





Lawyer For Hire

What attorneys need to know about advertising rules and social media.

BY AL HARRISON AND GENE MAJOR

Is it OK for an attorney to tout case victories on his website? Should a lawyer know the privacy policy of Twitter before she tweets? Attorneys have myriad avenues they can use to disseminate information about their law practice. Today, a digital presence is a tiered structure incorporating websites, blogs, and social media. To be successful, attorneys—and not just the tech-savvy ones—need to understand the do's and don'ts of this virtual world.

The State Bar of Texas Advertising Review Committee (ARC) receives more than 1,000 submissions a year—or more than one-third of the total submissions annually—that pertain to electronic communications. The ARC provides direct oversight of the Advertising Review staff and reviews attorney submissions that staff provides in order to establish guidelines for compliance. It is noteworthy that while the ARC is not the adjudicative entity, violating these rules is a grievable offense and the ARC acts as the complainant in a Chief Disciplinary Counsel grievance. The ARC also writes interpretive comments to the rules, which provide staff and advertising lawyers some guidance as to what the ARC is looking for in terms of compliance. Since the majority of attorney submissions are ads that are web-based, the ARC has crafted Interpretive Comment 17 to provide assistance with interpreting the different portions of Part VII of the Texas Disciplinary Rules of Professional Conduct (the Ad Rules) and electronic communications.

The Ad Rules regulate what attorneys may disseminate to the general public regarding their legal services—an important distinction. The general scope of the Ad Rules is that of the accessibility the public has to the information about the legal services of the attorneys or law firms. The Ad Rules are not media specific, so as other forms of social media or electronic communications arise, the Ad Rules can still be applied. The fundamental goal of the Ad Rules is to ensure that attorneys do not disseminate information about their legal services in a false, misleading, or deceptive way. This could include the use of past successes and results without specific disclaimer information included in the advertisement (R.7.02 (a)(2)), improperly stating that an attorney is a specialist or specializes in a specific area of law without satisfying the proper requirements from the Texas Board of Legal Specialization (R.702(c)), and not filing the submission to the ARC.

ADVERTISING

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would be if the advertisement addresses or speaks to the qualifications or the services of the lawyer or firm, if the material being disseminated is not exempt under R.7.07(e), and if it is generally available to the public. Focusing on whether the information an attorney wants to put on a social media landing page is exempt under the rules goes a long way in determining not only the filing requirement under the Ad Rules but also compliance with the rules.

The exempt information covered in R.7.07(e) expands beyond what was once considered to be “tombstone” or “business card” information. Taking the business card essentials of name, law firm name, and contact information, attorneys can include a list of areas of practice, dates of admissions to other jurisdictions, foreign language ability, and other basic information enumerated in the rule. This type of landing page is suitable for a social media presence that is compliant under the rules and does not need to be filed with the ARC.

But what about blogs? Are they considered advertising? There’s no doubt that blogs have become a useful way for attorneys to show their competency, generally without running afoul of the rules. Used effectively, blogs provide an electronic forum for lawyers to carve out a niche in cyberspace. To understand how blogs can be compliant, we go back to the overall theme of the Ad Rules: prohibiting false, misleading, or deceptive communications about an attorney’s legal services. If a blog contains information that is editorial or educational in nature, and the information provided about the blogger is only the information that is exempt from the filing requirement under R.7.07(e), then the blog would not need to be filed with the ARC. Blogs can cross the line into attorney advertising, though, so it is important that the content remains purely educational or editorial. A recent case in Virginia exemplifies the blurring of lines. In *Horace Frazier Hunter v. Virginia State Bar Ex. Rel. Third District Committee*¹, the Virginia Court of Appeals held in part that attorney Hunter’s blog posts were potentially misleading commercial speech that the Virginia State Bar may regulate. Hunter had a blog entitled “This Week in Richmond Criminal Defense.” An overwhelming number of his posts dealt with successful verdicts he had received for his clients. Hunter missed his chance to provide educational topics that could have raised his reputation within the legal community and thereby create a niche to get his name out in cyberspace and optimized in search engines. Blogs are effective, but lawyers must be wise as to how to maximize their usefulness.

PRIVACY CONCERNS

Attorneys must safeguard the privacy and confidentiality interspersed in all profiles, postings, and communications (“personally identifiable information”) via social media,

such as through Facebook friends and LinkedIn connections. In order to exercise diligence commensurate with the Texas Disciplinary Rules, it is essential for attorneys to rigorously apply a three-pronged “virtual filter” that controls what information should be uploaded to social media, and likewise, what information may be downloaded.

The first prong of this virtual filter is to exercise sound professional judgment regarding how much personally identifiable and client-related information is uploaded to social media. The second prong is to sparingly populate an attorney’s profile with identifying information that satisfies the minimum prerequisite for establishing a social media presence, possibly with the exempt information covered in R.7.07(e), to the extent that a social media presence is deemed to be advantageous and sufficiently fail-safed by the attorney and/or law firm. The third prong is to properly specify privacy settings that limit access to and scope of use of uploaded personally identifiable information, including information that may be made available to third parties, such as vendor advertisers, as articulated in the privacy policies of Facebook, LinkedIn, and other social media sites.

While getting on board social media is incredibly easy, becoming conversant with the respective privacy policies, operational protocols, and default assumptions is a daunting and time-consuming task. Indeed, familiarity with intertwined privacy policies requires keeping abreast of updates in real time. To implement a fail-safe strategy, attorneys should be constantly conversant with essentially every avenue in which personal information may be accessed by supposedly authorized personnel—for example, friends and connections, the public, or advertisers—and should exercise sufficient control over which and how much user information may be accessed, downloaded, and distributed.

For instance, when enrolling in social media websites, attorneys initially encounter the oft-recurring admonition: “Your privacy is important to us. Please read our privacy policy.” But how many lawyers take this seriously? Another important ingredient of an effective fail-safe protocol is for attorneys to regularly monitor social media accounts and promptly address any anomalies or other unexpected uploaded “contributions” that may tend to undermine both attorney integrity and diligent and secure client representation. Social media’s privacy challenges are unavoidable, and attorneys must routinely meet them head-on.

One of the recent trends the ARC is monitoring is how different social media sites have evolved—and how some have declined. With the advent of Facebook, the ARC saw a commingling of personal and professional information on one landing page. Soon, attorneys real-

ized the effectiveness of Facebook as a marketing vehicle and separated their professional and personal landing pages. Previously, the information generally contained on professional Facebook pages was held to be mostly the exempt information attorneys can disseminate under R.7.07(e). Now, with Facebook being a staple in attorney advertising, landing pages have become sophisticated and have evolved into mini websites for the attorney or firm. It is these types of landing pages that have crossed the line from exempt information to something that needs to be filed with the ARC. The Advertising Review Committee has taken a proactive, supportive approach via Ad Rules and interpretive comments to assist attorneys who want to utilize electronic means to disseminate information about their legal services.

For questions regarding the ARC guidelines for social media usage, please contact the State Bar of Texas Advertising Review Department at (800) 566-4616. To download the rules, go to texasbar.com/adreview. **TBJ**

NOTES

1. *Horace Frazier Hunter v. Virginia State Bar*, Ex. Rel. Third District Committee, <http://www.courts.state.va.us/opinions/opnscvwp/1121472.pdf>.



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