Ethics - Social Media

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Social Media

Forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).

Source: Merriam-Webster Dictionary

Social Media

Most Used Media Platforms

Social Media Platform	*Number of Users*
Facebook	2.95 billion
Youtube	2.56 billion
Whatsapp	2 billion
Instagram	2.5 billion
WeChat	1.26 billion
Tik Tok	1.2 billion
Facebook Messenger	988 million

Ten Facts and Trends

There are 4.9 billion social media users in the world as of June 2023. It is forecasted that this number will reach 5.85 billion by the year 2027.

The global social network penetration rate is 59.4%.

Facebook is the biggest social media platform in terms of user base. It has 2.958 billion users.

On average, the typical social media user interacts with 6.6 social media platforms.

Eastern Asia has the most social media users (26%) as of 2023.

Source: www.demandsage.com/social-media-users

Ten Facts and Trends (Cont'd)

Social media is used by 85% of the world's 5.27 billion mobile phone users.

China, with 1,021.96 million users, is the country with the most social media users as of 2023. India ranks second with 755.47 million, and the United States makes it to the third spot with 302.25 million users.

An average person uses social media for two hours and thirty-five minutes every day around the globe.

Millennials and Gen Z are the most frequent users of social media platforms.

The fastest-growing network is TikTok, which has had a startling 105% user increase in the US during the last two years.

Source: www.demandsage.com/social-media-users

No Third Party Discovery from Social Media Companies

1) Social media companies can refuse a non-law enforcement subpoena (Stored Communications Act, 18 U.S.C. Sec. 2701 *et seq*.).
2) Information comes from litigants through the standard discovery process.

Discovery

1) Although information on social media accounts is generally discoverable, discovery requests for social media information should be "time and subject-matter limited.“

2) Some discovery is generally allowed even if the user limits access to the content.

- **Authority**: *Arcement v. Blue Bayou Waterpark, LLC*, 2019-1374 (La. App. 1 Cir. 12/09/19).

What's Required Beyond Authentication or Identification under LCE 901?

Concurrence: The laying of a foundation for the admissibility of evidence before a trial court is of primal importance, yet it has become routine that such elementary applications of procedural law are often disregarded in the introduction of social media evidence.

Authority: *La. v. Henderson*, 2022-01113 (La. 08/11/22).

Client Advice

1) Instruct client on her social media usage.
2) Best practice – have the client acknowledge social media instructions in writing at the time of engagement.
3) Archive current account contents. Or instruct client not to delete data.
4) If possible, discontinue using. At minimum, no posting about the case.
5) Highest privacy settings.
6) Exercise caution on posting and only accept “friends” you know well.

Rules of Professional Conduct

Pursuant to Article 5, Section 5 of the Louisiana State Constitution, the Louisiana Supreme Court has original jurisdiction over the practice of law, and with its inherent and plenary authority, has created the Louisiana Attorney Disciplinary Board as well as adopted the Louisiana Rules of Professional Conduct.

The Rules of Professional Conduct are separated into (8) distinct sections although there is some overlap as to the subject matter of the Rules.

The Attorney-Client Relationship (Rules 1.1 -1.18)
Counselor
Advocate
Transactions with Persons Other than Clients
Law Firms and Associations
Public Service
Information about Legal Services
Maintaining the Integrity of the Profession

Rules of Professional Conduct Areas

Practice Assistance and Improvement

- Practice Assistance Home
- Responding to a Complaint
- Law Office Management
- Rules of Professional Conduct
- Disciplinary Procedure and Rule XIX
- Malpractice Avoidance
- Switching Firms
- Fee Arbitration
- Practice Aid Guide
- Hot Topics

Competence and Social Media

Rule of Professional Conduct 1.1(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.

Louisiana State Bar Association Public Opinion –
19 – RPCC – 021, Lawyer's Use of Technology

Confidentiality

Rule 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Impartiality and Decorum of the Tribunal

Rule 3.5

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

  (1) the communication is prohibited by law or court order;

  (2) the juror has made known to the lawyer a desire not to communicate; or

  (3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Lawyer and Judge Communications

In re McCool

The court disbarred a lawyer who started an online petition. The court found the petition attempted to influence the judges in pending cases, it contained false and inflammatory matters, and it provided the judges' contact information.

In re McCool, 172 So.3d 1058 (La. 2015).

Code Commentary

A judge may communicate through a social media account with an attorney who will be appearing before the judge in a pending case if the communication falls within one of the exceptions for ex parte communications. A judge may not "recommend" attorneys on LinkedIn or other social media sites. A judge may not support a business on social media. A judge may support a charitable organization on social media.

Source: National Center for State Courts, pp. 7-8, Colorado Advisory Opinion 2022-5.

No Disqualification

The Florida Supreme Court held that a Facebook "friendship" with an attorney appearing before a judge, standing alone, did not constitute a legally sufficient basis for disqualification, disagreeing with Florida Advisory Opinion 2009-20 which advised that a judge may not be Facebook "friends" with lawyers who may appear before the judge.

Law Offices of Herssein and Herssein v. United Services Automobile Association, 271 So.3d 889 (Florida 2018).

Source: NCSC, p. 25.

Trial Publicity

Rule 3.6(a)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not 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.

Dealing with Unrepresented Person

Rule 4.3

In 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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Advertising

Rule 7.1(a)

(a) Permissible Forms of Advertising. Subject to all the requirements set forth in these Rules, including the filing requirements of Rule 7.7, a lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with Rule 7.4.

CODE OF JUDICIAL CONDUCT

CANON 1
A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code are to be construed and applied to further that objective. As a necessary corollary, the judge must be protected in the exercise of judicial independence.

COMMENTARY TO CANON 1

The word “shall” is intended to impose binding obligations, the violation of which can result in disciplinary action.

When “should” is used, the text is intended to instruct judges concerning appropriate judicial conduct. The use of should is an acknowledgement that the conduct regulated in these Canons may impose in the judge more discretion, and/or may involve the conduct of others. Nonetheless, a clear violation of any Canon in which should is used, a clear abuse of discretion by the judge in conforming his or her conduct to any such Canons, or a clear abuse of discretion by the judge in regulating the conduct of those persons whose actions are subject to the judge's direction and control, may also result in judicial discipline.

CANON 2
A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

As used in this Code, "impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge. **[Amended effective February 1, 2005]**

B. A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness. Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. Letters of recommendation may be written only on private stationery which does not contain any official designation of the judge's court, but the judge may use his or her title. A judge shall not initiate the communication of information in any court or disciplinary proceeding, but may provide such information for the record in response to a formal request by a court or disciplinary agency official.

C. A judge shall not hold membership in any organization that arbitrarily excludes from membership, on the basis of race, religion, sex or national origin, any persons who would otherwise be admitted to membership. The term "organization" shall not include, however, an association of individuals dedicated to the preservation of religious, ethnic, historical or cultural values of legitimate common interest to its members; or an intimate, distinctly private association of persons whose membership limitations would be entitled to constitutional protection.

Code of Judicial Conduct

Canon 1 provides, in part: “A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

Code of Judicial Conduct

Canon 2A provides, in part: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Code of Judicial Conduct

Canon 2B provides, in part: A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment … nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

- must avoid inappropriate relationships
- shall not convey or permit others to convey the impression of influence

Canon 7

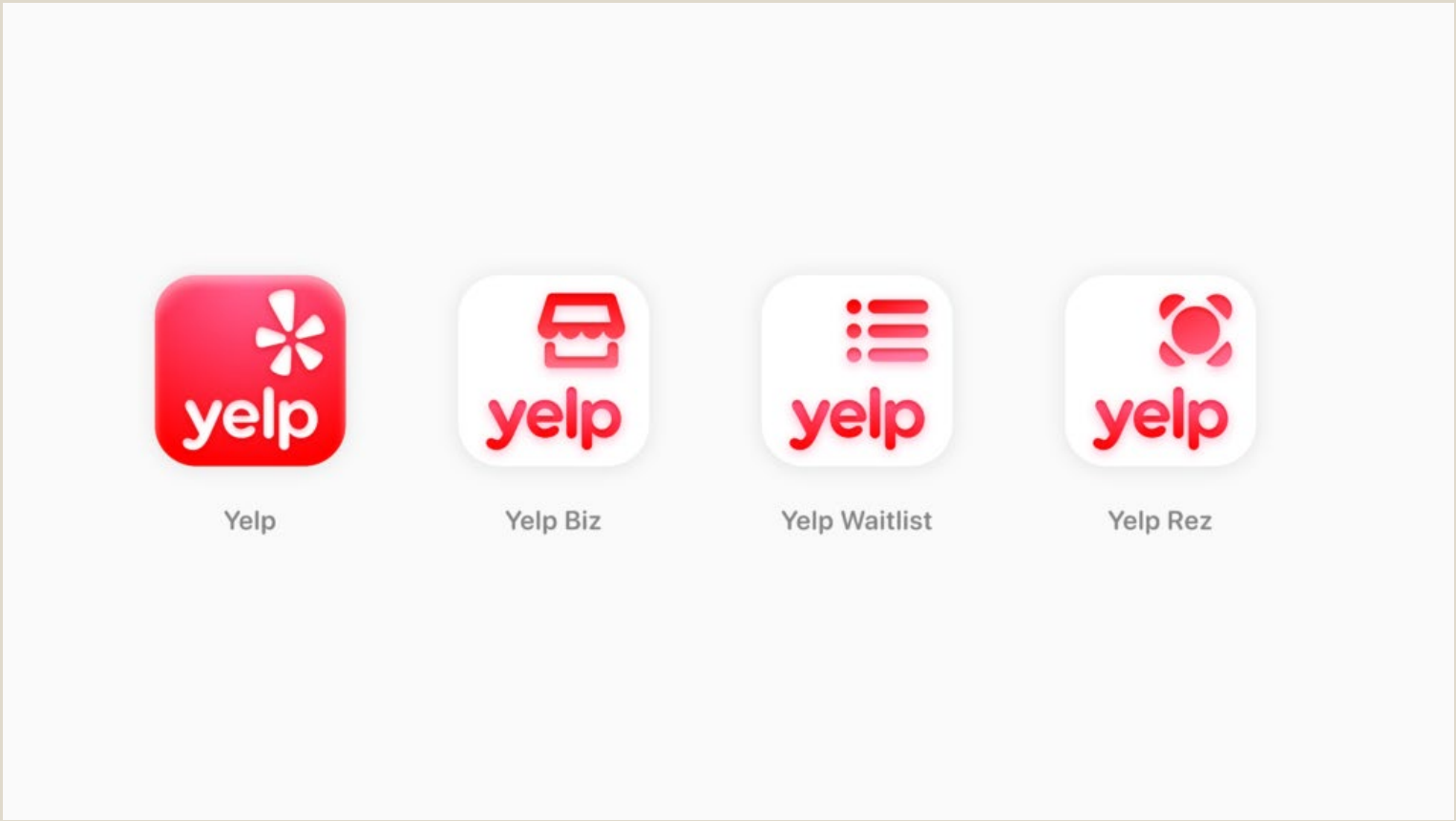
A. A Judge or Judicial Candidate Shall Not, Except to the Extent Permitted by These Canons:

(2) publicly endorse or publicly oppose another candidate for public office;

(3) make speeches on behalf of a political organization or a candidate for public office;

(11) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Yelp



Code Commentary

If a judge posts on social networking sites such as Facebook or crowdsourced sites such as Yelp or TripAdvisor, the judge may not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others. For example, a judge may not comment on, recommend, or criticize businesses, products, or services on such sites if it is reasonably likely that the judge can be identified as a judge.

Source: NCSC, Social Media and Judicial Ethics (2022), p. 2, California Court Commentary to Canon 2B.

Staff Member

Code Commentary

When an appellate justice learns that a staff member has posted a comment on social media that violates the canons, the justice should immediately take steps to remedy the violation, including at a minimum requiring the staff member to take all reasonable steps to have the post taken down and removed from the public domain.

Source: NCSC, pp. 6-7, California Oral Advice Summary 2020-37.

Politics

Code Commentary

Judges should not use social media "to express support for or to protest current political issues," including "validat[ing], endors[ing], or 'lik[ing]' a person, image, or statement made by another," even if they do not use their titles.

Source: NCSC, p. 7, Colorado Advisory Opinion 2020-2.

Code Commentary

A judge who views another judge's profile on Facebook and learns that it has posts about the 2020 presidential election and media coverage and bias, links to articles about politics, internet memes about politics, expressions of political opinions, and exchanges about politics with those who commented on the judge's profile or posts, has actual knowledge of code violations that raise a substantial question regarding the other judge's fitness as a judge and is required to report it.

Source: NCSC, p. 8, Massachusetts Letter Opinion 2021-1.

Disqualification

The Chief Justice of the Kentucky Supreme Court disqualified a trial judge from a lawsuit brought by the Attorney General against the state Secretary of Labor because the judge had "liked" a Facebook post supporting the Attorney General's campaign for governor.

Source: NCSC, p. 25, Kentucky Supreme Court, September 27, 2019.

Disqualification

The Wisconsin Supreme Court held that a serious risk of actual bias had been created in a custody dispute when, while his decision was pending following a contested hearing, the trial judge accepted a Facebook "friend request" from the mother; she interacted with him, including "liking," "loving," or commenting on at least 20 of his Facebook posts; and she "shared" and "liked" third-party posts about domestic violence, which was an issue in the case.

Source: NCSC, p. 26, *In re Paternity of B.J.M.*, 944 N.W.2d 542 (Wisconsin 2020).

Judicial Discipline

Accepting an agreed statement of facts, the New York State Commission on Judicial Conduct publicly admonished a judge for posting on his Facebook page 2 photographs of himself wearing a sheriff's uniform and personal comments expressing his appreciation for law enforcement officers and describing his appearance at a "Back the Blue" event.

Source: NCSC, p. 14, *In the Matter of Peck*, Determination, New York State Commission on Judicial Conduct, June 10, 2021.

Judicial Discipline

The Texas State Commission on Judicial Conduct publicly warned a judge for affirmatively allowing a photo constituting an endorsement of a candidate for county commissioner to be posted on his Facebook page.

Source: NCSC, p. 17, Public Warning of Madrid, Texas State Commission on Judicial Conduct, April 3, 2019.

Code Commentary

A judge and a judicial association may publicly support or oppose proposed legislative or constitutional changes affecting court structure or court operations but should use discretion when expressing a position on social media.

Source: NCSC, p. 9, New York Advisory Opinion 2019-120.