

**SOCIAL MEDIA AND TECHNOLOGY FOR LAWYERS AND JUDGES**

**Why Is Social Media and Technology A Professionalism Issue?**

by

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## **Introduction**

Beginning in 1990, the Georgia Supreme Court required all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder]. The Chief Justice's Commission on Professionalism ("Commission") administers the Professional Continuing Legal Education (CLE) requirement for lawyers and judges.<sup>1</sup> Professionalism CLE is distinct from and in addition to the required ethics CLE. The general goal of the Professionalism CLE requirement is to create a forum in which lawyers, judges and legal educators can explore the meaning and aspirations of professionalism in contemporary legal practice and reflect upon the fundamental values of lawyer professionalism.

Former Chief Justice Harold Clarke of the Georgia Supreme Court perhaps offered the best distinction between ethics and professionalism:

***". . . the idea [is] that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers."***

In other words, Georgia's Rules of Professional Conduct establish minimum standards of consensus impropriety; they do not, however, define the entire criteria for professionalism. People can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law or the code. At other times, there are no laws or ethical rules to prohibit certain conduct.

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<sup>1</sup> The Chief Justice's Commission on Professionalism, the first body of its kind in the nation, was created in 1989 by the Supreme Court of Georgia with the primary charge to enhance professionalism among Georgia's lawyers. In carrying out its charge, the Commission provides ongoing attention and assistance to the task of assuring that the practice of law remains a high calling, enlisted in the service of client and public good. Composed of representatives of the organized bar, practicing bar, judiciary, law schools and the public, the Commission serves as the institutional framework for sustaining an environment that fosters professionalism in the legal community.

Karl N. Llewellyn, jurisprudential scholar who taught at Yale, Columbia, and the University of Chicago Law Schools, often cautioned his students:

The lawyer [and judge] is a [person] of many conflicts. More than anyone else in our society, he [or she] must contend with competing claims on his [or her] time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations – to your conscience, your God, your family, your partners, your country, and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.<sup>2</sup>

As lawyers and judges, we are called to develop the capacity for critical and reflective judgment so that we can handle professional conflicts. The Commission also believes that when lawyers and judges engage in conversations about professionalism that their conduct will often exceed the minimum ethical standards and will comport with professionalism values of exceptional competence, character, civility and commitment to the rule of law and the public good. As you contemplate the challenges raised during the Social Media and Technology CLE, the Commission hopes that the professionalism discussion will have an affirmative dimension – with a focus on conduct that preserves and strengthens the dignity, honor, and integrity of the legal system.

In an effort to provide concrete examples of the distinction between ethical and professionalism issues, I offer two hypotheticals that have historically generated spirited discussion among lawyers and judges for your consideration.

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<sup>2</sup> Mary Ann Glendon, *A Nation Under Lawyers* 17 (1994)

## **I. The Lawyer and the Errant E-mail:**

*You receive an e-mail from the plaintiff's attorney. You are rushing to a meeting and without looking at it, you ask your assistant to forward it to your client. Unbeknownst to you, the plaintiff's attorney emailed you the wrong attachment and sent you a memo assessing the plaintiff's case and the attorney's strategy against your client.<sup>3</sup>*

Rule 4.4(b) of the Georgia Rules of Professional Conduct states: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

Comment [2] states in part: "Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. . . . Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules . . . ."

Ethics tells us what we are required to do "at a minimum." Professionalism contemplates what should we do. Generally, during discussions about this hypothetical lawyers contemplate the conflict between a lawyer's duties to his client, a lawyer's obligation to respect the rights of third persons (including opposing counsel), and a lawyer's personal values. To assist lawyers and judges in thinking about professionalism issues, the Supreme Court of Georgia adopted the *Lawyers Creed and Aspirational Statement on Professionalism* in 1990.<sup>4</sup> Relevant portions of the Lawyers Creed include:

**To my clients**, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

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<sup>3</sup> This hypothetical is contained in the materials for some of the Law School Orientations offered each year for first year law students at Georgia's five law schools.

<sup>4</sup> See Appendix A. You can also find the *Lawyer's Creed* and the *Aspirational Statement on Professionalism* online at State Bar of Georgia, *Lawyer's Creed and Aspirational Statement on Professionalism*, <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> (last visited May 17, 2018)

**To the opposing parties and their counsel**, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

**To my colleagues in the practice of law**, I offer concern for your welfare. I will strive to make our association a professional friendship.

Some of the relevant portions of the *Aspirational Statement on Professionalism*

include:

**As to clients**, I will aspire:

(b) To fully informed client decision-making.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

**As to opposing parties and their counsel**, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties.

**As to my colleagues in the practice of law**, I will aspire:

(a) To recognize and to develop our interdependence; and,

(c) To assist my colleagues become better people in the practice of law

Respected lawyers of integrity often disagree about what a lawyer should do next after notifying the sender of the error. Reflect and think about the values that are implicated for you in the above hypothetical. How do you prioritize those values? Who should make the final decision about what happens next – the lawyer or the client? After reflecting on those values, what is your judgment of what is the correct professionalism response?

## II. **The Tweeting Judge**

*Judge Roberta Hefner is a probate court judge, an Army veteran and an avid football fan. The recent controversy regarding players who kneel during the*

*national anthem before NFL football games has upset her. The judge intends to send the following tweet but asks your advice first:*

***If a player wants the privilege of making millions of dollars in the NFL he should not be allowed to disrespect our Flag and should stand for the National Anthem. If not, find something else to do!***<sup>5</sup>

Canon 4 of Georgia's Code of Judicial Conduct states: "Judges shall refrain from political activity inappropriate to their judicial office." This Canon notwithstanding, judges do have First Amendment rights. In fact, Comment 1 to Rule 4.2 states: "This Canon does not prohibit a judge or judicial candidate from publicly stating his or her personal views on disputed issues, *see Republican Party v. White*, 536 U. S. 765 (122 S.Ct 2528, 153 LE2d 694) (2002)." In the *White* case, the U.S. Supreme Court held that a Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment. So, what does that mean for a judge who wants to comment on "political" issues in the public domain, especially when those issues will not come before the judge in his or her judicial capacity? It appears that ethically the judge may do so, but what are the considerations for a judge when thinking about professionalism? Although Georgia has not yet developed a creed or aspirational statements specifically for judges, tenets of the *Aspirational Statement on Professionalism* a judge may want to consider include:

**As to the public and our systems of justice**, I will aspire:

(b) To consider the effect of my conduct on the image of our systems of justice;

(e) To improve our laws and legal system by, for example [by]:

(2) Assisting in the education of the public concerning our laws and legal system;

(3) Commenting publicly upon our laws; and,

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<sup>5</sup> Thank you to Professor Patrick Longan, William Augustus Bootle Chair in Professionalism and Ethics at Mercer University School of Law, for creating this hypothetical for the 39<sup>th</sup> Annual National Association of Women Judges Conference and for allowing the Commission to use it for this program.

(4) Using other appropriate methods of effecting positive change in our laws and legal system.

The Supreme Court of Ohio and its Commission on Professionalism noted in its *Judicial Professionalism Do's and Don'ts*: "As the guardians of our legal system, judges are expected to establish and maintain the highest level of professionalism. . . . The words and actions of judges also shape the public's perception of the justice system."<sup>6</sup>

Based on professionalism values and tenets, what is your advice for the judge and why?

### **Conclusion**

Learning ethics and professionalism involves at least four skills and capacities:

(1) the ability to recognize ethical and professionalism dilemmas;

(2) the ability to form sound judgments;

(3) the ability to prioritize values; and

(4) the ability to implement judgments - which requires cultivating personal and interpersonal skills and habits - communication, honesty, courage, prudence.

Not surprisingly, Professionalism CLE discussions rarely bring forth a consensus, for individuals give differing priorities to values. However, the Commission hopes that these programs will continue to give the participants an awareness of the issues and an exposure to a framework for analysis of similar issues when they occur in the future.

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<sup>6</sup> Supreme Court of Ohio & the Ohio Judicial System, Professionalism Do's & Don'ts: Judicial Professionalism, <https://www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf> (Last visited May 17, 2018).