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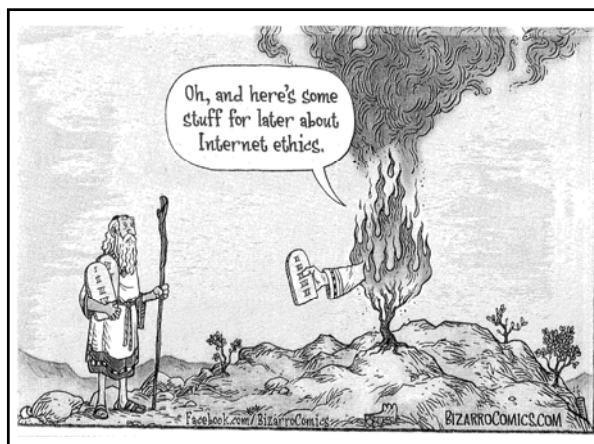
**SOCIAL MEDIA FOR LAWYERS:
 COMMUNICATING ETHICALLY IN
 THE AGE OF FACEBOOK AND
 TWITTER**

SCRIBES 2017 CLE
 OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW
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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, arbitration, 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); and two forthcoming books, including a book on legal ethics and social media for the ABA. Mr. Browning is also a contributing author to seven other books, the author of over 30 published law review articles; and the award-winning writer of numerous articles for regional and national legal publications. His work has been cited in over 300 law review articles, practice guides in 11 states, and by courts in Texas, California, Maryland, Tennessee, and Florida. 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*, the *ABA Journal*, *Law 360*, *Time Magazine*, *The National Law 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 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.



NOISE TO SIGNAL
Rob Cottingham - socialsignal.com/n3



To quote further from people's exhibit A, your Twitter feed,
 "@holdupguy I'm in the getaway vehicle with
 the money and hostages. Where R U?"

	• Over 1 billion unique users each month; 400 hours of video are uploaded to YouTube each minute
	• Over 1.7 billion users
	• Approximately 1 billion registered users (293 million monthly active users)
	• Over 433 million users
	• Over 400 million active users (over 60% log in daily)

Fun Facts 

- 78% of all adult Americans have at least one social networking presence; 58% have two or more
- 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 sent every 48 hours
- Every 60 seconds, there are over 293,000 status updates posted on Facebook
- 146 million "likes" generated every hour.

THE NEW DUTY 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”

- 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.
- Womack v. Yeoman, 2011 WL 9330606 (Cir. Ct. Va. 2011) – the dangers of not being conversant in technology.

DANGER AREA NUMBER ONE:

**DISREGARDING
CONFIDENTIALITY**

“... proper attire for trial.”



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

Result:

- Motion for mistrial – granted
- Lawyer fired

Look before you tweet

- “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)

“This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he’s no snitch.” . . . My client is in college. Just goes to show you that higher education does not imply that you have any sense.”

-In the Matter of Peshek (Illinois)

“He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean.”

- In the Matter of Peshek (Illinois)

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)

Result:

Suspended from practice for 60 days

Fired after 19 years in PD office

- *In the Matter of Peshek* (Illinois 2010)

DANGER AREA NUMBER TWO:

**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”

- **May 2012** – Ohio civil suit filed against insurance defense firm, carrier, and investigator over the investigator’s alleged online impersonation to gain access to private Facebook page of minor plaintiff in a dog bite case. Claims of invasion of privacy, violation of wiretapping statute alleged.
- **June 2013** – Cleveland assistant prosecutor fired for posing on Facebook as fictional “baby mama” of murder defendant in order to persuade two female alibi witnesses not to testify

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. Guidance Committee Opinion 2014-5 (2014)
- Pennsylvania Bar Assoc. Opinion 2014-300 (2014)
- North Carolina Formal Ethics Opinion 2014-5 (2014)
- Florida Bar Prof. Ethics Committee Proposed Advisory Opinion 14-1 (2015)
- Washington, D.C. Prof. 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.

- W. Va criminal defense lawyer ordered to show cause why she shouldn’t be held in contempt for allegedly giving her client a copy of a packet containing the identify of a confidential informant.
 - Client’s roommate then posted several photos of the packet on Facebook, showing the name and address of the confidential informant, and bragging about “exposing the rat.”
 - Result: fine

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





BE AWARE OF WHAT YOUR CLIENT IS POSTING ABOUT THE CASE, AND BE AWARE OF WHAT THE PROSECUTOR IS POSTING AS WELL:

- People v. Armstrong (California 2014)
 - Prosecutor posting on Facebook about plot to kidnap key prosecution witness
- Missouri v. Polk (2013)
 - D.A.'s tweets before, during, and after trial called "troubling" and "concerning" by appellate court
- State v. Usee (Minnesota 2011)

MORE QUESTIONABLE BEHAVIOR

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."

BE CAREFUL ABOUT WHAT YOU POST

- 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)

JUDGES POSTING ON SOCIAL MEDIA

The Good:

Judge Michelle Slaughter (Galveston)
– “Big criminal trial starting this week in the 405th.”

The Bad:

- “Some things I guess will never change. I just love doing the stress of jury trials. In a felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.”
 - Judge Edward Bearse (Minnesota), posting on Facebook during a trial.
- “In the end it’s all about the money. Always. Unfortunately, I see it EVERYDAY. Once ck is in hand, they’ll disappear.”
 - Judge Kenneth Johns (South Carolina), posting on Facebook about a settlement in a wrongful death case.

The Ugly

November 2016

- Burnet County Judge James Oakley (top elected official in Burnet County, serves on board of Texas Commission over Law Enforcement) reacts to the arrest of an African-American suspect in the killing of San Antonio police detective with a Facebook post that read “Time for a tree and a rope.”

EVEN MORE QUESTIONABLE BEHAVIOR

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.



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 now charged with felony intimidation.

Other Lawyers Behaving Badly on Social Media

- **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."
- **December 2014:** An Air Force lawyer posts comments on Facebook critical of the military's policy on sexual assault, resulting in a criminal investigation of that lawyer.

- **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

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.

DANGER AREA NUMBER THREE:

EVIDENCE PRESERVATION & SPOILIATION

- 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.

Spoliation

Gatto v. United Airlines, Inc.
(2013 WL 1285285)

- Personal injury plaintiff deactivated Facebook account during the middle of discovery, unbeknownst to his lawyer.
- Held to be spoliation
- Moral: Know what your client is up to.

Spoliation

Patel v. Havana Bar, Restaurant
(2011 WL 6029983, E.D. Pa. 2011)

- Plaintiff in premises liability case solicits witnesses to change their stories via Facebook, then deletes the Facebook messages.
- Held: Spoliation
- Moral: Know what your client is up to.

DANGER AREA NUMBER FOUR:
ETHICAL CONDUCT INVOLVING JURORS

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, both stress using caution, so as not to inadvertently communicate with juror. Sites like LinkedIn and Twitter inform users who's looked at their profile or who is following them; this can "constitute an impermissible communication."
- October 2013, "Hustle" mortgage fraud trial in New York federal court against Bank of America (juror complains about 1st year associate on defense team peeking at his LinkedIn profile).

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, and Colorado

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."*

**DANGER AREA #5: DON'T LET
YOUR ONLINE SELF IMPACT
YOUR PROFESSIONAL SELF**

1. July 2012 – Prosecutor in Norfolk, VA. gets fired, and makes threats on Facebook about killing his former boss. He is arrested.
2. November 2012 – Sarah Peterson Herr, a staff attorney with the Kansas Court of Appeals, sends profane, critical tweets about the ethics hearing of Kansas' former Attorney General. She makes a public apology, but is fired and receives a disciplinary admonishment in 2014.

3. July 2012 – Justin Marrus, a Brooklyn A.D.A., has his Facebook page posted on a national media outlet. On it, these are photos of him in blackface, holding a Confederate flag, and simulating prison rape. The Brooklyn D.A. is not amused by the “abhorrent, stupid, and childish” behavior.
4. February 2011 – Indiana Deputy A.G. Jeffrey Cox tweets about using “live ammo” on pro-labor protesters in Madison, Wisconsin. *He is fired.*
5. May 2015 – Wayne County, Michigan prosecutor Teana Walsh posts on Facebook about shooting rioters in Baltimore.

6. August 2013 – AUSA John Craft (Beaumont office, E.D. of Texas) comes under fire for inflammatory posts on Facebook about the Trayvon Martin case and derogatory statements about Pres. Obama (including referring to him as “the Dalibama”). U.S. Attorney for the Eastern District John Bales calls the comments “reprehensible”

Defense attorneys use the comments to allege “improper motivation” behind Craft’s sentencing recommendations.

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

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.
