
DON'T TAKE HEAT FOR THAT TWEET: AVOIDING THE ETHICAL PITFALLS OF SOCIAL MEDIA

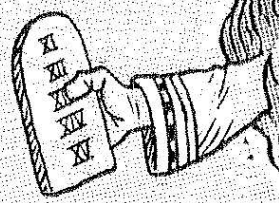
John Browning, Passman & Jones

STATE BAR OF TEXAS 30th Annual Labor and Employment Law
Institute

August 23-24, 2019

San Antonio, Texas

Oh, and here's some
stuff for later about
Internet ethics.



WHY IS IT CRITICAL FOR LAWYERS TO BE MINDFUL OF ETHICAL GUIDELINES WHEN USING SOCIAL MEDIA?

- Reason #1: Social media too pervasive to ignore



- **Over 1 billion unique users each month; 400 hours of video are uploaded to YouTube each minute**



- **Over 2 billion users worldwide**



- **Approximately 1 billion registered users (300 million monthly active users)**



- **Over 800 million users**



- **Over 800 million active users (over 60% log in daily)**

Fun Facts



- 82% of all adult Americans have at least one social networking presence
- Sixteen minutes of every hour spent online is spent on Facebook
- More Facebook profiles (5) are created every second than there are people born (4.5)
- More than a billion tweets are processed every 48 hours (about 6,000 every second)
- Every 60 seconds, there are over 293,000 status updates posted on Facebook, as well as 510,000 comments and 136,000 photos
- 146 million “likes” generated every hour
- 4.2 billion Instagram likes every day

REASON # 2: A NEW STANDARD OF COMPETENCE

- ABA Ethics 20/20 Commission and new Rule 1.1
 - “To 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.**”
- Trend in courts nationwide to hold lawyers to a higher standard regarding technology: a “duty to Google”

**I'M JUST A CAVEMAN. YOUR WORLD
FRIGHTENS & CONFUSES ME!**

**I- I'M CONFOUNDED BY THE MAGIC VOICES
COMING FROM THIS ENCHANTED TALKING BOX!**

- Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) – affirmative duty to research jurors online.
- Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013) – failure to investigate social media recantation of sexual abuse victim held to be inadequate assistance of counsel.

A Cautionary Tale About Tech Incompetence

- The Wells Fargo data breach was caused by an attorney, Angela Turiano, who inadvertently turned over confidential information about thousands of bank clients while defending a defamation case. How? She didn't understand the e-discovery software, leading her to produce documents that she hadn't reviewed for privilege, to produce documents that were not redacted, and to produce data about tens of thousands of bank's wealthiest clients instead of a limited universe.

Be Careful About What You Post, And Especially What You Post During Trial

- 2018 – Lawyers sanctioned after getting \$27.8 million verdict in pharmaceutical products trial in Philadelphia because of posting courtroom photos to Instagram with the hashtag “#killinnazis” as part of alleged “xenophobic strategy” against German-based defendant.

Yes, Employment Lawyers Have Committed Misconduct on Social Media Platforms

- 2018 – New York lawyer in FLSA case claims she missed deadline for certification of a collective action due to family medical emergency in Mexico City.
- Her Instagram account, however, revealed that she was partying in Miami at the time of the alleged “emergency.”
- Result: \$10,000 in sanctions.

Even In-House Counsel Are At Risk...

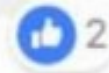
- October 2017 – CBS VP and Senior Counsel Hayley Geftman-Gold fired because of her Facebook comments about the mass shooting in Las Vegas, voicing lack of sympathy for the victims.
 - “If they wouldn’t do anything when children were murdered I have no hope that [Republicans] will ever do the right thing. I’m actually not even sympathetic bc country music fans often are Republican gun toters.”
 - CBS Statement: “Her views as expressed on social media are deeply unacceptable to all of us at CBS. Our hearts go out to the victims in Las Vegas and their families.”



Hayley Geftman-Gold

If they wouldn't do anything when children were murdered I have no hope that the Repugs will ever do the right thing. I'm actually not even sympathetic bc country music fans often are republican gun toters.

54m Like Reply



- November 2016 - Washington D.C. Legal Ethics Committee opinion warned of the dangers of creating “positional conflicts” with your employer or client through statements on social media.

- September 2017: Travis County attorney Robert Ranco tweets that he's be "OK" with Secretary of Education Betsy DeVos being sexually assaulted.
 - Ranco and his law firm part ways shortly after the backlash ignited by these comments.



Rob Ranco

@RancoLaw

I'm not wishing for it... but I'd be ok if
#BetsyDevos was sexually assaulted.

#SexualAssault #TitleIX

9/8/17, 21:21

YES, EVEN APPELLATE LAWYERS HAVE RUN AFOUL OF SOCIAL MEDIA...

- “Naughty, naughty boy”
- “Why is Phil Klein (sic) smiling?
There is nothing to smile about,
douchebag.”
 - Tweets by Sarah Peterson Herr, a research attorney with the Kansas Court of Appeals

Public Statement by Herr

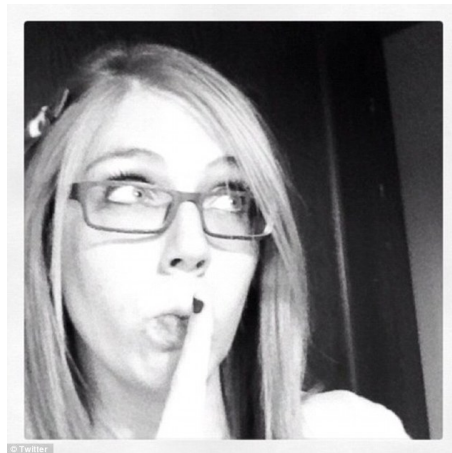
“I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also *communicating with the public* at large, which was not appropriate for someone who works for the court system.”

Statement by Herr (Cont.)

“I apologize that because the comments were made on *Twitter – and thus public* – that they were perceived as a reflection on the Kansas courts.”

Result:

- Fired from Job
- Informal Admonishment (Jan 2014)



Result:

- Fired from Job
- Informal Admonishment (Jan 2014)

DANGER AREAS FOR LAWYERS:

**1) DISREGARDING
CONFIDENTIALITY**

Confidentiality

“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 presentation or the disclosure is permitted by paragraph (b)”

- Rule 1.6(a)

“... proper attire for trial.”



- Facebook post by Public Defender Anya Citron Stern (Fl. 2012)

Result:

- Motion for mistrial – granted
- Lawyer fired

2) UNETHICAL INFORMATION - GATHERING

Ethical Information Gathering

- Don't misrepresent who you are, or act with deception.
 - Ethics opinions about contacting witnesses via Facebook: Philadelphia Bar Association Ethics Committee (March 2009), New York City Bar Association Committee on Professional Ethics (September 2010), New York State Bar Association Committee on Professional Ethics (September 2010), and New Hampshire Bar Association (2012)
 - You can't "friend" a witness under false pretenses

Rule 4.1 "A lawyer shall not knowingly make a false statement of material fact or law to a third person."

Rule 8.4 "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Cases of “False Friending”

- June 2013 – Cleveland assistant prosecutor Aaron Brockler fired for posing on Facebook as fictional “baby mama” of murder defendant in order to persuade two female alibi witnesses not to testify; is later disciplined as well.

Another Case of “False Friending”

- Pennsylvania – Centre County D.A. Stacy Parks Miller suspended over 1 year for creating a fake Facebook profile for “Britney Bella,” to allegedly communicate with and obtain information about defendants.

Don't Communicate With A Represented Party

- Rule 4.2 of the Model Rules of Professional Conduct: “A lawyer shall not communicate with or cause another person to communicate with an individual represented by counsel without the prior consent of that individual’s attorney.”
- May 2011: San Diego County Bar Association Legal Ethics Committee Opinion
- John Robertelli/Gabriel Adamo pending ethics case in New Jersey; allegedly directed their paralegal to “friend” young male plaintiff in personal injury case, even though he was represented by counsel, to gain access to privacy-restricted portion of his Facebook profile.

CAN YOU ADVISE YOUR CLIENT TO “CLEAN UP” HER FACEBOOK PAGE?

- New York County Lawyers Association Ethics Opinion 745 (2013)
- Philadelphia Bar Assoc. Prof'l. Guidance Committee Opinion 2014-5 (2014)
- Pennsylvania Bar Assoc. Opinion 2014-300 (2014)
- North Carolina Formal Ethics Opinion 2014-5 (2014)
- Florida Bar Prof'l. Ethics Committee Proposed Advisory Opinion 14-1 (2015)
- Washington, D.C. Prof'l. Ethics Opinion (November 2016)

- All ethics opinions looking at this issue have said that it is ethically permissible to provide advice to clients on what privacy settings to implement on social media profiles, as well to counsel them on the content they post and the potential ramifications of same.
- All say that it is ethically permissible to advise clients to remove or take down social media content, so long as no spoliation of evidence occurs and all evidence preservation obligations are adhered to.

The Dangers of Not Knowing What Your Client is Doing on Social Media

- Gulliver Schools, Inc. v. Snay, (Fla. Ct. of App., 2014)
 - \$80,000 settlement torpedoed by Plaintiff's daughter's "Suck it" Facebook post, which violated release's confidentiality provision.

- 50 Cent ordered by bankruptcy court judge to explain why he's posting photos like this on Instagram:





© Instagram



3) SPOILIATION OF EVIDENCE

- Rule 3.1 – A lawyer may not unlawfully alter or destroy evidence and cannot direct or assist others in doing so.
- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Virginia 2013)
 - wrongful death case; surviving husband told to “clean up” his Facebook page, and then answer sworn interrogatories that he didn’t have a Facebook account;
 - \$722,000 in sanctions;
 - Plaintiff’s counsel resigns from the practice of law, and in June 2013 has his license suspended for five years by the Virginia Bar.

**4) CAN YOU RESEARCH JURORS
ONLINE?**

Ethical Conduct Involving Jurors

- Ethics opinions say it's o.k. to research prospective jurors using social media (New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 743, May 2011, and Oregon Bar Association Ethics Opinion, 2013).
- However, all stress using caution, so as not to inadvertently communicate with juror.

ABA Formal Opinion 466

(April 2014)

- Okay to review a juror's internet presence as long as no contact is initiated;
- “The fact that a juror or a potential juror may become aware that a lawyer is reviewing his internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5 (b).”
- Followed by subsequent opinions in Pennsylvania, West Virginia, Colorado, and D.C.

Travis County, Texas (2013)

- Assistant D.A. Steve Brand “Facebooks the jury” during voir dire for robbery trial of Darius Lovings. He strikes an African-American woman from the panel because of NAACP references on her Facebook page. A Batson challenge is made, and Brand loses.
 - *Brand is then fired by D.A. Lemberg for “racially insensitive remarks.”*

While a growing number of courts have adopted specific rules for researching jurors (see, for example, Judge Gilstrap's recent standing order in the E.D. of Texas), some judges oppose the practice.

- U.S. District Judge Alsup's orders in Oracle v. Google (2016).

And then, there are lapses in professionalism...

September 2015 – Courtroom “victory selfies?”

- Wisconsin lawyer Anthony Cotton snaps “victory selfie” with acquitted murder client in the courtroom, then posts it on Facebook.
 - Judge didn’t “like” it; orders Cotton to return to court to explain himself.



Sunday, May 11, 2014

Fort Wayne Attorney Arrested For Threatening To "Anal Rape" Client's Ex-Husband



A Fort Wayne attorney, James Hanson, faces a [felony charge of intimidation](#) after sending a Facebook message threatening the ex-husband of his client. Hanson represented Nachole Mevis in her divorce and more recently was representing her in a misdemeanor domestic battery charge her ex-husband, Chad Vice, filed against her. Hanson threatened to "anal rape" Vice so hard that his "teeth come lose" after Mevis' arrest. In 2012, Hanson ran unsuccessfully against State Rep. Bob Morris (R) in District 83 as a [Libertarian candidate](#). Here's the text of the message Hanson sent to Vice using

his Facebook account:

You pissed off the wrong attorney. You want to beat up women and then play games with the legal system... well then you will get exactly what you deserve. After I get Nachole out of jail. I'm going to gather all the relevant evidence and then I'm going to anal rape you so hard your teeth come loose. I tried working with you with respect. Now I'm going to treat you like the pond scum you are. Watch your ass you little (expletive). I've got you in my sights now."

Zealous advocacy, or felony intimidation?

- Indiana attorney sends client's ex-husband a profanity laced Facebook post, in which he says "I'm going to gather all the relevant evidence and then I'm going to anal rape you so hard your teeth come loose...I've got you in my sights now."
- Lawyer is later charged with felony intimidation, and received suspension of his law license.

- Kansas, December 2014: Kansas Supreme Court imposes 6 month suspension on lawyer for “egregious,” “over the top” messages on Facebook to an unrepresented unwed mother while representing the baby’s biological father in an adoption proceeding. Court held that lawyer’s messages, trying to make the mother feel guilty about consenting to giving the child up, constituted violations of Rule 8.4(d) (conduct prejudicial to the justice system) and Rule 8.4(g) (conduct reflecting adversely on fitness to practice)

- In Re Gamble, 2014 BL 342439

- July 2015: Joyce McCool, a Louisiana lawyer who used Twitter and other social media to publish “misleading and inflammatory” statements about judges and to promote an online petition about child custody cases that contained sealed information about those cases, gets disbarred for her “social media blitz.”

POSTING AND PROFESSIONALISM

- Roxanne Conlin's pretrial Facebook posts questioning whether her client could get justice results in trial being postponed due to concerns over tainting the jury pool (Iowa 2015)
- Defense attorney Mark Griffith's Facebook prayers met with gag orders from Ellis County judges (2016)

July 2015 – Pittsburgh –area assistant district attorney Julie Jones poses for photo toting a shotgun, along with police officer holding assault rifle, both of which were evidence in a case they worked on together. The photo is posted to Facebook with the caption “You should take the plea.”

- The D.A. is not amused, says Jones’ conduct is “contrary to office protocol with respect to the handling of evidence.”





TWEETS 1,386 FOLLOWING 448 FOLLOWERS 250 LIKES 619 LISTS 2

+ Follow

Trace Schmelz

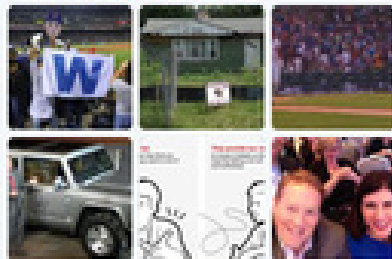
@TraceSchmelz

Trying civil and criminal cases involving financial issues and blogging at btgovtenforcement.com.

btlaw.com/Vincent-P-Trac...

Joined December 2012

157 Photos and videos



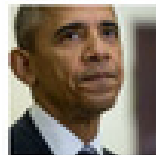
Tweets Tweets & replies Photos & videos

Trace Schmelz Retweeted



Joe Scarborough @JoeNBC · Nov 7

Obama also told the majority of American who supported Keystone by a 2 to 1 margin that they don't matter.



Sean Hackbarth @seanhackbarth

Obama tossed economics and science out the window when he rejected #KeystoneXL: uscham.com/1HxGhuZ

Reply Retweet 53 Like 81



Trace Schmelz @TraceSchmelz · Nov 6

Thx, @jameskoutoulas: "Can't believe #LoveYourLawyerDay is a thing, but xoxo @TraceSchmelz, 1 of maybe 5 [mostly] non-evil ones I know..."

Reply Retweet Like



Trace Schmelz @TraceSchmelz · Nov 5

Why US regulators target spoofing - FT.com on ft.com/1OPHeoH via [GFT](#) -- explanation of what-whv spoofing is at issue.

New to Twitter?

Sign up now to get your own personalized timeline!

Sign up

You may also like · Refresh



John L. Roe @JohnLRoe



Diana Rydbeck @DianaKoutoulas



James Koutoulas @jameskoutoulas



John Needham @johnneedham



Hilary Escajeda @HilaryEscajeda

Trends

#WinTheHolidays

Promoted by Best Buy

Tweeting From the Courtroom

- 10/28/15: Chicago lawyer Vincent Schmeltz is observing a “spoofing” trial in federal court and sends 9 tweets with pictures of evidence – despite the prominent courtroom signs saying “PHOTOGRAPHING, RECORDING OR BROADCASTING IS PROHIBITED,” and F.R.C.P. 53.
- After a show cause hearing, Schmeltz is sanctioned with a \$5,000 fine, ordered to do 50 hours of pro bono work, and ordered to attend a seminar on social media and legal ethics.

- 2016: Just before start of trial in plaintiff p.i. case against Carnival Corp., Florida lawyer posts on Facebook “wildly improper” photos and statements about clients injuries and case; also posts about confidential mediation proceedings.
 - Result: Federal judge refers lawyer to disciplinary committee on first day of trial.

- 2016: Florida prosecutor Kenneth Lewis posts controversial comments after Orlando nightclub mass shooting.
 - says nightclubs are “utter cesspools of debauchery”
 - calls for Orlando to be “leveled” as a “melting pot of 3rd world miscreants and ghetto thugs.”
 - RESULT: Lewis is fired



Kenneth Lewis

May 11 near Orlando, FL

Happy Mothers day to all the crack hoes out there. It' never too late to turn it around, tie your tubes, clean up your life and make difference to someone out there that deserves a better mother.

Like · Share

9 people like this.

- 2016: Nevada – General counsel of Nevada Public Utilities Commission “resigns” one day after media reveals that she tweeted negative comments about parties appearing PUC through a Twitter account under another name.
- 2016: United Kingdom – British lawyer Mark Small sends “gloating,” “insensitive” tweets after court victory for local government in case brought by parents of disabled child.
 - RESULT: “a publicity nightmare” and the loss of half of his client base.

PRACTICE POINTER:

Remember that communications and conduct on social media platforms are just as subject to the Disciplinary Rules as anything you do in more traditional avenues of communication. Bottom Line: If you wouldn't express it in a letter, a phone call, an email, or a pleading, don't post it on Facebook, don't tweet it, don't Instagram it, etc.

Proceed, but proceed with caution

