The Precipice Episode 1

PLUS Staff: [00:00:00] Welcome to this PLUS podcast, The Precipice, Episode 1. We would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

I'd like to turn it over to Peter Biging to get us started.

Peter Biging: Thanks, Tyla. Welcome to the inaugural podcast of the Precipice. A podcast focused on exploring what trends, data, and experience is showing us in regards to professional liability issues. The goal is to foster discussions that help us try to anticipate what's coming next, and hopefully be better positioned to take actions that will help people writing and brokering insurance for professional liability risks, as well as those like me who make our living defending professional liability claims, find the best ways to deal with what's coming.

Each podcast will involve discussions with people, with expertise in various areas of management and [00:01:00] professional liability about what is coming over the horizon and what we need to be concerned about now, tomorrow, and the days, weeks, months, and years ahead.

In common podcasts, we'll talk a bit with experts about what we need to be concerned about in regards to cyber liability risks, how to underwrite the risks, what insurance is available for these risks, and what can realistically be done to manage and mitigate the risks going forward.

We'll also talk with experts about what they see ahead in terms of risks for insurance agents and brokers, financial service professionals, real estate professionals as well as in regards to D&O claims. The goal is to peel back the curtain a bit, talk with people who are seeing what is happening in specific professional liability spaces in a deeply granular way and get to learn about what they're seeing, what they're sensing, what they fear, and where are they think things are heading.

In [00:02:00] addition to speaking with industry professionals, the goal of this podcast is also to speak with people with specialized expertise in their issues presented and take advantage of their knowledge and expertise to understand why these risks are forming and what we can do about them when they arise.

Today's presentation is going to be focused on the risks presented by attorney advertising in the manner in which it is practiced today. We'll start with a short discussion on the history of attorney advertising in the U.S. to provide some context, then move to a discussion of how it has morphed into what we're seeing today.

Then we'll move to a discussion of professional ethics concerns, including some of the ways the new era of advertising we're in, have created potential ethical landmines. We'll also talk about some of the legal risks presented, and then we'll move on to a discussion of the ways these risks can be avoided or mitigated, which will include a discussion of some of the types of insurance that can be impacted, how this insurance will likely come into play, [00:03:00] as well as optional insurance coverages that might be available to lawyers and firms if they are willing to pay for them.

With me today for this discussion are Professor Bruce Green, a former law clerk to U.S. Supreme Court Justice Thurgood Marshall, who is the Lewis Stein Chair at Fordham Law School, where he directs the Lewis Stein Center for Law and Ethics. He teaches and writes primarily in the area of legal ethics, and criminal law and is involved in various Bar Association activities.

To avoid spending the entire podcast talking about Bruce's achievements, I'll just note a few. He chairs and is a member and past chair of the New York State Bar Association's Committee on Professional Ethics. He previously chaired the ABA Criminal Justice Section and the ABA Criminal Justice Standards Committee.

And he also chaired the Multi-State Professional Responsibility Examination Drafting Committee. Welcome Professor Green.

Bruce Green: Thank you.

Peter Biging: Also with me today for this discussion is John Muller, head of [00:04:00] lawyers professional liability at Risksmith, where he is Lead Underwriter for their National Lawyers Professional Liability Insurance Program.

Prior to working at Risksmith, John spent a number of years underwriting lawyers professional liability at InsurancePro, and after that as the Senior Vice President and Lead LPL Underwriter for Sompo. Welcome John.

John Muller: Thanks, Peter. Very excited to be here.

Peter Biging: Okay. Let's get things started. Let me just start off--I'll start talking about some of the history of attorney advertising.

And I want to get to the meat of it and really start throwing some questions at the two of you. Attorney advertising flourished in the 19th century with ads appearing regularly in classified sections of newspapers. This changed in 1908. When the ABA condemned attorney advertising in its 1908 Canons of Professional Ethics.

Canon 27 provided in part, the most worthy and effective advertisement possible, even for a young lawyer, and especially for his brother lawyers, is the [00:05:00] establishment of a well-merited reputation for professional capacity and fidelity to trust. The Canons permitted business cards. But prohibited other forms of advertising.

This led many states to pass regulations banning or severely limiting attorney advertising. The modern era of attorney advertising began in 1977 when the U.S. Supreme Court issued its holding in Bates v. Arizona, finding attorney advertising to be a form of commercial speech entitled to some degree of first amendment protection.

Bates v. Arizona was interesting to me because I think the, they published an ad that said something like “good lawyer and cheap,” or “good legal services for very little money.” And that got them in trouble, but they ended up ultimately prevailing. So since then, we see what attorney advertising has evolved into.

It's ubiquitous, with current estimates being that 75 percent of all lawyers advertise in some form or another. [00:06:00] Attorneys advertise in a variety of ways. Radio and television advertisements, websites, email, newsletters, email alerts, podcasts, special appearances on news programs to discuss topical issues, and social media posts, among other things.

Some statistics of note can be drawn from an ABA survey conducted in 2021. In the 2021 survey, 37 percent of firms said their firm had a blog. Interestingly, use of blogs and attorney advertising are much more prevalent among firms with 100 or more attorneys. There it's almost 100%. Social media is more popular than blogging.

86 percent of respondents indicated that their firms have a presence on social media, and of those they have stated, 87 percent market on LinkedIn, 61 percent market on Facebook, 37 percent market on Instagram, 13 percent market on

Twitter. Additionally [00:07:00] 72 percent say they use email alerts to clients. All right.

So having laid out the background of this and where we started, which was virtually no advertising to where it's just all over the place and everywhere you turn. Let me start by asking Professor Green. Are there things that you're starting to see, or you've been seeing, or you're seeing as future issues over the horizon impacting ethical issues for attorneys who advertise in the way that we advertise today?

Bruce Green: I think there's nothing new under the sun in one sense, which is that lawyers are always marketing and trying to get business, and they're always trying to put their best foot forward, and they're always engaging in public communications of some kind. And certainly since 1977, when the First Amendment was interpreted to liberate lawyers from the most restrictive anti-advertising rules. But [00:08:00] the media changes.

And as the methods of communications change and AI provides opportunities to multiply and rely on technology to create your methods of communications, there are other or new opportunities to trip up or to promote yourself. But I don't really have a crystal ball, Peter, so I don't have any great predictions. But I could talk a little bit about what I think the perennial issues are, and maybe a little something about their significance going forward, if you'd like.

Peter Biging: Sure.

Bruce Green: To me there's really two big issues. There used to be a TV show called Truth or Consequences. To me, the two big issues are “truth” and “confidences”. And let me take them one at a time.

And there's also an underlying sort of threshold issue if we're talking about advertising about what is an advertisement as opposed to other forms of public [00:09:00] communications because lawyers are talking all the time. And of course, many of us can't help talking about ourselves or writing about ourselves and not everything that might put yourself forward is an advertisement. And some are actually maybe marketing that would be called a solicitation.

That's even more regulated than advertising. So, I think categorizing this stuff is important. The main “truth” point as to advertising is, lawyers are not supposed to lie or mislead. And that's probably not much of a surprise because lawyers are not supposed to lie or mislead in lots of contexts, not just the context of advertising. But I think it's important to know whether something is or is not an

advertisement, because the regulatory authorities' sense of what is a false or misleading statement tends to be different [00:10:00] depending upon the context, depending upon whether you're engaged in advertising, on one hand, or advocacy, on another hand, or political speech, on another hand.

And the case that I like to talk about, and I know, Peter, you want to take us forward into the future, but there's a case from 2013 Virginia, called Hunter, which I find really interesting. And I've been teaching it for about a decade because it raises both of the issues I want to talk about. But initially, the issue of how sensitive the regulatory authorities are to truthfulness and misleading omissions in advertising.

This was a case where a criminal defense attorney had a blog on which he wrote about criminal cases in Virginia. Many of them, maybe most of them, were his own cases, but not exclusively. And it mattered whether you called his blog an [00:11:00] advertisement or not, because if it was not an advertisement, if it was just educational, like my law review articles, then there would be probably very little problem with what he was writing.

He wasn't engaged in – at least from the "truth" point of view – he wasn't engaged in false claims. But if it was viewed as an advertisement, then he was going to have a disclaimer, because he was writing about a lot of cases that he won. And according to the disciplinary authorities, that could be misleading, because somebody reading his blog might think that if they hired him, he was going to win their case as well. And so, the disciplinary authorities said that "we think it's an advertisement. You need a disclaimer that says essentially, 'past results don't predict future results.'"

If I wrote a Law Review article about a case that I litigated, nobody would think that was an advertisement, even though I might have a motive in part to promote myself, [00:12:00] but it would be viewed primarily as educational because of the forum.

And I wouldn't have to write at the bottom, "just because I won this case doesn't mean if you hire me, I'll win your case." But the issue here was whether or not it was an advertisement. The court was divided, but the majority said it was because he was mostly writing about himself and because his website linked to his blog.

So that raises an interesting question when lawyers, maybe not, when law firms, are blogging, but when individual lawyers are blogging. We like to engage in self-expression. We like to educate the public. We like to talk. Is someone going

to view that as an advertisement and view it under a higher standard of truthfulness? Or are they going to say this is just personal, educational, something else other than self-promotion?

So I think that's an interesting issue. And going forward as lawyers have more and more media in which to populate,[00:13:00] and maybe even start drawing on AI to ghostwrite, I think they have to be careful about the credibility of what they're putting forth and whether or not they're making misleading claims.

For example, the other favorite of mine, is if I have a coffee cup that says "world's greatest dad," that may not be true. I'm sure my kids don't actually think it's true, but nobody is going to discipline me for making a false claim. But if you say, "I'm the world's greatest lawyer," you get disciplined for making an unverifiable claim, even if you are the world's greatest lawyer, since you can't prove it. And that's just because of the heightened sensitivity I think disciplinary authorities have to what people say in advertising.

The other issue, the "confidentiality" issue, was also raised in the Hunter case. And again, the court was split. He said, "I'm [00:14:00] writing about public cases. I won them. Any newspaper or other media could go to the public file and see what happened. Are you saying I can't write about this?"

The disciplinary authority said, "no, you can't because you owe a duty of confidentiality to your clients and you're not allowed to write about their cases even if it's otherwise accessible information to the public." The court there held that he was right, that he had a First Amendment right to discuss things that are public, but I think other authorities would disagree. And other courts would as well, because if you look closely at the rules of professional conduct, at least the model rule, 1.6 applies to any information relating to the representation, and it does not make an exception for publicly available information. Again, thinking about now fast forward to contemporary media. My students if they write a [00:15:00] bad review of me on Yelp, I suppose I could respond if I had a truthful response that redeemed me, because they're, I don't have any duty of confidentiality. But when your clients put a Yelp review on and say, what a bad lawyer you are and what horrible things you did, even if it's not true, you're going to be limited in your response because you're not allowed to disclose information relating to the representation without the client's consent. And so, I think that's another issue or the other big issue for lawyers in dealing with advertisements.

And to finally just to close on sort of the malpractice point: Breaching client confidentiality is a breach of fiduciary duty, and so there's a risk of civil

liability. Overstating things in advertising or in marketing yourself with the client carries a malpractice risk for one thing. If you claim to be an expert, it's a higher malpractice [00:16:00] standard. You get held to the standard of an expert lawyer rather than that of the run-of-the-mill garden-variety practitioner. But also, if you screw up, I think your false or overstated claim about your own attributes are going to come back to haunt you.

So, I think sticking to the truth and being careful about client confidences are going to be important, however things develop in the future.

Peter Biging: Yeah, it's interesting. One of my partners just had a significant success and we got an electronic copy of his decision, summary judgment decision, just today.

And the first question out of my mouth was, would your client have any objection to us publicizing this, or at least in an anonymized way? And immediately the response was, the client has, does not want us to publicize this at all. They want to just play it down low, and even in an anonymized way. So, I think your point is well taken both with ethics [00:17:00] and just in terms of client relationships as well, right?

The last thing you want to do is do something that the client is unhappy with, even if you've done it in the context of a success that they should be proud of.

Bruce Green: If I could add, Peter, because you talk about doing something in an anonymized way. And so, there's a whole body of writing in the Bar Association Ethics Opinions about whether you're violating confidentiality when you leave out the client's name.

And then, you go tell your war stories or in some other way you talk about a case. And lawyers need to remember that if there's any way to figure out who the client is, as I'm sure there would be. And, you take out the client's name, but you post your victory. It's not going to be that hard to trace it back to a client.

Any disclosure that could be attributable to a client is going to be a breach of confidentiality. And so, you have to be super careful. If you say, I won a case. That's fine, [00:18:00] but when you start providing details and people in your professional community know what you're talking about, or which case you're talking about, you have a confidentiality problem.

Peter Biging: Let me ask you a more nuanced question. Suppose, you're at a large firm and they do newsletters and they, the newsletters discuss recent

decisions of note in particular areas of the law and you're just you're a young associate and you're writing up an article and you're summarizing some cases and one case happens to involve a client that the firm didn't represent in that instance, but is a significant firm client. Is that an ethical concern, or is that more just a client relation concern if you're reporting on a published decision in the ordinary course of, you know, providing a newsletter without having checked with the client about whether they want that publicized?

Bruce Green: I think it's mainly a business decision because [00:19:00] you didn't work on the case, whatever information you have was not acquired in the course of representing the client. But it also depends on what you're saying in that newsletter, because lawyers, besides owing their clients a confidentiality duty, owe them a duty of loyalty. And if you're writing about a case that's embarrassing to the client and now, you're publicizing the ridiculous things that the client did, represented by some other lawyer, no doubt, you're going to make that client feel they're being betrayed, whether it's technically a breach of the fiduciary duty of loyalty or not.

Why would you want to do that? So, it seems to me it costs nothing to check with the client and say, “do you mind if we talk about you in the context of a case that we didn't work on?” If the client said “no”, maybe you wouldn't be technically bound by that, but why would you want to go ahead?

Peter Biging: Yeah, so this is something I, when I shift the discussion over to some of the things we can do to prevent risks and [00:20:00] mitigate against risks, I want to talk to John about it, but let me bring him in real quick. It sounds to me that's a note of caution for firms that have people just writing newsletters or writing case reports that they might want to run those case reports by their client lists just to see if even though they weren't involved in the case, they're talking about a client, a present client.

John Muller: One of the things that, we look at from an underwriting standpoint, and I'm speaking principally from, my background as a, as an LPL underwriter is whether or not the firm has a policy around advertising or social media or communications to clients and what kind of guidance that they're giving to their attorneys. In this case, absolutely, I think it would be very important to have someone review that at the firm level and opine or communicate with the client to ensure that there's not going to be an issue with the firm making a disclosure of that nature.

[00:21:00] From a risk management standpoint, this is a pretty significant point.

Peter Biging: I have a couple more questions for you, Bruce, and then I wanted to move over to some of the legal risks. Is there a concern? I know that you talked about like Yelp or something responding to ratings sites, reviews, and how careful you have to be with that.

Have you noticed any concerns, or do you have any concerns or is this just an ongoing thing with regard to criticism of judges? People in their podcasts that can get pretty informal, and they can start to perhaps be critical of the way one or more judges handle cases or handles cases. Is that a issue of just normal concern, growing concern, given the, given the platforms and the way that lawyers communicate with the public these days.

Bruce Green: So, now I think we're out of the realm of advertising since criticizing a judge on your blog is probably not going to bring in [00:22:00] all that much business. And we're talking about public communications more broadly on the part of lawyers and there are actually rules. I don't know that lawyers are more critical of judges now than they were 50 years ago or in the 19th century.

There's actually some famous 19th century cases involving lawyers criticizing judges. But there is a rule, 8.2 that says you can't make knowingly or recklessly false statements about judges qualifications or honesty or integrity. And that's a problem. And judges, by the way, who are the ones enforcing the rule in some jurisdictions take a very broad view of what's a false statement about the judge.

But, most of the people who do that are litigators. And it's usually just a bad thing to do because your work is taking place in front of judges. And there's a, there's a tension because, some judges are elected and we want [00:23:00] robust public discussion about a judges work.

I tend to think that lawyers are more inhibited in most cases and reluctant to say things publicly that are critical of judges, then they are going out and slandering judges. The other rule, by the way, which relates to lawyers in ongoing litigation is rule 3.6, which says that you can't make public statements about a pending case that are going to prejudice the case, that are going to prejudice the jury.

Again, I think we're out of the realm of advertising, although it does raise an interesting issue because it is part of the playbook of lawyers in high profile cases, often to make public statements. And there's an opinion in the Supreme Court Gentile where Justice Kennedy writes an opinion, and he basically endorses the idea of lawyers protecting their clients' reputation in criminal

[00:24:00] cases by making statements designed to offset unfavorable and unfair publicity. And so sometimes it's part of an advocacy tool to go out and say things about your client that are nice.

But there's an interesting question about what's your motivation? You're not calling it an advertisement, but if you have a high-profile case, that enables you to get in the newspapers and on television. And so you're holding a press conference. Are you really doing it to promote the client's interests?

Or are you doing it to get the free publicity? I don't think anyone calls it an advertisement, but I think you have to worry about whether you have a conflict of interest between your own self-interest in putting yourself forward. And the client's interest in winning the case. And the last thing I wanted to--you mentioned ratings, and I hadn't really talked about lawyer rating services but, there, there were some interesting [00:25:00] Bar Association opinions about those because if you actually paid the rating service to give you a high rating, it would take it out of an objective rating service and arguably make it a violation of the rule that says you can't pay people to endorse you.

There's a general rule, it's I think 7.2 in the ABA model rules that you can't pay people to promote your professional services because, when they do that the person who's getting their recommendation may not know they're being paid and may think it's a disinterested recommendation.

And likewise, there's a risk that, if you're paying the ABC rating service to rate you as the, the world's best lawyer, that's not a disinterested rating if you're paying them. That raises yet another interesting question about lawyer self-promotion.

Peter Biging: All right. Let me ask you the last question. In The Verdict, famously at the [00:26:00] beginning of the movie, although we end up rooting for him later on, Paul Newman's character is just so low that he's actually attending wakes and giving out business cards at wakes and funerals. And I know that there's ethical rules about not trying to solicit patients who are particularly vulnerable or in vulnerable circumstances.

When you're doing stuff, like on air, or on the internet or wherever you're advertising, I assume that's something of a remove, but are there concerns that there's like a higher tech version of this type of advertising that might cross the line and become a problem for lawyers in the way they advertise to these more vulnerable people?

Bruce Green: The first of all, one thing you're getting at is the difference between advertising and solicitation. If you just put up a billboard, I'm sure you've seen billboards of personal injury, you know, if you're [00:27:00] injured, call, whatever the phone number is. It's an advertisement, people could drive right by it, they're not pressured by it, and if there's anything misleading in it, it's in print, and you could catch the person.

The rules regulate more strictly people who are, certainly, going to hospitals and giving their business cards, but any in person attempt to market your services or telephone calls and other things that are comparable to that because people are put under more pressure and because, it's usually verbal and you're not preserving what people are saying.

And so if they're being misleading, you don't really know. And there's interesting questions about where you draw the line and evolving technology will raise more questions. For example, an email that says, “here's my, equivalent of a business card and here's my qualifications.”

It's more like an advertisement. The Supreme Court has said letters, as a general [00:28:00] rule fall on the advertising side, as far as the First Amendment is concerned. You can't just shut them down. In person solicitation you can shut down. Maybe an email is more like a letter. What about, if you're in, I don't think people have chat rooms anymore, but if you're texting or you're, any of a number of things that I don't have, I don't even know, from Instagram and things like that.

But as communications methodology evolves, disciplinary authorities are going to have to figure out which one is going to be subject to greater restriction and which ones are, as long as you're being truthful and not misleading, we're going to let it go.

Peter Biging: Yeah. It's interesting. I would, my mind immediately went to like texting because you're getting texts. I've gotten about 50 texts from Nikki Haley in the last month asking for money. So, I imagine that lawyers can do the same thing if your phone numbers appeared on the right list.

In any event, let me--let's move on. Thank you very [00:29:00] much. I'm going to. I'll get back to you in a minute, but I want to talk a little bit about some of the legal risks. And then I want to talk to John about some of the things we can do to proactively avoid these risks and or if necessary, mitigate them through insurance.

So, some of the legal risks, I think you touched upon it Bruce is defamation is certainly an issue. The elements of that are if the statement's materially false or defamatory, if it constitutes a copyright or trademark infringement, that can be another legal risk.

If the material constitutes a breach of someone's privacy rights, they may have a claim under a statute protecting against disclosure of private information. And if the material breach is used as a confidentiality, again, there may be some legal claims in addition to ethical claims.

With defamation, I just want to note that there's a whole host of possible defenses that can be raised. Truth is a defense, if it's an opinion but you can run into issues with mixed facts and opinion. And also, there's a fair reporting [00:30:00] privilege and this can come up I think where lawyers are marketing by reporting on cases and maybe they say something unflattering about a particular party or an expert.

There is a case in New York, a recent case in New York, where somebody was just in court, attending a court hearing and--a trial actually. And there was an expert who had been found out, apparently, that he had made some representations about a examination that he had undertaken. And to do all the things he claimed he had did in his report, it would have taken at least some amount of time, like 15, 20 minutes.

And the plaintiff had surreptitiously taken a video and it literally was like two and a half minutes of time there. And so, the expert got excoriated on the stand by the judge and then this lawyer looking to show what an insider he was and to market his [00:31:00] self and to highlight this issue for some insurance defense carriers made an issue of this and talked about how the expert was caught on the stand lying repeatedly.

And in addition to, truth as a defense, one of the defenses was that there was a fair reporting privilege and under that privilege, generally in most states if the report is substantially accurate, a definition can't, claim cannot be maintained. Other ones, like I said, I talked about copyright infringement.

That's another concern. If you're using original works of authorship of a particular artwork or something else there's a danger that you can be sued for copyright infringements. You have to be concerned about that when you're doing presentations, blog posts, posting digital photographs, images, music, et cetera.

As soon as the work is created and reduced to a fixed form, it becomes copyright protected. And if it's [00:32:00] registered, that's helpful, but it's not necessary that it be registered for you to have a risk in that regard. We talked about invasion of privacy, there's statutes in New York, there's a statute Sections 50 and 51 of the Civil Rights Law, which applies when any person, firm, or corporation uses any living person's name, portrait, picture, or voice for advertising or trade without written consent, or if a minor or his parent or guardian within the state of New York.

So that can create, again claims for, sued for injunction and damages, including exemplary damages if the defendant acts knowingly in violation of the statute. Okay. And then I think one of the other things, and then John might touch on this, is, inadvertent creation of attorney client relationships.

I know a lot of firms do, and we've done this at our firm, we'll do hotlines. And we go to great lengths to let people know on the hotline that we're not providing legal advice, and there was no attorney client relationship being created. But if you're not [00:33:00] careful in how you set aside some, you know, some protective language and advice in regards to these hotlines, you can potentially find yourself at risk of being found to have created an attorney client relationship.

And then the client either acts or doesn't act based upon the very off the cuff advice perhaps, and there's a problem and then suddenly you're sued for illegal malpractice.

All right. So those are some of the legal and ethical risks. So, what I wanted to do now was just ask John to take us through some of the things you think as an underwriter, what are the things that are most concerning to you today about attorney advertising?

John Muller: Thanks Peter. Yeah, actually you hit on one of them, which is the inadvertent creation of an attorney client relationship. Remember that's always, that's determined I think pretty universally by the from the standpoint of the client.

So, it's really important to ensure that[00:34:00] there's clarity around that you do or do not represent them. And that kind of goes more generally to a point I wanted to make about how you communicate managing expectations and setting expectations with your clients is a really important part of this, and I think it comes into play in a lot of specifically LPL claims.

I wanted to run briefly through the different types of insurance that could respond to an advertising injury or an advertising type claim. And there's four principal types of coverage that could be triggered by something like this. And those would be the lawyer's professional liability policy.

That's probably the most restricted type of insurance in this scenario, or the least responsive. The commercial general liability policy would be the next one. That's a level up from the lawyers. Cyber insurance, specifically because it includes a media liability, or some of those policies will include a media liability insuring agreement.

And so you would have more coverage under that, [00:35:00] the gold standard would be a standalone media liability policy. And I'll just touch briefly on what each one of those, how each one of those would respond to something like this. The lawyer's professional liability policy will always tie coverage back to the rendering of professional services or some variation of that phrase.

So, it really has to be in connection with you providing your professional advice to a client. Advertising isn't specifically addressed in some indemnity policies and that's one type of policy you can get.

You can either get an indemnity policy or a pay on behalf policy. Pay on behalf is typically more restrictive. And the liability arising out of attorney advertising is generally not covered under the pay on behalf policies either, but there may be some coverage for personal injury arising out of slander, defamation, or violation of a right of privacy.

Right of privacy is not defined, so the precise meaning of that's [00:36:00] really going to depend on the wording of the policy and potentially where you are. Intentional acts are excluded. That's your LPL. There's generally no coverage for advertising injury under that. The CGL, your Commercial General Liability Policy, would be the next level up.

And that's really the go-to policy for a lot of business risks. There is, in Coverage Part B Personal and Advertising Injury, there is coverage for defamation. Copyright Infringement is limited to your advertisement. So, it depends on what we consider advertising under the, under that policy, and there may be policy language in there that specifies what it is.

Trademark infringement is not going to be covered. Invasion of privacy coverage is going to be limited. Your coverage territory is going to be limited.

So, you really do need to pay attention to the wording there, but there is going to be some level of cover for advertising.

For cyber insurance, I would really focus on the media liability piece of it. It is really, it's a common insuring agreement. And that's going to provide [00:37:00] some cover for you as well. The media liability coverage agreement is going to be a claims-made typically. It may be limited to digital content because it is connected to a cyber policy.

So, it may be limited to your website. Limit is going to be shared with other insuring agreements. It's going to exclude intentional conduct, and there's a question about whether or not there's going to be coverage under that for third party social media. So, if you're posting to Instagram or LinkedIn, it may or may not be covered, it's going to depend on the wording.

And it's generally worldwide coverage. And, a lot of these policies can be manuscripted for unique exposures. The standalone media policy is really the gold standard here, but most law firms don't purchase it because they don't, they're not really in the media business.

But those policies are--they are quite comprehensive, they can offer defense outside the limits, they could be done on a occurrence or a claims-made basis. They can be, written on a broad list of enumerated perils, or even an all [00:38:00] risk which would be, pretty comprehensive.

Again, they're going to have experienced in-house claims counsel who can help defend against these kinds of claims, dedicated limits of liability for specific media perils. A law firm would be a favorite class if the law firm has good risk mitigation. So, it would be a good option for law firms if you have a really robust social media presence or a blog, or you engage in a lot of publishing.

So, those are the different types of insurance that are available. And depending on the facts, it's going to depend which policy is really going to be the most responsive.

I'm not a media underwriter, I don't underwrite cyber. My experience is really, primarily through the lens of, lawyers professional liability policy, which, is the most restrictive. But in terms of what worries me as an underwriter, from that standpoint, Bruce touched on it earlier, and I think Peter, you touched on some of these issues as well, and one of the biggest things is the disclosure of [00:39:00] client information.

If the client can show that they have suffered some sort of economic harm as a result of the firm's disclosure of their identity, or their particular legal issue, if they lost a contract, or they suffered significant embarrassment in the public sphere, and if they're a public figure, even more so.

That could be something that triggers your lawyer's professional liability policy because there is that ethical obligation of confidentiality and loyalty to your client. If you've got something in an ad that has that effect, it could fall under cover in the LPL wording.

Peter Biging: Given what's happened with advertising as lawyers today and the myriad ways you can advertise in the myriad platforms you can advertise in, and the risk, I guess, that so many different people may have a hand in it, right?

It's not going to be just one person doing the advertising for the firm. There's going to be from the lowest level associate, to the highest level partner. People may [00:40:00] be creating blogs, creating, writing email alerts. Otherwise posting on LinkedIn about successes and about items that they think are of note and of interest.

Are there things that you are doing as an underwriter or considering at least in terms of how to better underwrite for this type of a risk?

John Muller: Yeah, and this is something that's much broader than attorney advertising generally. So, I'll talk about it a little bit in a broader context.

One of the things that we are very concerned about from an underwriting perspective is, as I mentioned before, this idea of managing client expectations and being really clear about what you are being engaged to and to accomplish in the case of a particular representation. Or what you're promising them if they become one of your clients. So from an advertising standpoint, if you put on your website, or you have on your social media [00:41:00] page a promise, right?

Whatever it is, “we're cost effective” or “we're going to offer you white glove service” or something along those lines, you really have to make sure that you live up to whatever that standard is.

And the problem with using some of those things like “we're an efficient law firm” is that. So that's not a very specific term. It can mean a lot of things to a lot of different people. And if your client is interpreting it one way and you're thinking about it in a different way, you can wind up with an unhappy client.

And unhappy clients are generally, most or many LPL claims rise out of fee disputes, and unhappy clients don't want to pay your fees. And they are unhappy, even if you're successful, we've seen claims where a firm recovered what was a substantial amount of money for a client, but the client felt like they should have gotten more.

And so, they wound up suing the firm and saying had you presented [00:42:00] this evidence, or had you made this argument, we would have gotten an extra X number of dollars. But what that, what I think what that claim really is, is you've really just got an unhappy client and there was a breakdown of communication or a misalignment between what they thought you promised, and what they got.

Now, there's some obvious cases where, we've seen lawyers make promises that, "yeah, your case is, this is a winning case." Don't do that. That's a big potential--that's a landmine. And you're about to step on it, I think if you're making concrete promises like that. But generally, you just have to be very careful about how you represent what you're going to do and how you manage your client's expectations. And that starts at the very beginning with your advertising, because that's the first place, unless you've got this long standing client relationship that your clients are going to engage with you, right?

So, what they see when they go to your website or when they go to your [00:43:00] blog, or when they go to your LinkedIn page or any number of the things that are available now as advertising outlets, that's what's going to set their expectations. So, you have to be very careful with your messaging because again, unhappy clients are the ones that are going to wind up suing.

Peter Biging: I would say from my perspective one of the concerns too, I think, as being part of a larger firm, like we've got about 450+ lawyers, is just periodically keeping an eye on what people are posting on their LinkedIn pages. Because, like I said, they're representing the firm.

And they may be disclosing client confidences, they may be saying things that we don't want them to say, they may be making representations, like you said, that set unreasonable expectations. So all those things, and I guess, for me, that seems there's a danger there that it could be a virus or a fire that's, you know, going to burst out of control if you've got 450 different people just doing their own thing, or more.

Lawyers, [00:44:00] 1500 lawyers or more. So, I think that's something that as law firms, we probably have to really focus on to the extent we're not doing that

already. And I would, I imagine that's something that you're going to be looking at more closely as you underwrite coverages for these firms going forward.

John Muller: Yeah, the reality is, most people have some social media presence, right? And you're going to post about things that you're doing. Some, LinkedIn, it's specifically about your professional life. And yeah, there are many ways in which your statements can impact your firm. So for us, there are two things, right?

The technology is evolving, people have different methods of putting themselves out there and promoting themselves and, by their association with the firm, promoting the firm but also, from an underwriting standpoint, I think. Okay.

What we look for is you can't be there in all of these cases, right? You can't put your finger in all of the leaks and in [00:45:00] the dam, but you can have a policy that says, look, this is how we want you to be guided when you are. Posting on social media, that's and offer some guidance and some training to the firm's attorneys about what the firm considers to be appropriate and inappropriate to put on their own personal sites.

That's probably where we start from an underwriting standpoint is, we look to see what kind of policies and procedures the firm has in place. We talked a little bit earlier about. Making somebody, making sure that we had the firm has the client's consent to post something.

And this falls right into that vein. You really just want to have the controls in place. You can't be everywhere all at once. But if you have a policy, at least you can point to that and say, look, this is how we've tried to manage the risk, and you do the best you can to ensure that people follow that guidance.

Peter Biging: Yeah I said without marketing department, they're doing double duty. They're number 1 marketing and coming up with ideas as to how to market, but they're also playing traffic cop [00:46:00] and they're a buffer and they're protecting us as well. All right. We've talked for a long time here but the people who are still with us, I just want to say this has been a really fun and fascinating discussion.

Thank you to both my guests for participating on this, the inaugural episode of The Precipice. As we move ahead with these podcasts, as I noted at the outset, our goal will be to take on issues on the horizon in regards to cyber and various

professional lines. Before we close today's episode, let me just ask my guests for any very brief final comments.

Professor Green, are there any particular takeaways we should carry with us from this discussion in regards to the professional ethics risks presented in the context of attorney advertising today?

Bruce Green: I would just reiterate be honest and keep your client confidences and you're halfway there.

Peter Biging: So it's like the movie Spike Lee when Spike's character goes and says what are you doing and he says do the right thing, always do the right thing.

Exactly. I got it, I'm gone. Okay [00:47:00] John how about from your perspective as an underwriter?

John Muller: Yeah, I would say have a plan about how you engage with the public and make sure that your attorneys and your firm stick to the plan and don't overpromise. And we've touched on that a number of times in this podcast, set expectations accordingly and just be careful about what you put out there.

Peter Biging: All right. Okay. That's our show. Looking forward to spending time with our listeners on future episodes. Till then, I'm Peter Bigging and we'll see you next time on The Precipice.

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