

CLE Presentation  
2022 CLE & Training Program  
Hosted by US Court of Appeals for the Armed Forces

Title: Electronic Communications & Social Media: Ethical Considerations for Attorneys and Judges

Duration: 60 minutes

Course Objectives: This ethics class is focused on the intersection of the judicial canons, the rules of professional ethics and the use of electronic communication platforms and social media. The class looks at various canons and rules such as Rule 1.1, Competence, Rule 4.3, Dealing with Unrepresented Persons and Rule 8.4 Misconduct and applies them to social media/electronic communication scenarios. Public ethics complaints against attorneys and judges are used to explain the application. The class is also designed to meet the Maine, North Carolina and Florida CLE requirements on technology training.

The use of electronic communications and the social media has continued to increase over the recent years. In fact, it may be hard for some of us to remember a time before emails, Facebook, Twitter and Linked-In. We should keep in mind that like any tool at our disposal, these resources can be used productively, negligently or deliberately misused. Judges and attorneys need to be especially vigilant and ensure that their actions over “the interwebs”<sup>1</sup> are in compliance with their respective ethics rules. In recognition of the nuances and prevalence of electronic communications and social media, at least two states. Florida and North Carolina, have mandated specialized training in this area. The Board of Overseers of the Maine Bar states: “The purpose of minimum continuing legal education (MCLE) requirements is to promote and sustain competence and professionalism and to ensure that attorneys remain current on the law, law practice management, and technology in our rapidly changing society.”<sup>2</sup>

The Code of Judicial Conduct may have slight variations between the different jurisdictions. The Federal Judge Code of Conduct, 12 March 2019<sup>3</sup> has 5 canons:

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office

Canon 5: A Judge Should Refrain From Political Activity

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<sup>1</sup> I promised my teenagers that I would use the term “interwebs” at least once.

<sup>2</sup> [https://mebaroverseers.org/regulation/bar\\_rules.html?id=638733](https://mebaroverseers.org/regulation/bar_rules.html?id=638733)

<sup>3</sup> <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

Along with the Judicial Canons, the rules of professional conduct for attorneys provides standards that must be met. For example, as a base line the first rule of professional conduct is basic competence. The DC Bar states it as follows<sup>4</sup>:

Rule 1.1: Competence

a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

The ABA Model Rules include a similar provision and its comment 8 to this rule includes an exhortation for attorneys to keep up with “changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>5</sup>

Many lessons can be learned from issues reported in the media and those reported by the disciplinary decisions of state bars.

You may be familiar with the cat filter attorney. Recently that same jurisdiction was visited by an attorney who had problems with their microphone such that they wound-up with the moniker of chipmunk attorney.<sup>6</sup> As humorous as these occasions are they are also good reminders of how a minor lapse can result in nationwide attention. And of course, not all lapses in judgment are as anodyne. A judge in California likely wished that a defendant was using a filter instead of actually logging into a recorded video court proceeding while a patient was in the background on an operating table. How would you handle this situation?

Before we turn our attention to current to current developments in electronic communications, it is helpful to review a former technological marvel we now take for granted: cordless phone and cellphones. As cordless phones were first being used, there were concerns about whether calls could be intercepted and if the use of these technological marvels could preserve confidential communications. There is some evidence that phone calls were listened to by third parties. Several states imposed restrictions on the use of cordless phones and cellphone either by requiring the additional equipment of a scrambler or obtaining a client’s informed consent as to the risk of interception. As technology has

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<sup>4</sup> <https://www.dcbbar.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Client-Lawyer-Relationship/Competence>

<sup>5</sup> [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence/comment\\_on\\_rule\\_1\\_1/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/)

<sup>6</sup> The Chipmunk Song (Christmas don’t be late) was nominated for album of the year in 1959. While it did not win in that category, it did garner three other grammy awards including “best engineered record – nonclassical.”

improved and those who draft the rules have become more familiar with the use of cell-phones, the modern rule has evolved to be that the use is authorized absent extraordinary circumstances.

Much like old cordless phones had a risk of interceptions, current electronic communications are designed not to be private. Twitter is communication platform that enables a user to share their thoughts with a wide audience. Attorneys have claimed ignorance of the public nature of their communications on this platform have faced disciplinary action. Similarly, the dreaded “reply all” email has resulted in questions about a judge’s impartiality and professionalism.

Social media has enable people from across the globe to connect and interact with each other. However, attorneys need to be cognizant of interactions with unrepresented people and even having social media contact with witnesses.<sup>7</sup>

Similarly there are limitations on a judge’s friendship with attorneys and witnesses who appear in court. A judge is prohibited from allowing family or social relationships to influence their judgment.<sup>8</sup> A judge is certainly permitted to have a family and friends. But how are these terms defined in the virtual realm? Much like in the real world, it can differ depending on the nature of the interactions. Is the attorney someone who the judge sees occasionally at bar functions? Is that similar to a business focused platform liked Linked-in?<sup>9</sup> Or is the interaction on more of a personal familiarity level? Is that similar to Facebook?<sup>10</sup>

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<sup>7</sup> Phila. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Op. 2009-02 (Mar. 2009).

San Diego County Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011).

N.Y. City Bar Ass’n Comm. on Prof’l & Judicial Ethics, Op. 2010-02 (Sept. 2010).

<sup>8</sup> Code of Conduct for US Judges:

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

(C) Nondiscriminatory Membership. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

<sup>9</sup> CJE Opinion No. 2016-08 Date: 09/06/2016 Organization: Massachusetts Supreme Judicial Court-Letter Opinion of the Committee on Judicial Ethics: Linked In: Using Social Networking Site

<sup>10</sup> CJE Opinion No. 2018-03 Date: 05/18/2018 Organization: Massachusetts Supreme Judicial Court Letter Opinion of the Committee on Judicial Ethics Disclosure of Former Facebook Friendship