

It's Giving 'Ethical Obligations'!



The pitfalls of using social media as attorneys.

WRITTEN BY LORENA VALLE

In an age where social media has become an integral part of daily life, its impact reaches far beyond casual interactions. For attorneys, navigating the digital landscape requires careful consideration, particularly concerning the preservation of professionalism and civility. While social media platforms offer attorneys unique opportunities to connect with clients, peers, and the wider legal community, they also present challenges that demand a thoughtful approach.

THE POWER OF SOCIAL MEDIA

The smartphone industry kicked off in the early 2010s, allowing most Americans to have access to the internet in their pockets. Today, about 90% of Americans own a smartphone.¹ Instant access to the internet allowed consumers to create, share, and discuss content with each other. Thus, beginning the social media frenzy. Social media has many definitions but can be defined as a platform “that allow[s] users to create profiles for sharing user-generated or curated digital content . . . within a networked community of users who can respond to the content.”² As of January 2023, about 246 million Americans used social media on a daily basis.³ Attorneys may use social media to reach target audiences, strengthen their brand and reputation, establish loyal clients, and increase revenue. Social media provides a great opportunity for attorneys to build trust with the public.⁴

As of 2022, 29% of attorneys in Texas were under the age of 40—attorneys who grew up using the internet and have spent most of their adult years using social media.⁵ Nationally, 81% of attorneys participate in social media for professional purposes.⁶ Thus, attorneys often do not—and should not—avoid social media. By maintaining an active and professional presence on social media, attorneys can showcase their expertise, share valuable insights, and establish themselves as thoughtful leaders within their respective fields. Social media also provides a platform for attorneys to stay updated on legal

developments, engage in discussions with peers, and even attract potential clients. Attorneys are increasingly adapting to the concept of incorporating social media into their practice—even creating the “TikTok Lawyer” trend.

The TikTok Lawyer trend has seen an uproar of attorneys sharing “legal hacks,” “lawyer reactions” to videos, “a day in the life” of an attorney vlog, informational videos, and even commentary on prominent litigation. TikTok, along with the other social media platforms, has gifted attorneys a blank canvas of endless opportunities to promote their practice. Social media, however, also creates an endless list of potential conflicts for unwary attorneys.

REMEMBER, CIVILITY EXTENDS OUTSIDE OF THE COURTROOM

The inherent informality of social media communications can blur the lines between personal and professional interactions, potentially leading to lapses in judgment or inadvertent breaches of professional conduct rules. In the heat of a debate or discussion, attorneys may be tempted to express strong opinions or engage in confrontational exchanges, which can undermine their credibility and reflect poorly on the legal profession as a whole. Additionally, the public nature of social media means that even seemingly innocuous posts or comments can be easily misconstrued or taken out of context, leading to reputational damage or even disciplinary action.

In the realm of social media, an attorney’s ethical duties outside of the courtroom are put to the test daily. The Texas Lawyer’s Creed is a declaration of professionalism and civility that requires attorneys, among other things, to: (1) advise their client that civility is expected; (2) be courteous and civil in oral and written communications; and (3) treat counsel, opposing parties, the court, and members of the court staff with courtesy and civility.⁷ The American Bar Association Model Rules of Professional Conduct require attorneys to be

fair to opposing parties and opposing counsel, maintain the decorum of the tribunal, and refrain from engaging in conduct that is prejudicial to the administration of justice.⁸

Specifically, the model rules prohibit an attorney who is participating in an investigation or litigation to make an “extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”⁹ Outside of the court, especially behind a keyboard or a camera, attorneys may be tempted to violate the underlying principles of civility to “act” as zealous advocates for their clients. When advocating on a client’s behalf, attorneys will often deeply and personally believe their position and arguments. Thus, an attorney may see themselves transform from a zealous advocate to a “keyboard warrior.” However, zealous advocacy should serve as a bridge—not a barrier.

In a recent decision by the District of Columbia Court of Appeals, the Board of Professional Responsibility ruled that a plaintiff’s attorney was suspended from practice for 60 days for posting a tweet that included: (1) unredacted portions of a sealed settlement agreement; (2) emails between the attorney and the defendant’s attorney regarding provisions of the settlement agreement; (3) a picture of the defendant’s attorney; (4) a news article of the plaintiff’s death; and (5) the caption “Where’s MY CA\$H [sic].”¹⁰ The court held that the suspension was reasonable because the lawyer “engaged in

conduct that seriously interfered with the administration of justice.”¹¹ Even absent the formalities of the courtroom, attorneys are expected to be courteous and civil.

Social media can also be a tempting resource to research, monitor, or even indirectly influence jurors. Jury pool and juror research play a pivotal role in the judicial process. To safeguard the impartiality that is essential to the judicial process, the Texas Disciplinary Rules of Professional Conduct require that jurors are protected against “extraneous influences.”¹² However, the rules only address direct communications with the jurors. The ability to publicly post on social media and potentially reach jurors without directly interacting with them may tempt attorneys to develop a prominent social media presence.

In a recent case out of the state of Georgia, a \$1.5 million verdict was vacated after the plaintiff’s attorney posted TikTok and Instagram videos addressing the “three lies we actively have to tell the jury” a few days before the start of the trial.¹³ The attorney did not mention the case specifically and did not name the parties, however, they referred to specific facts that they were precluded from sharing with the jury. During trial, and before the jury reached its verdict, the attorney posted two additional videos discussing the case and criticizing the defense. The attorney had over 130,000 followers on TikTok and over 30,000 followers on Instagram, so the court held that the attorney was aware that the videos would be disseminated publicly and had a “substantial likelihood of materially prejudicing” the outcome of the trial.

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Thus, the judge used judicial discretion to vacate the verdict and grant a new trial. The attorney, in this scenario, gave a few “hot takes” to gain views on their social media platforms. The attorney probably also believed that they were zealously advocating for their client. Instead, the videos resulted in a tarnished reputation and a vacated award.

Leaving civility at the door can often lead to distrust from clients, tarnishing one’s reputation, sanctions, and even suspension from the practice of law. Attorneys should be mindful to maintain civility despite any temptation to act in a manner not in conformity with the rules of professional conduct. Remember, even if you are talking to a camera or typing on a keyboard, it is crucial that you remain courteous and act with dignity, integrity, and kindness.

CONCLUSION

In an increasingly interconnected world, social media has become an essential tool for lawyers to connect with clients, colleagues, and the broader legal community. Most lawyers would never intentionally run afoul of their ethical obligations. Instead, many ethical implications arise from inadvertent or innocuous social media activity. Attorneys should value the importance of balancing the benefits of social media with their duty to professionalism, civility, and ethical conduct. By adhering to established guidelines and exercising caution in their online interactions, attorneys can harness the power of social media while upholding the integrity of the legal profession. **TBJ**

NOTES

1. Risa Gelles-Watnick, *Americans’ Use of Mobile Technology & Home Broadband*, PEW RESEARCH CENTER (Jan. 31, 2024), <https://www.pewresearch.org/internet/2024/01/31/americans-use-of-mobile-technology-and-home-broadband/>.
2. Gregory C. Cook & Andrew Ross D’Entremont, *No End in Sight? Navigating the “Vast Terrain” of Personal Jurisdiction in Social Media Cases after Ford*, 73 ALA. L. REV. 621, 624 (2022).
3. Simon Kemp, *Digital 2023: The United States of America*, DATAPORTAL (Feb. 9, 2023), <https://dataportal.com/reports/digital-2023-united-states-of-america> (“72.5 percent of the total population” are social media users.).
4. Susan T. Fiske and Cydney Durpee, *Gaining Trust As Well As Respect in Communicating to Motivated Audiences About Science Topics*, PNAS (Sep. 15, 2014), <https://www.pnas.org/doi/full/10.1073/pnas.1317505111> (This study demonstrated that the public views lawyers as highly competent, but lacking trustworthiness.).
5. State Bar of Texas Membership: Attorney Statistical Profile (2021-22), STATE BAR OF TEXAS DEPARTMENT OF RESEARCH AND ANALYSIS (Dec. 31, 2021), https://www.texasbar.com/AM/Template.cfm?Section=demographic_and_economic_trends&Template=/CM/ContentDisplay.cfm&ContentID=56197.
6. Allison C. Johs, *2023 Websites & Marketing TechReport*, AMERICAN BAR ASSOCIATION (Jan. 08, 2024), https://www.americanbar.org/groups/law_practice/resources/tech-report/2023/2023-websites-and-marketing-techreport/?abajoin=true&tabajoin=true.
7. *See* The Texas Lawyer’s Creed, TEXAS BAR FOUNDATION (1989).
8. *See* MODEL CODE OF PRO CONDUCT r. 3.4–3.6, 8.4 (AM. BAR ASS’N 2023).
9. *See* MODEL CODE OF PRO CONDUCT r. 3.6 (AM. BAR ASS’N 2023).
10. *In re Jackson*, 300 A.3d 747 (D.C. 2023).
11. *In re Jackson*, 300 A.3d 747 (D.C. 2023).
12. TEX. R. DISC. PROF’L. CONDUCT r. 3.06
13. *See Cartagena v. Medford*, No. 20C-4779-4 (Ga. 2023).



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