HOW TEXAS LAWYERS CAN USE SOCIAL MEDIA WITHOUT VIOLATING ETHICS RULES

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CHAPTER 5

Chelsie King Garza

Chelsie Garza is an experienced litigator with extensive trial experience. She has successfully handled complex commercial and product liability litigation, in addition to a variety of personal injury matters.

Devotion is the consistent theme that transcends every aspect of her life. Outside of the office, Chelsie Garza's life is dedicated to her husband and two children. Just as she dedicates herself to her family, she pours herself into each and every task she takes on. Chelsie tried a medical malpractice case for a client who will forever have a colostomy as the result of a botched hysterectomy. That trial resulted in the largest medical malpractice verdict in Texas for 2012.

Below are a few of her awards and accolades, along with a sampling of her publications and speaking engagements.

Awards & Accolades

- Named a Super Lawyer by Texas Monthly
- Named one of Houston's Top Lawyers by H Texas Magazine
- Named a Rising Star by Texas Monthly
- Top 100 Trial Lawyers, The National Trial Lawyers

Publications & Speaking Engagements

- *"The Innocent Seller and Foreign Manufacturer,"* Texas Lawyer, August 11, 2014.
- Speaker "Ethics and Social Networking," April 22, 2014, Houston Bar Association CLE.
- *"Four Considerations in Medical Malpractice Case,"* Women Trial Lawyers Caucus, American Association for Justice, Spring, 2013.
- "*Mental Anguish: The Overlooked Element of Damages,"* September/October 2013, The Houston Lawyer, Vol. 51.
- Speaker "Mental Anguish: The Overlooked Element of Damages," January 15, 2013, Houston Bar Association, Litigation Section CLE.
- Speaker "How to Succeed in a Plaintiff's Practice," January 23, 2013, Association of Women Attorneys.
- Speaker "Lessons From Our Past – History of Women and The Law," March 1, 2013, Texas Women Lawyers.
- "*Expanding the Coming and Going Rule… One Officer's Struggle*," January/February 2012, The Houston Lawyer, Vol. 49.
- Speaker "Personal Injury Damages," April 26, 2012, Personal Injury Basics, Law Review CLE.

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Zach Wolfe is a trial lawyer who focuses on non-compete and trade secret litigation. Zach frequently teaches continuing legal education courses on current issues in litigation. He writes a weekly blog on litigation topics: www.fiveminutelaw.com.

Zach received his undergraduate degree from Harvard and his law degree from the University of Texas.

Zach is active in the Houston Bar Association, currently serving as a co-chair of the Law Week Fun Run Committee. He is also a member of the Garland R. Walker American Inn of Court.

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I. INTRODUCTION

First, the bad news. The Texas Disciplinary Rules of Professional Conduct that apply to use of social media are poorly written, ambiguous, byzantine, and potentially onerous. And of course, they were not written with the use of social media in mind. But there is good news. The Texas State Bar Advertising Review Committee has provided helpful interpretive comments that put some common sense back into the ethics rules. With the help of those comments and a few simple rules of thumb, you can use social media as part of your business development efforts without fear of violating the Texas ethics rules.

II. THE FLOWCHART

The ethical issues presented by Texas lawyers using social media boil down to two issues. First, is it "advertising"? Second, is it "misleading"? But note that "advertising" and "misleading" are terms of art here. If these terms were intuitive, you would not need to read this paper or the ethics rules. Alas, these terms are not intuitive, or at least not *wholly* intuitive. That means a basic understanding of some key concepts in the advertising rules is necessary to ensure ethical use of social media. The best place to start is the flowchart below. If you are not satisfied with knowing *what* to do but must know *why* you must do it, we will get to that in Section III.

A. Is it Advertising?

1. Is it publicly accessible? If yes, skip to 3.
2. Are you sure it isn't publicly accessible? If yes, then it's not advertising.
3. If publicly accessible, does it tout your **Experience or Qualifications**? If yes, then it's advertising.
4. Is it **Educational or Informative**? If yes, then you are probably right that it is not advertising. But if no, that is a sign that maybe it does tout your Experience or Qualifications.

B. Is it covered by the Website Rule?

1. Is it your profile on your law firm's website? If no, then skip to C below.
2. Has your firm complied with **Rule 7.07(c)** and filed its landing page? If no, then make sure your firm complies.
3. Is your profile on the landing page? If yes, it will be included in the filing with the Advertising Review Committee.
4. If your profile is not on the landing page, it does not need to be filed with the Advertising Review Committee.
5. But consider securing an optional "advance advisory opinion" under **Rule 7.07(d)**.

C. Is it advertising covered by a Filing Exemption?

1. <u>Is it covered by one of the exemptions listed in **Rule 7.07(e)**? These include:</u>

   a. Basic contact information
   b. Particular areas of law
   c. Dates of bar and court admissions
   d. News or legal articles not prepared by the lawyer

2. <u>Is it covered by the Unofficial LinkedIn Endorsement Exemption?</u>

If not covered by the Website Rule or a Filing Exemption, then comply with the filing requirements in **Rule 7.07(b).**

D. Is it "Misleading"?

1. <u>Does it violate the Specialization Rule?</u>

   a. Do you use the term "specialist," "specialize," etc.? If yes, go to (b).
   b. Do you have board certification or one of the other certifications in **Rule 7.04(a)** or **Rule 7.04(b)(2)**? If not, then delete your use of "specialize," "specialist," etc.

2. Does it violate the Results Obtained Rule?

    a. Does it violate the **Literal Interpretation** of **Rule 7.02(a)(2)**? If yes, the ultra-cautious approach is to delete it, but if you can tolerate some risk, then go to (b).
    b. Does it violate the **Common Sense Interpretation** of **Rule 7.02(a)(2)**? If yes, then modify it to make clear if you were not lead counsel, etc.
    c. A disclaimer may help but is not conclusive. See **Comment 6** to Rule 7.02.

3. Does it violate the Lawyer Comparison Rule?

    a. **Rule 7.02(a)(4)**: "compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data."

If it complies with the three rules above, then it is probably not "Misleading." Just use common sense to make sure it is not misleading in some other way.

III. THE FLOWCHART EXPLAINED

A. Is it Advertising?

Whether it is a landing page, a tweet, or a Facebook status update, or a LinkedIn update, the most basic question is whether it is "Advertising." This matters primarily because if it's advertising, then generally it has to be filed with the State Bar.

> **Rule 7.07(b) [The Filing Requirement]**
>
> Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. . . .

The State Bar has made it clear that the filing requirement applies to lawyer advertising posted on this newfangled thing called the "Internet," including websites and landing pages on social media sites.

> **Interpretive Comment 17**
>
> A digitally transmitted message that addresses the availability of a Texas lawyer's services is a communication subject to Rule 7.02, and when published to the Internet, constitutes an advertisement in the public media.
>
> A. Websites
>
> A website on the Internet that describes a lawyer, law firm or legal services rendered by them is an advertisement in the public media. . . .
>
> B. Web-Based Display/Banner Ads
>
> An image or images displayed through the vehicle of an electronic communication is an advertisement in the public media if the ad describes a lawyer or law firm's practice or qualifications . . .
>
> C. Social Media Sites
>
> Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements. Where access is limited to existing clients and personal friends, filing with the Advertising Review Department is not required.

Obviously, it would be so cumbersome to file every social media post with the State Bar that it would hardly be worth the effort. So learning how to use social media without triggering the filing requirements is critical.

Whether your social media content is an "advertisement in the public media" comes down to two issues. First, is the content available publicly? Second, does the content expressly tout your experience or qualifications as a lawyer? If the answer to both questions is yes, then it's a safe bet that the content is advertising. This means it is subject to the requirements of the advertising rules, including the general requirement of filing the advertising with the State Bar.

The first question is not always as simple as it seems. In many cases, social media content that you thought was only available to your friends may actually be publicly available. Take the time to understand the privacy settings on your social media accounts and make sure they are set the way you want them.

Aside from privacy settings, the more fundamental problem is that social media blurs the distinction between public and private. For example, if my Facebook posts are only visible to my 50 Facebook friends, who are all my actual friends and family, the posts are probably not "advertising" because they are not available generally to the public. But what if I have over 5,000 Facebook "friends"? And what if one of my friends shares my content on his publicly available account? It is easy for content you thought was private to become public.

Of course, if you are hoping to use social media as part of your business development efforts, then you will *want* your content available to the public. Otherwise, what's the point? In this case, whether the content is "advertising" will come down to whether it expressly promotes your experience or qualifications as a lawyer.

We say "expressly," because a major purpose of using social media for business development is to demonstrate your experience and qualifications to your target audience. Content that *tells* people your qualifications will typically be advertising, but content that *shows* people you have expertise in a certain practice area will not. The good news here is that *showing*, rather than telling, is not only less likely to be considered advertising, it is also more likely to be effective. And the best way to show this is with content that is *educational or informative*.

> **Interpretive Comment 17**
>
> D. Blogs
>
> Blogs or status updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department. However, attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements.

Interpretive Comment 17 from the Texas State Bar Advertising Review Committee is helpful but somewhat circular. It effectively says "educational or informational content is not advertising, and therefore does not have to be filed, unless it's advertising." But the intent is clear: social media content, that is "educational or informational in nature" is *not* advertising and does *not* have to be filed.

This makes it possible for Texas lawyers to use social media without having to file every post with the State Bar. Keep your social media content educational and informative, rather than using it to toot your own horn, and you should be able to avoid running afoul of the advertising filing requirement.

But what about the *landing pages* for your social media accounts? This is where it gets trickier. Typically, the landing page will have information about your experience and qualifications. LinkedIn profiles are the prime example. Most lawyers have LinkedIn profiles that look very similar to their law firm website profiles. Unless an exemption applies, typical profiles like this could be considered advertising that must be filed with the State Bar.

B. Is It Covered by the Website Rule?

Law firm websites have their own special rule: Rule 7.07(c). Most lawyers who work for a law firm have their own separate profile on the law firm's website. If this applies to you, then your main concern is going to be making sure your profile is not "misleading," as addressed in Section D below. As long as someone at the firm has complied with Rule 7.07(c) and filed the firm's landing page with the State Bar, you are not required to file your individual profile page.

Rule 7.07(c) [The Law Firm Website Rule]

(c) Except as provided in paragraph (e) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas no later than its first posting on the internet or other comparable network of computers information concerning the lawyer's or lawyer's firm's website. As used in this Rule, a "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL). The filing shall include:

(1) the intended initial access page of a website.
(2) a completed lawyer advertising and solicitation communication application form; and
(3) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be set for the sole purpose of defraying the expense of enforcing the rules related to such websites.

If you have your own firm or you are in charge of your firm's website, you will need to make sure the firm has complied with Rule 7.07(c) as stated above. You may also want to consider the option of seeking an "advance advisory opinion" for your landing page under **Rule 7.07(d)**. Advance approval is not required, but in can give you peace of mind that your firm's website is in compliance.

Rule 7.07(d) [Pre-Approval]

A lawyer who desires to secure an advance advisory opinion, referred to as a request for pre-approval, concerning compliance of a contemplated solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b), **or the intended initial access page submitted pursuant to paragraph (c)**, including the application form and required fee.

C. Is It Advertising Covered by a Filing Exemption?

If it is advertising that is not covered by the Website Rule, then the presumption is that it must be filed with the State Bar. But there are exceptions. Rule 7.07(e) provides a number of filing exemptions. So, if a Texas lawyer does not want to have to file his social media site landing page, one avenue is to limit the information on the landing page to things that are exempt under Rule 7.07(e)

The types of information that are exempt under Rule 7.07(e) include:

a. Basic contact information
b. Particular areas of law
c. Dates of bar and court admissions
d. News or legal articles not prepared by the lawyer

If a Texas lawyer's landing page is limited to exempt information, filing will not be required.

But what about LinkedIn endorsements? Almost every lawyer who has a LinkedIn account has endorsements from his or her contacts. LinkedIn endorsements would seem to be advertisements in the public media, and no formal exemption appears to apply. This is where Texas lawyers must rely on what we call the "Unofficial LinkedIn Endorsement Exemption." A 2013 Texas Lawyer article quoted the director of the Advertising Review Committee indicating that he did not see a problem with LinkedIn endorsements to be false, misleading, or deceptive. The State Bar seems to have taken a pragmatic approach to pervasive LinkedIn endorsements.

However, lawyers should be cautious about LinkedIn endorsements. At a minimum, make sure that the areas of experience listed under your "Skills & Endorsements" are areas in which you are actually competent. Otherwise, displaying the endorsements to the public on your landing page could be considered false or misleading advertising.

D. Is it "Misleading"?

Regardless of whether your social media content is "advertising" that must be filed with the State Bar, there is the overarching question of whether your content is "misleading." Your content can violate the "misleading" prohibition in two different ways; one is intuitive, the other is not.

The intuitive part of the requirement is summed up well in Comment 3 to Rule 7.02

> **Rule 7.02, Comment 3**
>
> . . . A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.
>
> A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable foundation.

This common sense formulation of "misleading" is easy to understand, even if application of the standard to specific fact situations may be more difficult.

The *non-intuitive* requirement is what we call the "Misleading Per Se" Rule. Rather than merely providing a general definition of "misleading" communications, Rule 7.02 lays out a list of seven things that are considered "false or misleading" by definition.

> **Rule 7.02(a) [The "Misleading Per Se" Rule]**
>
> A communication is false or misleading if it:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
> (2) contains any reference in a public media advertisement to past successes or results obtained unless
>
> (i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict.
> (ii) the amount involved was actually received by the client,
> (iii) the reference is accompanied by adequate information regarding the nature of the case or matter, and the damages or injuries sustained by the client, and
> (iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;
>
> (3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;
> (4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;
> (5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;
> (6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or
> (7) uses an actor or model to portray a client of the lawyer or law firm.

The three "Misleading Per Se" rules that most often come up with social media are the Specialization Rule, the Lawyer Comparison Rule, and the Results Obtained Rule.

The Specialization Rule is relatively easy to follow. Unless you have a board certification or one of the other certifications in Rule 7.04(a) or 7.04(b)(2), avoid using the terms "specialist," "specialize," etc. It is fine to identify areas of practice in which you are competent. Just don't say you "specialize."

The Lawyer Comparison Rule is also easy to comply with, although it is probably violated more often. Under Rule 7.02(a)(4), you may not compare your services with another lawyer's services, "unless the comparison can be substantiated by reference to verifiable, objective data." This means that just about any opinion comparing yourself to other lawyers is going to be prohibited. The comment to the rule provides examples of prohibited comparisons: "toughest lawyers in town," "we will get money for you when other lawyers can't," "we are the best law firm in Texas if you want a large recovery." Avoid making comparisons like these and you will be fine.

The Results Obtained Rule is more difficult. If the rule were applied literally, thousands of Texas lawyers would be violating it every day. Fortunately, the State Bar has adopted a common sense interpretation of Rule 7.02(a)(2) in its Interpretive Comment 26. Essentially, the Interpretive Comment says comply with the parts of Rule 7.02(a)(2) that apply to your situation, and don't worry about the parts that don't apply.

> **Interpretive Comment 26. Reference to Past Successes or Results Obtained in an Advertisement in the Public Media**
>
> When making any reference to past successes or results obtained in advertisements in the public media, an attorney or law firm must comply with the general rule contained in Rule 7.02(a)(1), which prohibits communications that: (i) contain a material misrepresentation of fact or law, or (ii) omit a fact necessary to make a statement not materially misleading.
> In addition, Rule 7.02(a)(2) imposes an affirmative requirement that advertising lawyers and law firms include specific information when referring to past successes or results obtained.
>
> 1. A lawyer or lawyer firm publishing a claim of past successes or results obtained in an advertisement in the public media must include information sufficient to provide the basis for a reasonable person to understand the nature of the case, matter or representation, and the advertising lawyer or law firm's role in it.
>
> a. When reference is made to past successes or results obtained by a lawyer or firm in a matter where any or all of the descriptive elements of 7.02(a)(2)(i)-(iv) apply, the applicable elements must be incorporated into that reference.
>
> b. When reference is made to past successes or results obtained by a lawyer or firm in a matter where one or more of the descriptive elements of 7.02(a)(2)(i)-(iv) do not apply – either because of the nature of the matter or representation or for any other reason – the advertising lawyer or law firm must not only comply with the applicable elements, but must also comply with the requirement that sufficient information be included to avoid misleading a reasonable person. That lawyer bears the burden of providing in the advertisement the information required by the particular facts and circumstances of that representation and that communication.

Interpretive Comment 26 also clarifies the intent of the rule with respect to references to sums of money obtained: "If any reference is made to a sum of money, a particular type of relief, or some other amount or value, care must be taken to make clear the nature of the result, the role of the advertising lawyer or law firm, their relationship to that result, relief, or amount, and the net effect thereof."

These comments help, but what about the onerous lead counsel requirement in Rule 7.02(a)(2)(i)? It says that if you list a past result, you had to be the "lead counsel in the matter giving rise to the recovery," or "primarily responsible for the settlement or verdict." It states no exceptions.

The problems with this requirement are obvious. What if the result obtained did not involve a litigation matter, such that there was no "recovery," "settlement" or "verdict"? Or what if it was a litigation matter but you were defense counsel, and there was a take-nothing verdict? On its face, the rule is not designed to address these situations. Furthermore, does the rule *really* mean that *only lead counsel* is allowed to say anything about his experience with the matter? What if the lawyer makes it clear that he was in a supporting role?

Interpretive Comment 26 applies common sense to this issue as well. Essentially, the Comment says that you don't have to be lead counsel, as long as you don't overstate your role or otherwise make the statement misleading:

> **Interpretive Comment 26**
>
> 5. If a lawyer or law firm describes his or her legal experience with reference to a specific matter without claiming responsibility for success or results obtained, that communication may not be subject to the requirements of Rule 7.02(a)(2). In that instance, however, the general rules regarding communications about qualifications and services still apply, and the burden lies with the advertising lawyer or law firm to demonstrate that a reasonable person would not conclude that a claim of responsibility for a particular result is being made.

Thus, an associate could say "assisted team with document review in large antitrust matter" (assuming that was true). This statement would violate a literal application of Rule 7.02, which requires the lawyer to be lead counsel, but Interpretive Comment 26 makes clear that the State Bar does not take such an extreme approach.

IV. CONCLUSION

The moral of our story is somewhat contradictory. Intuition and common sense will help you avoid many violations of the lawyer advertising rules that apply to use of social media. But intuition and common sense alone are not enough. You don't have to become an expert on every comment to every rule in the Texas Disciplinary Rules of Professional Conduct, but becoming familiar with some basic concepts from the rules, along with the interpretive comments discussed above, will go a long way towards helping you avoid any ethical violations.