ETHICAL RISKS IN SOCIAL MEDIA USE

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I. An Introduction to Ethical Concerns with Social Media Use

By now, most lawyers know that practicing in the Digital Age is rife with ethical minefields. With over 2 billion people worldwide on Facebook, a billion tweets processed on Twitter every 48 hours, and over 800 million users Instagramming and Snapchatting away, social media is impossible to ignore. Changes to Model Rule of Professional Conduct 1.1 have ushered in new expectations of digital competence as attorneys are now held to a higher standard of being conversant in the benefits and rights of technology. Ethics opinions across the country are addressing issues like the limits of advising clients about what to "take down" from their Facebook pages, contact with witnesses via social media, and even researching the online profiles of prospective jurors. By forgetting that posts on Facebook or Twitter are just as subject to ethical prohibitions as more traditional forms of communication, lawyers nationwide have found themselves facing disciplinary actions.

Take, for example, the recent case of a Florida personal injury lawyer, David Singer, who was referred to a disciplinary committee over Facebook posts related to a case in which he represented a passenger who had allegedly been permanently injured by walking on the hot deck of a Carnival cruise ship. Carnival's counsel argued that Singer should be disqualified for "inexcusable" conduct in posting photos and "willfully improper" statements on Facebook to warn passengers of "outrageously high temperatures" on the cruise ship deck. Among other statements on Singer's Facebook page right before trial were allegations that Carnival "knew that their fake Teakwood deck heated up" so as "to burn the feet of a passenger who ended up having all 10 toes and parts of both feet amputated," as well as admonishments to a defense medical expert that "Doc, your buddies at Carnival knew of the problem because there were nine previous cases of burns on their deck—many of them kids." Carnival's lawyers also claimed that Singer had violated court orders by allegedly publishing private information about a mediation in the case. Although Singer apologized to the court, federal judge Joan Leonard referred the Facebook conduct to a disciplinary committee.

Lawyers have to understand that civility and professionalism are expected not just in the courtroom, or in traditional avenues of communication, but on social media platforms as well. On many occasions, a lack of civility can put a lawyer at risk of disciplinary action or even criminal charges. In *In re Gamble*, 228 P.3d 576 (Kan. 2014), the Kansas Supreme Court imposed a six-month suspension on a lawyer for his "egregious" and "over the top" messages on Facebook to an unrepresented unwed mother while representing the baby's biological father during an adoption proceeding. The court felt that the lawyer's communications — trying to make the mother feel guilty about consenting to give the child up — violated both Rule 8.4(d) (conduct prejudicial to the justice system) and Rule 8.4(g) (conduct reflecting adversely on the lawyer's fitness to practice).

Beyond civility concerns, lawyers need to be aware of how their use of social media in handling a case can raise ethical issues. This includes such tasks as case investigation, evidence preservation, and even jury selection. A number of jurisdictions around the country have already begun holding attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence, researching prospective jurors and even locating and using

exculpatory evidence in criminal cases. [1] As "digital digging" becomes the norm, it becomes harder for an attorney to say he or she has met the standard of competence when the attorney has ignored social media avenues.

The content from social media sites like Facebook or Twitter and the use of that content have assumed greater importance for bankruptcy practitioners in recent years. Not only can evidence from a debtor's social media profile help refute their claims, but at least one bankruptcy court in Texas has held that a party's act of making his Facebook page private might lend support for arguments regarding the party's intent. In *In re Platt*, No. 11-12367-CAG, 2012 WL 5337197 (Bankr. W.D. Tex. Oct. 29, 2012), Judge Gargotta held that a debt owed by a debtor (who had filed Chapter 7 following the filing of a personal injury suit alleging that the debtor committed assault at an Austin nightclub) was nondischargeable under 11 U.S.C. § 523(a)(6) because the debtor willfully and maliciously injured the plaintiff. When determining whether the requisite intent for such a holding was present, Judge Gargotta considered, among other things, that the debtor made his Facebook account private immediately after the incident.

Other bankruptcy courts have also found that social media use can contribute to a showing of intent, most often in the context of nondischargeability actions under 11 U.S.C. § 523(a).[2] Furthermore, statements on social media have been considered "representations," which, if false, may lead to a finding of nondischargeability pursuant to 11 U.S.C. § 523(a)(2).[3]

While social media posts may have the power to serve as evidence of intent or as representations, they may not violate the automatic stay in 11 U.S.C. § 362. Harassment on social media, alone, that is not "directly aimed at collecting a debt" has been found not to violate the stay.[4]

Additionally, in a case of first impression, the U.S. Bankruptcy Court for the Southern District of Texas held that business social media accounts could be considered property of the bankruptcy estate. *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015). Ruling that the Facebook page and Twitter account at issue provided "valuable access to customers and potential customers," Judge Bohm held that such social media accounts constituted "property interests"

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[1] *See, e.g., Cannedy v Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel); N.H. Bar Ass'n Ethics Comm. Advisory Op. No. 2012-13/05 (June 2013), http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp.

[2] *See, e.g. Heaney v. Lamento (In re Whiz Kids Dev., LLC)*, 576 B.R. 731, 758 (Bankr. D. Mass. 2017) (considering "attacks" on social media platforms when determining whether a party intentionally violated injunctive provisions in a sale order); *Corcoran v. McCabe (In re McCabe)*, 559 B.R. 415, 429 (Bankr. E.D. Pa. 2016), *aff'd,* 588 B.R. 428 (E.D. Pa. 2018) (discussing posts made on a social media site but ultimately finding a lack of intent for purposes of 11 U.S.C. § 523(a)(6) due to the plaintiff's failure to properly authenticate the posts); *SSS Educ., Inc. v. Fisher (In re Fisher)*, No. 16-12991-ABA, 2017 WL 590306, at *8 (Bankr. D.N.J. Jan. 24, 2017) (finding that a (former) student debtor acted maliciously for purposes of 11 U.S.C. § 523(a)(6) due to, among other things, negative social media posts about her college).

[3] *See Almasudi v. Ibrahim (In re Ibrahim)*; 580 B.R. 218 (Banrk. E.D. Tenn. 2017) (representations both in person and via social media were in the nature of "false representation(s)" sufficient for a finding of nondischargeability under section 523(a)(2).

[4] *Thors v. Allen*, No. CV 16-2224 (RMB), 2016 WL 7326076, at *10 (D.N.J. Dec. 16, 2016).

under Texas law such that they must be included within "all legal or equitable interests" comprising a bankruptcy estate under § 541 of the Bankruptcy Code. Judge Bohm distinguished social media accounts of businesses and individuals, noting that requiring an individual to provide services under his or her personal social media account(s) runs afoul of the 13th Amendment's prohibition on involuntary servitude. He noted, however, that an official social media page of a celebrity or public figure may not run into the same issue – the identity of such person is a "persona" that is recognized as a property interest in Texas. Furthermore, employees typically manage such accounts, and thus courts may not run into the same 13th Amendment issue.

Many of the ethical quandaries that social networking presents for lawyers arise out of the manner in which attorneys use (or misuse) these sites. Consider the practice of using social media sites to gather information about a party or witness, for example. While there generally is no ethical prohibition against viewing the publicly available portion of an individual's social networking profile, may an attorney (or someone working for that attorney) try to "friend" someone in order to gain access to the privacy-restricted portions of that profile? Ethics opinions from the Philadelphia Bar Association (March 2009), the New York City Bar (September 2010), the New York State Bar (September 2010), the Oregon Bar (February 2013) the New Hampshire Bar (June 2013), and others have made it clear that the rules of professional conduct against engaging in deceptive conduct or misrepresentations to third parties extend to cyberspace as well.[5] As the New York City Bar ethics opinion emphasizes, with deception being even easier in the virtual world than in person, this is an issue of heightened concern.

Not surprisingly, lawyers have found themselves in ethical hot water for engaging in such "false friending." In June 2013, Cuyahoga County, Ohio, assistant prosecutor Aaron Brockler was fired after he posed as a murder defendant's fictional "baby mama" on Facebook in order to communicate with two female alibi witnesses for the defense and try to persuade them not to testify. County Prosecutor Timothy McGinty had to withdraw his office from the case and hand it over to the Ohio Attorney General, but not before acknowledging that Brockler had "disgraced this office and everyone who works here" by "creating false evidence" and "lying to witnesses."[6] Similarly, even though Rule 4.2 of the Model Rules of Professional Conduct prohibits communicating with a represented party, lawyers have had to be reminded that this applies to *all* forms of communication, including via social networking. Two defense attorneys in New Jersey currently face disciplinary action for allegedly directing their female paralegal to "friend' the young male plaintiff during the course of a personal injury lawsuit in order to gain access to information from his privacy-restricted Facebook profile.[7]

In addition to using social networking sites for gathering information, the ethical duty to preserve information is another concern in the age of Facebook and Twitter. While no lawyer

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[5] Phila. Bar Ass'n Prof'l Guidance Comm. 2009-02; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843; Or. State Bar, Formal Op. 2013-189, N.H. Bar Ass'n Ethics Comm. Advisory Op. No. 2012-13/05 (June 2013).

[6] James F. McCarty, *Cuyahoga County Prosecutor Fired After Posing as an Accused Killer's Girlfriend on Facebook to Try to Get Alibi Witnesses to Change Their Testimony*, Cleveland Plain Dealer, June 6, 2013, http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_prosecutor_fir.html

[7] For a more detailed discussion, see John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 St. Mary's L.J. on Legal Malpractice & Ethics 204 (2013).

wants to discover embarrassing photos or comments on a client's Facebook page that might undermine the case, Rule 3.4 prohibits an attorney from unlawfully altering or destroying evidence or assisting others in doing so. Clearly, a lawyer's ethical duty to preserve electronically stored information encompasses content from social networking sites. Yet this, too, is a lesson that some lawyers learned the hard way. For example, in the Virginia wrongful death case of *Lester v. Allied Concrete* in 2013, the plaintiff's attorney directed his paralegal to instruct the client to delete content from his Facebook page that depicted him as something less than a grieving widower (the Facebook photos in question depicted the young man in the company of young women, wearing a shirt that read "I ♥ Hot Moms").[8] The attorney also had his client sign sworn interrogatories stating he didn't have a Facebook account. After a $10.6 million verdict for the plaintiff, the defense brought a motion for new trial based on spoliation of evidence. The trial judge cut the damages award in half (the Virginia Supreme Court later reinstated the full verdict) and imposed sanctions of $722,000 (most of which were against the plaintiff's counsel) for an "extensive pattern of deceptive and obstructionist conduct." The attorney, a partner in the largest plaintiff's personal injury firm in the state and a past president of the Virginia Trial Lawyers Association, had his license to practice law suspended for five years by the Virginia Bar in June 2013.

Another area in which lawyers' use of social media can raise ethical questions is jury selection. Should lawyers probe the online selves of prospective jurors? The Missouri Supreme Court actually has imposed an affirmative duty on lawyers to conduct certain internet background searches of potential jurors (specifically that juror's litigation history) if the lawyer plans to argue juror bias related to his/her litigation history.[9] Multiple ethics opinions, including an ABA Formal Opinion, have addressed the issue of "Facebooking the jury." In the first of these, the New York County Lawyer's Association Committee on Professional Ethics held in 2011 that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so long as lawyers have no direct or indirect contact with jurors during trial. Subsequent opinions from the New York City Bar Association (2012) and the Oregon Bar (2013) agreed with this, while sounding a cautionary note to lawyers that even accessing a prospective juror's Twitter profile or LinkedIn profile could cause the juror to learn of the lawyer's viewing or attempted viewing. Such contact, according to both ethics committees, "might constitute a prohibited communication even if inadvertent or unintended." In other words, as with other aspect in which lawyers might use social media, ignorance or lack of familiarity will not be an excuse in committing an ethical violation.[10]

In April 2014, the ABA weighed in on this issue with Formal Opinion 466. Like the earlier state ethics opinions, it too concluded that a lawyer is ethically permitted to review a juror's social networking presence, provided that no contact is made with the juror. However, the ABA opinion diverges from its state counterparts in its consideration of whether auto alerts by sites such as

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[8] 736 S.E.2d 699 (Va. 2013).

[9] *See Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010) (en banc); Missouri Supreme Court Rule 69.025.

[10] For a more detailed discussion, *see* John G. Browning, *As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn?*, Jury Expert, Vol. 25, No. 3 (May/June 2013). In fact, this very topic recently was raised in the high profile "Hustle" mortgage fraud case brought against Bank of America over its Countrywide unit. A juror claimed improper contact in violation of the federal judge's pretrial order after a first year associate with one of the defense firms looked at his LinkedIn profile, and the juror received a notification from LinkedIn of the viewing.

LinkedIn or Twitter to the juror/user that her profile is being viewed would constitute impermissible contacts. Formal Opinion 466 doesn't see this as a problem, stating that "[t]he fact that a juror or 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)."[11]

So how can lawyers maintain their civility and avoid ethical issues when engaging on social media? Here are a few handy pointers:

1. Treat social networking platforms no differently than other communications.

   Lawyers run the risk of committing malpractice, violating disciplinary rules, and breaching ethical guidelines just as much when they post or tweet as when they write a letter. And in many ways, the permanence of something posted online and the seemingly unlimited audience it can reach make it vital for attorneys to be even more cautious about their Facebook posts or their tweets than they are with more traditional modes of communication. Make sure you understand the functionality of any social media site you use, including its privacy protocols. Bottom line – if you wouldn't express it in a phone call, a letter, or a pleading filed with the court, don't share it with the world on social media.

2. Remember the "eye of the beholder" before posting.

   Before posting something on social media, resist the immediacy, take a step back, and consider how it might be perceived – by opposing counsel, clients, the judge, and even the public. In July 2015, Pittsburgh-area assistant prosecutor Julie Jones posted a photo on her Facebook page of herself holding a 12-gauge shotgun bearing an evidence tag, alongside a uniformed police officer brandishing an assault rifle (also evidence in the case). The photo bore the caption "You should take the plea." While intended as humorous, the Facebook post didn't amuse Ms. Jones' superiors, who issued a statement calling her conduct "contrary to office protocol with respect to the handling of evidence."

3. Don't gloat.

   Countless football coaches, including Vince Lombardi, reminded their players that if they made it into the endzone, "act like you've been there before." Wisconsin criminal defense attorney Anthony Cotton could have used this advice. Following the September 18, 2015 acquittal of his client Brandon Burnside on homicide charges, Cotton took a "victory selfie" in the courtroom with Burnside and posted it on Facebook. The judge didn't click "like," and Cotton found himself back in court, apologizing and taking down the Facebook post.

[11] American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466 (Apr. 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

II. Instagram and Your Duty of Candor to the Court

"Insta-famous or Insta-Infamous? Ethical Perils for Lawyers on Instagram"

With more than one billion active users, Instagram is behind only Facebook and YouTube in popularity. In a typical day, Instagram users "like" over 4.2 billion posts per day, and share 95 million posts each day. So even if you can't claim as many followers as Selena Gomez (over 148 million as of April 2019) or Beyoncé (more than 126 million), there's still a lot of incentive to use Instagram (a photosharing social networking platform that enables users to take pictures, share them, and edit them with filters).

However, lawyers have to be careful about what they post as well. In January 2018, a Philadelphia judge punished two lawyers who had represented the plaintiff in a December 2017 trial over the medication Xarelto. The two lawyers, Ned McWilliams of Pensacola, Florida and Emily Jeffcott of New Orleans, had posted a number of photographs of the courtroom to Instagram with the hashtag "#killinnazis" (a reference to both the Quentin Tarantino movie "*Inglourious Basterds*" and German-based Bayer, the developer of Xarelto).[12] Post-trial motions by the defense had argued that the plaintiff's counsel's social media posts were intended to create a link in the minds of the jurors between the German pharmaceutical company and Nazi Germany, calling it a "xenophobic" strategy. The court issued a judgment notwithstanding the verdict and set aside the $27.8 million verdict (on grounds unrelated to the social media posts). It also revoked the *pro hac vice* admission of McWilliams, and sanctioned Westcott $2,500 and ordered her to perform 25 hours of community service. The judge noted that the Instagram posts in question and the #killinnazis hashtag (which Westcott's firm subsequently used in promotional materials) were "well beneath the dignity of the legal profession."[13]

And, you definitely don't want to find yourself in the same situation that New York lawyer Lina Franco recently experienced. Franco, a labor and employment solo, was representing a group of restaurant workers in a wage-and-hour violations case in New Jersey federal court, *Ha v. Baumgart Café*.[14] She missed a deadline to file a Motion for Certification of a collective action under the Fair Labor Standards Act, and 16 days after this motion was due Franco filed a Motion along with a request for an extension of time. As good cause for the extension, Franco represented to the court that she had missed her deadline due to a family emergency in Mexico City. She even attached what happened to be a travel website itinerary showing her flight from New York to Mexico City on Thursday, November 21, 2016 and a December 8 return flight.

Unfortunately for Franco, her opposing counsel owned a calendar (November 21 was a Monday, not a Thursday) and was social media savvy. Defense attorney Benjamin Xue responded with exhibits consisting of screen shots from Franco's own Instagram account. During the period

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[12] Debra Cassens Weiss, *Judge Punishes Lawyer for Using Hashtag #killinnazis, Tosses $27.8 M Xarelto Verdict on Other Grounds,* ABA Journal.Com (Jan. 11, 2018) 7:00 AM), http://www.abajournal.com/news/article/judge_punishes_lawyer_for_killinnazis_hashtag_tosses_27.8m_xarelto_verdict/.

[13] *Id.*

[14] Charles Toutant, "Late-Filing Lawyer's Excuse Undone By Vacation Photos on Instagram," New Jersey Law Journal, April 27, 2018, https://www.law.com/njlawjournal/2018/04/27/late-filing-lawyers-excuse-undone-by-vacation-photos-on-instagram/?slreturn=20180430200540

of time she was supposedly in Mexico City caring for her ailing mother, Instgram photos posted by Franco herself showed her enjoying a Thanksgiving dinner in New York, visiting a bar in Miami, attending an art exhibit in Miami, and sitting poolside in Miami as well (note: enjoying a poolside margarita does not count as "visiting Mexico").

Caught red-handed, Franco admitted her lack of candor to the court, saying she was "not honest" and claiming that she had experienced so much emotional distress from caring for her mother at an earlier juncture that it caused her to miss the filing deadline and provide the fake itinerary.[15] Further falling on her sword, Franco withdrew as counsel for the three restaurant worker plaintiffs. However, lawyers for the restaurant owners sought sanctions against Franco. U.S. Magistrate Judge Michael Hammer agreed with the defense, finding that Franco had "deliberately misled the Court and the other attorneys in this case."[16] Judge Hammer imposed sanctions of $10,000 against Franco (a total of $44,283 in attorney's fees were sought by the three defense firms, but Judge Hammer rejected the requests as "unreasonably high").

We all know that our ethical responsibilities include a duty of candor to the tribunal. Lawyers across all practice boundaries need to be mindful not only of what they post on a site like Instagram, but also of the fact that the same ethical rules that apply to more traditional avenues of communication apply to social networking platforms as well.[17] After all, in the quest to be "Insta-famous" you don't want to find "Insta-Infamy" instead.

III. "But I Was Venting, Not Discussing Cases": How Sharing Too Much on Social Media Can Get You in Trouble

Your hands glide over the keyboard as you post a comment here, a "like" or share there. Checking your Twitter feed, you scroll until something catches your interest and you decide to enter the online conversation with a tweet of your own, or maybe a retweet. Perhaps the topic du jour is something you've seen in the news. You do this in the shadow of that Texas bar license hanging on the wall, secure in the knowledge that you enjoy just as much First Amendment protection as anyone else does.

But as many lawyers (and even judges) are finding out nowadays, that doesn't mean there won't be consequences professionally. Just because you can air your innermost thoughts on Facebook or Twitter doesn't mean you should, especially when one considers not just the potential backlash from the general public, but also from colleagues, clients, and even disciplinary authorities.

Consider some recent examples. In December 2017, Andrew Leonie, a top aide to Attorney General Ken Paxton, wrote a Facebook post critical of the #MeToo movement, stating "Aren't you also tired of all of the pathetic 'me too' victim claims? If every woman is a 'victim', so is every man. If everyone is a victim, no one is. Victim means nothing anymore." He also linked to an

[15] *Id.*

[16] *Id.*

[17] Ian Jacobowitz & John Browning, Legal Ethics and Social Media: A Practitioner's Handbook (ABA Publishing, 2017).

article about how women purportedly "ask" to be objectified.[18] The response from members of the public and the media was swift, condemning the remarks. The Texas Attorney General's Office responded quickly as well. A spokeswoman for the office announced within several hours of the media reports that Leonie had resigned "effective immediately," and that the "views he expressed on social media do not reflect our values."[19]

In September 2017, Austin attorney Robert Ranco used his Twitter account to express his anger over Secretary of State Betsy DeVos' decision to revamp certain Obama administration Title IX guidelines on the investigation of on-campus sexual assault claims. Asserting that the move was "bad for young women," he tweeted that he'd "be ok if #BetsyDeVos was sexually assaulted."[20] A firestorm quickly ensued, prompting Ranco to delete his Twitter account but not before acknowledging that his words "were harsh," while insisting that "I don't wish harm on anyone."[21] He later apologized, telling the media that his tweet "was a mistake" and that "I take full responsibility for it."[22] However, that wasn't sufficient for his employer, the Carlson Law Firm. The firm announced the same day as Ranco's apology that he had resigned, and released a statement that said given the firm's makeup (75% of its employees are women), "anyone in our company advocating or even expressing apathy towards sexual assault is [an] affront to all victims and a line that simple cannot be uncrossed."[23]

And in October 2017, a senior in-house lawyer at CBS posted insensitive comments on Facebook in the aftermath of the Las Vegas mass shooting. VP and senior counsel Hayley Geftman-Gold proclaimed that she was "actually not even sympathetic" because "country music fans often are Republican gun toters." She also referred to Republicans as "Repugs" who "wouldn't do anything when children were murdered."[24] A screenshot of her post identifies Geftman-Gold as vice president and senior counsel of strategic transactions at CBS and former BigLaw attorney. CBS' response was quick and decisive. Geftman-Gold was fired, and the network issued a statement saying that she had "violated the standards of our company" and that "Her views as expressed on social media are deeply unacceptable to all of us at CBS."[25]

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[18] Maggie Astor, *Texas Attorney General's Aide Resigns After Mocking #MeToo Movement*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/us/andrew-leonie-texas-attorney-general.html.

[19] *Id.*

[20] James Wilkinson, *Texas Professor Resigns from Law Firm After Tweeting He'd Be 'OK' With Betsy DeVos Being Sexually Assaulted After She Changed Title IX Rules for Campus Rape Cases*, DAILY MAIL.COM (Sept. 12, 2017), http://www.dailymail.co.uk/news/article-4877732/Texas-prof-tweeted-d-OK-DeVos-sex-assault.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Debra Cassens Weiss, *CBS Fires Lawyer Over Facebook Posts Calling Vegas Shooting Victims Likely 'Republican Gun Toters'*, ABA JOURNAL.COM (Oct. 2, 2017 2:56 PM), http://www.abajournal.com/news/article/cbs_fires_lawyer_over_facebook_comments_calling_vegas_victims_likely_republ/.

[25] *Id.*

But losing a prestigious job and being at the epicenter of a high-profile controversy were just the beginning for Geftman-Gold. A group called Citizens for Judicial Reform initiated an online petition calling for the New York State Bar Association to take professional disciplinary actions against Geftman-Gold over her "reprehensible and despicable remarks," questioning whether she was capable of remaining professional in response to a national tragedy. Within just days, the petition had over 12,000 signatures.[26]

Even when you win in the courtroom, your social media posts can turn it into a Pyrrhic victory. For example, in 2016, British lawyer Mark Small went on Twitter to celebrate a win for a local government client in a case brought by the parents of a disabled child (Small's firm had a niche practice of defending such entities in suits seeking additional benefits and accommodations). His tweets, characterized as "gloating" and "insensitive," resulted in a publicity nightmare. The controversy was too much for many of Small's clients, half of whom terminated the firm's representation or elected not to renew their contracts.[27]

Beyond negative publicity, loss of employment, and loss of clients, lawyers' expressing themselves on social media can have ethical consequences as well. In November 2016, the Washington, D.C. Bar Legal Ethics Committee became the first in the country to address the risk of creating "positional" conflicts when blogging, posting, or tweeting about legal developments or even news.[28] When a lawyer advances one position online, but is called upon to argue the opposite on a client's behalf, a "positional" conflict exists. For example, a lawyer whose firm represents the National Rifle Association or a firearms manufacturer might be seen as having taken a position contrary to her client if she sent a tweet deploring the proliferation of guns.

Even judges aren't immune to the siren song of social media, and have borne the professional consequences that followed their speech. In August 2017, Gwinnett County, Georgia Judge Jim Hinkle posted his reaction to those protesting against Confederate monuments, calling them "nut cases" and "snowflakes" who "are equivalent to ISIS destroying history."[29] Although Judge Hinkle said he didn't "see anything controversial" about his posts, he was suspended by the chief judge soon after making them and he resigned a day later. In May 2017, Orange County, California Superior Court Judge Jeff Ferguson was publicly admonished by the state's Commission on Judicial Performance over certain posts he had made on Facebook. The Commission found that Judge Ferguson's "reckless" allegations that a prosecutor (and judicial

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[26] Jennifer Williams-Alvarez, *Petition to Look at Former CBS Lawyer Underscores Ethical Risks of Social Media*, CORPORATE COUNSEL (last updated Nov. 28, 2017 11:52 AM), https://www.law.com/insidecounsel/sites/insidecounsel/2017/10/06/petition-to-look-at-former-cbs-lawyer-underscores-ethical-risks-of-social-media/?slreturn=20180201132812.

[27] David Ruiz, *Lawyers Using Social Media Lack Framework for What's Allowed*, THE RECORDER (Mar. 29, 2017 2:07 PM), https://www.law.com/therecorder/almID/1202782237344/Lawyers-Using-Social-Media-Lack-Framework-for-Whats-Allowed/?mcode=1202617072607&curindex=4&curpage=2.

[28] Washington, D.C. Bar Ass'n Legal Ethics Comm., Ethics Opinion 370 (Nov. 2016).

[29] Jessica Chasmar, *Georgia Judge Resigns After Calling Anti-Confederate Protestors 'Snowflakes' on Facebook*, WASH. TIMES (Aug. 17, 2017), https://www.washingtontimes.com/news/2017/aug/17/jim-hinkle-georgia-judge-resigns-after-calling-ant/.

candidate) was sleeping with a defense attorney whose cases she was overseeing, "undermined public respect for the judiciary and all the integrity of the electoral process."[30]

Another factor that lawyers need to consider before expressing what they feel online is whether or not the firm, company, or governmental agency they work for has a social media policy or internet usage policy covering such online statements. Such policies have become commonplace in light of Digital Age concerns about online sharing of confidential information or trade secrets as well as the risk of an employer being viewed negatively thanks to its employee's internet conduct. In 2016, Florida prosecutor Kenneth Lewis was fired after he posted controversial comments in the wake of the Orlando nightclub mass shooting, calling such establishments "utter cesspools of debauchery" and calling the city a "melting pot of 3rd world miscreants and thugs." Lewis was terminated for violating his office's social media policy, having received a warning over a previous post.[31]

Lawyers need to be mindful that they face heightened public and ethical scrutiny when they express opinions online or on social media platforms, particularly in light of today's more polarized climate. Lawyers also need to remember not only the speed with which our wired world reacts and the ubiquitous nature of social media, but also the fact that the same ethical rules that apply to every other form of communication similarly apply to social networking platforms. If you wouldn't put it in a letter or publish it in a newspaper, don't post it on Facebook or tweet about it.

[30] Cheryl Miller, *California Judge Admonished for 'Reckless' Facebook Post*, LAW.COM (last updated Oct. 14, 2017 1:02 PM), https://www.law.com/legaltechnews/sites/legaltechnews/2017/06/01/california-judge-admonished-for-reckless-facebook-post/.

[31] Jacobowitz & Browning, *supra* note 15.

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John Browning is a shareholder in the Dallas, Texas firm of Passman & Jones, P.C., where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Mr. Browning has extensive trial, appellate, and summary judgment experience and has represented companies in a wide variety of industries throughout Texas. Mr. Browning received his Bachelor of Arts with general and departmental honors from Rutgers University in 1986, where he was a National Merit Scholar and member of Phi Beta Kappa. He received his Juris Doctor from the University of Texas School of Law in 1989. He is the author of the books *The Lawyer's Guide to Social Networking*, *Understanding Social Media's Impact on the Law*, (West 2010); the Social Media and Litigation Practice Guide (West 2014); Legal Ethics and Social Media: A Practitioner's Handbook (ABA Press 2017 with Jan Jacobowitz); and Cases & Materials on Social Media and the Law (forthcoming). Mr. Browning is also a contributing author to seven other books, the author of nearly 35 published law review articles; and the award-winning writer of numerous articles for regional and national legal publications. His work has been cited in nearly 350 law review articles, practice guides in 11 states, and by courts in Texas, California, Maryland, Tennessee, New York, Florida, Illinois, and Puerto Rico. He has been quoted as a leading authority on social media and the law by such publications as *The New York Times*, *The Wall Street Journal*, *USA Today*, *Law 360*, *Time* Magazine, *The National Law Journal*, the ABA Journal, *WIRED* Magazine and *Inside Counsel* Magazine, and he is a recurring legal commentator for the NBC, CBS, and FOX news stations in Dallas. He serves as Chair-elect of the Computer & Technology Section of the State Bar of Texas, immediate past chair of the Texas Bar Journal Board of Editors, as a member of Professional Ethics Committee of the State Bar of Texas, and is a frequent speaker at CLE seminars and legal symposia all over the country.

BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE
EASTERN DISTRICT OF TEXAS

Judge Bill Parker is in his 21st year as a United States Bankruptcy Judge in the Eastern District of Texas. In exercising primary responsibility for bankruptcy cases filed in the Tyler, Marshall, Beaumont and Lufkin Divisions of the Eastern District, Judge Parker is based in Tyler, but also travels on a monthly basis to conduct court in Beaumont.

A native of Hughes Springs in northeast Texas, Judge Parker holds a B.A. degree in political science from Stephen F. Austin and a master's degree in 20th century American and Mexican history from UT-Permian Basin, earned while employed in west Texas as a high school government teacher in Kermit. After discovering that he did not possess the real-world skills required to supplement the salary of a classroom teacher, he was forced into a vocational change and subsequently earned a J.D. degree from the University of Arkansas, where he served as an editor for the *Arkansas Law Review*.

After engaging in the private practice of law in Longview, Judge Parker served as the initial Assistant United States Trustee in the Eastern District of Texas. From his departure from the US Trustee program until the time of his appointment to the bench in 1998, Judge Parker practiced as a board-certified business bankruptcy attorney in Tyler with the law firm of Ireland, Carroll & Kelley, P.C.

Judge Parker has been a frequent speaker on bankruptcy issues in numerous venues across Texas, including the Fifth Circuit Conference. He has contributed to the development of the annual orientation program for new bankruptcy law clerks across Texas for the past 13 years and has enjoyed his role in the "Starting Out Right" introductory programs for new bankruptcy lawyers across Texas.

Judge Parker has been married for 42 years to his wife, Thana, who is a retired elementary music teacher. They have two adult daughters and four grandchildren.

Amber M. Carson
Associate
Gray Reed & McGraw LLP
https://www.grayreed.com/Our-People/Amber-M-Carson

Amber Carson is an associate in the Dallas, Texas office of Gray Reed & McGraw LLP, where she advises commercial debtors, creditors, official committees, trustees, and other parties in interest in all facets of bankruptcy, creditors' rights, and federal bankruptcy-related litigation matters. Her experience covers a wide range of industries, including construction, retail, healthcare, and energy.

Ms. Carson chairs the Young Lawyers Committee for the Bankruptcy Law Section of the State Bar of Texas. She also serves as Vice President for the DFW Association of Young Bankruptcy Lawyers, Membership Co-Chair for the International Women's Insolvency and Restructuring Confederation – DFW Network, and chairs the American Inns of Court New Lawyers Task Force. She has written and presented on numerous business bankruptcy topics and occasionally serves as a guest lecturer for the Creditors Rights' course at SMU Dedman School of Law.

Ms. Carson graduated from Southern Methodist University Dedman School of Law in 2012 and holds a bachelor's degree in business administration from the University of Massachusetts. Following graduation, Ms. Carson served as the term law clerk for the Honorable Harlin D. Hale, U.S. Bankruptcy Judge for the Northern District of Texas.