ETHICAL ISSUES FOR LAWYERS AS IT RELATES TO THE INTERNET

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ETHICAL ISSUES FOR LAWYERS AS IT RELATES TO THE INTERNET

I. INTRODUCTION
To put this paper in perspective, it is important to provide the following information:

A. The opinions expressed in this paper are solely the author’s and not those of the State Bar of Texas.
B. The purpose of this paper is to inform the reader of disciplinary liability (and not malpractice liability), which may be implicated through the use of the Internet.

II. BRIEF SUMMARY
The use of the Internet for the practice of law falls into two categories, and can be summarized rather succinctly for purposes of disciplinary liability, as:

A. Commercial speech (e.g., online advertising and solicitation)
B. Noncommercial speech (e.g., educational blogs, political discourse, and online information that is specifically exempted by Texas Disciplinary Rule of Professional Conduct 7.07(e) does not have to be reviewed by the State Bar of Texas Advertising Review Committee).

Most practitioners seem primarily concerned about complying with the advertising and solicitation regulations under Chapter 7 of the Texas Disciplinary Rules of Professional Conduct (TDRPC). However, as technology continues to develop, what once was said in private may easily be a public conversation with disciplinary repercussions.

As a result, several rules outside of the Chapter 7 advertising and solicitation regulations may be implicated in noncommercial speech, such as confidentiality (TDRPC 1.05); candor towards the tribunal (TDRPC 3.03); trial publicity (TDRPC 3.07); truthfulness in statements to others (TDRPC 4.01); respect for rights of third persons (TDRPC 4.04); and conduct involving dishonesty, fraud, deceit or misrepresentation (TDRPC 8.04(a)(3)), to name a few.

Because other speakers at this seminar will address particular aspects of social media¹, this author will limit her discussion to weblogs (also called, “blogs”) and speak briefly about e-mail and social media sites.

III. COMMERCIAL SPEECH
A. What is Commercial Speech?
Commercial speech is defined as speech whose purpose is to “propose a commercial transaction”, or more broadly, as speech “related solely to the economic interests of the speaker and its audience.” See Texans Against Censorship, Inc. v. State Bar of Texas, 888 F.Supp. 1328, 1342 (E.D. Tex. 1995). The U.S. Supreme Court has said, “It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.” See Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

Chapter 7 of the TDRPC governs the commercial speech of attorneys as it relates to obtaining employment for legal services. If the attorney is acting in the capacity of a teacher, real estate agent or other professional and solicits or advertises nonlegal services, the Chapter 7 disciplinary rules do not apply. See Texans Against Censorship, 888 F.Supp at 1342.

Comment 1 to TDRPC 7.02 says:

“The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer’s efforts to obtain employment is linked to a matter of current public debate.” (Italics added for emphasis.)

As the comment suggests, sometimes commercial and noncommercial speech may be combined in one communication. In those instances, the court will look at the communication in its entirety.

For example, in Texans Against Censorship, plaintiffs alleged the lawyer’s newsletter (which was not an online version in this case) “inextricably intertwined” commercial and noncommercial speech. The court found it should be treated as commercial speech as a whole, because the newsletter contained language that began with “A Message from Attorney Adler…” and ended with:

¹ “Social media appears in many forms, including e-mail, blogs, online forums and message boards. …Examples of social media applications that facilitate professional and social networking include Facebook, LinkedIn and, most recently, micro-blogs such as Twitter.” See, “Social media latest networking tool for lawyers” by Nicole Black, The

“TELL YOUR FRIENDS ABOUT US  

No one expects them, but accidents do happen. If someone you know has been injured, we can help. At the Law Offices of Jim S. Adler, we’ve helped thousands of people get compensated for their injuries. Please give our toll-free number to someone who might need our services….  We thank you for your past support and are ready to help you again.”

See supra at 1345-46.

In spite of the newsletter’s content on consumer and public safety, the court determined the newsletter was commercial speech as a whole. In other words, a communication cannot masquerade as noncommercial speech if its true purpose is to gain professional employment for the attorney.

The court said, “… the Supreme Court has determined that linking commercial speech to issues of public concern does not controvert otherwise commercial expression into noncommercial speech.” See supra at 1346, quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-67 (1983).

It found that nothing kept Attorney Adler and his law firm “from distributing the noncommercial information in the newsletters separately from the commercial information”. See supra at 1346.

As a result, an electronic stand-alone newsletter sent to prospective clients by e-mail, or which is not linked to a firm’s website, could also be viewed as commercial speech based on the entirety of its content. If the electronic newsletter is commercial speech, it will need to comply with the advertising rules. TDRPC 7.05 requires, for example, e-mail solicitations to state: “ADVERTISEMENT” in the subject portion of the e-mail and again at the beginning of the text. If the newsletter is part of a website, then the website must follow the regulations in TDRPC 7.04. Both e-mail solicitations and websites must be reviewed by the State Bar of Texas Advertising Review Department (which is under the purview of the Advertising Review Committee) pursuant to TDRPC 7.07. For simplicity, the Advertising Review Department and the committee will simply be referred to as the ARC.

B. Live Chat Rooms  

Internet communications initiated by an attorney (or someone acting on his or her behalf) which cause a prospective client, who has not sought the attorney’s legal advice, to be contacted in a live, interactive manner are prohibited by TDRPC 7.03. Attorneys who communicate in live chat rooms cannot do so if it is prohibited by any of the factors set forth in 7.03(a). For example, an attorney (or a person acting on his or her behalf) cannot promote the attorney’s legal services in a chat room for grief support if the purpose of that communication is to obtain employment in a wrongful death suit or probate matter. The ARC does not review these communications, because they are prohibited.

C. E-mail  

E-mail is now a standard tool for business communications with existing clients. However, e-mail sent to prospective clients (and not requested by the prospective client) to solicit professional employment must meet several requirements under TDRPC 7.05. In addition to the word, “ADVERTISEMENT”, the e-mail (1) shall not reveal the nature of the prospective client’s legal problem in the subject line, (2) shall not resemble legal pleadings or other legal documents, and (3) shall explain how the lawyer obtained the prospective client’s e-mail address, and whether “such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s)”2 [7.05(b)(2)-(5)]. There are other requirements in TDRPC 7.05, as well, such as the lawyer (or a lawyer in the firm) reviewing and approving in writing a copy of the e-mail solicitation. [7.05(d)]. A record of the solicitation must be kept for four years after dissemination. [7.05(e)].

Exceptions to regulations described in 7.05(b)&(c) are listed in 7.05(f). For example, e-mail solicitations to prospective pro bono clients do not have to comply with 7.05(b)&(c). However, 7.05(a) lists other require-ments and prohibitions to all e-mail solicitations whether they are for pecuniary gain or not.3 These include rules about the lawyer’s certification, and practice area, as well as other regulations. A copy of the e-mail solicitation must be filed with the ARC pursuant to TDRPC 7.07.

Lastly, it should go without saying that e-mail spamming and phishing are prohibited by other law.4

D. Public Media: Websites, Online Video-Sharing, and Internet Banner and Pop-Up Ads  

Law firm websites, online video-sharing for purposes of obtaining employment, and Internet banner and pop-up ads are considered public media under the ARC’s Internal Interpretative Comments 1, 9 and 17. As a result, they must follow the regulations in TDRPC 7.04 and filing requirements under TDRPC 7.07 unless

2 See specific language of TDRPC 7.05 and comments which follow the rule.

3 The requirements of 7.05(a) must be met in addition to 7.05(b)-(e) for most written e-mail solicitations.

4 Several federal and state laws apply to spam and phishing.
they fall under the exemptions listed in 7.07(e). TDRPC 7.07(e) is discussed later in III.E.

TDRPC 7.04 is an extensive rule. For the sake of brevity, websites, online video-sharing and Internet ads are simply referred to hereafter as “advertisements”. Because 7.04 is a long and technical rule, the reader should take time to read the rule. The ARC website is also very helpful. (See the Resource Page at the end of this article.)

Generally speaking, TDRPC 7.04(a) covers attorneys advertising as specialists when licensed in particular practice areas for patents, trademarks, and intellectual property; listings for certain lawyer referral services; and listings, or announcements in legal directories and newspapers.

TDRPC 7.04(b)(1) requires that at least one attorney who is responsible for content of the advertisement be listed in the ad itself. TDRPC 7.04(b)(2) states the conditions for saying a lawyer is a specialist in an advertisement. Paragraph (c) to 7.04 requires that the statements required by paragraph (b) be conspicuously displayed and in easy to understand language. TRDPC 7.04(d) gives a nonexhaustive list of advertising media.

Other requirements of 7.04, without covering the whole rule, say that the attorney or firm must review the advertisement and have a lawyer approve it in writing; must keep a copy or recording of the advertisement for four years after its dissemination, including when and where it was used; requires lawyers to portray themselves in advertisements and not use actors; must disclose information about fees and give specific information about principal and branch offices; and, sets conditions on sharing advertising costs between lawyers who are not in the same firm.

1. Websites
The ARC’s Internal Interpretative Comment 17 defines “website” and states that the website’s “intended initial access page” (synonymous to the “home page”) shall include:

1) the name of the lawyer or law firm responsible for the content of the site
2) if areas of law are advertised or claims of special competence are made on the intended initial access page or elsewhere on the site, a conspicuously displayed disclaimer regarding such claims in the language prescribed at Rule 7.04(b); and
3) the geographic location (city or town) in which the lawyer or law firm’s principal office is located.5

Two copies of the home page must be filed with the ARC. Submission applications and submission procedures are at the ARC home page on the State Bar of Texas website.

2. Online Video-Sharing
The ARC reviews videos shared on Internet sites like YouTube, MySpace and Facebook. If the video is part of the law firm’s website, it does not need to be filed separately from the website ARC submission. TDRPC 7.04 also applies to online video advertising, since it is in the public media on the Internet.

3. Internet Ads
ARC Internal Interpretative Comment 17 states that:

“An image or images displayed through the vehicle of another’s website is an advertisement in the public media if the ad describes a lawyer or law firm’s practice or qualifications, whether viewed independently or in conjunction with the page or pages reached by a viewer through links offered by the ad (‘target page’). The content of a web-based display or banner ad will be viewed in conjunction with the target page.” (Italics added for emphasis.)

Consequently, TDRPC 7.04 applies to these Internet advertisements, too; which include banner ads, pop-up ads and advertising that may frame, or appear in or around a blog. If the ad content only has the information listed in TDRPC 7.07(e)(1), it is exempted from the filing requirement with the ARC. Keep in mind that if the Internet ad is connected to the law firm’s website, it can be reviewed as part of the website under one submission and one filing fee to the ARC.

E. Exemptions from Filing Requirements with the Advertising Review Committee
After all of this information on what commercial speech must do to conform to the advertising rules, it is welcome news that there are some exceptions. TDRPC 7.07(e) lists those exceptions, or exemptions, to the

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5 See the Resource Page at the end of this paper for Advertising Review Committee links to Interpretative Internal Comments, Frequently Asked Questions and more.
ARC filing requirements. Rule 7.07(e) is two-pages long and leaves plenty of leeway for what is sometimes referred to as a “tombstone” ad. Additionally, online recognition by charities do not have to be filed with the ARC. See Professional Ethics Committee Opinion 548 (January 2003) and TDRPC 7.07(e)(2) below. Both are available on the ARC home web page.

TDRPC 7.07(e) says that advertisements which include the exempted information in the list below do not have to be filed with the ARC. However, the ads must meet the other requirements of 7.02 and 7.04, such as truthfulness about the lawyer’s services, past successes, etc. See TDRPC 7.02(a)-(c) and, where applicable, TDRPC 7.04 (a)-(c).

7.07(e)(1) exempted information includes:

1. Name of the lawyer/s or law firm
2. Office address
3. Phone numbers and fax numbers
4. Electronic e-mail and web addresses
5. Links to other websites
6. Particular areas of the law the lawyer/s or law firm specializes in or possesses a particular area of competence
7. Areas of law to which the lawyer/s or law firm limits the practice.
8. Date of admission to the State Bar of Texas or other jurisdictions, including federal courts
9. Foreign language ability
10. Office hours
11. Acceptance of credit cards
12. Acceptance and identification of prepaid legal plans

The rest of 7.07(e) deals with the types of commercial speech which are exempted, such as:

1. Advertisements in the public media that identify the lawyer/s or the law firm as a contributor to a specific charity, public interest program or other activity and contains no other information other than the law office’s location. [7.07(e)(2)]
2. Listing in a regularly published law list [7.07(e)(3)]
3. An announcement card (including one sent by e-mail) stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card [7.07(e)(4)]
4. A newsletter, whether written, digital, or electronic that is sent to:
   a. current or former clients
   b. other attorneys or professionals, or
c. members of a nonprofit organization, providing the organization meets the conditions stated in Rule 7.07(e)(5)(iii). For example, the organization’s primary purpose is not to provide legal services to its members, nor does it derive financial benefit from the lawyer who provides its members’ legal services. [7.07(e)(5)]

5. A “solicitation communication” that is not based on a particular past occurrence or event (or series of past occurrences or events), or concerned with a prospective client’s particular legal problem. [7.07(e)(6)]
   In other words, a communication which has all of the exempted information in Rule 7.07(e)(1), but is under the heading of “Were you injured in a car accident?”, or “Have you been arrested?” does not comply with this exemption.

6. A “solicitation communication” which is not motivated by the lawyer/s pecuniary gain (i.e., pro bono legal work). [7.07(e)(7)]

7. And lastly, if a prospective client requests the “solicitation communication” from the lawyer, it is exempted.

F. Domain Name

ARC Internal Interpretative Comment 27 says that “Uniform Resource Locator’s (URL’s) cannot be used as a trade name, but can be advertised as the Internet address for the lawyer or law firm as long as the requirements of the Rules are met.” TDRPC 7.01 prohibits law firms from using trade names. Additionally, TDRPC 7.02(a) says that an attorney “shall not make or sponsor a false or misleading communication about the qualifications or the

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6 Note comparison to TDRPC 7.03(a) regarding prohibition against in-person or telephone conversations.

7 ARC Internal Interpretative Comment 1, Public Media Advertisement (Nov. 1995) - A public media advertisement is an advertisement broadcast or made available to the general public, such as telephone Yellow Pages, newspapers or other periodicals, outdoor display, the Internet, radio or television. Publications or information disseminated primarily to lawyers, such as legal newspapers, legal directories, firm brochures mailed to other lawyers, and online services provided to lawyers are not considered to be in the public media. (Underlines added for emphasis.)
services of any lawyer or law firm”, and then proceeds to list communications that are false or misleading. For example, 7.02(a)(3) prohibits creating unjustified results. Consequently, a domain name such as www.iWINcases.com would be prohibited.

G. Jurisdictional Disclaimers in Internet Advertising

Because many states have disciplinary rules pertaining to advertising on the Internet, and jurisdiction over such advertisements reaching residents of their states, it is prudent to use a disclaimer that the ad is intended solely for residents of Texas, or persons seeking representation in Texas. Of course, if you are licensed in federal court or other state jurisdictions, adjust your disclaimer accordingly. It is important to check the disciplinary rules in each state in which an attorney is licensed in order to comply with that state’s advertising regulations.

In addition, the lawyer may want to disclaim forming an attorney-client relationship over the Internet, unless it is his or her intent to do so.

H. Advertising Review Committee Information is on the State Bar of Texas Website

This Internet link to the ARC is listed on the Resource Page at the end of this paper. However, contact information is printed below for the reader’s convenience. The director of the Advertising Review Department is Gene Major.

Advertising Review Committee’s Contact Information:

Phone number  Fax number
(800) 566-4616  (512) 462-7399

Attention: Gene Major
Mailing address
If using the US Postal Service:
Advertising Review Committee
State Bar of Texas
PO Box 12487
Austin, TX 78711-2487

If using another delivery service:
Advertising Review Committee
State Bar of Texas
1414 Colorado St., 5th Floor
Austin, TX 78701

IV. NONCOMMERCIAL SPEECH

A. What is Noncommercial Speech?

Noncommercial speech is afforded greater First Amendment protection than commercial speech. See Texans Against Censorship, 888 F.Supp. at 1341. For example, noncommercial speech may involve debate about matters of public concern, or political discourse. It includes a wide range of expression that is not commercial in nature,8 and perhaps more importantly for purposes of this paper, it is not regulated by Chapter 7 of the TDRPC.

However, it is wishful thinking that noncommercial speech of a Texas-licensed attorney is not also governed by the disciplinary rules. As a result, examples of attorney misconduct through case law and various articles will be used to illustrate disciplinary liability in the context of noncommercial speech. The TDRPC rules are given for each item in IV.B. to aid the reader in understanding which Texas disciplinary rules would likely apply if similar conduct occurred in this state. These lessons from the Internet are purely illustrative and do not state an opinion as to whether or not a grievance panel would find professional misconduct based upon the same rules.

B. Lessons From the Internet

1. An attorney in Minnesota is disciplined for sending an e-mail to a witness in a disciplinary proceeding, asking the witness not to testify against another attorney. See In re Soronow, 694 N.W.2d 556 (Minn. 2005).

   Applicable TDRPC 3.04(e) – A lawyer shall not ask a person other than a client to refrain from voluntarily giving relevant information to another party unless….

   Applicable TDRPC 8.04(a)(4) – A lawyer shall not engage in conduct constituting obstruction of justice.

2. A juror was dismissed from a securities fraud case after disclosing the juror had read attorney Robert Grime’s9 blog about the trial. The Wall Street Journal article said, “Grimes, who is posting up-to-date detailed reports on the trial at his firm’s website, was reportedly hired to write the blog by a law firm involved in some of the civil litigation arising from [one of the parties] meltdown, but Grimes declined to identify the firm.”10

   Applicable TDRPC 3.07(a) – In the course of representing a client, a lawyer should not make an extrajudicial statement… disseminated by means of

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8 The author recognizes that this definition is barely sufficient to describe the large body of First Amendment case law regarding noncommercial speech.

9 Mr. Grimes is a lawyer in San Diego, California.

10 “Lawyers Blogging on Cases: Good or Bad?” by Dan Slater, WSJ Blogs – Law Blog, posted on May 1, 2008 at http://blogs.wsj.com/law/2008/05/01/lawyers-blogging-on-cases-good-or-bad/
public communication if... it will have a substantial likelihood of materially prejudicing an adjudicatory hearing. A lawyer shall not counsel or assist another person to make such a statement.

3. A temporary prosecutor wrote on his blog that “opposing counsel was “chicken” when she asked for a continuance, directly alluded to her with some posting titles obscene enough that the judge did not repeat them.” In this case, the judge read the temporary prosecutor’s personal blog.

   Applicable TDRPC 4.04(a) – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.…

4. In Pennsylvania, an attorney was disbarred for falsely accusing a judge in an Internet “press release” of such offenses as the criminal alteration of recorded court proceedings, subornation of perjury by an officer of the court, and harboring criminal conduct. The attorney had made these accusations repeatedly, which he knew to be false, not only on the Internet, but in the local newspaper and through pleadings and letters to various officials. See Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1285, 1288 (Pa. 2006).

   Applicable TDRPC 8.02(a) – A lawyer shall not knowingly make false statements, or with reckless disregard for their truth… about the qualifications or integrity of judge.…

   Applicable TDRPC 8.04(a)(3) – A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

NOTE: Some attorneys have improperly used their Facebook pages and blogs to name call and criticize judges, and a few, as shown here, have been disciplined for professional misconduct.12

5. An Illinois attorney is being investigated for disclosing confidential client information in her personal blog, because the fact patterns of her clients’ cases were “thinly veiled”. The assistant public defender also called one judge who she practiced before “Judge Clueless” and made remarks about a client who lied to the court.13

   Applicable TDRPC 1.05(b)(1) – A lawyer shall not knowingly reveal confidential information of a client or former client to… anyone.…

   Applicable TDRPC 3.03(b) – If a lawyer has offered material evidence [to the court] and comes to know of its falsity,… the lawyer shall take reasonable remedial measures, including true disclosure of the facts [to the court if the client will not take corrective steps after being so advised by the lawyer]. See Comment 13 to TDRPC 3.03.

   Applicable TDRPC 3.03(a)(1) – A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.14

C. Online Noncommercial Speech Serves Several Legitimate Purposes

Attorneys who write legal blogs to educate the public about a particular area of law serve an undisputed legitimate purpose. There are many great legal blogs on the Internet which are useful resources for both laypersons and lawyers. The attorneys, who write these blogs, improve their writing skills, build a reputation for being knowledgeable in a certain area of law, and stay current with developments in case law and legislative changes.

Political speech also informs through debate and discussion. In State Bar of Texas v. Semann,15 the court of appeals reversed a disciplinary sanction against an attorney who criticized a judge as being a “midget among giants” in comparison to other criminal court judges. The court found the statement was not made with falsity or reckless disregard for the truth about the qualifications or integrity of the judge.16 The court in Semann wrote:


13 See id.

14 See id.


“It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not.”

The best prevention regarding disciplinary liability and online noncommercial speech is to behave like a professional. Remember what is said online generally stays online and may be used against you. Familiarize yourself with the Texas Disciplinary Rules of Professional Conduct, and if you need advice on the rules or ethics opinions, call the State Bar of Texas Ethics Helpline at 1-800-532-3947 for nonbinding, nonconfidential advice from an ethics attorney.

17 See Semann, 508 S.W2d at 432.
Appendix

RESOURCE PAGE WITH INTERNET LINKS

A. **Lawyers and Social Media**


B. **State Bar of Texas Advertising Review Committee Information**

Contact Information and “Home Page” for ARC
NOTE: ARC submission applications and procedures are near the bottom of this web page.

[http://www.texasbar.com/Template.cfm?Section=For_Attorneys&CONTENTID=25320&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.texasbar.com/Template.cfm?Section=For_Attorneys&CONTENTID=25320&TEMPLATE=/ContentManagement/ContentDisplay.cfm)

Links available on the ARC home page for advertising are:
- Advertising Rules
- Ethics Opinions and Office of Attorney General Opinion Related to TDRPC Chapter 7 Advertising Rules
- Frequently Asked Questions
- Internal Interpretative Comments
- New Rule Questions for TDRPC Chapter 7 (effective June 1, 2005)
- Top Five Rule Revisions (Between Old Rules and New)

C. **Noncommercial Speech Stories From the Internet**

(FN 10) “Lawyers Blogging on Cases: Good or Bad?” by Dan Slater, WSJ Blogs – Law Blog, posted on May 1, 2008 at [http://blogs.wsj.com/law/2008/05/01/lawyers-blogging-on-cases-good-or-bad/](http://blogs.wsj.com/law/2008/05/01/lawyers-blogging-on-cases-good-or-bad/)


D. **Tips For a Lawyer’s Online Noncommercial Speech**
