

Yes, Judges Should Know About Recurring Ethical Issues Involving the Use of Social Media by Lawyers

By Judge Herbert B. Dixon Jr.

While it is typical that I use this column to discuss technology issues of interest to judges, I turn my attention in this column to a summary of issues that lawyers must consider when using social media. My attention to this topic occurred during my preparations to give a presentation at ABA Techshow 2018 entitled “Think Before You Tweet.” Just a few days before my presentation, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 480.¹ The opinion discusses ABA Model Rules of Professional Conduct limits on lawyers who blog or engage in other social commentary. In summary, the opinion provides that lawyers who blog or engage in other public commentary must take care not to reveal information relating to their representation of a client, including information in a public record, unless authorized by a provision of the Model Rules. While it does not have a major impact on the ethics rules overall, the opinion is a reminder of numerous restrictions on a lawyer’s conduct that a lawyer may overlook during her use of social media—all to the lawyer’s detriment.

I prepared the Techshow presentation with Megan Zavieh, Esq., an ethics attorney with a substantial practice in California helping lawyers defend and avoid state bar complaints. Together, Megan and I developed a set of “Commandments” to provide lawyers a quick reference of dos and don’ts when using social media—a list informed by the ABA Model Rules of Professional Conduct. Our presentation went well, but now I would like to share a portion of our handiwork with a larger audience that includes judges.

Megan and I developed nine commandments; however, I expanded that list by one because, historically, 10 seems to be an ideal number for a list of command-



ments to establish acceptable conduct.

I am presenting these commandments in summary form, with brief explanations. They can be helpful to a judge because the commandments provide a perspective about certain litigation issues that frequently play out in the courtroom. Also, in my opinion, a judge who is cognizant of limitations on a lawyer’s use of social media will have a heightened awareness of traps involving the judge’s use of social media that are prohibited by the Model Code of Judicial Conduct, but I digress.

I. A lawyer shall understand the opportunities and pitfalls associated with social media.

There are many instances in which judges have gotten into trouble by not



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recognizing pitfalls in their use (uh, misuse) of social media.² And, yes, similar missteps occur with lawyers, too. This commandment is based on Rule 1.1 of the Model Rules involving the client–lawyer relationship. The rule states, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In addition, a well-known comment to the rule, Comment 8, provides, “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” Obviously, this means that to satisfy the requirement of competence, the lawyer must understand (or work with someone who understands) the benefits and risks associated with the use of social media. The old refrain by some lawyers that they went to law school because they did not like science is not a defense.

II. A lawyer shall have a basic understanding or familiarity with social media to screen a client or opponent’s social media posts to gather relevant information.

This commandment is based on Model Rule 1.3 addressing the client–lawyer relationship that requires a lawyer to “act with reasonable diligence and promptness in representing a client.” There are numerous instances of lawsuits being adversely affected by a litigant’s social media posting, be it a posting by the lawyer’s client or the opposing client. Examples that often occur are social media posts of a litigant participating in activities that supposedly were curtailed due to a personal injury or a criminal defendant posting or having posted inculpatory photographs or statements. The lawyer not only must advise the client that his social media postings can adversely affect the case; the lawyer also must know how to search for this type of information and undertake discovery designed to seek helpful evidence and avoid unwanted surprises.

III. A lawyer shall NOT disclose privileged or confidential information on social media.

This commandment is covered by several of the Model Rules because of the risks of disclosing, purposefully or inadvertently, privileged or confidential information, including the identity of clients. Rule 1.6 protects the identity and privileged and confidential information of current clients, Rule 1.9 protects former clients, and Rule 1.18 protects prospective clients. Moreover, lawyers must obtain client consent before posting information about clients on websites (including social media sites).³

IV. A lawyer shall oversee the preservation of relevant social media evidence and shall not unlawfully alter, destroy, or conceal evidence.

This commandment is based on Rule 3.4 of the Model Rules involving the lawyer’s role as an advocate, which requires conduct that is fair to the opposing party and counsel. The rule states that a lawyer shall not (a) “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . .” or (b) “falsify evidence, counsel or assist a witness to testify falsely. . . .”

Unfortunately, most experienced litigators are aware of instances in which opposing parties or counsel have produced incomplete or altered documents or failed to produce documents (including photographs and recordings) that would have been helpful to the requesting party or problematic for the party from whom the discovery was requested. The same applies to discovery requests related to social media. The lawyer’s obligation does not change whether the requested discovery is a physical thing in a storage cabinet or a digital file stored in the “cloud.” Relevant social media evidence must be preserved and not altered, destroyed, or concealed. As previously discussed regarding Rule 1.3, the lawyer must know enough to advise the client and to seek the information during discovery.

V. A lawyer shall NOT communicate on social media

with a person represented by counsel without first obtaining consent from the person’s lawyer.

This commandment is based on Model Rule 4.2, which concerns a lawyer’s transactions with persons other than clients. In particular, this rule states, “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” This rule is easily understood in a person-to-person context but often overlooked in the context of social media contacts. A lawyer must realize this rule applies to all types of social media contacts, including Facebook, Twitter, and LinkedIn, to name a few formats. It is often easy for a lawyer to forget that the person on the other end of the social media connection is represented by counsel. Additionally, a lawyer would be wise to assume the same prohibition applies to contacts with the opposing lawyer’s office staff and agents such as outside investigators unless an exception exists under state rules.

VI. A lawyer shall NOT make false or misleading statements or give legal advice on social media to unrepresented persons.

Recognizing that a person on the other end of a social media connection may fall into several categories (e.g., witness, represented person, unrepresented adverse party, potential client, etc.), this commandment is based on Model Rule 4.3 that, similar to Rule 4.2, addresses transactions with persons other than clients—in this case, unrepresented persons. In particular, this rule states, “[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested [and] . . . shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if . . . the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.” Additionally, the lawyer must be aware of the governing rules in her state because, often, even if the person is not

represented, the lawyer has an obligation to identify herself and the adverse interest she represents. A lawyer using a social media connection to casually obtain information from someone who is a witness may be inviting a bar complaint.

VII. A lawyer shall maintain respect for the rights of third persons on social media.

This commandment is based on Rule 4.4 and is tied in with Rules 4.3 and 8.4 of the Model Rules. As if it is not clear thus far, a lawyer must be careful in her social media interactions with third parties. Generally, the prohibitions in these rules do not apply to third-party social media postings that are accessible by the public. If, however, the third party's privacy settings are such that "friending" or some other action is required to gain access, many states forbid deceptive or surreptitious conduct to get around those privacy settings. Some states go further by requiring the lawyer to specifically disclose her status and the reason for the communication. Lastly, these prohibitions normally apply to a lawyer's use of others to get around the third party's privacy settings to do the lawyer's bidding. Obviously, the lawyer must tread this ground carefully.

VIII. A lawyer shall NOT make false or misleading statements on social media about a lawyer's legal credentials, achievements, or abilities.

This commandment is based on Rule 7.1 of the Model Rules involving communications concerning a lawyer's services. The rule states, "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." This includes not only the lawyer's statements, but also LinkedIn testimonials and Facebook postings by satisfied clients. Some states specifically prohibit postings that compare one lawyer's services with another's and require substantiation by verified data. Under this rule, "[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." With any social media post about a lawyer's



ability, the lawyer must know and understand her state's rules and exercise caution with mutual admiration postings about the capabilities of other lawyers or linking to or republishing posts about their accomplishments by grateful clients.

IX. A lawyer shall NOT make a false or misleading statement on social media about specialty certification.

This commandment is based on Rule 7.4, which also concerns information about legal services, and is directed at misleading communications about a lawyer's field of practice or specialization. The rule first provides that "[a] lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." That's the easy part. However, the rule goes on to provide that "[a] lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless . . . [.]" for example, the lawyer is certified by an accredited entity recognized by the state bar. The lawyer must be careful about a posting that proclaims a generic specialty in "personal injury," "bankruptcy," or "criminal law" matters without also holding a certification of speciality in that area from the state bar.

X. A lawyer shall NOT use social media to engage in any act of misconduct.

This commandment, based on Rule 8.4 of the Model Rules, is what I refer to as the "catch-all" provision for all other social media conduct by a lawyer that is not, specifically or by analogy, covered by any other Model Rule. This rule states, in part, "[i]t is

professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. . . ." If that is not a "catch-all" provision, I don't know what is.

Conclusion

The above list of commandments is not exhaustive. Issues not addressed in this column include inadvertent creation of an attorney-client relationship based on social media discussions (Rule 1.18); unauthorized practice based on social media's lack of geographical state boundaries (Rule 5.5); lack of candor toward the tribunal based on inconsistencies between social media posts and statements to the court (Rule 3.3); social media advertising in violation of state prohibitions (Rule 7.2); and others. However, this discussion of restrictions for lawyers using social media provides a helpful starting point for a judge presiding over a case if a social media issue should arise. Additionally, because a judge is a lawyer, I believe the judge who has basic familiarity with limitations on a lawyer's use of social media will have a heightened awareness of the types of ethical issues that arise when a lawyer fails to consider whether her conduct in a digital medium implicates or is analogous to conduct that has clearly been determined to violate ethical standards in the physical world. Lastly, and somewhat parenthetically, I found it interesting to see the similarity that several of these social media commandments have with number eight of the real commandments about bearing false witness. ■

Endnotes

1. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018), Confidentiality Obligations for Lawyer Blogging and Other Public Commentary, <https://bit.ly/2pPrfB3>.
2. See, e.g., CYNTHIA GRAY, NCSC CTR. FOR JUDICIAL ETHICS, SOCIAL MEDIA AND JUDICIAL ETHICS (July 2017), <https://bit.ly/2IH1dH>; Herbert B. Dixon Jr., *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, 49 JUDGES' J., no. 4, Fall 2010, at 38, <https://bit.ly/2uZLaCn>.
3. Formal Op. 480; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010), Lawyer Websites, <https://bit.ly/2JxfOpZ>.