reached in that context do not apply more broadly to the Internet. But, that, unfortunately, remains to be seen.

1. Who Posted The Content? A threshold question that any firm must address in analyzing the propriety of a third party linking to a firm website is whether the linking website is in fact under the control of the law firm. Control can be direct or indirect, and so may involve questions of degree.

Obviously, a firm that posts a link on a site with content that the firm could not place on its own site cannot avoid the strictures of the advertising rules by hiding the fact of control. What may to the public appear to be an arm’s length statement of praise about a firm could instead be a self-serving and misleading statement by the firm, for example. Hiding the fact that the lawyer is making the improper statement does not make it right.

Even if a firm does not literally control the content from the linking page, the firm could have a relationship with the third party site owner that could violate the rules. For example, although not controlling the linking site, the firm could be making an improper payment for the posting of the link. See Thompson, supra (discussing other issues, mostly related to improper referral fees). See, e.g., Va. Jud. Ethics Advisory Comm. Op. A-0117 (Sept. 19, 2006) (discussing distinction between online directory and lawyer referral service); Ohio Advisory Op. 99-3 (June 4, 1999) (same).

Even if there is no improper payment or referral arrangement, and even if the site is truly controlled by a third party and not the firm, questions can arise about whether a lawyer has any ethical obligation to act in response to third party posts. In most jurisdictions, clear answers have yet to be developed. For example, a third party could make a statement on its website or a blog that clearly could not be made by the lawyer himself.
What if a client made a statement that could constitute “false or misleading” information in terms of Model Rule 7.1? Or what if an existing client solicited additional clients to join a pending suit in which the firm represented the client and, in doing so, made statements that the lawyer could not have made? Under these circumstances, does the lawyer have any responsibility? In large measure the answer to that question turns on whether the lawyer has induced the third party to act; however, as noted below, it is not clear in some jurisdictions that it is limited to that circumstance.

Lawyers cannot, of course, cause a third party to violate the disciplinary rule and avoid liability because the third party, not the lawyer, engaged in the conduct. So, a lawyer cannot direct a third party to make a statement that the lawyer could not himself make. See Model Rule 8.4(a) (stating that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”). But control or the ability to direct the act is not all that is prohibited. Instead, under Rule 8.4(a), the lawyer may not “induce” or “assist” in improper conduct.

Those words connote questions of degree. A lawyer who obviously writes the content for the third party and directs its placement on the third party’s website is responsible for the content because the lawyer clearly assisted the third party to post the information. See Model Rule 8.4(a). Because “inducement” and “assistance” are in some measure subjective, lawyers should be careful about even encouraging clients to post matter that violates the state ethics rules, since “encouragement” might be viewed as “assisting” or “inducing” the third party to violate the ethics rules. See Sup. Ct. Ohio Bd. of Comm’rs on Grievances and Discipline Op. No. 2004-7 (Aug. 6, 2004) (“Lawyers should not encourage others” to make statements that violate the ethical rules).

If a firm cooperates or works with a client or third party to establish the link, the law firm may be subject to the claim that it induced the third party. No doubt for that reasons, two bar associations have suggested that a law firm has an affirmative obligation to ensure that, at least with respect to postings by clients of the firm made in cooperation with the firm, that the postings comply with the ethical rules. Sup.Ct. Ohio Bd. of Comm’rs on Grievances and Discipline Op. No. 2004-7 (Aug. 6, 2004) (suggesting that lawyers should examine client webpages and counsel those clients whose commentary violates the advertising rules); Phila. B. Ass’n Prof’l Guidance Comm. 2007-13 (Dec. 2007) (same). For example, the Pennsylvania Bar Association wrote that the lawyer “should review the website to insure that there is nothing on it that would constitute any other violation of the advertising Rules....” Phila. B. Ass’n Prof’l Guidance Comm. Op. No. 2007-13 (Dec. 2007). These opinions are discussed more fully below.

In sum, a lawyer clearly has no obligation to monitor the Internet for improper postings by third parties that relate to the lawyer’s services. At the same time, if the lawyer works with the third party, the lawyer should be careful to ensure that, if the posting goes beyond a naked link to the firm’s website, that the content comply with the lawyer advertising rules. Although the client is not subject to those rules, the lawyer runs the risk of being accused of “assisting” or “inducing” the violation.

2. What Should The Lawyer Do? What should the lawyer do if a third-party unilaterally posts material that, if posted by the lawyer, would violate the ethical rules?