

**Unguided: Social Media Usage in the Legal
Profession and the Need for Practical Guidance**

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1. Abstract

An unprecedented ethical dilemma currently faces the legal profession, how to ethically utilize social media. Lawyers who choose to utilize social media in their legal practice are not provided any ethical guidance on how to properly use social media. Specifically, there are currently no uniform guidelines for state bar examiners to emulate these guidelines from. Existing rules of professional conduct address competence, the duty of confidentiality, and legal advertising but none of these rules address the applicability of each topic to social media usage. Social media usage and the traditional practice of law require different rules, so it is inexcusable for lawyers to be instructed to apply existing rules to their ethical dilemmas. To illustrate the lack of guidance provided to lawyers, one can simply consult the guidance that judges, physicians, pharmacists, and nurses are provided regarding social media usage. To provide guidance that the legal profession desperately desires, the largest bar association in the United States, the American Bar Association (ABA), must create rules that address ethical social media usage and add them to the existing Model Rules of Professional Conduct. This can be accomplished by the ABA addressing competent social media usage, confidentiality when using social media, and using social media without violating advertising and solicitation rules. As a result, state bar regulators can be confident in the guidance provided by the ABA and adopt these rules in their jurisdictions, and legal practitioners will no longer face the ethical pitfalls that currently plague the profession.

2. Introduction

Over the last two decades, social media has become a large part of the lives of most Americans. In a 2019 survey, over 70 percent of the U.S. population, 246 million Americans, were using social networks to post pictures, like and comment on content by others, or send private messages and by 2023, the number of users is forecast to increase to approximately 257 million.¹ In the legal profession, social media is used for advertising and other professional purposes. However, professional ethics are an issue of utmost importance to legal practitioners and they must be consistently cognizant of them in order to avoid malpractice claims or disbarment. Specifically, lawyers must be cognizant of the rules of professional conduct in their jurisdictions and avoid violating those rules. The American Bar Association is the governing ethics body over legal ethics in the United States. However, other than a miniscule number of advisory opinions, they have

¹ J. Clement, *Social media usage in the United States - Statistics & Facts*, statista, <https://www.statista.com/topics/3196/social-media-usage-in-the-united-states/>.

provided no guidance to practitioners on how to ethical use social media. Many lawyers have unknowingly violated professional ethics rules in their jurisdictions for social media usage but have received no prior guidance on how to ethically use social media. Many jurisdictions advise practitioners to simply apply the existing rules that address the traditional practice of law. However, there are many areas of social media usage that are not addressed by existing rules. This leaves attorneys in a dangerous position to potentially commit an ethical violation unknowingly.

Many ethical violations can occur through improper social media usage such as violations of the competence rules, duty of confidentiality, trial publicity rules, and advertising rules. However, there is no mention of social media or modern technology in these rules and the lack of guidance leaves attorneys open to ethical pitfalls. It must also be noted that the legal profession has no ethical guidance regarding social media guidance, but other professions do, such as, physicians, judicial employees, pharmacists, and nurses all have ethical guidance when using social media. Unlike the legal profession, the previously mentioned professions provide both general guidance and specific guidance for their professionals.

Although some situations are avoidable by the use of common sense, that generalization does not hold true with practitioners who are not experienced with social media usage and have never seen any guidance or rule concerning advice and usage of social media in the legal profession. As this article suggests, the American Bar Association (ABA), the legal industry's largest professional organization, can help eliminate this problem through providing proper guidance and materials to reference for state bar examiners and practitioners. The ABA is merely an advisory board for state bars to follow. However, the guidelines presented in this article should be applied nationwide because issues with social media are experienced by practitioners in every state. As a result of

nationwide adoption of these guidelines, attorneys in every jurisdiction will have access to proper guidance and rules when they have a question and will avoid the pitfalls that are currently present.

This article proceeds by 1) explaining general social media usage and social media usage in the legal profession 2) examining existing guidelines and regulations, common ethical conflicts, and the lack of guidance for attorneys, 3) comparing attorney's ethical standards for social media usage to those of other professions, 4) comparing international social media usage guidelines and professional conduct rules for the legal profession to existing guidelines, and 5) suggesting a Model Rule for Professional Conduct and ABA Center for Social Media Guidance to deal with social media usage and provide guidance for uninformed practitioners.

3. Social Media Usage Generally and in the Legal Profession

a. General Social Media Overview

“Social media is any digital tool that allows users to quickly create and share content with the public. Social media encompasses a wide range of websites and apps. Some, like Twitter, specialize in sharing links and short written messages. Others, like Instagram and TikTok, are built to optimize the sharing of photos and videos.”² Fewer limitations exist as to what can and cannot be posted to social media compared to other means of mass communication like newspapers, radio stations, and television channels.³ Social media is also widely accessible because anyone with internet access can sign up for a social media account and use that account to share whatever content they choose to, and the content they share reaches anyone who visits their page or profile.⁴

² Matthew Hudson, *What is Social Media? Definitions and Examples of Social Media*, THE BALANCE, <https://www.thebalancesmb.com/what-is-social-media-2890301> (last updated June 23, 2020).

³ *Id.*

⁴ *Id.*

Social networks, one form of social media, are “an online service or site through which people create and maintain interpersonal relationships.”⁵ Social networks are used to stay connected with friends, family, colleagues, customers, or clients.⁶ Additionally, social networking can have a social purpose, business purpose, or both.⁷

Facebook is the best-known example of social networking, and the world’s largest social networking site with more than 2.70 billion monthly active users (as of the second quarter of 2020).⁸ Users can create a personal profile, add other users as friends, exchange messages, and post status updates.⁹ Additionally, a corporation can create pages and Facebook users can “like” the company’s pages.¹⁰

LinkedIn, another example of social networking, is dedicated to the business community. The site targets professionals to connect with past and current colleagues, increase their number of business connections, network within their industry, discuss business ideas, search for jobs, and look for new hires.¹¹ LinkedIn users create professional profiles that allow other users to learn more about their business background, areas of expertise, and groups or organizations they belong to.¹² Once users create their profile, they can add others to their network.¹³ The profiles also include options for status updates that allow people in a user's network know what they're working on and

⁵ *Social network*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/social%20network>.

⁶ Will Kenton, *Social Networking*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/social-networking.asp> (last updated Jul. 28, 2020).

⁷ *Id.*

⁸ *Social Media Overview*, TUFTS UNIVERSITY, <https://communications.tufts.edu/marketing-and-branding/social-media-overview/> (last visited Oct. 12, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Business News Daily, *What is LinkedIn?*, <https://www.businessnewsdaily.com/2489-linkedin.html> (Jan. 15, 2020).

¹² *Id.*

¹³ *Id.*

when they might be traveling or offer advice when needed. There are also features that allow those not signed into LinkedIn to view parts of the profile the user allows.¹⁴

Twitter, another popular social network, is similar to a blog. The site launched in 2006 and now has 100 million daily active users and 500 million tweets sent daily.¹⁵ Twitter is known as a micro-blogging site.¹⁶ Blogging usually consists of people setting up basic websites where they write about whatever subject they want, whether it be politics, sport, cooking, or fashion.¹⁷ On Twitter, posting a message is known as a tweet and people make connections by following other people's twitter feeds.¹⁸

b. Social Media Usage in the Legal Profession

Of the 246 million Americans that use social media, a portion of those are lawyers. In a 2020 ABA Legal Technology Survey Report, 80% of lawyers reported that they maintain a presence on social media for professional purposes.¹⁹ Specifically, 39% of those surveyed reported that they maintain a Facebook account for professional purposes and 30% reported that Facebook is one of the main channels they use to market their law practice.²⁰ Social media is extremely important to legal practitioners whether it is used to market a law practice or to simply maintain a professional presence online.

4. The Problem: Lack of Guidance

a. Existing Guidelines and the Lack of Guidance for Practitioners

¹⁴ *Id.*

¹⁵ Caroline Forsey, *What is Twitter and How Does It Work?*, <https://blog.hubspot.com/marketing/what-is-twitter>.

¹⁶ Explained: *What is Twitter?*, <https://www.webwise.ie/parents/explained-what-is-twitter-2/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Nicole Black, *ABA Survey: Lawyers and Social Media in 2020*, MyCase, <https://www.mycase.com/blog/2020/01/aba-survey-lawyers-and-social-media-in-2020/>.

²⁰ *Id.*

The American Bar Association (ABA) is one of the world's largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities. The ABA provides resources for legal professionals, accredits law schools, establishes a code of ethics, and publishes both scholarly and professional materials. Additionally, the ABA advocates for legislation and policy. The ABA's advocacy priorities include access to legal services, immigration reform, independence of the judiciary, international rule of law, national security, and civil liberties.²¹

“The Model Rules of Professional Conduct (MRPC) are a set of legal ethics rules created by the ABA in 1983 in place of the 1969 Code of Professional Responsibility.”²² The MRPC is comprised of sections concerning: Client-Lawyer Relationship, Counselor, Advocate, Transactions with Persons Other than Clients, Law Firms and Associations, Public Service, Information About Legal Services, and Maintaining the Integrity of the Profession.²³ The MRPC provides mandates and guidance on topics including conflicts of interest, attorney duties of competence, diligence, confidentiality and loyalty, conduct owed to the courts, and attorney fees and solicitation.²⁴ The MRPC are not binding but instead only advisory because the ABA is a voluntary bar association for practitioners to join. However, the MRPC task state entities with using the model rules to create their own rules of professional conduct that are binding in their respective jurisdictions. The ABA created the Commission on Ethics 20/20 in 2009 to study technology in legal practice.²⁵ Before the creation of the commission, there were virtually no guidelines or even formal opinions that addressed limitations of legal professionals when utilizing

²¹ *Priorities and Policy*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/

²² *Model Rules of Professional Conduct*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/model_rules_of_professional_conduct

²³ *Id.*

²⁴ *Id.*

²⁵ Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 HOFSTRA L. REV. 95, 96 (2014).

social media although some guidelines considered common sense.²⁶ Over a four-year period, the commission ultimately addressed two major points in their investigation: competence and confidentiality.²⁷

i. Rule 1.1: Competence

Model Rule of Professional Conduct 1.1 concerns competence. The rule states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”²⁸ Comment 8 on Rule 1.1 provides that “[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.”²⁹

The Comment 8 to Rule 1.1 was silent as to the specifics but shows that the pervasiveness of social media in our society, coupled with its ease of use, demonstrates that a lawyer who ignores social media will fail to provide competent representation.³⁰ This rule does not provide insight as to relevant technology means and fails to mention social media or social networking platforms in general. The resulting reality of this failed attempt to clarify Rule 1.1 is a vague, over broad guideline that deprives an ordinary, intelligent person of fair notice of its reach, which State Bar Associations and Supreme Courts expect attorneys to uphold.³¹

²⁶ Tatum Simpson, *Legal Ethics and Social Media: A Need for More Detailed Guidelines*, 44 T. MARSHALL L. REV. 97, 105 (2019).

²⁷ *Id.*

²⁸ Model Rules of Prof'l Conduct R. 1.1 (2020).

²⁹ *Id.*

³⁰ John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 204, 210 (2013).

³¹ Shea, Patrick, *Technology Competency: The Urgency to Clarify Comment 8 of Model Rule 1.1* (February 28, 2015). Available at SSRN: <https://ssrn.com/abstract=2571719> or <http://dx.doi.org/10.2139/ssrn.2571719>

There is no clear answer as to how lawyers should “keep abreast” of changes to social media besides engaging in continuing legal education. Without any guidance from the governing body on legal ethics, it is incredibly difficult for legal education to teach anything besides general guidance, leaving the specifics and special situations ignored. Lawyers will not be able to competently use social media until the governing body of ethics provides them with a roadmap to follow. In order to avoid an ethical violation or competency issue, “[t]wo areas in particular where attorneys need to adjust their representation or risk an ethical violation include advising clients on the implications of social media use and incorporating social media into key aspects of their trial strategy, specifically in jury selection.”³²

ii. Rule 1.6: Confidentiality

There are many ethical pitfalls for attorneys when they are using social media. Some of these pitfalls are so hidden that many attorneys unknowingly fall into them. The ease of sharing and publicizing information through social media raises a danger that lawyers might fall afoul of their duty of confidentiality.³³ Specifically, an attorney could accidentally disclose confidential information instantly through a blog post, a Facebook post, a tweet, or through a photo on an Instagram post.³⁴ Lawyers can violate their duty of confidentiality even if they take steps to conceal the identity of their client.³⁵

There is no mention in the rules of professional conduct concerning the use of social media in the legal profession or how attorneys should use those platforms to maintain their duty of

³² Lauren Kellerhouse, *Comment 8 of Rule 1.1: The Implications of Technological Competence on Investigation, Discovery, and Client Security*, 40 J. LEGAL PROF. 291 (2016).

³³ Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 155 (2012).

³⁴ *Id.*

³⁵ *Id.* (“Even a post that hides the identity of a client and recounts only public details of a trial still might reveal confidential information.”)

confidentiality.³⁶ Despite this lack of guidance, lawyers are expected to understand how social media sites function and how information is shared by each site. Model Rule 1.6 of the Model Rules of Professional Conduct provides that:

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client³⁷

The ABA Commission on Ethics 20/20 proposed the change to Model Rule 1.6, which deals with confidential information. The proposal, section 1.6(c), provided that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access

³⁶ Model Rules of Prof'l Conduct R. 1.6 (2020).

³⁷ Model Rules of Prof'l Conduct R. 1.6 (2020).

to, information relating to the representation of a client.”³⁸ The commission seemed to believe this new rule indicates what ethical obligations lawyers have to prevent unauthorized disclosures and how to digitally safeguard a client's confidential information. “As far as guidance on the steps that might be considered ‘reasonable,’ the Commission declined to provide specific suggestions, primarily because ‘technology is changing too rapidly to offer such guidance[,] and [] the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available.’”³⁹

By punting on the issue of providing specific suggestions, the only guidance that the legal profession has received on this issue and how it relates to social media usage is a mere ethics opinion by the American Bar Association.⁴⁰ In ABA Formal Opinion 18-480, the ABA confirmed that lawyers who use social media, blog or engage in other public online commentary are governed by the duty of confidentiality of Model Rule of Professional Conduct 1.6.⁴¹ This conclusion is not surprising, but practitioners must recognize that Rule 1.6's duty of confidentiality is broad in scope and without exception.⁴² According to the opinion, the duty of confidentiality extends to all information related to representation even if that information is public record or is known to or accessible by others.⁴³ The ABA Opinion also cautions that client identity is subject to Rule 1.6's confidentiality rule and warns that online commentary using hypotheticals can violate Rule 1.6 "if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client

³⁸ Model Rules of Prof'l Conduct R. 1.6(c) (2020).

³⁹ Browning, *supra* note 30, at 219.

⁴⁰ Kate Gordon Maynars, ABA's New Take on Lawyers' Use of Social Media, North Carolina Lawyer Weekly, <https://www.robinsonbradshaw.com/newsroom-publications-ABA-New-Take-on-Lawyers-Use-of-Social-Media.html> (“ABA Formal Opinion 18-480 confirms that lawyers who use social media, blog or engage in other public online commentary are governed by the duty of confidentiality of Model Rule of Professional Conduct 1.6.”).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (citing ABA Formal Op. 04-433 (2004) (“[i]ndeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer”)).

from the facts set forth in the hypothetical."⁴⁴ The opinion concludes that the lawyer has violated Rule 1.6(a) if the lawyer participates in public, online commentary that includes a client's information and does not obtain the client's informed consent or the disclosure is not otherwise authorized for representation.⁴⁵ If a lawyer wants to reveal client information in a public forum, the lawyer must abide by Rule 1.6(a).⁴⁶

Although the ABA took the time to issue a mere formal opinion regarding one rule of professional conduct, there are numerous other rules that have gone unaddressed. Additionally, it must be noted that this rule was incredibly difficult to find and was not easily accessible on the ABA's website. By ignoring the vast majority of professional guidelines, bar regulations have left practitioners alone to navigate the uncharted territory of social media usage in the legal profession. State bar regulations are left to guess and come up with their own guidelines, but many have failed to do so, largely because of the lack of guidance from the largest bar association in the United States, the ABA. Common sense can only take one so far in the complex world of the social media and vague professional conduct rules. To safeguard themselves from violating their duty of confidentiality, lawyers should employ privacy filters and settings on social media platforms to limit the disclosure of information they post or by dividing personal and professional networks.⁴⁷

iii. Rules 7.1 - 7.3: Advertising and Solicitation

Like many businesses and professionals, lawyers advertise on social media and may communicate with others on social media about their services. However, there are no clear model rules that address lawyer advertising or client solicitation on social media. Questions arise as to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Lackey, *supra* note 33, at 157-58.

whether friending a potential client is considered solicitation and whether a lawyer’s social media post is considered to be a legal advertisement. Additionally, it is unclear what the standard is for a social media post to be considered a legal advertisement. In today’s technological society, these social media and legal advertising frequently come up together, but the existing model rules do not address the subject. Rules 7.1, 7.2, and 7.3 of the Model Rules of Professional Conduct address communications about legal services and solicitation of clients. In the following rules, notice the ambiguity and lack of attention to lawyers who use social media in their legal practice to advertise or solicit clients.

When using social media, lawyers must also be aware of what constitutes a private communication, public advertisement, and a solicitation so they can avoid an ethics violation. Explicit advertising rules for lawyers vary by jurisdiction, but generally require lawyers to “ensure that any postings, messages, and video campaigns are permitted and are approved by the required authorities under their jurisdictions’ relevant rules.”⁴⁸ However, the ethical pitfalls attorneys experience in advertising arise in situations involving specific social media communications in which an attorney unknowingly advertised on social media. For example, is the following statement an attorney advertisement? “Another great victory in court today! My client is delighted. Who wants to be next?” “Another great victory in court today” is not likely an advertisement because it does not promote the availability of legal employment.⁴⁹ However, the addition of “who wants to be next” promotes availability for legal employment and, contrary to what many practitioners would think, could make the post an advertisement.⁵⁰ With this in mind, lawyers should avoid editing, updating, expanding, or claiming profiles created by third parties, unless they

⁴⁸ *Id.* at 158.

⁴⁹ Ethan Wall, *Are Your Facebook Posts A Social Media Legal Advertisement?*, Social Media Law and Order, <https://www.socialmedialawandorder.com/blog/ethics/social-media-legal-advertisement/>.

⁵⁰ *Id.*

are comfortable being held responsible for the content.⁵¹ Additionally, attorneys should regularly observe social profiles for factual accuracy, omit any unapproved representation of expertise, and use disclaimers on their social media content when necessary.⁵²

This guidance is necessary for attorneys to employ in their practice so they can avoid unknowingly violating ethics rules like the following examples demonstrate. In 2012, the Supreme Court of South Carolina punished a new attorney for exaggerating both his skill and experience on online attorney profiles and including statements likely to create unjustified case expectations.⁵³ The attorney relied on assurances by website representatives, including lawyers, that the advertisements satisfied the ethical requirements, but the court noted that the attorney failed to review the applicable provisions of the state ethics rules before using creating the profiles.⁵⁴ In 2011, the Virginia State Bar reprimanded an attorney for failing to include advertising disclaimers on his criminal law blog.⁵⁵ Although the blog was accessible from the attorney's firm website and focused mostly on his favorable cases, the attorney argued that the blog was political speech.⁵⁶ However, the Virginia Supreme Court rejected the argument and concluded that the blog was "potentially misleading commercial speech" that the Virginia State Bar could regulate.⁵⁷

Rule 7.1 addresses communication concerning a lawyer's services and states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact

⁵¹ Lackey, *supra* note 33, at 160.

⁵² *Id.*

⁵³ Arielle B. Adler, *You Know the Rules, and So Do I: What the RPCs Say (And Don't Say) About Social Media* (Nov. 1, 2019), ABI Journal, <https://www.lowenstein.com/news-insights/publications/articles/you-know-the-rules-and-so-do-i-what-the-rpcs-say-and-don-t-say-about-social-media> (citing *In re Dickey*, 722 S.E.2d 522, 523 (S.C. 2012)).

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *Hunter v. Va. State Bar*, 744 S.E.2d 611, 613-14 (Va. 2013)).

⁵⁶ *Id.* (citing *Hunter* at 613, 615).

⁵⁷ *Id.* (citing *Hunter* at 618, 621).

or law or omits a fact necessary to make the statement considered as a whole not materially misleading.”⁵⁸ This rule generalizes what constitutes a communication and there is no mention of online communication.

Rule 7.2 addresses special rules concerning communications regarding a lawyer’s services. Part A of the rule states that “[a] lawyer may communicate information regarding the lawyer’s services through any media.” Although this rule includes any media, ambiguities are still present, and the rule is not well defined. In New York State Bar Association Social Media Guidelines, these ambiguities are noted and guidance is desired. Specifically, the guidelines state that, “[t]he scope and practical application of the language used in the revised rules, especially as applied to social media and online communications, are yet to be well defined.”⁵⁹ Although Part A of the rule is most concerning, the remainder of the rule does not mention online communication or social media. The remainder of Rule 7.2 states that:

- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the agreement; and
 - (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

⁵⁸ Model Rules of Prof’l Conduct R. 7.1 (2020).

⁵⁹ *Social Media Ethics Guidelines*, NYBSA Commercial and Federal Litigation, <https://nysba.org/NYSBA/Sections/Commercial%20Federal%20Litigation/ComFed%20Display%20Tabs/Reports/NYSBA-Social%20Media%20Ethics%20Guidelines-Final-6-20-19.pdf>

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content⁶⁰

Rule 7.3 of the Model Rules of Professional addresses solicitation of clients. This analysis focuses on how these solicitation rules apply to social media. “There are various ways to use social media to contact potential clients, and the method of contact varies, depending on the type of platform.”⁶¹ For example, LinkedIn allows a user to email someone already within their network but to contact anyone outside the network, the user must first send a request to connect.⁶² “Facebook allows a user to email a connection (someone in their network), and also email strangers (paying a \$1.00 fee sends the email directly in the recipient’s mailbox).”⁶³ Live chat with video capability with connections is also possible. Rule 7.3 states that

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

⁶⁰ Model Rules of Prof’l Conduct R. 7.2 (2020).

⁶¹ Julia Lee, *Solicitation and a Lawyer’s Use of Social Media in Pennsylvania*, LCL Web Solutions, <https://www.lclwebsolutions.com/solicitation-and-a-lawyers-use-of-social-media-in-pennsylvania-part-3/>.

⁶² *Id.*

⁶³ *Id.*

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan⁶⁴

Many practitioners sign solicitation covenants, which prevent them from soliciting clients from their previous employer. In determining whether social media activity constitutes a violation of a covenant against solicitation of customers or clients, courts tend to view social media activity on a spectrum.⁶⁵ Courts tend to consider the level of activity and how targeted it was toward the previous employer's customers.⁶⁶ A recent United States Court of Appeals for the Third Circuit case⁶⁷ addressed the level of activity and targeting that courts consider in determining whether an employee has violated a non-solicitation agreement through social media activity. The case concerned a customer non-solicitation covenant, but the covenant made no mention of social media. The employee's posts to LinkedIn and Facebook were found to have possibly constituted solicitation because not only did he post his new job title, but he advertised when his non-compete agreement ended and encouraged qualified professionals, including old co-workers and clients, to contact him for a job with the new company.⁶⁸

⁶⁴ Model Rules of Prof'l Conduct R. 7.3 (2020).

⁶⁵ Benjamin Fink, *Social Media May Affect Compliance with Non-Solicitation Agreement*, Berkman Fink Van Horn, <https://www.bfvlaw.com/social-media-may-affect-compliance-with-non-solicitation-agreement/>.

⁶⁶ *Id.*

⁶⁷ *Coface Collections North America, Inc. v. Newton*, 430 Fed. Appx. 162.

⁶⁸ *Id.*

With this spectrum in mind, lawyers must be attentive to judicial decision-making regarding solicitation because no adequate guidance has been provided. In the age of social media, courts generally look at the level of targeted activity and place it on a spectrum to determine what may be a solicitation and what is not.⁶⁹ Generally, courts have held that an employee merely updating his profile may not constitute a solicitation.⁷⁰ “Similarly, a new employer may be able to utilize social media to inform its followers about its employment of a new employee with the company.”⁷¹ However, a violation of a non-solicitation covenant may occur when a social media user manipulates the features of the site to reach targeted populations or contact specific people associated with the previous employer.⁷² Courts may still be reluctant to enforce non-solicitation agreements that do not specifically address restrictions on social media use. Therefore, it is necessary for lawyers to be attentive to both non-solicitation agreements they may be bound to and how courts rule on this issue. Attorneys should be advised that emailing a connection or member of a network or circle and emailing a stranger is ethically permitted under Rule 7.3 and a grey area exists beyond that.⁷³

b. Client-Focused Lawyer Ethics vs. Judicial Ethics

Judges have been accused of bias in frivolous attempts by litigants to establish something out of nothing. In Texas, a judge was accused of bias for merely friending the father of a victim on social media.⁷⁴ In that same case, the Texas Court of Appeals noted the lack of guidance available

⁶⁹ Fink, *supra* note 65.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Lee, *supra* note 61.

⁷⁴ *Youkers v. State*, 400 S.W.3d 200, 205-06 (Tex. App. 2013) (holding that designating someone as a “friend” on Facebook does not show the degree or intensity of a judge’s relationship with a person. Based on this social media friendship, one cannot say whether the judge and the “friend” have even met; are acquaintances; or have some deeper, more meaningful relationship. “Thus, the designation, standing alone, provides no insight into the nature of the relationship.”).

to judges and practitioners to follow concerning proper social media usage.⁷⁵ In Florida, a motion to disqualify a trial court judge on the basis of a Facebook “friendship” was denied by the Supreme Court of Florida.⁷⁶ The court also noted the split concerning the appearance of impropriety when a judge friends an attorney on Facebook.⁷⁷

In 2013, the ABA issued a formal opinion addressing the usage of social media by judges. However, this was merely an opinion because a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety. In the opinion, the ABA addressed a judge’s general usage of social media and usage of social media during a campaign.

All social interactions, including social media, can be beneficial to judges and prevent them from being thought of as isolated or out of touch. “Upon assuming the bench, judges accept a duty to ‘respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.’”⁷⁸ Although the majority of judges are deeply involved in their communities, they “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens....”⁷⁹ All of a judge’s social contacts, in any context,

⁷⁵ *Id.* (“No Texas court appears to have addressed the propriety of a judge's use of social media websites such as Facebook. Nor is there a rule, canon of ethics, or judicial ethics opinion in Texas proscribing such use.”).

⁷⁶ *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, 271 So. 3d 889, 897 (Fla. 2018) ([T]he mere existence of a Facebook ‘friendship’ between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook ‘friends’ with a relationship of an indeterminate nature.”).

⁷⁷ *Id.*

⁷⁸ Judge’s Use of Electronic Social Networking Media, ABA Formal Op. 13-462 (citing Model Code of Judicial Conduct, Preamble).

⁷⁹ *Id.* (citing Model Code of Judicial Conduct Rule 1.2 cmt. 2).

including social media, are governed by the requirement that judges must always act in a manner “that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and must “avoid impropriety and the appearance of impropriety.”⁸⁰ Because of this requirement, judges must be sensitive to the appearance of relationships with others, even of social media.

Additionally, the Model Code of Judicial Conduct requires judges to “maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.”⁸¹ The ABA’s opinion interprets this to mean that judges must be attentive and impartial in their interactions with others, particularly when using social media, and assume that comments posted on social media will not remain within the circle of the judge’s friends on that social media platform.⁸² “Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge’s knowledge or permission to persons unknown to the judge or to other unintended recipients.”⁸³ The ABA articulated that dissemination of this information has the potential to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary as a whole.⁸⁴

The ABA also noted the obvious differences between in-person and digital social interactions. Specifically, the ABA noted that in contract face-to-face conversation that usually remains among the participants in the conversation, messages, videos, or photographs posted to social media platforms may be shared with thousands of people without the consent or knowledge of the original

⁸⁰ *Id.* (citing Model Code of Judicial Conduct Rule 1.2).

⁸¹ *Id.* (citing Model Code of Judicial Conduct, Preamble).

⁸² *Id.*

⁸³ ABA Formal Op. 13-462.

⁸⁴ *Id.*

poster.⁸⁵ Additionally, the ABA warned that “such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent.”⁸⁶

The ABA subsequently outlined situations in which judges should practice ethical social media usage by urging judges who participate in social media to be mindful of relevant provisions of the Model Code of Judicial Conduct. “For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed.”⁸⁷ Judges were also cautioned against forming relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge’s decision making.⁸⁸ The ABA advises judges to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A) of the Model Code of Judicial Conduct, and avoid using any social media platform to obtain information regarding a matter before the judge in violation of Rule 2.9(C) of the Model Code.⁸⁹ It is also vital that judges be mindful of pending matters in court. The ABA requires judges to avoid commenting about a pending or impending matter in any court in order to comply with Rule 2.10, Judicial Statements on Pending and Impending Cases.⁹⁰ Like lawyers, judges must be careful to avoid offering legal advice in violation of Rule 3.10, Practice of Law.⁹¹

⁸⁵ *Id.*

⁸⁶ *Id.* ([i]n addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly”).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ABA Formal Op. 13-462.

⁹⁰ *Id.*

⁹¹ *Id.* See Model Rule of Judicial Conduct 3.10 (“[a] judge shall not practice law. A judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited from serving as the family member’s lawyer in any forum”).

When judges use social media, disclosure or disqualification concerns may also arise regarding judges participating on the same platforms used by lawyers and others who may appear before the judge.⁹² The drafting committees of judicial ethics in a number of states have expressed differing views as to whether judges may “friend” lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.⁹³ A judge who has a connection with a lawyer or party who has a pending or impending matter before the court on a social media platform must evaluate that connection to determine whether the relationship should be disclosed by the judge prior to, or at the initial appearance of the person before the court.⁹⁴ The ABA advises that the context of the connection is significant in this situation, and simple designation as a social media connection does not alone indicate the degree or intensity of a judge’s relationship with a person.⁹⁵

However, the ABA did note that because of the open and casual nature of a social media communication, judges seldom have an affirmative duty to disclose a connection.⁹⁶ The ABA advised that a judge should consider disclosing a social media connection if the connection includes current and frequent communication.⁹⁷ Specifically, when a judge knows that a party, a witness, or a lawyer appearing before the judge has a social media connection with the judge, the

⁹² *Id.* (citing California Judges Ass’n Judicial Ethics Comm. Op. 66 (2010)).

⁹³ *Id.* (citing Geyh, Alfani, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition), Section 10.05E).

⁹⁴ *Id.* (citing California Judges Assn. Judicial Ethics Comm. Op. 66) (the need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent).

⁹⁵ ABA Formal Op. 13-462. (citing Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (stating that designation as a social media follower does not, in and of itself, indicate the degree or intensity of judge’s relationship with the person)).

⁹⁶ *Id.*

⁹⁷ *Id.*

judge must realize that such a connection may be considered a social relationship or be perceived as a relationship that requires disclosure or recusal.⁹⁸

To avoid disqualification, the ABA urged judges to remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 and is not waivable by parties in a dispute being adjudicated by that judge.⁹⁹ With this in mind, judges should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.¹⁰⁰ To conduct this analysis, the ABA encourages a judge to disclose, on the record, information the judge believes the parties or their lawyers might consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.¹⁰¹ “For example, a judge may decide to disclose that the judge and a party, a party’s lawyer or a witness have a [social media connection], but that the judge believes the connection has not resulted in a relationship requiring disqualification.”¹⁰² This suggestion is not application in every situation. If a judge does not have specific knowledge of a social media connection that rises to the level of a problematic relationship, nothing requires a judge to search all of the judge’s social media.¹⁰³

After reviewing the foregoing material, it is clear that judges have received minimal formal guidance addressing issues associated with appropriate social media usage and lawyers have simply not received such guidance. Judges are given examples of what do in certain situations and

⁹⁸ *Id.* (citing New York Judicial Ethics Advisory Opinion 08-176).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing Jeremy M. Miller, “Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance),” 33 PEPPERDINE L. REV. 575, 578 (2012) (“Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge”).

¹⁰¹ ABA Formal Op. 13-462 (citing Rule 2.11 cmt 5).

¹⁰² *Id.*

¹⁰³ *Id.*

what professional conduct rules to be mindful of in those situations. It must also be noted that judges are also plagued with ambiguities and uncertainties in using social media because of a lack of regulatory guidance. There are no Model Rules of Judicial Conduct present that address how judges should ethical use social media, but a formal opinion is far more guidance than lawyers are given. Judges may be faced with impartiality issues in their decision making but this does not mean that lawyers can simply be ignored. Lawyers must also be mindful of many of the concerns that judges face when using social media. However, social media usage by lawyers has become an afterthought of the largest bar association in the United States.

c. Legal Ethics vs. Other Professional Ethics Regarding Social Media Usage

i. Physicians

The American Medical Association (AMA) is the largest association of physicians in the United States. The Code of Medical ethics recognizes that social media networks, blogs and other online communications create new challenges to the patient-physician relationship.¹⁰⁴ As a result, the AMA Code of Medical Ethics provides guidance to physicians on how they should navigate different social media platforms and recognizes the attraction of social media and the need for caution when used.¹⁰⁵ In conjunction with the AMA, the Council on Ethical & Judicial Affairs formulated guidelines for physicians when maintaining a presence online.

Part A of the guidelines provides that “[p]hysicians should be cognizant of standards of patient privacy and confidentiality that must be maintained in all environments, including online, and must refrain from posting identifiable patient information online.”¹⁰⁶ This rule is the equivalent

¹⁰⁴ American Medical Association, *Social media guidance for physicians taps timeless principles*, <https://www.ama-assn.org/delivering-care/ethics/social-media-guidance-physicians-taps-timeless-principles>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

of Model Rule 1.1 but is much more descriptive because it instructs physicians to refrain from posting certain information online. The legal profession does not receive such detail in professional conduct rules. In order for practitioners to provide competent representation to clients, the ABA must specify what contexts practitioners should pay attention to. By reminding lawyers that must be cognizant of professional conduct rules while using social media, the ABA would provide the clarity the legal profession so strongly desires and prevent any further ethical violations for practitioners that do not understand the current, ambiguous rules.

Part B of the guidelines provides that “[w]hen using social media for educational purposes or to exchange information professionally with other physicians, follow ethics guidance regarding confidentiality, privacy and informed consent.”¹⁰⁷ Through this specific guidance, the AMA provides physicians with directions for ethical social media usage in certain situations. This situation-based application of ethical guidance is extremely useful to practitioners, and the legal profession deserves similar guidance for legal practitioners.

Part C of the AMA guidelines states that “[w]hen using the internet for social networking, physicians should use privacy settings to safeguard personal information and content to the extent possible, but should realize that privacy settings are not absolute and that once on the internet, content is likely there permanently.”¹⁰⁸ By recognizing that privacy settings are merely a safeguard and not a catch all, the AMA encourages uses of privacy settings but warns physicians to not become overly reliant on them. Although this is a general guideline, it is more than the ABA has provided regarding privacy settings and ethical social media usage for legal practitioners.

Part D provides that if physicians “interact with patients on the internet, physicians must maintain appropriate boundaries of the patient-physician relationship in accordance with

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

professional ethics guidance just as they would in any other context.”¹⁰⁹ This guideline is comparable to Model Rules 7.1-7.3, concerning legal advertising and solicitation of clients because of its focus on interactions with patients. However, the model rules do not explicitly instruct legal practitioners to be mindful of client interactions on the internet. Legal practitioners, like physicians, need to be reminded that interactions with clients online must be treated as if they were occurring in person. However, this reminder is nonexistent in the legal community due to a lack of guidance by the governing ethics body in the profession.

Part E directs physicians “[t]o maintain appropriate professional boundaries physicians should consider separating personal and professional content online.”¹¹⁰ This guideline is extremely important to all professionals. By ordering practitioners to keep their personal and professional personalities separate online, the AMA is assisting physicians in avoiding any conflicts of interest or potential ethical violations for personal content on social media. Similar guidance would be useful for legal professionals to remind them that they should be mindful of what type of content is posted so that an advertisement is not accidentally produced.

Part F states that “[w]hen physicians see content posted by colleagues that appears unprofessional they have a responsibility to bring that content to the attention of the individual, so that he or she can remove it and/or take other appropriate actions.”¹¹¹

Finally, Part G requires physicians to “recognize that actions online and content posted may negatively affect their reputations among patients and colleagues, may have consequences for

¹⁰⁹ *Id.*

¹¹⁰ American Medical Association, Social media guidance for physicians taps timeless principles, <https://www.ama-assn.org/delivering-care/ethics/social-media-guidance-physicians-taps-timeless-principles>.

¹¹¹ *Id.*

their medical careers (particularly for physicians-in-training and medical students) and can undermine public trust in the medical profession.”¹¹²

Unlike the ABA, the AMA established formal guidelines for physicians to follow when using social media. Physicians are told how they should react in certain situations if faced with something ethically questionable. Specifically, what to do if they interact with patients on the internet. The AMA guidelines are not extremely specific, but physicians are given general advice on how to navigate social media. By creating general guidance, the AMA has left room for physicians to use common sense and interpretation. Conversely, the ABA has refused to provide such advice to attorneys and has left the legal community with nothing but ambiguities in the Model Rules of Professional Conduct. As a result, attorneys are left wandering down a path of ethical pitfalls due to the lack of guidance from the association tasked with upholding ethics for the profession.

ii. Pharmacists

The American Society of Health Systems Pharmacists (ASHSP) has issued formal guidance for pharmacist to follow when using social media.¹¹³ For example, the ASHSP recommends that medical advice offered through social media should be provided in accordance with the professional standards of pharmacy practice.¹¹⁴ Specifically, the ASHSP recommends pharmacy professionals should provide medical advice only with a complete understanding of the patient’s medical conditions and only if they accept the associated liabilities, especially those regarding privacy and the requirements of pharmacy practice.¹¹⁵ According to the ASHSP, pharmacy

¹¹² *Id.*

¹¹³ American Society of Health-System Pharmacists, *ASHP statement on use of social media by pharmacy professionals*, <https://www.ashp.org/-/media/assets/policy-guidelines/docs/statements/use-of-social-media-by-pharmacy-professionals.ashx>

¹¹⁴ *Id.*

¹¹⁵ *Id.*

professionals should be aware that providing medical advice may create pharmacist–patient relationships and that all online relationships should conform to the ethical boundaries of an appropriate pharmacist–patient relationship.¹¹⁶ Additionally, the ASHP recommends that social media be used to receive drug information and to counter detail false or misleading information; that pharmacists recognize when alternative communication methods (phone consultation, face-to-face) with patients are more appropriate; and that pharmacists ensure that privacy settings are sufficient to protect patient identity.¹¹⁷ Further, pharmacists who use social media should present an image that will positively influence students and residents, and at all times should avoid complaining about or disparaging patients.¹¹⁸ These guidelines are not extremely specific but provide pharmacists general guidelines regarding ethical social media usage. The ASHP guidelines that addresses establishing a relationship with a patient on social media could easily be utilized by the ABA. A threshold could be established for what constitutes attorney-client relationship online and attorneys should be made aware of trigger words that could establish this relationship through ABA guidance.

iii. Nurses

The National Council of State Boards of Nursing (NCSB) has established guidelines for nurses to follow while using social media. The council cautions nurses to use social media cautiously by stating that “[n]urses can positively use electronic media to share workplace experiences, particularly those events that are challenging or emotionally charged, but it is imperative not to

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

mention patients by name or provide any information or details that could possibly identify them in order to protect patients' right to privacy.”¹¹⁹

The council has also established the following guidelines for nurses to follow to avoid inadvertently disclosing confidential or private information about patients.

Nurses are strictly prohibited from transmitting by way of any electronic media any patient-related image. In addition, nurses are restricted from transmitting any information that may be reasonably anticipated to violate patient rights to confidentiality or privacy, or otherwise degrade or embarrass the patient. Nurses must not share, post or otherwise disseminate any information or images about a patient or information gained in the nurse/patient relationship with anyone unless there is a patient care-related need to disclose the information or other legal obligations to do so. Nurses must not identify patients by name, or post or publish information that may lead to the identification of a patient. Limiting access to postings through privacy settings is not sufficient to ensure privacy. Nurses must not refer to patients in a disparaging manner, even if the patient is not identified. Nurses must not take photos or videos of patients on personal devices, including cell phones. Nurses should follow employer policies for taking photographs or videos of patients for treatment or other legitimate purposes using employer-provided devices. Nurses must maintain professional boundaries in the use of electronic media. Like in-person relationships, the nurse has an obligation to establish, communicate and enforce professional boundaries with patients in the online environment. Use caution when having online social contact with patients or former patients. Online contact with patients or former patients blurs the distinction between a professional and personal relationship. The fact that a patient may initiate contact with the nurse does not permit the nurse to engage in a personal relationship with the patient. Nurses must consult employer policies or an appropriate leader within the organization for guidance regarding work related postings. Nurses must promptly report any identified breach of confidentiality or privacy. Nurses must be aware of and comply with employer policies regarding use of employer-owned computers, cameras and other electronic devices, and use of personal devices in the workplace. Nurses must not make disparaging remarks about employers or co-workers. Do not make threatening, harassing, profane, obscene, sexually explicit, racially derogatory, homophobic or other offensive comments¹²⁰

Through these policies, the NCSB has provided nurses with guidance in a variety of situations and when to consult with an employer if a questionable situation arises. Additionally, the NCSB

¹¹⁹ *A Nurse's Guide to the Use of Social Media*, National Council of State Boards of Nursing, https://www.ncsbn.org/NCSBN_SocialMedia.pdf (2018).

¹²⁰ *Id.*

recognizes that it is not enough for a nurse to simply limit privacy settings and post any content they want. Instead, a nurse must establish professional relationships in both in-person and online environments. Unlike the ABA, the NCSB has promulgated these guidelines for nurses to follow and each guideline is tailored to a specific aspect of professional, ethical usage of social media in the workplace. The ABA should look at the NCSB guidelines and establish a set of guidelines or a Model Rule of Professional Conduct for attorneys to follow that addresses the same concerns. Specifically, the duty of confidentiality that nurses follow while using social media could easily be applied to the legal profession and utilized by the ABA.

d. International Ethical Guidelines

Similar to the ABA, the International Bar Association (IBA) is a bar association of legal practitioners around the world.¹²¹ The IBA currently contains a membership of more than 80,000 individual lawyers and 190 bar associations and law societies.¹²² In 2014, the IBA developed International Principles on Social Media Conduct for the Legal Profession that focused on six principles that regulatory bodies and bar associations should focus on to combat problems that arise when using social media in the legal profession.¹²³ The six principles include independence, integrity, responsibility, confidentiality, maintaining public confidence, and policy. Although these principles are merely advisory to bar regulators, the IBA suggests that by following these principles, the legal profession can combat the ethical pitfalls this article has previously mentioned.

The first principle, independence “is integral to legal practice.”¹²⁴ The IBA emphasizes the importance of “bar associations and regulatory bodies [to] ensure that their lawyers are not subject

¹²¹ *About the IBA*, INTERNATIONAL BAR ASSOCIATION, https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (2020).

¹²² *Id.*

¹²³ *IBA International Principles on Social Media Conduct for the Legal Profession*, INTERNATIONAL BAR ASSOCIATION, [IBA-Int-Principles-on-Social-Media-Conduct.pdf](#) (2014).

¹²⁴ *Id.*

to external pressures so that they are impartial in providing advice and representation.”¹²⁵ The IBA also emphasizes that “before entering into an online ‘relationship’, lawyers should reflect upon the professional implications of being linked publicly.”¹²⁶ Lawyers’ online comments and posted content should project both professional independence and the appearance of independence that is required of lawyers in practice.¹²⁷

The IBA also stresses integrity as a principle of ethical social media usage and expects lawyers to “maintain the highest standards of integrity in all dealings, including those conducted over social media.”¹²⁸ Bar associations and regulatory bodies should encourage their members to think about the impacts social media could have on a lawyer’s career and professional reputation because online activity is difficult to control.¹²⁹

Responsibility is the third principle that the IBA emphasizes for attorneys to adhere to when using social media.¹³⁰ “Bar associations and regulatory bodies should encourage their members to assess these privacy settings of any social media account, be it personal and/or professional.”¹³¹ Additionally, legal professionals should maintain responsible use of social media based on a full understanding of the implications of publishing content on social media networks and, at the same time, monitor and regularly review their use of and content on social media.¹³² Legal professionals should also rectify any mistakes immediately after they occurs because information on social

¹²⁵ *Id.*

¹²⁶ *Id.* (“[s]ocial media creates a context in which lawyers may form visible links to clients, judges and other lawyers”).

¹²⁷ *Id.*

¹²⁸ *Id.* (“[c]omments or content that are unprofessional or unethical could damage public confidence, even if they were originally made in a ‘private’ context”).

¹²⁹ INTERNATIONAL BAR ASSOCIATION, *supra* note 123, (“[f]or example, where something is posted that is damaging to a practitioner’s reputation goes ‘viral’ over the internet, it may be difficult to subsequently repair the harm to the practitioner’s professional standing and reputation”).

¹³⁰ *Id.* (noting that in order to fully understand professional responsibility on social media, lawyers should recognize that most social media websites have specific privacy settings that apply to users of the website).

¹³¹ *Id.* (emphasizing that it should be noted that privacy settings do not necessarily mean the information posted on the social media sites will be protected).

¹³² *Id.*

media sites could be produced by either side in litigation.¹³³ When lawyers themselves online as legal professionals, they should recognize that it is possible that their statements may be relied upon as legal advice and retainers could be inadvertently created meaning that individual lawyers or law firms could assume liability to unknown third parties and/or engage in the unauthorized practice of law in a jurisdiction where the lawyer is not licensed to practice.¹³⁴ Both bar associations and regulatory bodies should remind their members about the ramifications of posting content online, and they should encourage them to clarify their capacity and whether they intended the content to be relied upon as professional advice.¹³⁵ For appropriate social media usage, bar associations and regulatory bodies should remind lawyers to consider whether a particular social media platform is an appropriate forum for their intended output based on its popular use and the likely audience of the content.¹³⁶ “Bar associations and regulatory bodies should remind legal practitioners to consider the context, the potential audience and whether the comment is clear and unambiguous.”¹³⁷ As general guidance, legal practitioners should not do or say something online that they would not do or say in front of a crowd and should be reminded that inappropriate use of social media can also lead to exposure to discrimination, harassment, invasion of privacy, defamation, libel, and other claims.¹³⁸ Practice promotion, advertising and solicitation rules, codes and legislation may affect social media use and where there are such restrictions applicable, they

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ INTERNATIONAL BAR ASSOCIATION, *supra* note 123, (“[m]ore specifically, bar associations and regulatory bodies should call attention to the relevant rules of professional conduct in their respective jurisdictions”).

¹³⁶ *Id.*

¹³⁷ *Id.* (The IPA warns practitioners that social media provides a platform for quick, short messages to be disseminated widely and what was intended to be humorous or frivolous may be received as a serious declaration by some).

¹³⁸ *Id.*

must be adhered to online.¹³⁹ Conflicts of interest are not always limited to party representation and issue conflicts may also arise and create political, if not ethical, issues with clients.¹⁴⁰

The fourth principle considered by the IBA in ethical social media usage is confidentiality. The IBA recognizes that it is extremely important for lawyers to be trusted with private and confidential information, and that the public perceive that lawyers can be trusted with their confidential information.¹⁴¹ To ensure that the public perceives this, bar associations and regulatory bodies should remind lawyers that social media platforms are not appropriate for dealing with client data or other confidential information unless they are fully confident that they can protect such confidential data in accordance with their professional, ethical and legal obligations.¹⁴² In addition, bar associations and regulatory bodies should encourage lawyers to consider client confidentiality more generally when using social media because even the use of hypothetical questions or anonymous fact scenarios may inadvertently reveal a client's confidential information.¹⁴³

The fifth principle that attorneys should be cognizant of is maintaining public confidence. Legal practitioners should be encouraged to monitor both their online and offline conduct in the same way, and to achieve this, restraint should be exercised so that online conduct adheres to the same standard as it would offline in order to maintain a reputation demonstrating characteristics essential to a trusted lawyer, such as independence and integrity.¹⁴⁴ A lawyer's statements should be true and not misleading and as with offline activity, lawyers should have personal autonomy over their private affairs.¹⁴⁵ The key difference with online social media is that a lawyer's life and

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“[l]awyers must be sensitive to postings and use of social media that may reveal a position that is contrary to that taken by their clients and may impact on particular matters”).

¹⁴¹ INTERNATIONAL BAR ASSOCIATION, *supra* note 123.

¹⁴² *Id.*

¹⁴³ *Id.* (“[f]or example, information that locates a lawyer geographically and temporally could be used to show professional involvement with a client who does not wish to publicise that he or she is seeking legal advice”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

activities may be exposed more widely to public gaze, which may have the effect of highlighting the key characteristics of the lawyer, whether that may be good or bad.¹⁴⁶ To avoid the wrong characteristics being highlighted to public gaze, it is essential that bar associations and regulatory bodies ensure that lawyers appreciate these key characteristics and risks when pursuing their personal social life online.¹⁴⁷ When using social media in both a personal and professional manner, lawyers should also consider whether the sum total of their social media activity portrays a legal professional with whom clients can entrust their affairs.¹⁴⁸

The last principle that the IBA urges legal professionals to apply when using social media is policy.¹⁴⁹ To provide clear guidance, bar associations and regulatory bodies should encourage law firms to consider developing clear and coherent policies and guidelines on social media use because these policies and guidelines could be incorporated in letters of employment and induction training and supplemented by regular training to educate employees on new and emerging risks in this area.¹⁵⁰ Additionally, bar associations and regulatory bodies should advocate for clear parameters by law firms on if and how employees are allowed to use social media on the firm's behalf or otherwise in a work-related capacity.¹⁵¹ As a result, an effective social media policy will ensure that firms project a considered, consistent image online, as well as help comply with laws and regulations pertaining to them.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ INTERNATIONAL BAR ASSOCIATION, *supra* note 123.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (When engaging in the use of social media, employees of a legal practice should be given clear guidance and instructions on correct usage of those platforms).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (If employees are permitted to contribute, bar associations and regulatory bodies should encourage law firms to suggest ways that lawyers can differentiate whether they are uploading content in a personal or work-related capacity).

5. Proposal: Model Rule of Professional Conduct & ABA Center for Ethical Social Media Usage

In order to fill the ethical void regarding ethical social media usage in the legal profession, the ABA must take action. A good starting place for regulatory guidance is the Model Rules of Professional Conduct. Specific rules targeting social media that address the types of behavior outlined above could provide the necessary guidance in these areas. Though the ABA has addressed law firm websites and email through advisory opinions, it has not specifically addressed social media usage for practitioners and the questions presented in this article. Without proper model rules, many state bars have similarly been slow to provide guidance on ethical social media usage, and merely tell their attorneys to apply the regular professional rules of conduct. For example, Ohio's state bar association merely tells its members to "be responsible" and "be upfront" when using social media and interacting with other professionals.¹⁵³ As a result, these policy suggestions provide no real guidance to practitioners in Ohio and further escalate the problem outlined by this article.

The ABA must seek to have social media usage rules enforced in all jurisdictions because social media usage is an interstate issue. It would be problematic for a practitioner that practices in different jurisdictions to face different social media guidelines in those jurisdictions. If these rules are universal and adopted in all jurisdictions, practitioners would only have to worry about being in compliance with one rule. Uniformity would eliminate any ambiguity and allow practitioners to ethically use social media in all jurisdictions.

The rules suggested by the ABA should address competent social media usage, confidentiality when using social media, and how to use social media without violating advertising

¹⁵³ *Social Networking Policy*, OHIO STATE BAR ASSOCIATION, <https://www.ohiobar.org/about-us/policies/social-networking-policy/>

and solicitation rules. These are the three biggest issues facing attorneys who use social media. The New York State Bar Association (NYSBA) has accomplished something similar to this through their Social Media Ethics Guidelines. The guidelines adequately address how to change current standards for confidentiality and advertising but do not adequately address competency or trial publicity issues. Through the ABA transforming the model rules to address social media usage, state bar regulators can be comfortable by the guidance provided by the ABA and adopt these rules in their jurisdictions.

Additionally, to provide better guidance for the legal community, the ABA should consider creating a center for ethical social media usage in the legal profession. Through this resource, attorneys would be able to submit their questions online and have them answered by the ABA. If all state bars adopt the suggested model rules, this center would provide interstate guidance in areas of social media ethics that have gone unaddressed or are not clear. For this center to exist, the ABA would have to address social media usage in existing model rules or create a new model rule specifically designed to address ethical social media usage. This forum would be a great way for the ABA to show practitioners that ethics matter and would further increase the confidence that practitioners have in guidance provided by the ABA.

i. Competent Social Media Usage

Model Rule 1.1 does not address competency when using social media. Certain core competencies should be required for attorneys to successfully practice law in a modern, ethical profession. A new model rule should address competency issues by requiring lawyers to be knowledgeable of social media tools, the development of law firm social media policies, understanding e-discovery implications, and informed consent for client(s) when needed upon the

intake of a matter.¹⁵⁴ Additionally, a new model rule should require lawyers to be competent in modern communication methods in addition to traditional norms, including texting, emailing, social media, and secure online or cloud client messaging services.¹⁵⁵ Specifically, the ABA should look to a bar association that has already addressed the issue of social media usage and the duty of competence. For example, the Philadelphia Bar Association provided a very detailed rule that addresses many ambiguous areas concerning social media and the duty of competence. The rule states as follows:

A lawyer must, as part of the duty of competence, acquire a basic understanding of social network websites and advise a client about social network issues arising with respect to a matter in litigation. A lawyer who represents a party in litigation may advise the client to restrict access to a social network account by changing the account's privacy settings but may not advise the client to destroy posted content that there may be a duty to preserve. The lawyer may advise the client to delete content from a social network account if the lawyer also instructs the client to preserve a copy. The lawyer must make reasonable efforts to procure and produce social network content that the lawyer knows or reasonably believes the client possesses in response to a discovery request. If the lawyer becomes aware that the client has destroyed or failed to produce relevant information, the lawyer must take appropriate remedial action, including disclosure to the tribunal if necessary¹⁵⁶

Similar language should be added to Model Rule 1.1 or the language should be added as a comment to Rule 1.1. The aforementioned rule requiring a snapshot solves two possible issues for attorneys.¹⁵⁷ The attorney would have a record of client postings in case opposing counsel requests them during discovery and because the attorney wants to be sure to preserve all information on their client's social network site at the start of the litigation due to social media platforms being fluid and ever changing.¹⁵⁸ The snapshot requirement component of this rule is vital because it is

¹⁵⁴ Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 Case W. Res. J.L. TECH. & INTERNET 1 (2019).

¹⁵⁵ *Id.*

¹⁵⁶ ABA/BNA Lawyers' Manual on Professional Conduct, Opinion 2014-5, Social Media; Internet, Evidence; Discovery; Advice to clients; Competence; Candor toward tribunals

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

instinctive of many people to deactivate or delete social media content from their social media accounts. This rule would provide guidance to both clients and attorneys and warn them what not to do in situations where social media content could be important. By adopting a rule such as the one mentioned above, the ABA would provide guidance to state bar associations and practitioners on what constitutes competent social media usage.

ii. Confidentiality When Using Social Media

To maintain the duty of confidentiality, attorneys should always ask whether their actions could possibly disclose privileged or confidential information. IBA Guidelines urge bar associations and regulatory bodies to remind lawyers that social media platforms are not appropriate for dealing with client data or other confidential information unless they are fully confident that they can protect such confidential data in accordance with their professional, ethical and legal obligations. In addition, according to the IBA, bar associations and regulatory bodies should encourage lawyers to consider client confidentiality more generally when using social media because even the use of hypothetical questions or anonymous fact scenarios may inadvertently reveal a client's confidential information.

To achieve this, the ABA must add to Model Rule 1.6 and require that attorneys subject their social media activity to the confidentiality rules. Guideline No. 5.E: Maintaining Client Confidences and Confidential Information of the NYSBA's Social Media Ethics Guidelines provides that:

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media activities and a lawyer's website or blog must comply with these limitations.

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool

or practice operates before using it and consider whether any activity places client information and confidences at risk.

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.¹⁵⁹

This guideline warns practitioners that their actions on social media must comply with the duty of confidentiality. As a result of the application of this rule, the ambiguities that currently exist can be eliminated and attorneys can obtain the practical guidance they desire. This rule goes much further than the existing model rule because it actually outlines what reasonable efforts lawyers must make to prevent confidential information from being disclosed through social media usage. By doing this, the NYSBA has given practitioners a road map to abide by. Additionally, by integrating a competency standard into the rule, the NYSBA has required attorneys to understand social media before using it. As a result, this rule eliminates the excuse of ignorance for attorneys who violate the duty of confidentiality on social media.

iii. Social Media Advertising and Client Solicitation

To avoid committing an ethical violation, an attorney must apply the advertising rules and opinions to a social network setting in order to determine whether an action may violate a model rule. Certain state guidelines encourage attorneys to consider asking whether any of the social network site features are potentially making false or misleading statements. With this in mind, attorneys should consider whether the social media network offers any testimonial, endorsement or rating features that could potentially violate a rule.¹⁶⁰ Additionally, social media platforms, like websites, cover many jurisdictions. Attorneys should always consider whether their activity or

¹⁵⁹ *Social Media Guidelines*, *supra* note 59

¹⁶⁰ *Id.*

action could cross into a jurisdiction where they are not authorized to practice law and thereby be subject to discipline.¹⁶¹ When responding to questions posted or submitted online by clients, attorneys must beware of inadvertently creating attorney-client relationships by communicating with unrepresented third parties and represented third parties. It is also necessary for attorneys to be careful who they “friend.”¹⁶² Finally, to avoid a violation of advertising and solicitation rules, attorneys should check for automatic features the social network site offers that might inadvertently trigger prohibited solicitations.¹⁶³

At the crossroads of social media and client solicitation, a new set of guidelines is necessary to provide modern, useful guidance to practitioners. The NYSBA Social Media Ethics Guidelines provide the guidance the ABA should modify and adopt. Guideline 2.A, Applicability of Advertising Rules, states that “[a] lawyer’s social media profile – whether its purpose is for business, personal or both – may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.”¹⁶⁴ This guideline provides an outline of the remaining rules and establishes core principles concerning advertising on social media. The ABA should adopt this guideline and specify that communicating services on either personal or professional social media profiles can subject an attorney to advertising and solicitation rules. By forewarning practitioners, the excuse of ignorance is eliminated, and practitioners know to consult advertising and solicitation rules when questionable situations arise.

¹⁶¹ *Id.*

¹⁶² Kuehl, *supra*, note 154, (citing Christina Vassiliou Harvey, Mac R. McCoy, and Brook Sneath, 10 Tips for Avoiding Ethical Lapses When Using Social Media. *Business Law Today* (2014), http://www.americanbar.org/publications/blt/2014/01/03_harvey.html).

¹⁶³ *Id.*

¹⁶⁴ *Social Media Guidelines*, *supra* note 59.

Further, NYSBA Guideline 2.B, Prohibited Use of Term “Specialists” on Social Media, states that “[l]awyers shall not advertise areas of practice under headings in social media platforms that include the terms ‘specialist,’ unless the lawyer is certified by the appropriate accrediting body in the particular area.”¹⁶⁵ This guideline prevents practitioners who think of themselves as experts from advertising themselves as experts. By requiring a certification from an accrediting body, lawyers who present themselves as experts are actually experts. As a result, clients receive representation from practitioners who are extremely knowledgeable in certain practice areas and false advertising is prevented. The ABA must add this to Model Rule 7.2 as part of the rule or as a comment to the rule. This rule provides practical guidance that benefits the legal profession as a whole, through both practitioners and clients.

Finally, NYSBA Guideline 2.C, Lawyer’s Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer’s Social Media Page, provides that “[a] lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.”¹⁶⁶ In each of the NYSBA guidelines mentioned in this article, a mindfulness component is the first aspect of each guideline. This is vital to providing practical guidance because it serves as a reminder to practitioners. A mindfulness component like those mentioned in this article should be added to each applicable model rule by the ABA. Additionally, the guideline states that “[a] lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

that such third-party posts do not violate ethics rules.”¹⁶⁷ By suggesting that an attorney should monitor their social media accounts periodically, the NYSBA eliminates the excuse of ignorance by practitioners. For example, if an attorney does not monitor their social media for a substantial amount of time and a third party endorses or recommends the attorney, that attorney could violate ethics rules by not recognizing the endorsement as an advertisement. This component of Guideline 2.C. provides practical guidance because social media is seconds away from practitioners and can easily be monitored. Finally, Guideline 2.C. states that “[i]f a person who is not an agent of the lawyer unilaterally posts content to the lawyer’s social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she may wish to ask that person to remove it.”¹⁶⁸ This component of the guidelines adds to the monitoring component by requiring the attorney to remove or hide content that could be considered an advertisement or solicitation. The NYSBA yet again provides practical steps for attorneys to follow and safeguard their reputation in the legal community.

6. Conclusion

Professional ethics are an issue of utmost importance to legal practitioners and they must be consistently cognizant of them in order to avoid malpractice claims or disbarment. In today’s technological society, the majority of practitioners use social media in their practice. This usage could range from client solicitation to simply maintaining a professional presence online. However, due to the lack of guidance by the governing body for legal ethics, the ABA, many lawyers have unknowingly violated professional ethics rules in their jurisdictions for social media usage but have received no prior guidance on how to ethically use social media until it is too late.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Consequently, many jurisdictions advise practitioners to simply apply the existing rules that address the traditional practice of law. This is problematic because it leaves attorneys in a dangerous position to unknowingly commit an ethical violation.

Ethical violations can occur through improper social media usage such as violations of the competence rules, duty of confidentiality, or advertising and solicitation rules. None of these rules mention social media or modern technology. While other professions such as judicial employees, physicians, and pharmacists receive guidance regarding social media usage, the legal profession is left unguided. To solve this problem, the ABA can provide proper guidance and materials for state bar examiners and practitioners to reference.

Through establishing the aforementioned suggested model rules and ABA Center for Social Media Guidance, the ABA can eliminate the ambiguities and problems that practitioners currently face. The nationwide adoption of these model rules will transform social media ethics in the legal profession from an ambiguity to a set of promulgated guidelines. As a result of nationwide adoption of these guidelines, attorneys in every jurisdiction will have access to proper guidance and will be able to ethically use social media without being subjected to ethical pitfalls. As a result of the proposal for new model rules and further ABA guidance set forth in this article, legal practitioners will finally be given the guidance they long desired and will be able to comfortably use social media in their practice.