

# LEGAL ETHICS IN THE DIGITAL AGE: WHAT TO WATCH IN 2017

A Presentation on ETHICS to the  
COLLIN COUNTY BAR ASSOCIATION BY  
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SEPTEMBER 15, 2017  
COLLIN COUNTY, TEXAS

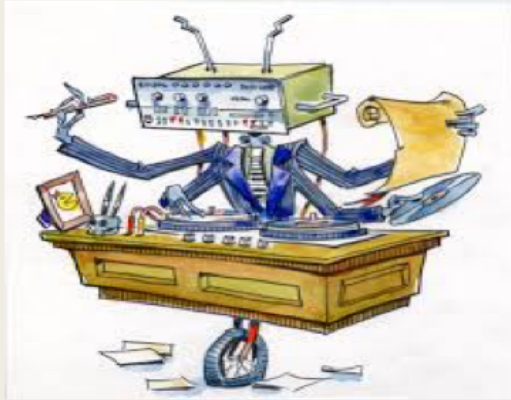
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Welcome to Lawyering in the Digital Age— It's 24/7,  
marketing driven and internet enabled.

# Welcome to the age of digital lawyering!



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In other words, you must have a 24-7 presence on the internet—posting updates on social media, blogging every week, have up to date listings on every online attorney directory, and tweets lined up in advance and going from your office at least 5 times a day.

And that is just the marketing side--The ABA recently published an article (online of course) that outlined 10 non marketing reasons that lawyers should use social media.

## WHAT WE ARE COVERING:

1. Client Communications: New Forms, Practical and Ethical Risks: Rule 1.03
2. Keeping Client Confidences in the Digital Age: Old Rules: New challenges: Rule 1.05
3. Getting the Word Out: Ethical Traps and the Ad Rules: Rules 7.01-7.07
4. Beware Third Parties: Lawyer Listing Services and Marketing Firms: Rule 5.03
5. Stay Safe: Coping with Multidimensional Stress in a 24/7 Practice

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### Dangers of a 24/7 world:

Temptation to use inappropriate means of communication

Revealing client confidences while self-promoting

Advertising that doesn't meet ethical standards

Fee splitting in the world of listing services.

And lastly, coping with all of the above and saying safe.

## WE ARE A SELF-REGULATED PROFESSION

- ❑ For lawyers to sustain/justify their monopoly, we have a responsibility to self-regulate (or the government will do it for us)
- ❑ That self-regulation imposes the dual duties of being self-sustained and protecting the public
- ❑ The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers.

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Take a step back and remember why all of this matters:

From Preamble to the Texas Disciplinary Rules of Professional Conduct:

*8. The legal profession has a responsibility to assure that its regulation is undertaken in the public interest rather than in furtherance of parochial or self-interested concerns of the bar, and to insist that every lawyer both comply with its minimum disciplinary standards and aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.*

# THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT: The “Ethics Rules”

- The Ethics Rules regulate the conduct of Texas Attorneys, including what we can say to the general public regarding our legal services
- They set the minimum standard below which no Texas Attorney can fall without being subject to sanction
- Failure to Follow the Ethics Rules can result in a grievance against you—including a grievance brought by the Advertising Review Committee (ARC) of the State Bar of Texas if you violate the Advertising Rules
- You may have a marketing department or social media director who does all the posting, listing and tweeting for you—but whether it is a Facebook update, a series of tweets or your LinkedIn profile—if it is your listing—you are responsible for its content

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First—the Rules

And remember:

A violation of any of the Ethics Rules can result in a grievance, and grievances can come from:

- clients
- other lawyers
- the State Bar
- the State Bar Advertising Review Committee (ARC)
- the general public

Also See Rule 5.03 Responsibilities Regarding Nonlawyer Assistants

## CLIENT COMMUNICATIONS: NEW FORMS, PRACTICAL AND ETHICAL RISKS RULE 1.03



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Technology and new forms of communication, like texts and social media messaging bring new risks—whether the communications are with clients or with other lawyers.

The Risk here is the temptation to use inappropriate means of communication

### ■ TDRPC 1.03 COMMUNICATION

(a) A lawyer shall keep a client *reasonably informed* about the status of a matter and *promptly comply* with reasonable requests for information.

(b) A lawyer shall *explain* a matter to *the extent reasonably necessary* to permit the client to make informed decisions regarding the representation.

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The Rules have not changed, but applied to new forms of communication routinely use by clients and required to be used with opposing counsel and the Courts, we have to ask new questions to not run afoul of the Rules:

Two Rules each with their own distinct set of issues: Part (a) begs the question: Is the communication form Secure? Did they get it? Did you get what they sent you? Will I have a copy? Can I prove I sent it? Will it be preserved?

Part (b) is more complex but possibly more important, since it addresses the actual content of the advice from the attorney to the client and you have to ask yourself: Is the form of communication Appropriate for the content? Does it say all you need to? Will it be taken seriously by the client? And again, because of its importance--Will it be preserved?





Part (a) keep the client reasonably informed and promptly comply with requests for information. What does it mean to the client for us to "promptly comply?"

In the world of 24/7 lawyering---**you are Amazon to your clients** – and they want you available 24/7 with perfect recall of all their needs and next day delivery if ordered within the next 4 hours and 20 minutes.

How is this possible?

Simple Answer. It's not.



And therein lies the risk.

We are sitting on a long road toward faster and faster communications. Putting a stamp on a letter today feels like sending a message by pony express. Quick, Quicker, Quickest is the message, and we hate to look like we are behind the curve on speed.

But there are dangers.

Here's the horror story.



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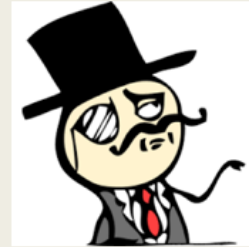
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A recent case of a lawyer in Nebraska who succumbed to using Facebook messenger as his primary means of communication in responding to his client, who in all fairness did message him on facebook. The lawyer's mistake was answering on facebook and in doing so adopting the whole breezy informal tone that implies.

[http://www.abajournal.com/news/article/lawyer advised client relax facebook suspension](http://www.abajournal.com/news/article/lawyer_advised_client_relax_facebook_suspension)

- Relax.
- I will take care of it.
- I will explain later.
- We are fine.
- Be happy. We are in the driver's seat.
- I'm busy right now.
- U realize we sued the wrong company right? We got the money from a company that had it. The correct company would never have had this type of money to pay our judgment.
- This is complicated.
- We've been busting our asses getting ready for this hearing.
- I can't explain the whole process.



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Here are some of the lawyer's messages in response to the client's request for information:

Now this lawyer may have "promptly complied" to his client's request for information in a way the client was comfortable with, but at the end of the day this lawyer was disciplined by his State Bar because he wasn't really communicating as is required under part (b) of the Rule ((b) A lawyer shall *explain* a matter *to the extent reasonably necessary* to permit the client to make informed decisions regarding the representation) (90 days suspension and 1 year of probation).

While it may be fast to respond to client's demands and questions on social media or by text—fast is not always good.

Fast will rarely satisfy your duty under 1.03 (b) regarding communication with the client. Not only are you less likely to take the time to think through and prepare a proper response (remember, lawyers get paid to think), communicating via social media or text makes it very difficult to provide the lengthy and detailed explanations often required to adequately advise the client. It also makes it nearly impossible to document and preserve the communication in case you need it later.

Here's the solution.



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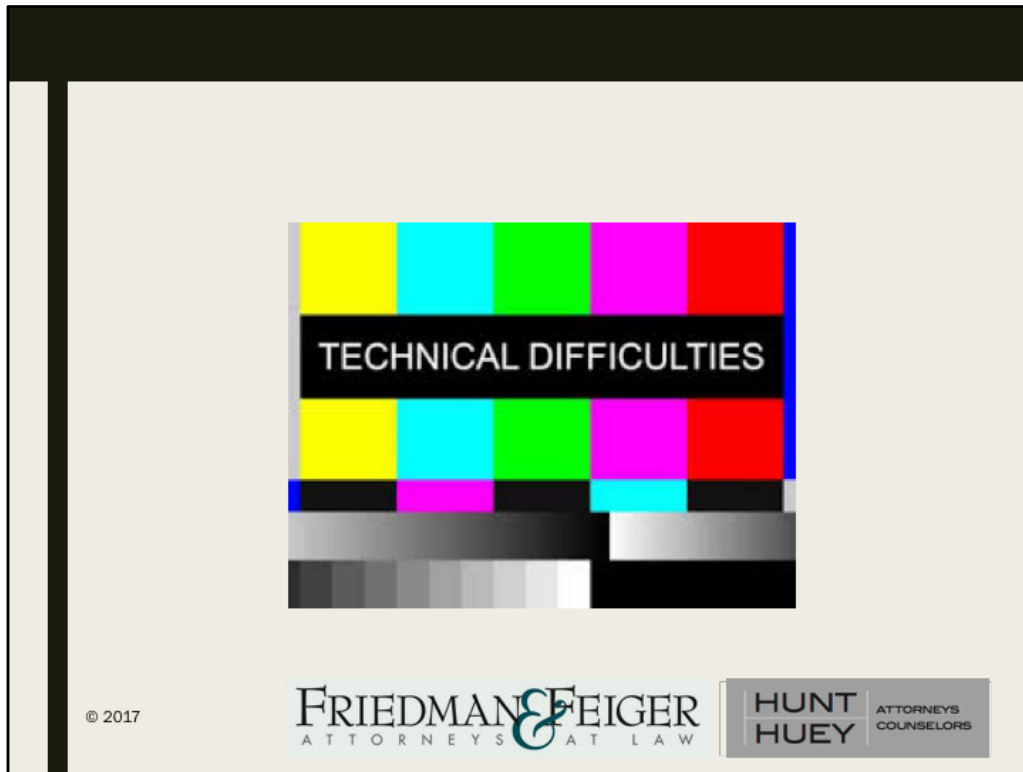
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- If you don't want clients to complain that you are not **promptly complying with reasonable requests for information as you are required to do under part (a) and you want to carve out time and space for yourself to adequately respond as part (b) requires--** you need to establish at the outset that the attorney-client relationship--is different than other relationships—and different from what they might expect. They need to know:
- You use different forms of communication for security and record keeping purposes.
- You have a different time frame for responses to their requests for information because you are giving important advice--and you don't expect or want an

immediate response from them most of the time because they need to carefully consider the advice you are giving.

- All of this is not because you're lazy, but because you have professional obligations that require you to keep good records and take time to respond.
- AND DO LIKE THE CUSTOMER SERVICE ROBOTS DO – acknowledge, but respond later, and document their communication to you, something like: “I got your text. I’ll get back to you by email tomorrow/next week/after I do some research.”
- Consider putting something in your fee agreement about the forms of communication that you will use and that your anticipated response time is not immediate.





Finally a word on technical matters. You can't rely on all the new technology if you haven't mastered it.

A Recent example of a technological failure occurred June, when a Federal Judge for the Eastern District of Wisconsin dismissed a case as a sanction for a lawyer's failure to produce his client at his deposition—the Lawyer claimed the notice went to his Junk Mail and he never received it.

Same case—The same lawyer did not get his client's disclosures timely served on the opposing

party, a University, because the University's email network was set up to reject large files and his email's attachment exceeded the maximum size.

Apparently by the time the email got kicked back to the attorney who sent it--the disclosure deadline had passed.

The Court has yet to Rule on the attorneys' motion asking the Judge to reconsider his dismissal based on these facts.

[http://www.abajournal.com/news/article/lawyer\\_says\\_he\\_missed\\_deposition\\_because\\_email\\_went\\_to\\_his\\_junk\\_mail\\_folder/?utm\\_source=maestro](http://www.abajournal.com/news/article/lawyer_says_he_missed_deposition_because_email_went_to_his_junk_mail_folder/?utm_source=maestro)

Do you know how your mail service provider filters Spam? Are you in charge of filtering or did you just accept the defaults? Do you know how your IT people handle email? Do you know the size limits on what you can send and receive? Do the people who send things on your behalf know all of these things? If not you are asking for trouble.

KEEPING CLIENT CONFIDENCES IN  
THE DIGITAL AGE:  
OLD RULES : NEW CHALLENGES:  
RULE 1.05

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8/27/17

Because we live in a world where we are encouraged to promote ourselves endlessly, it is easy to forget that client confidences come before bragging about our accomplishments.

## WHAT IS CONFIDENTIAL?

- All information relating to a client or furnished by the client that is acquired by the lawyer during the course of or by reason of the representation, whether learned directly from the client or another source
- Includes both privileged information and unprivileged information
- Regardless of whether the information was obtained before the client-lawyer relationship was established or after it ceased

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CONFIDENTIAL INFORMATION: Is a term of art, and covers even those things that are not “confidential” in the sense the word is used in other legal contexts.

**“Virtually any information relating to a case should be considered confidential [under Rule 1.05]” *Phoenix founders, Inc. v Marshall*, 887 S.W.2d 831, 834 (Tex. 1994).**

*See Perillo v. Johnson*, 205 F.3d 775, 799 (5<sup>th</sup> Cir. 2000)(applying Texas law)

(Preamble to Rules paragraph 12: “But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.”)

(Guide to Texas Rules at 90 and Rule 1.05 Cmt. 14. )

Most lawyers, if they stopped to think about it—know that everything they learn from or about the client from the time he or she first seeks legal advice is confidential. Everything—including the fact that they are your client.

The problem is, that in the world of 24/7 lawyering—we often don’t have time—or take the time— to “stop and think” before posting, texting, blogging, or even emailing.

In those instances, client confidentiality is usually one of the first things to go.



We used to think accidentally hitting “Reply All” to an email was our biggest risk in keeping client confidentiality.

Every form of social media now poses new and additional risks.

Example: Tweeting about your long day in a certain Court and how great you did or did not do. Anyone who wanted to know what this was about could easily look up your name in the Court’s docket to see who your client is and what it was about, and, further, look to see what Order was entered that day if they really wanted to know how you did. While this is probably already public

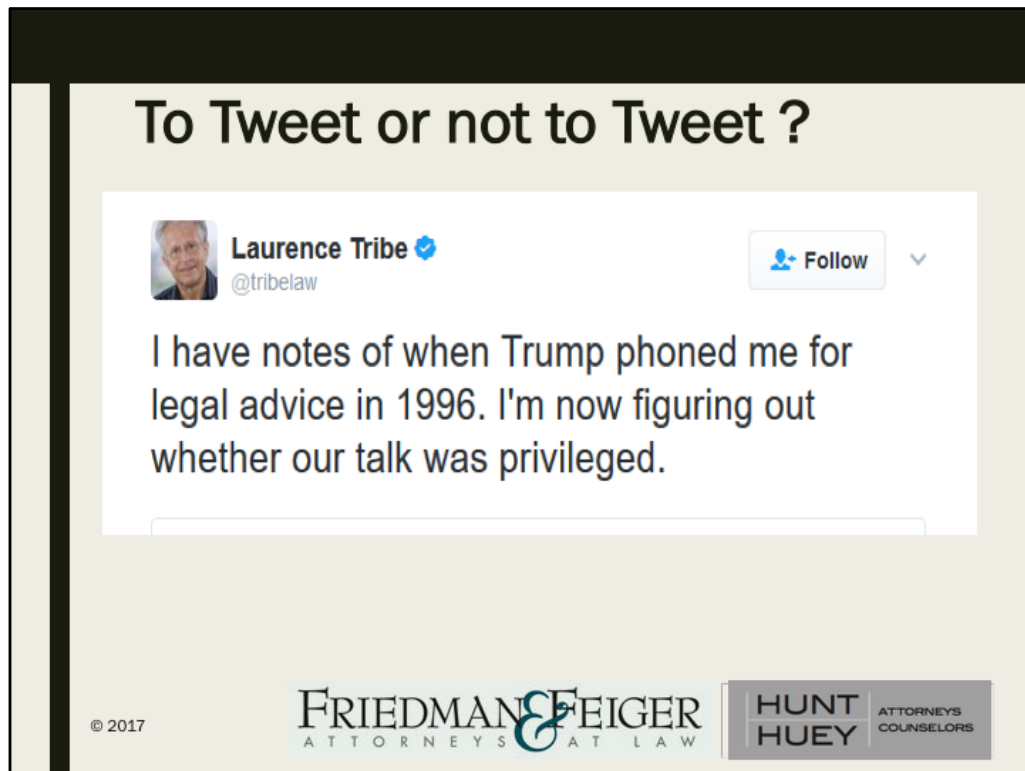
information, most people would not be interested in looking it up if it were not brought to their attention by the tweet.

Example: Your clients follow you on Facebook, and anyone who knows how to look at your Firm's followers can see who they are—potentially disclosing your client list. This includes not only busybodies but third party marketers and others who you probably don't want to have your client's information. At a minimum you don't want them to have gotten it from you.

**ABA issued advisory opinion:** Formal Opinion 477R\* May 11, 2017  
Revised May 22, 2017 concerning the security of email communications:  
"Securing Communication of Protected Client Information"

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."

<https://www.americanbar.org/publications/litigation-news/top-stories/2017/aba-provides-ethical-advice-to-protect-electronic-communication.html>



Example: Earlier this year Laurence Tribe Tweeted about a meeting he had with Donald Trump—From the text of the Tweet it seems pretty clear that he did not have Mr. Trump’s permission to tweet about their meeting.

While Professor Tribe was “figuring out” if it was privileged or not, the legal community, including the academic community, was all over the internet deriding him for his carelessness and many were quick to point out that the mere fact that there was a meeting at all was likely privileged. At a minimum it was confidential, since Tribe admits



Trump was seeking legal advice. Some went to far as to say Tribe should have been disbarred as a result of his carelessness.

Isn't the temptation in the age of endless self-promotion to do what Tribe did—we are encouraged to brag about everything on social media—what we eat, where we go, who we meet with?

When it involves a client—this kind of bragging likely violates the rule against disclosing client confidences.

Blogging [at Simple Justice](#), criminal defense lawyer Scott Greenfield also criticized Tribe's tweet in a post titled "Disbar Laurence Tribe."



"Tribe used this obviously insipid question to deliberately do harm to a client whose confidences he was ethically obligated to maintain," Greenfield wrote.

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George Washington University Law School Professor John Banzhaf concluded that the tweets by Tribe “certainly constitute a breach of attorney-client confidentiality, at the very least.”



He then explained that when a client contacts an attorney for legal advice, the client has an expectation that even the fact he contacted the lawyer will remain confidential. “It is not up to the lawyer to put himself in the client’s shoes to determine whether something should be confidential,” Banzhaf said. “An attorney must assume a legal conversation with a client demands confidentiality, unless or until the client specifically waives the privilege” (or certain circumstances that do not apply here occur).

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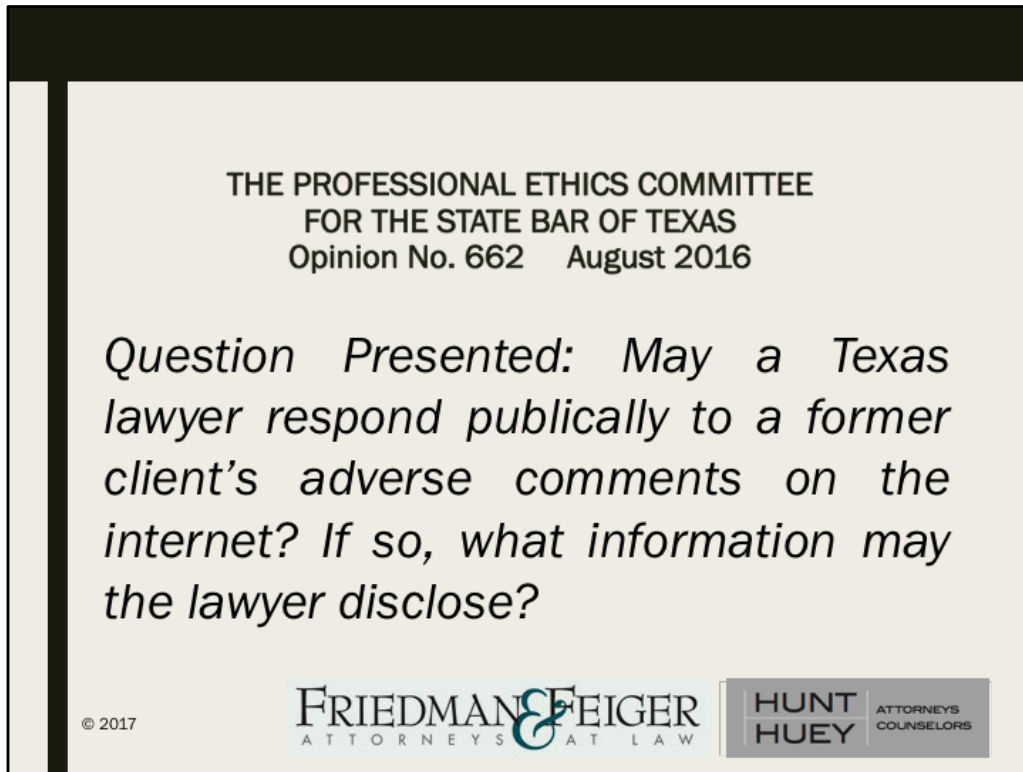
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What about when our clients have something to say about US on the internet?

The internet allows consumers to publish instant reviews and comments about goods or services. Once posted, consumer reviews are usually searchable, easily accessible to other potential consumers, and effectively permanent.

If you solicit reviews that's one kind of problem, but what about reviews you don't like? What can you do about those?



The Professional Ethics Committee addressed this question in August 2016

<https://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-662.aspx>

FACTS: A former client posted negative comments about a Texas lawyer on an internet review site. The lawyer believes that the client's comments are false. The lawyer is considering posting a public response that reveals only enough information to rebut the allegedly false statements.



The answer is No, and the reason is the lawyer's duty of confidentiality.

Or, to put it a little more formally (from the Opinion):

*The general public is relatively free to respond to negative reviews online as they see fit; however, a **lawyer's duty of confidentiality** limits the information the lawyer may reveal in a public response.*

*No exception in Rule 1.05 allows a lawyer to reveal information in a public forum in response to a former client's negative review.*

CONCLUSION

*Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may not publish a response to a former client's negative review on the internet if the response reveals any confidential information, i.e., information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. **The lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.***

## For Example . . .

- *“A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”*

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The committee suggested this would be an acceptable proportional and restrained response (taken by the committee from a Pennsylvania Bar Association Ethics Opinion on the same question).

The committee adds that nothing in the opinion is intended to suggest that a lawyer cannot sue the former client for defamation.



## GETTING THE WORD OUT : ETHICAL TRAPS AND THE AD RULES: RULES 7.01-7.07



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These rules are found under Part 7 of the Texas Disciplinary Rules of Professional Conduct— the “Ad Rules” for short—

Part 7 contains information pertaining to nearly every type of communication and contact that an attorney may make to the general public or a potential client. We are going to focus on a few key points directly related to your day to day use of the internet and social media to advertise and communicate with the general public.

[https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/mrpc\\_rule71\\_72\\_73\\_74\\_75.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html)

## What Speech can the Bar Regulate?

- The Bar can regulate commercial speech.
- In the Ad Rules commercial speech is called “Public Media Advertising”

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Of course, Commercial Speech is subject to less protection than other types of speech and the goal is to protect the general public.

*Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995) provided the standard quoted above.

## WHAT IS COMMERCIAL SPEECH?



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Commercial Speech in this context is speech that “suggests the lawyer’s professional services are available for hire.”

If your web page, tweet, status update or other internet post says “I’m available for hire” -- or, more commonly put--if you are “beckoning business?” then it is a public media advertisement covered by the Ad Rules.

The good news is that whether or not you are “beckoning business” is not determined by your subjective intent—but rather by the actual content of the message.

*Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995)

# Public Media Advertising:

IS SUBJECT TO THE AD RULES

**AND**

MUST BE SUBMITTED TO THE  
ADVERTISING REVIEW COMMITTEE (ARC)  
FOR REVIEW AND APPROVAL PRIOR TO  
POSTING/PUBLISHING UNLESS  
SPECIFICALLY EXEMPTED BY THE RULES

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Why do we care so much about defining Public Media Advertising? Because Public Media Advertising is what is subject to the Ad Rules and what must be submitted to the ARC for review and approval unless specifically exempted.

## Public Media Advertising is:

- Advertisement
- That is broadcast or made available to the general public
- Including the Internet
- But not publications aimed at lawyers

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*Advertisement is Defined as: Any communication to the general public prepared for the purpose of seeking paid professional employment.*

*Comment 1 to Rule 7.07*

The Internet under Rule 7.02 must be defined as broadly as possible, since it is an ever expanding universe of ways to communicate and connect with prospective clients and the General Public

Web page

Social media, Facebook, Twitter, LinkedIn

Banner advertisements

Google ads

Blogs

Anything else on the internet

## Rule 7.02 – DON'T LIE

**Or a “lawyer shall not make or sponsor a false or misleading communication . . . .”**

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The Ad Rules include lists of things that you must not do in your Public Media Advertising and they are found in Rule 7.02

## Communications Are False or Misleading If:

- (1) – misrepresents facts or law, or omits facts needed to make statement not misleading.
- (2) – reference to past success or results unless includes specific and verifiable information.
- (3) – creates unjustified expectations
- (3) – implies lawyer gets results from illicit conduct
- (4) – comparison of services to other lawyers if not verifiable
- (5) – suggests ability to improperly influence tribunal
- (6) – designates practice area in which lawyer is not competent
- (7) – uses an actor or model to portray lawyer or clients

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“Don’t lie” is more complicated than you might think. Here’s a list of possible misrepresentations –some of which you can find being violated all over the internet in a 30 second Google search of attorney websites—  
(PARAPHRASED from Rule 7.02.)

**THOU  
SHALT NOT**

**From Rule 7.04**

- State a lawyer is certified by anyone other than the Texas Board of Legal Specialization without qualifications.
- Use a motto, slogan or jingle that is false or misleading.
- Use anyone outside the firm to narrate or portray a lawyer.
- State the firm has an office unless that office is staffed 3 days a week or more. Ad must include office hours.
- Mention a referral service unless it meets the requirements of **Occupation Code Title 5 Subtitle B, Chapter 952**.
- Use co-op advertising unless the ad reveals that fact and does not suggest special competence.

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The Ad Rules include a list of things that attorneys shall not do in Public Media Advertising:

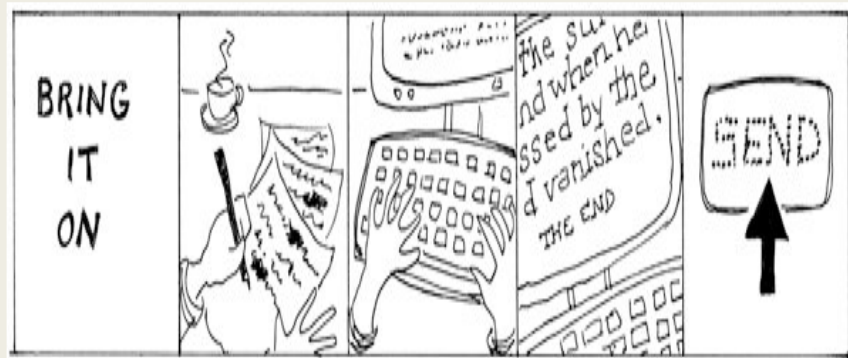
Occupation Code: governs lawyer referral services:

<http://www.statutes.legis.state.tx.us/docs/OC/htm/OC.952.htm>

Co-Op Advertising would violate Rule 7.04(o)(5), which prohibits lawyers from advertising as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.



## TO SUBMIT OR NOT SUBMIT:



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And finally, the Ad Rules require that certain Advertisements in the Public Media be submitted to the ARC for review

### **What must be submitted:**

7.07(a): Solicitations sent to one or more specific prospective clients

7.07(b) Advertisements in the Public Media

7.07(c) Websites

### **What is exempt from submission:**

Anything that is not commercial speech is exempt under the holdings in *Ohralik v. Ohio State Bar Ass'n*.

Anything that goes only to other lawyers, because as noted above, these are not “advertisements in the public media.”

Finally, advertisements that include only the exempt factual information listed in Rule 7.07(e) do not have to be submitted for review

traditionally called “Tombstone” Advertising—it includes only your basic name, address, phone number stuff found in a typical directory—dates of admission to the bar, federal courts, foreign language ability, acceptance of credit cards, consult fee, other publicly available information.

While they are NOT an adjudicative entity, and the ARC can:

- File a grievance as the complaintant if they determine that the rules have been violated, and
- Assess a fine for failure to submit an ad to them for review and approval.

## A Word About Blogs—



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From Interpretive Comment 17.D. “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."*

REMEMBER, the blog content is only one part of the Blog Page. If the information about the Author that appears on the side or at the bottom says "Hire me!" in big letters, you are beckoning business--your blog has just crossed into advertising territory—and you will have to submit each one and wait for approval from the ARC before hitting "Post".

## Blogs—

### What are they good for?

☐ **Do:**

- *Use your blog to demonstrate your knowledge or capacity on a subject or educate the public about the law*
- *Use your blog to carve out a niche in an area of the law that interests you*
- *Limit the information about the yourself to the exempt information under Rule 7.07(e)*
- *Keep your blog separate from your website or other advertisements*

☐ **Don't:**

- ☐ "Proclaim" your expertise on a subject
- ☐ "Beckon business"

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BEWARE THIRD PARTIES: LAWYER LISTING  
SERVICES AND MARKETING FIRMS:  
RULE 5.03



8/27/17

Almost all of the standard techniques for advertising on the internet will include something that runs afoul of the Ad Rules.

Internet ads, like other ads, are based on exaggeration, which is not permissible.

Web site developers and marketers love bold statements (Best in Town) and stock photos of clients or lawyers, none of which are allowed.

## The slippery slope from listing service to advertising . . .



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Then there is the slippery slope of the basic listing service. It seems innocent at first—just claim your profile and confirm your information is correct. But then the calls from the sales people start coming--asking “don’t you want an “enhanced” listing, adding more information, maybe a slogan or two? How about we send you some clients?

What starts as a basic listing service or attorney directory can easily turn into the sort of advertising that needs to be submitted to the ARC for review if you are not careful.

# Stick to the Basics



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You can be confident about not submitting a listing if you stick to the basics.

Traditionally called “Tombstone” advertising--this is the information that you should feel free to go ahead and use to populate your profiles on every social media site and listing service—it is exempt from submission to the ARC—check out the list in Rule 7.07(e).

It includes your basic name, address, phone number stuff found in a typical directory (or your business card)—dates of admission to the bar, federal courts, foreign language ability, acceptance of credit cards, consult fee, other publicly available information.

Because this sort of information is unlikely to mislead the general public, it is exempt from the ARC submission requirement.



## A good rule of thumb:

1. Be diligent about personally identifiable and client-related information (keep client confidences)
2. Populate your profiles only with identifying information exempt from review under 7.07(e) (“Tombstone” information-to avoid the submission requirements)
3. Know, set, and monitor the privacy settings on each Social Media, listing, or referral site you use in order to limit access to and use of personally identifiable information (about your Facebook followers (clients) or Twitter followers for example) to third parties, including third party advertisers

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If you have a real question about whether or not something you have put on the internet needs to be approved by the ARC--Apply this 3-pronged filter, which will help you from falling into some of the unique traps presented by Social Media sites and listing services.

This filter was suggested by Gene Major, the State Bar Staff member in charge of the Ad Review Department (and ARC).

You call it a marketing fee  
We call it fee splitting.



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Speaking of fee-sharing--

The New Jersey Committee on Ethics last month found that the “Avvo Legal Services” plan is an impermissible fee-sharing and referral service in which New Jersey lawyers may not participate.

This is not the Avvo “attorney directory” in which every attorney in the State is listed.

It is the “Avvo Legal Services” plan that attorneys must sign up to participate in.

The way it works is this: Avvo customers can pay a flat fee for a variety of basic legal services offered by Avvo's participating lawyers. A lawyer provides the service and receives the flat fee from Avvo. So far so good.

However, after that transaction is complete, Avvo, in a separate transaction, takes what it calls a "marketing fee" (\$10.00) back from the attorney.

The New Jersey committee calls that "marketing fee" both impermissible fee-sharing between a lawyer and non lawyer, and an impermissible referral service under their Rules.

*"When the lawyers pay a fee to the company based on the retention of the lawyer by the client or the establishment of an attorney-client relationship, the answer to the inquiry is simple: the company operates an impermissible referral service," the committee said.*

New Jersey joins Ohio, South Carolina and Pennsylvania who have previously found the "Avvo Legal Services" plan to be an impermissible fee-

sharing and/or referral service under their Rules.

New Jersey also looked at LegalZoom and Rocket Lawyer. They each offer a subscription program to customers for a flat fee, which then entitles the customer to reduced fee legal services by lawyers participating in the program. Lawyers do not pay to participate, and none of the subscription fee paid by the customer goes to the lawyers. This was not found to be impermissible fee-sharing but they were both in violation of a New Jersey Rule requiring them to register with the Courts in New Jersey prior to offering such services.

Texas Rule 5.04 (nearly identical to the New Jersey Rule) forbids sharing fees with non-lawyers,—and the Avvo Legal Services plan is most likely an impermissible fee-sharing arrangement for Texas lawyers as well. It may also be an impermissible referral service under Texas Rule 7.03.

[http://www.abajournal.com/news/article/avvo\\_violates\\_nj\\_ethics\\_rules\\_banning\\_fee\\_sharing\\_lawyer\\_referral\\_payments](http://www.abajournal.com/news/article/avvo_violates_nj_ethics_rules_banning_fee_sharing_lawyer_referral_payments)[New Jersey ethics opinion](#)

Lastly—I would be remiss if I didn't mention a concern about handling client funds in conjunction with payments from a client referral service. The IOLTA or Trust Fund rules apply to all of us, always. Once AVVO takes the client's money—is it earned? Or does it need to go into a Trust Account of the type that complies with the laws governing Trust Accounts in the State of Texas. Good question.

## Always Apply All the Rules

- Rules concerning client confidentiality
- Rules concerning client communications
- Rules concerning honesty and misrepresentation
- Rules concerning Fraud or deceit
- Rules regarding Ad submission to the ARC
- Rules regarding competence
- Rules regarding fee-sharing

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It's easy to get caught up in the minutia of the Ad Rules when you are thinking about your internet presence. However you need to remember that every interaction with clients and the general public must meet the standards under all of the Ethics Rules.

Grievance can happen for violating any one of these rules so

- (1) Know the rules – read them over and over again throughout your practice, and
- (2) Relentlessly monitor your internet and social media presence for possible violations, whether made by you, someone on your behalf or a third party posting or commenting about you.

GOOD NEWS: Note: The ABA Standing Committee on Professionalism has proposed amending the ABA Model Rules 7.1-7.5—working for over 3 years, deadline for comments on final draft was March 2017 so hopefully they will issue a final revision soon.

From Committee's April 2016 report: "The Committee's initial report, dated June 22, 2015, addressed concerns about overly restrictive and inconsistent state regulation of lawyer advertising, particularly in relation to today's diverse and innovative forms of electronic media advertising."

"In fact, the ABA historically expressed concern about in-person solicitation assuming a lawyer may overwhelm a potential client and that, given the verbal nature of the

exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. However, that rationale does not apply to electronic communications, such as text messaging and posting on social media and in chat rooms, where there are verbatim logs or records of the communications that preserve the lawyer-prospective client exchange, and where the consumer can simply delete/ignore the exchange.”

STAY SAFE: COPING WITH  
MULTIDIMENSIONAL STRESS IN A 24/7  
PRACTICE:



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## THE PERCS OF BEING A LAWYER::

- Long hours at work
- Isolation
- Self-generated pressure/low tolerance for failure
- High-stakes cases
- Exposure to dire life situations
- Dealing with difficult clients
- Pressure to make large sums of money
- A "dog eat dog" work environment

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These pressures are enough, but its been this way as long as any of us have been practicing—and we probably knew what we were getting into when we started.

Can it get any worse?



- The job of an attorney, particularly a trial attorney, has been described as "multidimensional stress." We can add to that the 24/7 label:
- Because of this, attorneys' jobs leave them in a constant state of crisis.

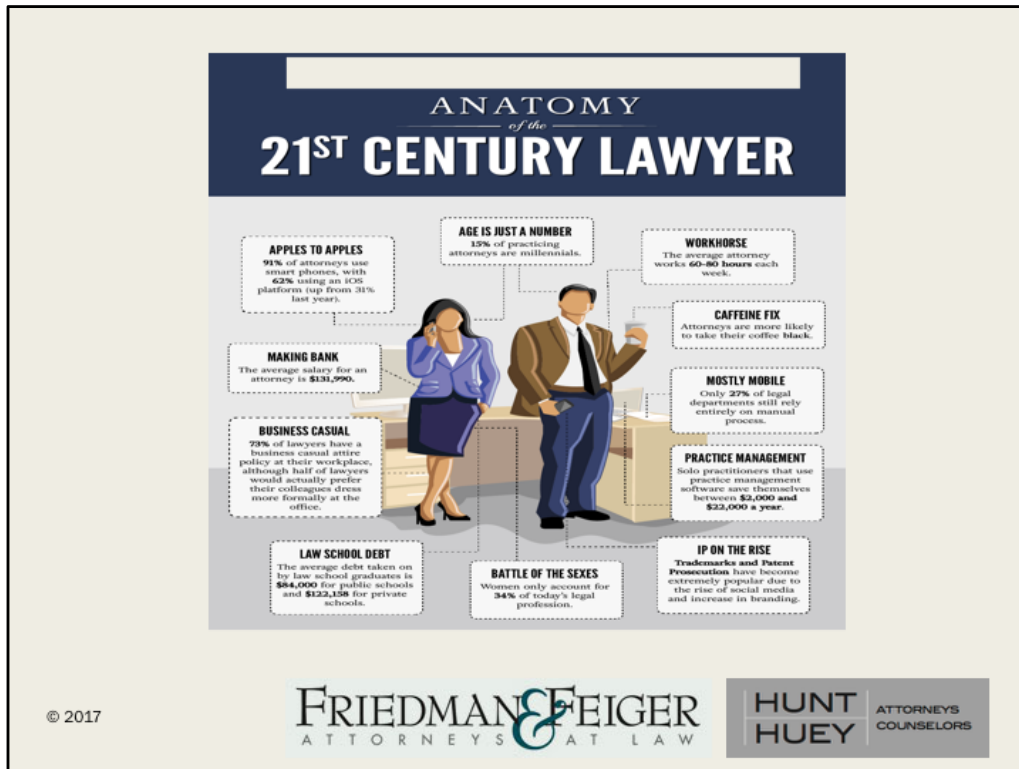
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Yes. Add the 24/7 label and it can mean disaster.

The statistics are sobering.



Attorneys have problems with substance abuse.

A study published in the Journal of Addiction Medicine in 2016 found that: *Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations. These levels of problematic drinking have a strong association with both personal and professional characteristics, most notably sex, age, years in practice, position within firm, and work environment. Depression, anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics.*

### The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW

Journal of Addiction Medicine: [February 2016 - Volume 10 - Issue 1 - p 46–52](#)

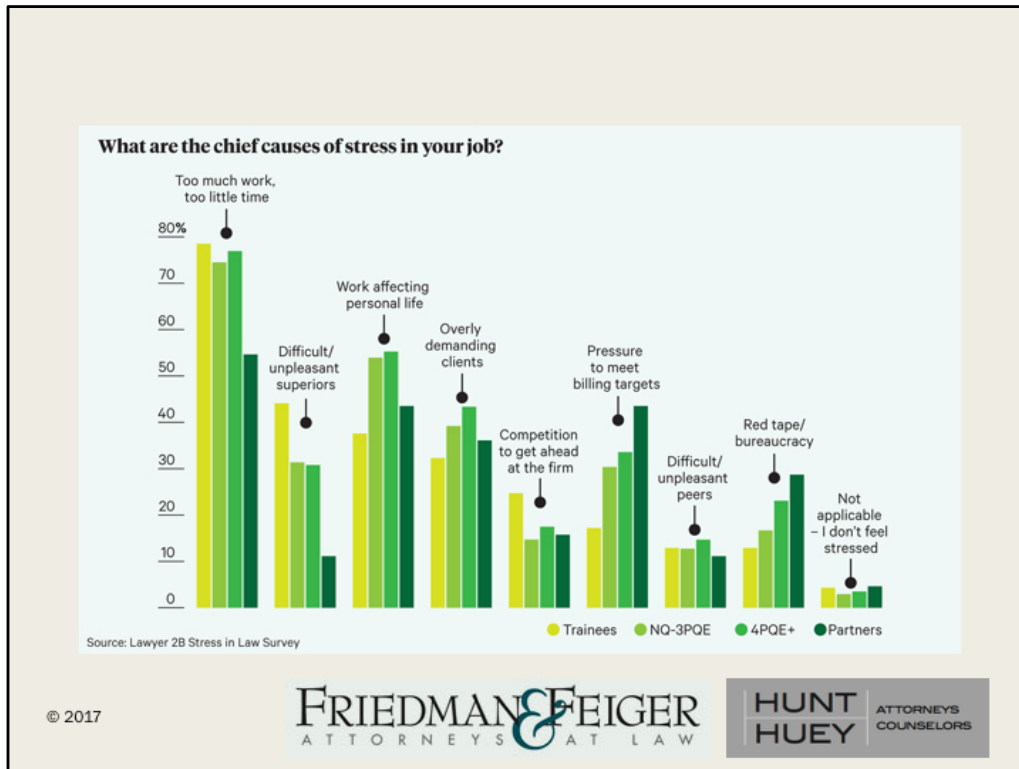
doi: 10.1097/ADM.0000000000000182

Original Research

[2016 report](#), from the Hazelden Betty Ford Foundation and the American Bar Association, analyzed the responses of 12,825 licensed, practicing attorneys across 19 states.

Over all, the results showed that about 21 percent of lawyers qualify as problem

drinkers, while 28 percent struggle with mild or more serious depression and 19 percent struggle with anxiety.. Eighty-five percent of all the lawyers surveyed had used alcohol in the previous year. (For comparison sake, [about 65 percent](#) of the general population drinks alcohol.)



WITH DEPRESSION:

*Lawyers are also prone to depression, which the American Psychological Association, among others, identified as the most likely trigger for suicide. Lawyers are 3.6 times more likely to suffer from depression than non-lawyers.*

2014 CNN: <http://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html>

See: What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success

[83 George Washington Law Review 554 \(2015\)](#)

[FSU College of Law, Public Law Research Paper No. 667](#)

74 Pages Posted: 22 Feb 2014 Last revised: 13 May 2015

[Lawrence S. Krieger](#)

Florida State University College of Law

[Kennon M. Sheldon](#)

University of Missouri at Columbia - Department of Psychological Sciences

Date Written: May 12, 2015

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2398989](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398989)



WITH SUICIDE:

*The Centers for Disease Control and Prevention provided CNN with the latest available data on suicide deaths by profession. Lawyers ranked fourth when the proportion of suicides in that profession is compared to suicides in all other occupations in the study population (adjusted for age). They come right behind dentists, pharmacists and physicians.*

Story 2014 CNN: <http://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html>

[www.texasbar.com/tlap](http://www.texasbar.com/tlap)



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Pass it on.

The Texas Lawyers Assistance Program (TLAP) “provides confidential help for lawyers, law students, and judges who have problems with substance abuse and/or mental health issues.” Its confidential hotline can be reached any time of day or night at 800/343-8527.

According to Linda Klien of the ABA-the ABA recommends one hour of CLE every 3 years that focuses on mental health. Maybe that needs to be increased?



We are a self-regulated profession. Let's take care of ourselves, and each other, and let's be careful out there.

JMH  
7/9/17



## Some Resources:

- The Texas Lawyers Assistance Program (TLAP) [www.texasbar.com/tlap](http://www.texasbar.com/tlap) provides confidential help for lawyers, law students, and judges who have problems with substance abuse and/or mental health issues. Its confidential hotline can be reached any time of day or night at 800/343-8527.
- Texas Center for Legal Ethics: [www.txethics.org](http://www.txethics.org)
- State Bar of Texas: [adreview@texasbar.com](mailto:adreview@texasbar.com); Ethics Hotline: 1-800-566-4616
- Ad Review Specifics:  
<https://www.texasbar.com/Content/NavigationMenu/ForLawyers/MembershipInformation/AdvertisingReview2/>
- The Texas Young Lawyer's Association: TYLA Pocket Guide: Social Media 101  
<http://www.tyla.org/tyla/assets/File/Social%20Media101%20booklet.pdf>
- American Bar Association:  
[http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising.html)
- <https://jeanne.blog>: <https://legalethicstoday.com> for current news and commentary on the ethical issues facing the 24/7 lawyer

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[https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html?utm\\_source=pocket&utm\\_medium=email&utm\\_campaign=pockethits&\\_r=0](https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html?utm_source=pocket&utm_medium=email&utm_campaign=pockethits&_r=0)

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