Editor's Notes

by Norman H. Roos

For those of us who recently endured a particularly nasty cold snap in the Northeast, the 2016 Board of Regents Meeting in Naples, Florida can't come soon enough. This edition of *The Abstract* contains news of the upcoming Board of Regents Meeting and an extensive array of informative articles and reports.

In his article, "Statutory Requirements for Payoff Letters and Satisfactions in Wisconsin," Dan Gentges provides an overview of a recent Wisconsin statute that requires mortgage holders to provide payoff statements and mortgage releases and imposes penalties for failure to do so in accordance with the statute. What distinguishes this statute from those in many other states is that this Wisconsin law applies to commercial mortgage loans as well as residential mortgages.

Jeff Lem and Megan Lem (Jeff's daughter and articling student at Osler, Hoskin & Harcourt LLP) once again provide an interesting and typically colorful article from north-of-the-border. "Canada, the Great White North: Land of Beavers, Blue Jays, and Now, Tort Tourism" discusses the derivation of the term "Tort Tourism" and explains why American businesses with subsidiaries or assets in Canada will want to know what this newly-coined phrase means for them.

In their article "Ethics and Use of Social Media," Don Shindler and his colleagues John L. Hines Jr. and Jillian B. Steinberg Sommers provide helpful tips on what to do when you find yourself trying to balance the need to embrace social media with need to comply with the Model Rules of Professional Conduct. In that case, the authors suggest "Remember the 3 D's."

Jim Wine and his colleagues Neal A. Coleman and Rachel N. Parker provide the first of two "Survey" articles that appear in this issue of *The Abstract*. "Adjusting to the 2016 ALTA/NSPS Survey Standards" provides a nice summary of a few of the key changes made to the 2016 Standards.

Our Corporate Counsel Committee has also gathered some timely articles: "Foreclosing on Time Barred Debt in Washington State" (by Laura Coughlin), "A Series of Unresolved Issues Surrounding Series LLCs" (by Justin C. Meyer), and "Are Aerial Surveys a Replacement for Traditional Surveys?" (by Byron T. Wilems).

In addition to these articles, this issue of *The Abstract* contains Don Shindler's inaugural President's Column, which reviews some of the major events and developments of the past year as well as Don's ambitious plans for ACMA's continued growth and success.

This issue also features the first Executive Director's Column from Leslie Edsall, our new executive director. As is apparent from her column, Leslie has hit the ground running and is looking forward to her new role and the upcoming opportunity to meet those of us who will be attending the Board of Regents Meeting in Naples.

Thanks to Dan, Jim, Don, Carol, Justin and Byron for their contributions to this issue of *The Abstract*. As always, I invite those who have not submitted an article for publication in *The Abstract* to do so. Meanwhile, I look forward to seeing you in in Naples. ◆

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Ethics and Use of Social Media

By Donald A. Shindler, John L. Hines Jr., and Jillian B. Steinberg Sommers

Like many areas in our modern society, existing laws and the Rules of Professional Conduct, in the forms as adopted by each state, and their application to the practice of law, all lag in the use of technology. Nonetheless, attorneys must conform to the Rules applicable in each jurisdiction in which counsel practices, recognizing that differences in the wording of a particular Rule or Rules as adopted by the different jurisdictions may exist.

Reflected below is a listing of certain Model Rules that are or may be interpreted to affect an attorney's use of social media. Since the "modern" Rules were first issued in 1983, the practice of law has changed greatly, but applying of the various Rules set forth below still imposes obligations upon counsel.

The intersection and application of these obligations with the use of social media should be monitored carefully by attorneys. Before "clicking, sending, replying, posting, chatting, blogging, endorsing, liking, texting, replying" and otherwise using social media, attorneys need to consider the potential impact of such social commentary and activity on a client's information, position, business, litigation, transaction, and reputation, as well as the attorney's duties to the client, the attorney's firm, the bar, and the attorney himself or herself. Don't think twice—think thrice!

Today's emerging technologies and digital media are often adopted and adapted rapidly, and the application of the Rules to the ever-expanding array of communications functionality is situational, fact-specific, and varying. These factors can make it a challenge for lawyers and law firms to use social media and, as the technology continues to evolve, to reconcile its use with the Rules. Some may argue that the best result is to ignore social media and not use it at all. Others assert that greater adoption of social media as part of the fabric of the lives, business activities, and communication practices of the population in general, and clients and attorneys in particular, necessitates making peace with the social media juggernaut and utilizing it to the extent one is comfortable and clients so desire. The reality is that abstinence is probably no longer an option. In fact, competently handling a matter may require the use of social media, but such use always should be tempered with reasonable judgment, limits, and restrictions.

First, attorneys need to know and understand what is undertaken and used. For example, Competence and Confidentiality obligations are mandated under the Rules. The first imposes an obligation to understand the technology used; the second hopefully follows from the first: safe, responsible, and confidential use of client information.

Consider "tagging." Facebook, social media's biggest player, allows attorneys to "tag," or make public, photos or locations of other Facebook users or themselves. An attorney who simply reveals his or her own location at a county courthouse along with a client could nonetheless run afoul of client confidentiality requirements by disclosing the status of his representation of that client and the client's whereabouts. Misuse or inadvertent use or simply failing to check the "default" settings reflects on the duty of competence.

Second, counsel must consider the position espoused or taken, as legal and business conflicts can arise. On Twitter, for example, a social media platform that allows for its users to "tweet" messages to its followers using 140 characters or less, and where nine out of 10 business executives have their own accounts, an attorney must be careful not to tweet or re-tweet messages conveying legal, political, or commercial views, opinions, or positions that might run counter to those of their clients. The mere use of a "hashtag" could convey support for

any number of legal positions, social movements, political parties, or corporate competitors.

Third, attorneys need to establish clearly that they are not giving legal advice (or appearing to be giving legal advice), soliciting clients (directly or indirectly), or otherwise violating the Rules. Attorneys can often pick up an "accidental client" by blogging online about any type of legal updates or news when, unbeknownst to the author, a reader thereafter relies on the information as legal "advice." Attorneys who blog must be aware of the need to clearly disclaim any use of his or her blog as legal advice, and any perception that an attorney-client relationship has been created, to avoid reader confusion and possible trouble down the road.

In addition, attorneys must recognize that obtaining business from parties through the Internet through direct one-on-one contact may constitute improper solicitation of a client, depending on the media used and the nature of the communication. Such contact that is "in-person, live telephone, or real-time electronic contact" is likely impermissible (unless, for example, a lawyer-client or other close relationship already exists). Where the communication does not fall into this "live/real-time" category, the rules still impose advertisement designation requirements (see Model Rule 7), which should be reviewed closely and carefully. Every time an attorney contacts a potential client through social media, he or she must consider whether the recipient (or a competitor) might consider that contact to be a solicitation for business.

Further, keep in mind that the Law of Unintended Consequences easily arises where the Rules are not expressly delineated and thus interpreted. Those interpretations could run counter to the attorney's interests and positions.

Like most technological areas, the application of the Rules of Professional Conduct to social media use by attorneys exists in a fluid and rapidly changing landscape. Usage must be considered carefully in a practice context. As a working rule of thumb, controlling principle, or whatever guiding mantra you follow when using social media in the practice of law, please remember the 3 "Ds": When in DOUBT, as a first step: DON'T—at least not without reflection and consultation with others—and if you do, consider DISCLOSURE.

The following listing reflects some of the Model Rules that can be and often are applied to social media in terms of governance of attorney behavior. Check your particular jurisdiction for additions, specific language tweaks, changes, and edits that can apply to social media situations.

ABA Model Rules of Professional Conduct:

- Rule 1.1: Competence
- Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer
- Rule 1.3: Diligence
- Rule 1.4: Communications
- Rule 1.6: Confidentiality of Information
- Rule 1.7: Conflict of Interest: Current Clients
- Rule 1.8: Current Clients: Specific Rules
- Rule 1.9 Duties To Former Clients
- Rule 2.1: Advisor
- Rule 3.3: Candor Toward the Tribunal
- Rule 3.6: Trial Publicity
- Rule 4.3: Dealing with Unrepresented Person
- Rule 4.4: Respect for Rights of Third Persons
- Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer
- Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law
- Rule 7.1: Communication Concerning a Lawyer's Services
- Rule 7.2: Advertising
- Rule 7.3: Direct Contact with Prospective Clients
- Rule 7.4: Communication of Fields of Practice & Specialization
- Rule 8.4: Misconduct ◆

For reference to the ABA's Model Rules of Professional Conduct, see:
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html

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