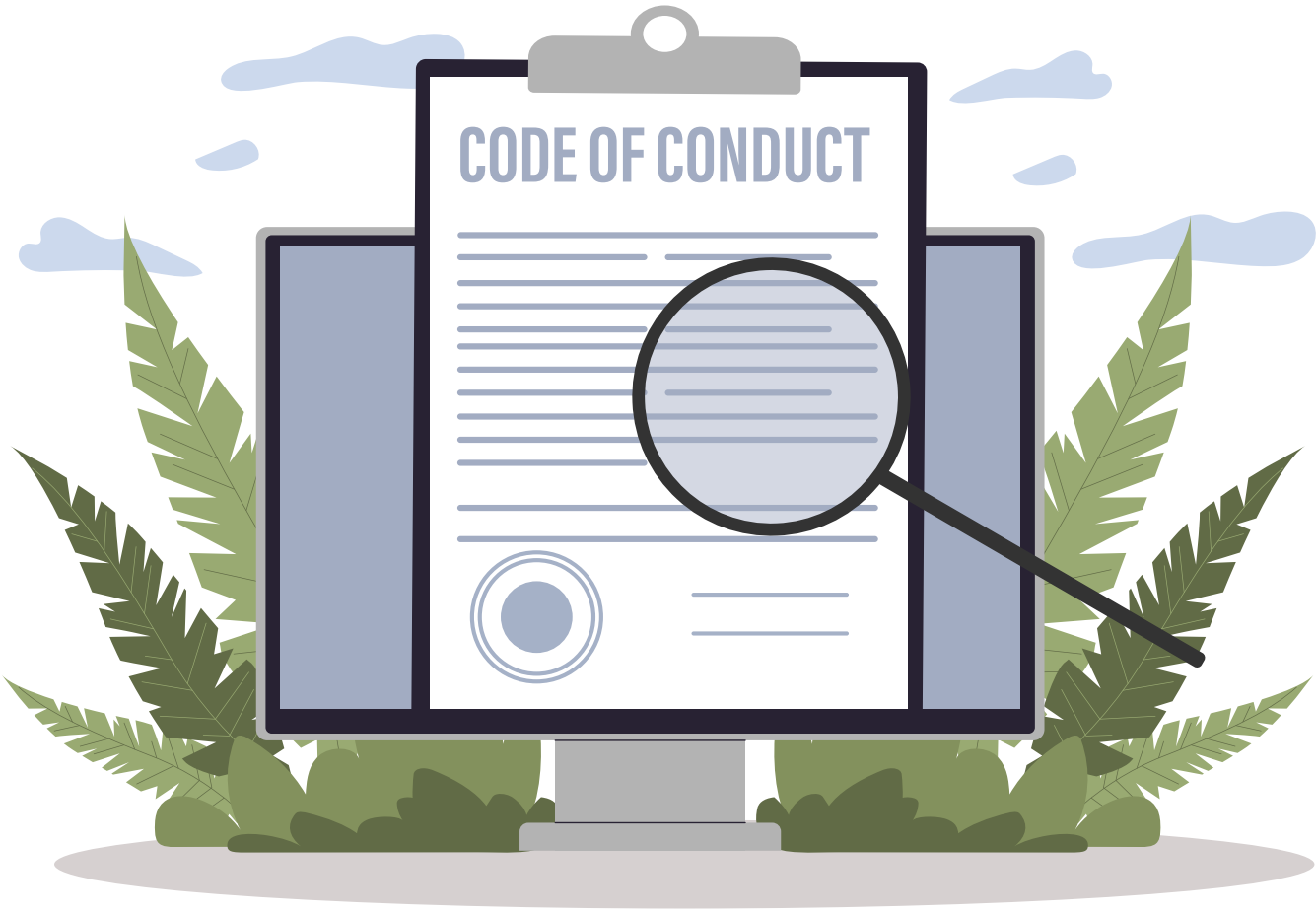
By David C. Marshall, Jennifer E. Watson, and Caroline Tinsley

# Proper Conduct Is Part Of A Lawyer's Ethical Duty So No One Gets Caught In A Riptide

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Lawyers are known to be zealous advocates, agents of social change and rarely hide their opinions, opting instead for open debate. These characteristics are hallmarks of successful attorneys, but when do these behaviors shift from skillfully riding the ethical wave to getting caught in the undertow of a breaking wave?

Herein, we address several ethical issues that are lurking just beneath the surface. First, we discuss two new ethical issues that have arisen with the COVID- 19 pandemic: (1) remote work and (2) remote depositions. Additionally, we address two areas that we as lawyers don't likely give enough consideration in terms of ethics – (1) the potential conflict of interest issues that arise within asbestos litigation specifically and (2) voicing personal opinions on social media accounts.

## Remote Work

Although remote work technology has existed for some time, the prevalence of remote work in light of COVID-19 has brought more focus in the context of ethical considerations. Remote work ethics considerations are largely drawn from the guidance obtained though opinions on contract work, which highlight the duty to supervise and data security.

### ABA Model Rule 5.1: Duty to Supervise

As a threshold matter, lawyers are required to supervise and monitor the work of their teams. However, the COVID-19 pandemic has brought new supervision considerations into play. While the duty to supervise has remained a constant in the ethics rules, it is now viewed in a different light because of the vast number of lawyers working remotely – a practice that is continuing. We look to earlier opinions regarding contract attorneys to draw conclusions regarding those duties as they exist in today's largely remote world.

As noted, the ABA Model Rules and opinions have focused primarily on the duty to supervise contract lawyers. In both the remote working and contract lawyer contexts, the supervising attorneys retain ultimate responsibility for directing and reviewing the work. The ABA Model Rules require a supervising lawyer to supervise and monitor working and contract attorneys and make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurances that all lawyers in the organization will adhere to the Rules of Professional Conduct. In 2008, the ABA issued an opinion regarding outsourcing as related to e-discovery and made it clear the attorney of record is responsible for the results of the entire legal team. ABA, Formal Op. 08-451 (2008).

> If there is opposition, you should also consider requesting both the attorney and the deponent appear on video simultaneously.

As with the outsourcing context, a supervising attorney is required to properly supervise the legal team in delivering services and confirming their adherence to ethical rules. Noteworthy for remote work, the supervising attorney has a duty to provide guidance, give directions and be available for questions. Best practices dictate that supervising attorneys engage in weekly Zoom calls, Teams check-ins and other forms of regular contact to ensure conformity with the Rules.

### ABA Model Rule 1.6: Data Security

The focus of ABA recommendations on outsourcing that apply to remote work involve data security and client confidences. As the COVID-19 pandemic has increased, reliance on personal Wi-Fi networks and various other homegrown workarounds abound. While the use of technology is demanded by legal organizations, courts and clients, data security is paramount.

The use of unsecured/public Wi-Fi, cloud storage, Bluetooth, Zoom, communicating while on speaker, and other platforms, raises numerous concerns, as does the use of artificial intelligence devices in homes which gather information from conversations. And the mistaken use of personal email is a daily occurrence by many. *See,* Peter T. Glimco & Matthew C. Luzadder, *Successful Partnering Between Inside and Outside Counsel,* § 13:11 (2021); "Protecting the Confidentiality of Unencrypted E-mail" ABA Formal Opinion 477R (2017) and Formal Opinion 483-2018 (2008).

Formal Opinion 483, citing Model Rule 1.6, identifies considerations to security issues including safeguards and information sensitivity. The ABA provides guidelines for an attorney to avoid inadvertent disclosures which include regularly assessing sensitive client information, communications with the client to determine how electronic communications should be protected, and, whether encryption and password protection are appropriate.

Best practices dictate that private areas or headphones be used for all conversations, and the use of VPNs and secured Wi-Fi be used working or accessing a law firm's system.

## Remote Depositions

Remote depositions were a necessity during the pandemic to keep litigation moving forward and are still commonplace for the foreseeable future. A number of ethical issues have arisen with remote attendance at depositions. We address some of the most common ethical questions facing attorneys taking or defending remote depositions: (1) communications with your client; (2) opposing counsel's communications with their client; and (3) the necessity of knowing how virtual software works.

**The ABA Model Rules most often implicated by issues arising during remote depositions are:**

- ABA Model Rule 1.1: Competence
- ABA Model Rule 3.3: Candor Toward the Tribunal
  - o Shall not offer evidence known to be false
- ABA Model Rule 3.4: Fairness to Opposing Party & Counsel
  - o Shall not improperly influence witnesses, engage in obstructive tactics in discovery procedure, and the like.

### *Communication With Your Client*

Attorneys are prohibited from communicating with or advising their clients during a remote deposition to the same extent as such actions would be prohibited during

an in-person deposition. *See*, Model Rules 3.3 and 3.4. Attorneys may and should lodge timely objections during the deposition; however, those objections should be stated concisely in a non-argumentative and non-coaching manner. See, Model Rules 1.1 and 3.4.

An attorney can, of course, instruct their client not to answer, to protect a privilege or preserve a limitation ordered by the court; however, attorneys are expressly prohibited from instructing or influencing their clients once their depositions have commenced. Fed. R. Civ. Pro. 30(c)(2).

Depending on the jurisdiction, you may or may not be prohibited from conferring with your client during a break in the deposition. If you are in a jurisdiction that allows such communications, extra caution must be taken in the remote setting to ensure that the attorney-client privilege is protected. At an in- person deposition an attorney can ensure that no third parties are within earshot, the same is not necessarily true for remote communications. It is possible that those with a remote presence could destroy the protections of the privilege if the conversation is not protected.

#### *Opposing Counsel Communicating with Their Client*

If you are taking the deposition and there is a remote component to the deposition, it is critical that you find out if opposing counsel is planning to be in the same room as the deponent during the deposition. If so, it is highly advisable that at least one defense counsel and (potentially, the court reporter) be in the same room with the deponent as discovery abusive have been uncovered.

If there is opposition, you should also consider requesting both the attorney and the deponent appear on video simultaneously. At a minimum, best practices dictate that with remote depositions you ask the witness to identify all individuals present in the room including where the defending attorney and others are located in relation to the witness. If opposing counsel attempts to communicate with his or her client during the deposition, it will be more difficult and likely obvious to counsel. *See*, Model Rules 3.3 and 3.4.

If the deposition will be a fully remote, with all attorneys, the court reporter and the deponent attending virtually, best practices dictate inquiring about the presence of multiple monitors, phones, iPads, and other technology that may be set up. You should instruct the witness to remove all technology that is not being used for the taking and recording of the deposition.

You and all of defense counsel on the remote deposition should be cognizant of behavior that would reveal that the deponent is receiving communications from their counsel which is improper under the ethical rules. An example is the witness's eyes constantly shift away from the camera.

If you reasonably believe that such communications are taking place, then you should document the behavior and move the court for an order terminating the deposition on the grounds that the deponent and/or opposing party is acting in bad faith. If the motion is granted, then the party or deponent whose conduct necessitated the motion may be required to pay the reasonable expenses incurred in making the motion, including attorney fees.

#### *Understanding the Virtual Platform*

As entertaining as the counsel showing up for a virtual hearing as a kitten was for the nation, does not having full command of the technology breach an ethical duty? Counsel has the absolute obligation to uphold their legal and ethical duties which includes Comment 8 to Model Rule 1.1, which in relevant part requires an attorney: "[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."*

There are innumerable mishaps that could occur while participating in a remote deposition without an adept knowledge of the virtual technology. For example, an attorney who misuses the camera and microphone functions risks making inadvertent disclosures or waiving privilege. So too with the sharing of exhibits. Attorneys should proceed with extreme caution before uploading documents from their computers into a virtual deposition.

Best practices require lawyers to take steps to become familiar with the various remote options available and to practice using the virtual platforms prior to the remote deposition.

### Conflicts of Interest

Conflicts related to multiple representations is a constant consideration for asbestos defense attorneys. Of particular concern, which is often overlooked, is the conflict raised by a potential cross-claim.

#### ABA Model Rule 1.7

#### *Conflicts Impacting Multiple Representations*

Conflicts must be cleared prior to undertaking representation. To clear a conflict, the prospective client must provide informed consent to the representation as well consent to the ongoing or earlier representation giving rise to the conflict in the first place. 48 Tex. Prac., Tex. Lawyer & Jud. Ethics § 6:6 (2021 ed.) ((*citing Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.*, 198 Cal. Rptr. 3d 253 (Cal. Ct. App. 2016) (purported waiver of conflict of interest ineffective, when lawyer only mentioned that a conflict existed but did not explain what that conflict was nor what its possible adverse consequences were)); *N.C. State Bar v. Merrell,* 777 S.E.2d 103, 114 (N.C. Ct. App. 2015) (rejecting a lawyer's claim of adequate conflict disclosure by concluding that "[a]cknowledging that a potential conflict exists, without identifying the potential conflict, does not provide the parties with [a basis for giving] informed consent"). In other words, the client must understand the scope of the representation to which it is consenting, as well as understand any conflict it is being asked to waive.

Lawyers often try to obtain advance waivers from clients. In this instance, the lawyer seeks to obtain the client's consent to taking a future representation that might be averse to the client. Because these types of waivers typically involve *unknowable representations and facts,* the ability to waive is questionable and courts often do not approve them. See ABA Comm. on Ethics & Prof. Resp., Formal Op. 05-436 (2005). *First NBC Bank v. Murex, LLC,* 259 F. Supp. 3d 38 (S.D. N.Y. 2017) (reject-

ing broad advance waiver of conflicts); *Brigham Young Univ. v. Pfizer, Inc.*, 2010 WL 3855347 (D. Utah 2010) (Where it appears that (i) the effects of the waiver in question were fully explained to the client, (ii) the client was either advised of the wisdom of and given a reasonable opportunity to consult with independent counsel or else actually did so, (iii) the conflict in question is within the scope of the waiver, and (iv) granting the waiver would not unfairly prejudice the client, it typically will be upheld.)

Best practices include describing the scope of representation in the engagement letter, and to the extent a conflict is known, describing that conflict and obtaining a signed waiver.

### *Cross-Claims*

As mentioned, Rule 1.7 provides that a lawyer cannot simultaneously represent clients whose interests are directly adverse unless there has been consent after consultation and the attorney has a reasonable belief that the representation will not adversely affect the relationship of the other client. Similarly, the rule provides that an attorney shall not represent a client if that representation would be materially limited by the lawyer's responsibilities to another client.

The same criteria for conflict of interest applies to a law firm, thereby prohibiting lawyers associated with the firm from representing clients if any individual attorney in the firm would have a conflict of interest. A firm owes a duty of loyalty to both the original clients and, if you accept the representation, the additional clients.

However, what happens in jurisdictions where mandatory cross-claims are required under a Court's standard case management order? Does this necessarily represent the provision of legal services directly adverse to a client?

The key to the analysis is whether the attorney and the firm believe the representation of one client will or will not actually materialize into an adversarial relationship with the other client. If, based on the facts present in the litigation, you believe the risk of an actual conflict and likely prejudice to the client is very low, the representation of both the original client and the additional client would not be a violation of Rule 1.7 ***provided*** each client understands and consents after consultation.

Best practices require the attorney to obtain consent in writing following correspondence documenting the implications of the multiple representations and the risks involved. Chief among the risks that should be detailed is the additional cost inherent the firm's withdrawal should a conflict occur.

## Ethics and Social Media

Next, we discuss the intersection between ethics and social media including requested or voluntary commentary on the judiciary. Due to the national breadth of mass tort litigation, lawyers are often called upon to comment on judges and other attorneys.

The Rules of Professional Conduct, Part 7, is titled "Information about Legal Services." Given that the majority of jurisdictions have not adopted the ABA's 2018 amendments to the Model Rules, it is worth noting how the prior version was organized:

- Rule 7.1: a general prohibition on false or misleading communication regarding a lawyer or the lawyer's services;
- Rule 7.2: prohibited a lawyer from giving "anything of value" to a person for recommending the lawyer's services except under certain specified circumstances. The rule also required that any lawyer's advertisement include the "name and office address" of the responsible lawyer;
- Rule 7.3: prohibited in-person solicitation of clients;
- Rule 7.4: regulated use of the term "specialist";
- Rule 7.5: specified requirements for firm names;
- Rule 7.6: prohibited "pay to play" arrangements in which a lawyer makes a political contribution in exchange for employment by the government.

The current version of Part 7 has been reorganized so that similar topics are grouped together. Now, for example, Rule 7.1 still covers misleading communication, but the information from Rule 7.5—also about potentially misleading information (firm names)—is included in the comments to the Rule. Rule 7.2 still covers specific technical requirements for ads, but the content of Rule 7.4 (requirements for use of the term "specialist") is now in the Rule as a comment. Rule 7.2 also allows nominal gifts to thank a person who has recommended the lawyer's services. Rule 7.3 still covers solicitation, but with additional commentary to help define the meaning of "live contact" solicitation in the digital world. Rule 7.6 was not included with the 2018 revisions.

### Social Media Considered Advertising

If you have a ***professional presence on social media***, and it is available to the public, it will be considered as advertising and thus will need to comply with Part 7 of the Model Rules. Your communications ***cannot be false or misleading.*** All communications must contain your name and contact information. Social media postings are written communications, albeit communications with potentially infinite reach and duration. For all content that you post online, carefully consider whether you are confident that it would not violate any ethics rules if placed on a billboard or other print media. For purposes of this discussion, the term "social media" includes postings on your website and lawyer review sites as well as Facebook, LinkedIn, and Twitter.

Many lawyers use LinkedIn as a networking and marketing tool. Additionally, other lawyer rating sites allow the lawyer to post information and also allow endorsements. Obviously, any content that you post must be truthful. A ***problem arises*** if others, such as colleagues, friends, or clients ***post endorsements that are exaggerated*** or make claims that you could not make for yourself. For example, if someone says that you have vast experience or expertise in an area of law that you do not in fact have, you need to take all actions permitted by the site to remove the statement or add a corrective statement.

The space limitations of Twitter will not allow for the information that is generally required to be provided in lawyer advertisements. However, it can be used as a marketing tool for posts in which you show that you are knowledgeable and following

legal developments, such as links to news items or important legal developments.

### Confidentiality and Social Media

Breach of confidentiality is a recurrent, central problem for lawyers using social media. Model Rule 1.6(a) states the lawyer's affirmative obligation: "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)."

The language of the rule – "information relating to the representation of a client" extends the confidentiality obligation beyond information protected by the evidentiary attorney-client privilege, and beyond information the client has specifically identified as confidential. Information may be confidential under Rule 1.6 even though it might also be lawfully obtained by others, outside of the attorney-client relationship or discovery rules. ***Your default presumption should be that if you got the information as part of representing a client, it is confidential regardless of source.*** Only then should you consider whether one of the rule's exceptions applies.

Second, information may be confidential because of the potential *effect* of disclosure, rather than the source of the information. If disclosure would be embarrassing or likely detrimental to the client, it is protected. Thus, though perhaps initially counterintuitive, the mere fact that information may be in the public domain in some fashion does not automatically mean it can be disclosed without client consent if a lawyer has learned of it in the course of representing the client.

ABA Formal Opinion 480 (March 6, 2018), *Confidentiality Obligations for Lawyer Blogging and Other Public Commentary*, reinforces the importance of not revealing information relating to a representation in a blog post.

### Publicizing Successful Results

Whether on a lawyer's website, a social media post, a blog, a discussion group, a comments thread or any of the myriad opportunities for on-line promotion, letting peers and potential clients know about a lawyer's successes has obvious value for building reputations, attracting new clients and increasing revenue. It is easy to think, why would a client object to publicizing a great outcome? It means they "won" or at least attained their goal, and if it was litigation, it is highly likely to be a matter of public record already.

One must remember that (1) confidentiality includes an "effects test," and (2) the audiences of public records of court proceedings are highly likely to be not only different than, but often infinitesimal in number compared to the potential recipients of the same information posted on the Internet. The truth of that result, and its existence in the "public record," perhaps even in the news media, does not diminish the fact that for most such clients it would be both embarrassing and highly likely to be detrimental in any number of ways. Such disclosure without the client's informed consent would almost certainly violate the ethical obligation imposed by Rule 1.6.

Breach of confidentiality is a recurrent, central problem for lawyers using social media.

Many situations will be gray and not black and white. The simple, foolproof (if there is such a thing) solution is explicit in Rule 1.6(a) itself: disclosure is prohibited "unless the client gives informed consent." Informed consent is a defined term which "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e). ***Always obtain informed consent before posting any information about a client's case or matter anywhere.***

What the client needs to know in order to make an informed decision will vary according to what is to be posted and where. It is impossible to list all possible considerations, but here are a few examples: Will the post be in the form of a client testimonial, or just be about the client's case? Will the client be named or remain anonymous (beware the possibility of revealing identity from the facts)? Will it appear on the lawyer's website, intended to be seen only by those who choose to explore the site? (If so, will it appear prominently on the home page? Under a testimonials tab? As part of a slide show?) Or will the post be actively disseminated via Facebook, blog, tweet, discussion group or other "push" platform? In the latter case, who is the potential audience? You must think about possible unintended consequences.

All such questions interact closely with what information, exactly, a client is willing after informed consent to disclose. You will have greater protection if the client consents to the verbatim content and exact location of the posting, and to the details and context of the posting within that location to the extent it is reasonably practicable. And while Rule 1.6 does not require it, written consent signed by the client is good prophylactic practice.

### ABA Model Rule 8.2

#### *Criticism of the Tribunal*

The First Amendment does not protect lawyers who criticize the courts or judiciary from disciplinary proceedings. The rules of professional ethics prohibiting attorneys from making false statements about judges are designed to preserve public confidence in the fairness and impartiality of the justice system. 7 Am. Jur. 2d Attorneys at Law § 51 (2021) (*citing Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012).

A court may discipline, suspend, or disbar an attorney for comment on and criticism of the judicial acts of a court or its members when the statements are false or made in reckless disregard of the truth. A lawyer may not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, or public legal officer. Accusing a judge of not acting impartially can be viewed as violating the prohibition against knowingly making a false accusation against a judge. *Akron Bar Assn. v. Holder,* 828 N.E.2d 621,

627 (2005) (accusing the judge of not acting impartially constituted a false accusation resulting in a misconduct violation). The rule prohibiting an attorney from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, applies to statements in pleadings, in open court and in letters. *Lawyer Disciplinary Bd. v. Hall*, at 298, 306, 765 S.E.2d 187, 196 (2014) (accusing Black administrative law judge of racial bias and impartiality found actionable and prejudicial to the administration of justice.)

An attorney's conduct in making statements on social media concerning the integrity of the judge violated the professional rule that prohibited a lawyer from knowingly or recklessly making false statements concerning the qualifications or integrity of a judicial officer. *Erie-Huron County Bar Ass'n v. Bailey and Bailey,* 161 N.E.3d 590 (2020), reinstatement granted (2021-Ohio-980, 2021 WL 1164463 (Ohio 2021) (posting on Facebook comments that the judge is self-righteous, condescending, and rude was inappropriate).

Best practices to maintain the integrity of the bench means lawyers should refrain from making any comments about judges and legal officers.