

The Corner Office—Professionalism

A Call for a Professionalism Statement that Includes the Proper Use of Technology

As lawyers, we are required to operate under a set of ethics rules based upon long-standing principles of acceptable behavior. These rules are highly regimented and not easily or routinely modified. However, we live in a world of rapidly developing technologies—technologies that we are expected to both understand and fully utilize to the extent possible for the benefit of our clients. Yet neither the Oregon State Bar Statement of Professionalism,ⁱ nor the Multnomah Bar Association Commitment to Professionalismⁱⁱ speak to the use of technology, let alone the civility that should be employed in its use. That should be remedied.

The present uncertainty

“All the rules that the legal profession relies on to instruct lawyer behavior were forged before the emergence of twenty-first century technology.”ⁱⁱⁱ For this reason, it can feel as if the ethics rules fail to keep pace with the real-world requirements of being a lawyer. This is particularly true where these swiftly evolving technologies impact or influence civility in the profession. For example, whereas a dispute between opposing counsel may have been previously hashed out in a telephone call or an exchange of letters, the digital era has facilitated the needless publication and escalation of such disagreements via online platforms. It is as if the cyber medium emboldens people in a way that direct contact, or even direct written correspondence, did not. Add to that the fact that social media and the inundation of extremist viewpoints has desensitized people to consideration of others and their positions, as well as made them comfortable with the disclosure of formerly private information, which is now a routine and voluntary practice. These issues are not addressed under the ethics rules.

RPC 1.1 mandates that a lawyer provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. ABA Model Rule 1.1, cmt. [8] explains 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.” Even so, the term “technology” is not found in the Oregon Rules of Professional Conduct. In addition, only few Oregon State Bar ethics opinions even deal with the proper use of technology in any meaningful way^{iv} and, although the ABA has recently provided a bit more guidance,^v notably, none of the opinions from either source talk about professionalism or professional courtesies. OSB Formal Ethics Op. 2022-201

(Responding to Negative Online Comments and Reviews) followed in the wake of Oregon Supreme Court guidance on the issue,^{vi} and, although useful as far as it goes, the opinion centers on protections to clients and duties with respect to client information, and does not extend to professionalism or obligations attorneys should have toward one another (*e.g.*, posting a review on another lawyer's website, Tweeting regarding another lawyer, or referencing their own or another lawyer's positive or negative reviews in advertising).

Similarly, even though published professionalism standards (although aspirational) can fill the gaps in the ethics rules or provide other useful guidance, as noted, neither of the predominant professionalism creeds in Oregon have taken on the appropriate use of technology. The Bar and MBA should fix this.

Concerns to be addressed

It is critical that there be a resource for attorneys to reference and cite with respect to online decorum and technological invectives, as well as technological competence. Although not an exhaustive list, the following issues should be considered for inclusion:

- Online comments and interactions can easily be misread, misunderstood, or taken out of context. Real-time exchanges and the seemingly back-and-forth conversational nature of many emails and other digital exchanges allows for their authors to be brusque and improvident. How rude is too rude? What subjects should be avoided or are off limits?
- Likewise, improvements in AI and research platforms have both facilitated access to more and more information and called into question its reliability. Lawyers must be encouraged to utilize these tools, but with appropriate factual vetting and research to verify their sources. But what does that entail?
- The technical competence required by RPC 1.1, as well as our duty of to protect client information under RPC 1.6,^{vii} has long required recognizing the risks of online social media and electronic communications, in addition to electronic storage and cyber security, but what are the "reasonable efforts" required by RPC 1.6(c)? How is a lawyer to know?
- In this same vein, the Covid-19 pandemic ushered in a "new normal" reliance on Zoom and other videoconferencing platforms, both in the provision of legal services and participation in judicial appearances. Indeed many lawyers have transitioned to a fully virtual practice, yet neither the Oregon State Bar nor the ABA offer any ethics opinion on either videoconferencing or virtual practice.

How much are lawyers required to do to ensure the security of equipment and platforms? How should they behave when participating on them?

- Lawyers deserve to have personal opinions and have a First Amendment right to engage in the discourse options available on social media, blogs, podcasts, and other digital media outlets. That said, does it create a conflict of interest for a lawyer to post or otherwise assert a personal position through these mediums contrary to the position they are advocating for on behalf of a client? Does it matter whether we are speaking as a lawyer (or even identify as a lawyer)? How far are we allowed to go in criticizing opposing counsel, a judge, or the legal process?

Conclusion

There a number of questions about the competent and professional use of technology by lawyers that the ethics opinions and Rules of Professional Conduct have yet to address. While waiting for these authorities to catch up, the Oregon State Bar and the Multnomah Bar Association have the ability and opportunity to provide needed guidance on these topics through their published professionalism statements—to help lawyers navigate the challenges of evolving technologies in appropriate, ethical, and professional ways.

ⁱ https://www.osbar.org/_docs/rulesregs/professionalism.pdf

ⁱⁱ <https://assets.mbabar.org/Pro%20Bono/profcertorder.pdf>

ⁱⁱⁱ Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 264 (2011).

^{iv} See OSB Formal Ethics Op. 2022-201 (Responding to Negative Online Comments and Reviews); OSB Formal Ethics Op. 2011-187 (rev. 2015) (Competency: Disclosure of Metadata); OSB Formal Ethics Op. 2011-188 (rev. 2015) (Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials); OSB Formal Ethics Op. 2013-189 (Accessing Information about Third Parties through a Social Networking Website).

^v See ABA Formal Op. 06-442 (Metadata); ABA Formal Op. 466 (Permissible Information gathering about Jurors Using Social Media); ABA Formal Op. 477R (Securing Communication of Protected Client Information); ABA Formal Op. 496 (Lawyer responding to on-line criticism).

^{vi} *In re Conry*, 368 Or 349, 491 P3d 42 (2021).

^{vii} RPC 1.6(a) prohibits a lawyer from revealing “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).” RPC 1.6(c) requires that a lawyer “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”