



TYLA POCKET GUIDE:

SOCIAL MEDIA 101



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TEXAS YOUNG LAWYERS ASSOCIATION

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POCKET GUIDE: SOCIAL MEDIA 101

Social media is a part of our everyday lives. We wake up and check one or more social media outlets, and we continue to check them throughout the day. While many of our friends are able to use social media to promote themselves and advertise professional services, lawyers must tread lightly with respect to those promotional statements and communications. Lawyers are subject to ethics rules that restrict professional advertisements generally, and those rules apply to social media.

Are there restrictions on what a lawyer can post to social media? Are social media posts considered advertisements? Are other social media activities such as “friending” regulated? This guide is intended to help you better understand the rules governing lawyer communications in social media.

Is all speech regulated?

The Texas Disciplinary Rules of Professional Conduct (TDRPC) and accompanying comments address how lawyers can advertise. Importantly, the TDRPC only apply to commercial speech. Commercial speech is defined as speech “related solely to the economic interests of the speaker and its audience.” *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995). Thus, if an attorney’s statements are not designed to market the lawyer’s services, then the TDRPC’s advertising restrictions do not apply.

Sometimes commercial and non-commercial speech is combined in one communication. When combined, courts look at the entire communication to determine whether the communication’s purpose is to gain professional employment as an attorney. If it is for employment-related purposes, the entire communication will be deemed commercial speech and subject to the TDRPC.

What are the basics?

Just like traditional communication forms, the TDRPC apply when attorneys use social media to market themselves. Rules 7.03 and 7.05 address solicitations and provide guidance as to electronic media.

Rule 7.03(a) prohibits a lawyer from seeking professional employment by in person contact, by regulated telephone, or “other electronic contact” under the following circumstances:

1. If the contact concerns a matter arising out of a particular occurrence or event, or series of occurrences or events;
2. from a prospective client or non-client who has not sought the lawyer’s advice and with whom the lawyer has no familial, past or present attorney-client relationship; and
3. when a significant motive is the lawyer’s pecuniary gain.

Rule 7.03(f) defines “regulated telephone or other electronic contact” as “any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means.”

Rule 7.03 prohibits in-person contact, or by regulated telephone or other electronic contact (as defined by the rules), and solicitation communications arising out of a particular occurrence, event, or series of events (*e.g.*, ambulance chasing).

Rule 7.05 regulates solicitation by “written, audio, audio-visual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment.” If a lawyer intends to contact a prospective client through these means, the communication must not involve coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment; contain false or misleading information about the lawyer’s qualifications or services; or contain false, fraudulent, misleading, deceptive, or unfair statements or claims.

Rule 7.05 additionally provides that if the communication involves “audio visual, digital media, recorded telephone message, or other non-electronic communication,” the lawyer must comply with Rule 7.05(c) and the requirements for marking the communication as an “ADVERTISEMENT.”

According to Comment 5 to Rule 7.05, the Rule applies to formats such as “recorded telephone messages, movies, audio or audio-visual recordings or tapes, digital media, the internet, and other comparable forms of electronic communications.” The

Comment also makes it clear these types of solicitations must “comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them.”

What do I have to file with the State Bar?

Attorneys must file solicitations and advertisements with the State Bar of Texas. Rules 7.07(a), (b), and (c) address the filing requirements for public advertisements and written, recorded, electronic, or other digital solicitations. Rule 7.07 generally requires that, *unless exempted*, a lawyer must file the following with the State Bar’s Advertising Review Committee (ARC):

- (1) “Solicitation communications;”
- (2) Advertisements in the public media; and
- (3) A copy of the lawyer’s website.

In addition to Rule 7.07, the ARC has revised its Interpretive Comment 17 to assist lawyers who advertise or solicit clients in social media and on the internet. The revised Interpretive Comment 17 is available at <http://www.texasbar.com/adreview>.

Are there exemptions to the filing requirement?

Unless an electronic communication is limited to the exempt information enumerated in Rule 7.07(e), it must be filed with the ARC. Sometimes called a “tombstone advertisement,” Rule 7.07(e) exempts contact information, dates of admission to the bar, areas of practice, acceptance of credit cards, languages spoken, and other specified information. The information listed in Rule 7.07(e) can be included in an advertisement without the need to file it with the ARC. Further, the same exemptions apply to a lawyer’s or law firm’s listing on web-based directories accessible by the public so long as the information included is exempted by Rule 7.07.

Non Solicitation Defense

Probably the greatest comfort lies in authoritative Comment 6 to Rule 7.07. It reminds lawyers that the Rule 7.07—specifically subsections (a),(b),and (c)—exempt certain types of communications from the filing requirements of paragraphs. It is

these types of “*communications need not be filed at all if they were not prepared to secure paid professional employment.*” But remember that other portions of Rule 7.02 may still apply even though there is not a filing requirement.

What if I don't file?

The penalty for not filing an advertisement with the ARC is a non-filer fee of \$300. The failure to file a non-exempt advertisement is also a violation of the TDRPC. The best practice is to file an application for review and confirm compliance with the appropriate rules rather than risk proving compliance after the advertisement/communication has been challenged.

What is included in the definition of “social media”?

The term “social media” includes many different services, such as LinkedIn, Facebook, Twitter, Instagram, and various blogging services. The ARC has used the term “electronic communication” since 2005 to broadly encompass all of these areas of social media. Interpretive Comment 17 was revised in 2010 to include specific references to different types of social media.

Subsection G to revised Interpretive Comment 17 makes it clear that the filing requirements apply to electronic communications not otherwise exempted under the TDRPC. It also puts the burden on the communicating attorney “to demonstrate that any particular online communication need not be filed with the Committee.”

Helpful Hint: Online media can take numerous forms, each raising different ethical concerns. When approaching any type of online expression, whether creating a website, drafting a blog entry, or posting videos to social media websites, it is important to be professional and remember that all of the disciplinary rules, not just those related to advertising online, apply. In any medium, attorneys must maintain the confidentiality of his or her client, be truthful in statements to others, and avoid dishonesty, fraud, deceit, or misrepresentation.

Websites

Rule 7.07(c) requires a lawyer to file his or her website with the ARC, unless website is limited to certain exempt information enumerated in Rule 7.07(e). The exemptions

include contact information, dates of admission to the bar, areas of practice, acceptance of credit cards, languages spoken, and other specified information. Rule 7.04 provides specific requirements of what must be included on the home page of an attorney or law firm website, including (1) the name of the lawyer or law firm responsible for the site's content, (2) a conspicuously displayed disclaimer regarding any claims related to areas of practice or claims of special competence (the disclaimer must copy the language of Rule 7.04(b)), and (3) the geographic location in which the lawyer or firm's principal office is located. The disclaimer and geographic information must be included on the home page and cannot be accessed through a link to a separate page.

Attorneys should also be cautious in selecting a domain name for their websites because the disciplinary rules apply to the information communicated through the domain name. The domain name must comply with the rules preventing law firms from using trade names or from making misleading communications about the lawyer's qualifications. For example, Rule 7.02(a)(2) prohibits communications which create a promise or guarantee unjustified results. A domain name such as www.iWINallcases.com is prohibited under this rule.

Helpful Hint: Residents outside of Texas may view a Texas lawyer's website or other internet advertisement. Because many states have their own disciplinary rules related to online advertising, it is prudent to include a disclaimer that the page or advertisement is intended solely for residents of Texas or persons seeking representation in Texas. This disclaimer can be expanded to cover the attorney's other licensed jurisdictions of practice. However, if an attorney is licensed to practice in other jurisdictions and the advertisement is targeting potential clients in that state, he or she should ensure that the website also complies with that other state's advertising regulations.

Blogs

Many lawyers write legal blogs to educate the public about a particular area of law. These serve the dual purpose of providing legal resources to the community and increasing the attorney's recognition. Blogs or social media status updates that are educational, informational, editorial, or political in nature are not considered commercial speech and need not be filed with the ARC. Revised Interpretive Comment 17, however, states that lawyers should be careful to ensure that such postings do not meet the definition of an advertisement under the TDRPC.

Even though legal blogs may not be commercial in nature, attorneys should still consider the application of the TDRPC. For example, attorneys must be concerned with maintaining confidentiality (Rule 1.05), candor towards the tribunal (Rule 3.03), trial publicity (Rule 3.07), truthfulness in statements to others (Rule 4.01); and conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 8.04).

Helpful Hint: Though not explicitly required by the TDRPC, it is wise to include a clear statement that the attorney does not intend to form a lawyer-client relationship over the internet.

Online profile

The same rule that exempts certain websites from the TDRPC's filing requirement may also protect your social media profile or blog. "A lawyer or law firm's listing on a web-based directory that is accessible by the public shall be exempt from the filing requirements of Rule 7.07 if it meets the requirements of 7.07(e)(1)." Thus, attorneys need not file social media profiles containing only information exempt under Rule 7.07(e). Recalling the discussion regarding domain names set out earlier, attorneys should avoid social media identifiers that violate Rules 7.01 or 7.02.

What about other information included in your online profile? Facebook and LinkedIn have fields for information about your personal and professional history. Those categories are not specifically exempted by Rule 7.07(e). Lawyers can choose to omit that information in their profiles, but they may lose some benefits provided by LinkedIn and Facebook. Social media sites use that information to suggest people you may know and want to connect to or "friend." Omitting that information may make it more difficult for former classmates and colleagues to locate you.

Helpful Hint: Subsection C to revised Interpretive Comment 17 states that where access is limited to existing clients and personal friends, filing with the ARC is not required.

Status Updates

Social media platforms generally allow users to post "status updates" consisting of short blurbs of information. The revised Interpretive Comment 17 treats status updates as advertisements. But like blog posts, status updates do not need to be filed if they

are educational or informational in nature. Identified below are some more specific issues associated with status updates.

Email & Newsletters

Email makes it possible to reach a large audience with very little cost. Many attorneys seek to capitalize on this by sending out email advertisements or newsletters. These newsletters can be informational, educational, or in the nature of an advertisement. Depending on who the recipient is and the reason for sending it, educational mailings do not need to be reviewed by the ARC. Attorneys sending out educational newsletters, however, should be careful that the educational material provided is not “inextricably intertwined” with commercial speech. A mailing that contains both educational information and commercial speech will be subject to review unless it falls under Rule 7.07(e). Rule 7.05 applies to written solicitations sent by snail mail or electronic mail.

Advertising by Email

Advertising sent by email is permissible, but it must meet the specific requirements of Rule 7.05, which states that all solicitation emails must state “ADVERTISEMENT” in the subject line and at the beginning of the email’s content. In addition, the email must not reveal the nature of the prospective client’s legal problem in the subject line, must not resemble legal pleadings or other legal documents, must explain how the lawyer obtained the prospective client’s email address, and must address whether the contact was prompted by a specific occurrence. A lawyer must keep all email solicitations he or she sends for four years.

There are some notable exceptions contained in 7.05(e), such as email solicitations directed to past or present clients, the lawyer’s immediate family, email information requested from a prospective client, and email communication not related to a particular event or existing legal problem. Attorneys must also be aware that there are numerous state and federal laws that prohibit email spamming and phishing.

Banner Ads & Pop Up Ads

Rule 7.04 also applies to advertising on the internet via banner ads, pop-up ads, or other online advertising opportunities that appear on the outer edges of blogs or

related websites. According to revised Interpretive Comment 17, any image displayed through an electronic communication is an advertisement in the public media if the ad describes a lawyer or law firm's practice or qualifications. Therefore, the communicating lawyer must comply with the submission requirements in Rules 7.04 or 7.07.

Mobile Phone Applications

The ARC reviews mobile phone applications that constitute electronic communications that are subject to Rule 7.07. Just like other electronic communications, if the app provides nothing more than the law firm's name, address, phone number, types of credit cards accepted, and other exempt information under Rule 7.07(e), it is not subject to ARC review.

“Friends” & Clients

There is no definitive answer as to whether “friending” (Facebook) or “linking” (LinkedIn) automatically leads to attorney-client relationship. The answer depends on the circumstances. An attorney-client relationship can be formed where the social media contact between the lawyer and client is spurred by the solicitation of legal services. Consider those instances where a friend request is accompanied by a message that could be considered a request for legal services.

LinkedIn/Professional Website “Recommendations”

Texas law does not prohibit the use of testimonials. On LinkedIn, one can prescreen recommendations (even unsolicited and unexpected ones) before they get posted for public view. Take advantage of the prescreening feature to ensure recommendations comply with the disciplinary rules.

For example, Rule 7.02(4) prohibits comparisons to other lawyers' services, unless substantiated by verifiable objective data. Therefore, if your client enthusiastically reports that you are “the best trial lawyer in town,” you will need to diplomatically ask for a revision before publication.

Lawyers would be well advised to avoid making reciprocal recommendations with others, *i.e.*, where the lawyer agrees to post a recommendation about another professional in exchange for receiving one. Rule 7.03(b) prohibits giving anything of value to a non-lawyer for soliciting prospective clients.

Being Voted as an Expert on Professional Website

Some professional websites that allow you to answer legal questions in exchange for “expert status” can also pose problems. On these websites, readers vote on the best responses posted. When you accrue a number of best response votes, you can be designated as an “expert” in that category. Such expert designation without board certification contravenes Rule 7.04(b)(2) in an advertisement. Although your LinkedIn profile may not be deemed an advertisement, the cautious course would be to avoid answering questions on these sites.

You can, however, demonstrate your knowledge and build relationships by answering questions in discussion groups that you join as long as you do not solicit business in violation of Rule 7.03(a) & (f). Specifically on LinkedIn, there is not an Expert designation or “best answer” feature in the discussion groups.

Chat Rooms

Under Rule 7.03, a lawyer is prohibited from initiating contact with a prospective client (who has not sought the lawyer’s legal advice) through any live interactive manner online. This Rule applies to conversations in public chat rooms or bulletin board forums.

Twitter Fodder

Interactivity constitutes a defining element of all social media. Twitter’s ability to instantaneously reach many people means that a lawyer must keep Rule 7.03(a) in mind. That Rule forbids using “regulated telephone or other electronic contact” to solicit business arising out of a particular occurrence or event from someone who has not sought the lawyer’s advice. Rule 7.03(f) defines “regulated electronic contact” to include electronic communication initiated in a “live, interactive manner.” Comment 1 to Rule 7.03 specifically references chat rooms, and communications on Facebook and Twitter can sometimes resemble a chat room conversation.

Judges as “Friends”

There does not appear to be any specific rule or ethics opinion addressing whether a lawyer and judge may “friend” each other in Texas. But lawyers and judges must be mindful that the rules regarding ethical conduct apply with equal force to social

media. Professional ethics committees in other states have weighed in on the issue and reached different conclusions. While many states permit judges to participate on social media sites with restrictions, some states, such as Florida and Oklahoma, prohibit judges from “friending” lawyers that will appear in front of that judge. Other states, such as Ohio, do not explicitly prohibit a judge from “friending” lawyers who may appear in front of the judge, but those states’ ethics committees encourage judges and lawyers to act carefully to avoid violating other applicable rules. For example, while a lawyer and judge may be permitted to have a social media connection, the lawyer should not use that relationship to engage in *ex parte* communications or engage in other unethical conduct. As a result, Texas lawyers should be mindful of the TDRCP, especially Rule 8.04(a)(6) when entering into electronic relationships with judges.

Top Ten Things to Take Away

1. When in doubt... FILE anything that can be construed as advertising with the ARC.
2. Websites must generally be filed with the ARC. Rule 7.07(c) requires a lawyer’s website to be filed unless it meets the exceptions set forth in 7.07(e). Rule 7.04 sets forth what must be included in your website.
3. Advertising emails must meet specific requirements (Rule 7.05) and must state that the email is an “ADVERTISEMENT.”
4. Banner ads and pop up ads are advertisements that may have to be filed.
5. Unless you are board certified by the Texas Board of Legal Specialization, you cannot say that you have a “specialty or specialize in a particular area of law.” Be careful of being designated an “expert” on professional networking websites.
6. It is prudent to include a disclaimer that your website or social media profile or other activity is intended solely for residents of Texas or persons seeking representation in Texas.
7. Status updates or blog posts do not need to be filed so as long as they are solely educational or informational in nature

8. A lawyer is prohibited from initiating contact with a prospective client (who has not sought the lawyer's legal advice) through any live interactive manner online. TDRPC 7.03.
9. Be careful of friend requests accompanied by a message that could be considered a request for legal services.
10. Though not required explicitly by the TDRPC, it is also wise to include a clear statement that the attorney does not intend to form a lawyer-client relationship when interacting with others on the internet and in social media outlets.

Useful Resources

- **The Texas Disciplinary Rules of Professional Conduct**
http://www.supreme.courts.state.tx.us/rules/atty_rules.asp
- **The Texas Rules of Disciplinary Procedure**
http://www.supreme.courts.state.tx.us/rules/atty_rules.asp
- **Ethics Hotline**
1-800-532-3947
- **State Bar of Texas**
www.texasbar.com
800.566.4616
adreview@texasbar.com
- **Opinions from the State Bar of Texas Professional Ethics Committee**
www.law.uh.edu/libraries/ethics
- **Texas Center for Legal Ethics**
www.txethics.org
1-800-204-2222
- **ABA Model Rules of Professional Conduct**
www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

NOTES

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