SOCIAL MEDIA, DISCOVERY, AND ETHICS

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State Bar of Texas
35TH ANNUAL
LITIGATION UPDATE INSTITUTE
January 17-18, 2019
San Antonio

CHAPTER 11

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With a practice spanning from Texas to New York, Kendyl T. Hanks is an experienced trial litigator and appellate advocate who represents clients throughout the country in state and federal forums. Kendyl represents clients from entrepreneurs, investors, executives and partnerships to *Fortune* 500 companies and burgeoning multinational firms. She has experience litigating and resolving high-stakes business disputes and test cases involving contract disputes, fraud claims, breaches of warranty, fiduciary duty, alter ego, bankruptcy confirmation and adversary proceedings, negligence and estoppel, real estate disputes, securities law, tribal sovereignty, tax disputes, joint and several liability and proportionate fault, governmental immunity, and other issues of importance to her business clients.

With experience on both sides of the docket, Kendyl represents both plaintiffs and defendants, finding practical ways for clients to settle their disputes before they become irreconcilable without judicial intervention. When litigation is unavoidable, Kendyl helps clients develop and implement litigation strategies that minimize wasteful battles over procedural minutia that have little impact on the ultimate result, and focuses the team's leverage and resources on the key issues of fact and law that will ultimately vindicate the client's position. Because of her experience as an appellate lawyer and oral advocate, clients and trial counsel often retain Ms. Hanks to zealously pursue the client's rights at each stage of the case, whether trying to preserve a big jury verdict through judgment and an imminent appeal, or to secure the reversal of an adverse trial court ruling or the dismissal of a meritless appeal.

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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 risks 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 York City Bar ethics opinion emphasizes, with

[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, Formal Op.

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]

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.

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. Speaking out on social media can have grave consequences when it's perceived as an attempt to influence a case. 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,

[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/.

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 $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, 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 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

[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.

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."[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]

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.[24]

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.[25] 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.

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[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] 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.

[25] Washington, DC Bar Association Legal Ethics Committee, Ethics Opinion 370 (Nov. 2016).

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."[26] 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 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."[27]

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.[28]

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.

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[26] 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/.

[27] 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/.

[28] JOHN G. BROWNING & JAN L. JACOBOWITZ, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK 178 (2017).