

**NO TWEETING AFTER MIDNIGHT: ETHICALLY
COMMUNICATING WITH CLIENTS IN THE DIGITAL AGE**

JOHN G. BROWNING, *Dallas*
Passman & Jones, P.C.

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John G. Browning
Shareholder
Passman & Jones, P.C.

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 25 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 250 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*, *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 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.

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NO TWEETING AFTER MIDNIGHT: ETHICALLY COMMUNICATING WITH CLIENTS IN THE DIGITAL AGE

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 Florida plaintiff’s personal injury lawyer David Singer, who began a jury trial in a case over whether a passenger had been permanently injured by walking on the hot deck of a Carnival cruise ship, only to have the federal judge presiding over the case refer him to a disciplinary committee over his Facebook posts. 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* in 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.

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.² As the New

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); New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013), available at

http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp.

² Philadelphia 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,

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.”³ 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.⁴

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 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”). 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.”⁵ 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.⁶ 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.⁷

Formal Op. 2013-189, New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013).

³ 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, available at http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_prosecutor_fir.html

⁴ 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).

⁵ *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).

⁶ See *Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010) (en banc); Missouri Supreme Court Rule 69.025.

⁷ 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.

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 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 "The 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)."⁸

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.

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

II. INSTAGRAM AND YOUR DUTY OF CANDOR TO THE COURT

With more than 800 million 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 132 million as of January 2018) or Beyoncé (more than 110 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).

But 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 *Inglorious Basterds* and German-based Bayer, the developer of Xarelto).⁹ 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

⁸ American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466 (Apr. 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

⁹ 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/.

million verdict (on grounds unrelated to the social media posts). It also revoked the pro hac vice admission of McWilliams, and sanctioned Westcott \$2500 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."¹⁰

And you definitely don't want to find yourself in the same situation which 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*.¹¹ 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 of time she was supposedly in Mexico City caring for her ailing mother, Instagram 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 redhanded, 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.¹² Further falling on her sword, Franco withdrew as counsel for the three restaurant worker plaintiff's. 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."¹³ 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.¹⁴ 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 article about how women purportedly "ask" to be objectified.¹⁵ 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

¹⁰ *Id.*

¹¹ 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>

¹² *Id.*

¹³ *Id.*

¹⁴ Ian Jacobowitz and John Browning, *Legal Ethics and Social Media: A Practitioner's Handbook* (ABA Publishing, 2017)

¹⁵ 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>.

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.”¹⁶

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.”¹⁷ 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.”¹⁸ He later apologized, telling the media that his tweet “was a mistake” and that “I take full responsibility for it.”¹⁹ 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.”²⁰

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.”²¹ 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.”²²

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.²³

And remember, there’s a fine line between zealous advocacy and a trip to the disciplinary board. Indiana attorney James Hanson was probably having a bad day when he wrote a Facebook post to the ex-husband of the client he was representing in both a divorce and a misdemeanor domestic battery case. And the 41-year-old lawyer says he only intended to send a message that the ex should expect a vigorous defense. Still, the profanity-laced post illustrates one of the many ethical traps lurking in the digital domain for lawyers—communicating without any filters or regard for appropriate, confidential communications. Hanson wrote, “You pissed off the wrong attorney...I’m going to gather all the relevant evidence and then I’m going to anal rape you so hard your teeth come loose...Watch your ass you little [expletive deleted]. I’ve got you in my sights now.” That online tirade resulted in Hanson being arrested and charged with felony intimidation, a crime punishable by jail time and a fine up to \$10,000.²⁴

In fact, 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.²⁵

¹⁶ *Id.*

¹⁷ 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>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 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/.

²² *Id.*

²³ 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>.

²⁴ Martha Neil, *Lawyer Charged with Felony Intimidation over Facebook Message to Client’s Ex-Husband*, ABA J., May 23, 2014, available at http://www.abajournal.com/news/article/divorce_lawyer_charged_with_intimidation_over_facebook_message_to_client.

²⁵ David Ruiz, *Lawyers Using Social Media Lack Framework for What’s Allowed*, THE RECORDER (Mar. 29,

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.²⁶ 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.

Venturing online to discuss your case, even with the best of intentions, can be fraught with peril. Consider a recent Title IX complaint against Texas A&M University, which stemmed from an incident in which a female student alleged that a male student-athlete (a member of the Aggie swim team) had sexually assaulted her. The alleged attacker was suspended for one semester, and was allowed back on the swim team. Upon learning of this, the female student tweeted out a screenshot of the email from Texas A&M's Title IX Coordinator informing her of the male student's reinstatement. The accused swimmer's attorney responded to the social media firestorm that ensued with detailed and outspoken Facebook posts of his own, because he "saw that it wasn't all the truth that is being put out there." The lawyer provided a detailed description of the incident using notes from the Title IX hearing itself, and made the post before contacting his former client (he later received approval after the fact after re-connecting with him). While the attorney stated he was responding to what he described as "a vindictive orchestrated attack" in order to "protect and defend his client's reputation," it would have been best to have the client's approval before posting, especially when details are being shared that might have bearing on the subsequent Title IX lawsuit that was filed.

Of course, lawyers also get into trouble for not being specific enough or responsive enough in communicating with clients via social media. For example, in April 2017 the Nebraska Supreme Court suspended attorney Dustin Garrison for 90 days (and probation for one year), because of his failure to adequately answer his client's questions and explain what was going on in the client's ongoing personal injury suit. Between December 2010 and April 2015, the lawyer had responded to his client's Facebook inquiries with statements like the following:

- "Relax"
- "I will take care of it."
- "I will explain later."
- "We are fine."
- "Be happy. We are in the driver's seat"
- "I'm busy right now."
- "U realize we sued the wrong company right? We got the money from a company that had it. The correct company would never have had this type of money to pay our judgment."
- "This is complicated."
- "We've been busting our asses getting ready for this hearing."
- "I can't explain the whole process."

At one point, Garrison even said he'd "have to write a book" to answer all of the client's questions. Needless to say, this did not turn out well.

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.

IV. WHAT ABOUT WHEN MY CLIENT (OF FORMER CLIENT) IS TRASHING ME ONLINE? WHAT CAN I DO?

And I don't give a damn 'bout my bad reputation. Oh no, not me.²⁷

With all due respect to Joan Jett and the Blackhearts, lawyers have to care about their online reputations more than ever. Gone are the "good old days" when dealing with an unhappy client meant fielding a few angry phone calls or responding to a curt letter informing you that your services were no longer needed. In today's digital age, where everyone is just a few clicks away from the opportunity to air grievances to the world, comments posted on lawyer rating sites like *avvo.com* and *lawyerratingz.com* or consumer complaint sites like *yelp.com* and *ripoffreport.com* can live online forever and pop up in response to Internet searches for your name. Moreover, the Web has become increasingly important in terms of generating referrals for legal services. According to a 2014 survey by

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>

²⁶ Washington, DC Bar Association Legal Ethics Committee, Ethics Opinion 370 (Nov. 2016).

²⁷ *Bad Reputation*, Joan Jett and the Blackhearts.

findlaw.com and Thomson Reuters Corp., the Internet is now the most popular resource for people in need of legal representation. Thirty-eight percent of respondents indicated they would first use the Internet to find and research a lawyer, while 29 percent would ask a friend or relative first, 10 percent would rely on a local bar association, and only 4 percent would use the Yellow Pages.²⁸ And research by the marketing firm Hinge shows that more people view a firm's website or conduct an online search (81 percent and 63.2 percent, respectively) to find and evaluate a lawyer than those who ask friends and colleagues or talk to references.²⁹

So what can a lawyer do when his or her professional reputation is attacked online by a client or former client? As with any criticism, there's a right way and a wrong way to respond – and the wrong way can land you in front of the disciplinary board. Chicago employment attorney Betty Tsamis learned this lesson the hard way in January 2014, when she received a reprimand from the Illinois Attorney Registration and Disciplinary Commission for revealing confidential client information in a public forum.³⁰ Tsamis had represented former American Airlines flight attendant Richard Rinehart in an unsuccessful quest for unemployment benefits (Rinehart had been terminated for allegedly assaulting a fellow flight attendant). After firing Tsamis, Rinehart posted a review of her on avvo.com. In the post, Rinehart expressed his dissatisfaction bluntly, claiming that Tsamis “only wants your money,” that her assurances of being on a client's side are “a huge lie,” and that she took this money despite “knowing full well a certain law in Illinois would not let me collect unemployment.”³¹ Within days of this posting, Tsamis contacted Rinehart by email, requesting that he remove it; Rinehart refused to do so unless he received a copy of his file and a full refund of the \$1,500 he had paid.

Sometime in the next two months, Avvo removed Rinehart's posting. But Rinehart posted a second negative review of Tsamis on the site. This time, Tsamis reacted by posting a reply the next day. In it, she called Rinehart's allegations “simply false,” said he didn't reveal all the facts of his situation during their client meetings, and stated, “I feel badly for him, but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.”³²

According to the Illinois disciplinary authorities, it was this online revelation of client information by Tsamis that violated the Rules of Professional Conduct, as well as the fact that her posting was “designed to intimidate and embarrass Rinehart and to keep him from posting additional information about her on the Avvo website,” which constituted another violation of professional conduct rules as well as conduct that tends to “bring the courts or the legal profession into disrepute.”³³

In a similar situation in Georgia, attorney Margrett Skinner's petition for a lesser sanction of voluntary discipline was rejected by that state's disciplinary authorities. According to *In re Skinner*, after being fired and replaced by new counsel, the lawyer responded to negative reviews “on consumer websites” by the former client by posting “personal and confidential information about the client that Ms. Skinner had gained in her professional relationship with the client.”³⁴ The court didn't go into detail about the exact comments posted, however, and specifically noted that the record didn't reflect “actual or potential harm to the client as a result of the disclosures.”³⁵

And in an unpublished 2013 California opinion, *Gwire v. Bloomberg*, a disgruntled former client anonymously posted comments about lawyer William Gwire on complaintsboard.com, accusing Gwire of committing “a horrific fraud” and including a “partial summary of Gwire's incredibly unethical history.”³⁶ Gwire responded with a post calling the client “unreliable,” “a proven liar,” and “mentally unbalanced,” and made references to his divorce file and previous business failures.³⁷ When Gwire then sued the client for defamation and trade libel, the former client tried to have the lawsuit dismissed under California's Anti-SLAPP statute. The trial court allowed the defamation claims to go forward (which was affirmed by the appellate court), and the appropriateness of Gwire's response to the online remarks wasn't raised as an issue on appeal.³⁸

An even more recent case serves as a cautionary tale of how not to respond to a negative online review. Colorado attorney James C. Underhill, Jr. was retained by a married couple to help with the husband's ongoing post-divorce decree issues with his ex-wife. When the clients had problems paying his full fee, Underhill threatened to withdraw unless paid in full in two

²⁸ The Internet is Now the Most Popular Way to Find and Research a Lawyer, Says FindLaw Survey, Press Release, Apr. 17, 2014, <http://thomsonreuters.com/press-releases/042014/internet-lawyer-search-survey>.

²⁹ Sherry Karabin, *Marketing Legal Services in a Brave New Internet World*, Law Technology News (Mar. 31, 2014), <http://www.lawtechnologynews.com/id=1396262346123/Marketing-Legal-Services-in-a-Brave-new-Internet-World>

³⁰ In the Matter of Tsamis, Commission No. 2013PR00095, available at <http://www.iardc.org/13PR0095CM.html>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *In re Skinner*, 740 S.E. 2d 171 (Ga. 2013).

³⁵ *Id.*

³⁶ *Gwire v. Bloomberg*, 2013 WL 5493399 (Cal. Ct. App. 2013) (unpublished opinion).

³⁷ *Id.*

³⁸ *Id.*

business days. When the clients terminated the representation, Underhill failed to refund a “filing fee” (nothing had been filed). The clients posted complaints about Underhill on two websites. He responded with postings of his own that, according to Colorado disciplinary authorities, “publicly shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions.”³⁹ As if that wasn’t bad enough, Underhill then sued the couple for defamation, and even though he was aware that they had retained counsel, he continued to communicate with them *ex parte* despite being instructed not to by their lawyers. Underhill’s lawsuit was dismissed, but he then brought a second defamation suit in a different court, concocting an unfounded tale of further internet postings by his former clients that Colorado authorities found to be frivolous. Among the myriad disciplinary breaches by Underhill, he was also found to have violated Colorado Rule of Professional Conduct 8.4 (d) (“a lawyer shall not engage in conduct that prejudices the administration of justice”). As a result of his misconduct, Underhill received an 18-month suspension effective October 1, 2015.⁴⁰

Occasionally, a defamation suit might prove successful. In a recent Georgia decision, *Pampattiwar v. Hinson et al.*, the appellate court upheld a \$405,000 trial verdict in favor of divorce lawyer Jan V. Hinson, who sued her former client Vivek A. Pampattiwar over negative reviews he allegedly posted online.⁴¹ Hinson represented Pampattiwar in a divorce proceeding until a series of disagreements ensued over the representation and billing and she stopped representing him. Approximately six weeks later, Hinson Googled herself and found a sharply negative review that Pampattiwar had posted on a professional services review site, kudzu.com. Among other comments, he allegedly described Hinson as “a CROOK lawyer” and an “Extremely Fraudulent Lady” who “inflates her bills by 10 times” and had “duped 12 people i[n] the last couple of years.”⁴² Although the comments were posted under the screen name “STAREA,” an investigation would reveal that STAREA’s IP address matched the IP address used by Pampattiwar to send several emails to Hinson.⁴³

Hinson sued for fraud, breach of contract over the unpaid legal bills, and libel *per se*, and she added a count for invasion of privacy and false light after a second

pseudonymous review was posted on kudzu.com, accusing Hinson of using her office staff to post “bogus” reviews.⁴⁴ The appellate court rejected Pampattiwar’s argument that Hinson had shown no actual damages from the defamatory postings, finding that applicable Georgia tort law allows recovery for “wounded feelings,” a form of personal injury to reputation.

In a recent Florida appellate decision, attorney Ann-Marie Giustibelli’s \$350,000 defamation verdict over a former client was affirmed.⁴⁵ The former client had posted negative reviews of the lawyer on Avvo.com and other sites that included what both the trial judge and the appellate court deemed “demonstrably false allegations” that Giustibelli had falsified a contract.⁴⁶ The verdict, incidentally, consisted entirely of punitive damages. However, as another recent decision illustrates, it’s one thing when you know who’s smearing you online, but what about when you don’t? Courts in many jurisdictions are hesitant to unmask anonymous commenters, and websites like Avvo.com, Yelp.com, and others enjoy broad protections under the law. Tampa attorney Deborah Thomson found this out first-hand when she filed a defamation suit against an anonymous reviewer on Avvo.com and asked courts in Seattle (where Avvo is based) to enforce a subpoena for information unmasking her critic. Both the trial court and the appellate court denied her motions.⁴⁷

Besides the ethical risk of revealing confidential client information when responding to a negative online review, there is another equally disturbing way for an attorney to get in trouble over reviews on websites: by posting false testimonials, both negative and positive. In 2013, an attorney was publicly reprimanded by the Minnesota Supreme Court for “falsely posing as a former client of opposing counsel and posting a negative review on a website.” In Dallas, a pending lawsuit brought by one law firm accused a rival firm of a campaign of false postings while posing as unhappy ex-clients. And in August 2013, Yelp took the extreme step of suing the McMillan Law Group, a San Diego bankruptcy firm, for allegedly “gaming the system” through the “planting of fake reviews intended to sway potential clients with false testimonials.”⁴⁸

With the Internet assuming an ever-increasing marketing importance for lawyers, legal analysts are starting to pay more attention to a lawyer’s options and

³⁹ *People v. James C. Underhill, Jr.*, Colorado Attorney Disciplinary Proceeding 15PDJ640 (August 12, 2015) 2015 WL 4944102

⁴⁰ *Id.*

⁴¹ *Pampattiwar v. Hinson et al.*, 2014 WL 943230 (Ct. App. Ga., Mar. 12, 2014).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Blake v. Ann-Marie Giustibelli, P.H.*, 2016 BL 1940, Fla. Dist. Ct. App. 4th Dist., No. 4 AD14-3231, Jan. 6, 2016.

⁴⁶ *Id.*

⁴⁷ *Thomson v. Doe*, 356 P. 3d 727, 31 Law Man. Prof. Conduct 421 (Wash. Ct. App. 2015).

⁴⁸ *Yelp, Inc. v. McMillan Law Group, Inc.*, Case No. CGC-13-533654 (Sup. Ct. Cal., Cnty. San Fran., filed Aug. 20, 2013).

risks in addressing online reviews.⁴⁹ Others have pointed to cautionary examples from the medical profession, in which physicians' attempts to restrict patients from posting online reviews through the use of nondisclosure agreements have led to litigation, bad publicity, and accusations of everything from censorship to unconscionability to violations of medical ethics guidelines.⁵⁰ But surprisingly little guidance on the issue has come from bar ethics authorities around the country. To date, only a handful of ethics opinions have emerged that deal squarely with the question of whether an attorney may respond to a client's negative online review.

In December 2012, the Los Angeles County Bar Association issued Formal Opinion No. 525, which dealt with the *Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client*.⁵¹ In the scenario discussed in this opinion, the adverse comments posted by the client did not disclose any confidential information, nor was there any pending litigation or arbitration between the lawyer and the former client. (If there had been, so-called "self-defense" exceptions to discussing a client's confidential information, analogous to those in legal malpractice or grievance context, might apply.) The LA Bar Association committee concluded that an attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject of the prior representation, and is "proportionate and restrained."⁵²

In January 2014, the Bar Association of San Francisco weighed in on this subject as well.⁵³ Like its Los Angeles counterpart, it addressed a scenario with "a free public online forum that rates attorneys," in which the negative review by the ex-client did not disclose any confidential information.⁵⁴ And like its fellow association, the San Francisco Bar reasoned that while an attorney "is not ethically barred from responding generally" to such an online review, the ongoing duty of confidentiality would prohibit the lawyer from disclosing any confidential information. In addition, it concluded, if the matter previously handled for the client was not over, "it may be inappropriate under the circumstances for [the] attorney to provide any substantive response in the online forum, even one that does not disclose confidential information."⁵⁵

Other state ethics opinions have come to similar conclusions. In October 2014, the New York State Bar issued Ethics Opinion 1032, in which it stated that "A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers." The Pennsylvania Bar agreed, and like its California counterparts held that the "self-defense" exception to preserving client confidentiality did not apply where online reviews were concerned. In Opinion 2014-200 (2014), the Pennsylvania state bar ethics committee opined that an online disagreement about the quality of a lawyer's services is not a "controversy" and that no "proceeding" is pending or imminent just because a client impugns his lawyer in an online review. It did, however, propose the following generic response to a negative online review:

"A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

So just what *is* the best approach for dealing with negative online reviews, where posting a rebuttal that's too specific may result in a trip to the disciplinary board and a defamation suit is chancy at best? Lawyer-coach Debra Bruce of Houston recommends refraining from lashing out. Instead, she says, ask happy clients to post their own positive reviews, and consider "addressing the comment with a gracious apology or regret for their dissatisfaction, appreciation for the feedback, and an invitation to address the matter with the complainant personally."⁵⁶ This advice is echoed by Josh King, general counsel to Avvo, who calls negative commentary "a golden marketing opportunity."⁵⁷ King says:

By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback, and strength of character. The trick is to

⁴⁹ See, e.g., Debra L. Bruce, *How Lawyers Can handle Bad Reviews and Complaints on Social Media*, 75 Tex. B.J. 402, 403 (May 2012); Josh King, *Your Business: Someone Online Hates You*, *The Recorder*, Aug. 16, 2013; Laurel Rigertas, *How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services*, 4 *St. Mary's J. Legal Mal. & Ethics* (2014).

⁵⁰ See, e.g., Sean D. Lee, "I Hate My Doctor": *Reputation, Defamation, and Physician-Review Websites*, 23 *Health Matrix: J. Law-Medicine* (Fall 2013).

⁵¹ LA Cnty. Bar Assoc. Professional Responsibility and Ethics Comm., Formal Opinion No. 525 (Feb. 2013)

⁵² Id.

⁵³ Bar Assoc. San Fran. Ethics Opinion 2014-1 (Jan. 2014), http://www.sfbar.org/ethics/opinion_2014-1.aspx.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Bruce, *supra* note 23, at 403.

⁵⁷ King, *supra* note 23

not act defensive, petty, or feel the need to directly refute what you perceive is wrong with the review.⁵⁸

This is sound advice. After all, when responding online to a negative posting, you're not just responding to one former client but to a reading audience of many potential clients.

⁵⁸ Id.