ETHICS IN SOCIAL MEDIA

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CHAPTER 15

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Present Position General Counsel, Harris County District Attorney's Office

Bar Memberships
State Bar of Texas – 1988
United States Supreme Court – 1998
U.S. Fifth Circuit Court of Appeals – 1995
U.S. First Circuit Court of Appeals (Bar No. 47873) – 2000
U.S. District Court for the Southern District of Texas – 1995

Other Legal Associations
State Bar of Texas – Government Lawyers Section Council (1999-2005, 2013-present; Chair 2002-03, 2016-17); Texas Disciplinary Rules of Professional Conduct Committee (2007–2017); Course Director: Advanced Government Law (2017, 2018); Advanced Criminal Law (2012); Suing and Defending Government Entities (2013).
Houston Bar Association – President's Award (2011, 2012); Co-Chair, Law & the Media Committee (2010-12, 2018-19); Co-Chair, Administration of Justice Committee (2005-06); Chair, Interprofessional Relations/Physicians Committee (1994-95); Associate Editor, *The Houston Lawyer* (1994-96); Law Day Committee (1996).
Texas District and County Attorneys Association – Gerald Summerford Civil Practitioner of the Year (2014); C. Chris Marshall Distinguished Faculty Award (2000); Publications Committee (1998-2004; Chair 2003-2004).
AV rated, Martindale-Hubbell, since 1998.

Prosecutorial Experience

1995 - present	Chief, General Litigation Division
1992 - 1995	Appellate Division prosecutor
1989 - 1992	Trial Bureau prosecutor

Representative Teaching/Lecture Experience
Since 1997, has spoken at events sponsored by the State Bar of Texas, the Houston Bar Association, the Texas District and County Attorneys Association, various district and county attorneys offices, the Houston Police Department, the *Houston Chronicle*, and others on topics including ethics, open government, media relations, records management, criminal law, and identity theft.

Representative Publications
- *Filing a Public Information Act Lawsuit in Seven Easy Steps*, TEX. PROSECUTOR (May/June 2016).
- *Guessing Game: Government Lawyers and Their Relationship to the Disciplinary Rules,* THE ADVOCATE (Summer 2011).
- *Searching the Matrix: Investigating the Use and Misuse of Electronic Communication Devices by Public Employees*, TEX. SCHOOL ADM. LEGAL DIGEST (May 2010) (with Lisa Brown).
- *Recent Developments in Open Government Statutes*, GOVERNMENT LAWYERS SECTION NEWSLETTER (July 2009 and Oct. 2005).
- *Identity Theft: How to Defend Against It and Fight Back*, THE STATE BAR COLLEGE BULLETIN (Fall 2005).
- *Changes in the Fair Labor Standards Act*, TEX. PROSECUTOR (September/October 2004).
- *The New Rules of Disciplinary Procedure*, TEX. PROSECUTOR (May/June 2004).
- *An Employer's Guide to Employees' Military Leave,* TEX. PROSECUTOR (January/February 2003).
- *Identity Theft – Strategies for the Information Age*, TEX. PROSECUTOR (September/October 2001).
- *Pointers on the Public Information Act*, TEX. PROSECUTOR (November-December 1999).
- *Open Records - An Overview of the Public Information Act*, VOICE FOR THE DEFENSE (May 1999).
- *Confidential Documents*, TEX. PROSECUTOR (September-October 1998).
- *Update on Prosecutorial Access to Medical Records*, TEX. PROSECUTOR (January-February 1998).
- *Ineffective Assistance in Texas: The Good, the Bad and the Ugly*, 30 HOU. LAWYER 17 (May-June 1993).

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SOCIAL MEDIA AND ETHICS

I. INTRODUCTION

- Jonathan Hudson sent a friend request to Courtney Downing on Facebook. Their relationship? Hudson was a juror in a civil car wreck case and Downing was the defendant. After Downing reported the contact, Hudson was removed from the jury and held in contempt. Afterward, his lawyer explained: "He seemed to be a very nice kid who made a silly mistake. It is a reflection of the times. Most everyone has smartphones now. They can hop on at almost anytime. And there's a lot of down time in jury duty, so what most people do is hop on their phone. But the rules are there for a reason." Hudson was less sanguine, expressing his dismay at the contempt finding, as one might expect, on his Facebook account.[1]
- North Carolina Judge B. Carlton Terry, Jr. friended Charles Schieck, an attorney handling a child custody case in Judge Terry's court that day. That night, Schieck posted the question, "How do I prove a negative?" on his Facebook account. Judge Terry responded, commenting on the merits of the case. Schieck then posted: "I have a wise judge." Judge Terry was later publicly reprimanded.[2]
- During the corruption trial of former Baltimore Mayor Sheila Dixon, Maryland Circuit Court Judge Dennis Sweeney learned that five jurors had become Facebook friends. Sweeney called a hearing on the matter. After that, he said, a young male juror posted on his Facebook page, "F*** the Judge." Judge Sweeney said he asked the juror about the offensive comment and was told: "Hey Judge, that's just Facebook stuff."[3]

It's no secret that social media – a term that encompasses everything from blogs, microblogs, social networks, and media sharing platforms – has integrated itself into the often stubbornly anachronistic practice of law in this country. Lawyers tell war stories online, judges befriend supporters on their Facebook pages, and jurors tweet about their service. Sometimes, these activities take place while a trial is ongoing, giving readers an insider's perspective about the deliberative process and the individual participants.

This has prompted much concern about whether new ethical rules need to be enacted to address these technological developments. Care should be taken, however, to recognize what has actually changed. These new social media platforms have not created new categories of *content* that are not addressed in the existing ethical rules. The rules already address improper communications, relationships and other interactions.

Instead, what have changed are three things: the *rapidity* of these communications, the *scale* of social interactions, and the *ease* of using these platforms. Messages that once may have taken days to receive are now received instantaneously; the content of a personal conversation between friends that may have taken weeks to circulate by word of mouth gossip is now circulated at the speed of light. A lawyer's disdain for a jury verdict that may have been shared with three or four close friends may now be shared with three or four thousand blog readers or Facebook friends. Doing so is just a few keystrokes and a mouse click away.

In some cases, the effect of this ubiquity has been to disconnect users from generally understood and accepted standards of conduct. Consider Jonathan Hudson's case, described above. In the absence of Facebook, it is highly unlikely that Hudson would ever have considered approaching the civil defendant in person during trial and trying to start a friendship. In the virtual world of Facebook, however, Hudson felt no qualms about approaching her and seeking her friendship.

What accounts for this disconnect? I suspect it is because Hudson defined online "friendship" differently than many of us do, not as a signifier of affection or commitment, but simply as a benign link allowing him to access information about someone interesting to him. He probably put no more thought into asking for her friendship than he would have into asking for Taylor Swift's. This explains why he did not understand that he had done something wrong – he likely (and incorrectly) thought he could still fairly judge this person's case even as her "friend."[4]

This disconnect between the virtual world and the real world is not unusual: a 2010 Reuters Legal analysis

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1 Eva-Marie Ayala, *Tarrant County juror sentenced to community service for trying to 'friend' defendant on Facebook*, FORT WORTH STAR-TELEGRAM, Aug. 28, 2011.

2 *Public Reprimand of Terry*, N.C. Jud. Stds. Comm. Inquiry No. 08-234 (2009).

3 Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS LEGAL (December 8, 2010); *see also* Hon. Dennis Sweeney, *Worlds Collide: The Digital Native Enters the Jury Box*, 1 REYNOLDS COURTS & MEDIA L.J. 121, 125-127 (Spring 2011) (Judge Sweeney's account of the "Facebook Five" matter).

4 Some jurisdictions have recognized that "friendship" in social media does not necessarily constitute a disqualifying relationship. *See, e.g., McGaha v. Commonwealth*, 414 S.W.3d 1 (Ky. 2013) ("It is now common knowledge that merely being friends on Facebook does not, *per se*, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed.")

found that, since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct, and more than half of the cases occurred between 2008 and 2010. The study found that judges granted new trials or overturned verdicts in 28 criminal and civil cases – 21 since January 2009, and in three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.[5]

In response to these concerns, many states and federal circuits have promulgated model jury instructions to instruct jurors on the limitations of social media use during trial.[6] In Texas, Rule of Civil Procedure 284 mandates that judges instruct the jury as follows:

> Immediately after jurors are selected for a case, the court must instruct them to turn off their phones and other electronic devices and not to communicate with anyone through any electronic device while they are in the courtroom or while they are deliberating. The court must also instruct them that, while they are serving as jurors, they must not post any information about the case on the Internet or search for any information outside of the courtroom, including on the Internet, to try to learn more about the case.
>
> If jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them, the court must instruct them that it is their duty not to communicate with, or permit themselves to be addressed by, any other person about any subject relating to the case.[7]

The mandates of Rule 284 have been integrated into the instructions given jurors at the beginning of voir dire, after jury selection, and immediately prior to deliberations.[8] For example, the instructions now give a trial judge the option of specifically prohibiting the use of social media (the bracketed language is currently optional):

> 4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.[9]

No similar rule or instruction for jurors has been promulgated for Texas criminal courts or for courts in the Fifth Circuit.[10] There should be.

There should also be some guidance for the judiciary. From the unique position of being both disinterested arbiters and elected politicians, Texas judges have to walk the razor's edge of maintaining the distance necessary to preserve the impression of impartiality while also communicating with constituents and supporters. They also have to avoid the same disconnect between activities in the social media universe and in the real world.

Consider Judge Terry's conduct. Caught up in the culture of Facebook, he engaged in ex parte communications in which he likely would have never engaged during a face-to-face conversation with Schieck. The ease of use overcame his inhibitions, the rapidity of the communication put his message out instantaneously, and the scale of dissemination made the communication extremely public.

Social media expert John Browning recently described other examples of judicial misconduct on social media:

> 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." Although Judge Hinkle said he didn't "see anything controversial" about his posts, he was suspended by the chief magistrate judge soon after making them, and he resigned a day later.
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> In May 2017, Orange County, California, Superior Court Judge Jeff Ferguson was publicly admonished by the state's Commission on Judicial Performance over a post 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

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5 *See* Grow, *supra*, n. 3.

6 Eric P. Robinson, *Jury Instructions for the Modern Age*, 1 REYNOLDS COURTS & MEDIA L.J. 307 (Summer 2011).

7 TEX. R. CIV. P. 284.

8 *See* Amendments to Texas Rules of Civil Procedure 281 and 284 and to the Jury Instructions Under Texas Rule of Civil Procedure 226A, Misc. Docket No. 11-9047.

9 TEX. R. CIV. P. 284.

10 *See* Robinson, *supra* n.6, at 316, 394.

> judiciary and all the integrity of the electoral process." [11]

This is not to say that using Facebook is necessarily improper in itself. In 2013, the American Bar Association recognized: "Judicious use of electronic social media can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach."[12] Most Texas judges and judicial candidates use Facebook for political networking.

In some instances, however, social networking may influence the adjudicatory process. For example, former Galveston County District Judge Susan Criss has spoken about a case in which she granted a lawyer a one-week continuance because of a death in the lawyer's family. When the lawyer's senior partner asked Judge Criss to extend the continuance to a month, she denied the request, telling the lawyer's partner, "I knew from her bragging on a Facebook account that she had been partying that same week."[13] Although one cannot argue with the end result, one can argue with the means by which she got there: Judge Criss was essentially engaging in the same kind of Internet research expressly forbidden to jurors. Judicial notice only goes so far.

The act itself of "friending" also carries some ethical freight. Canon 2(B) of the Texas Code of Judicial Conduct forbids a judge from lending the prestige of judicial office to advance the private interests of others, or to convey (or permit others to convey) the impression that they are in a special position to influence the judge.[14] Although the judge may subjectively believe that accepting a friend request (or extending one) is a social or political nicety without substance, the judge's good-faith belief is only the first step of the inquiry. The conduct must also meet an *objective* standard of review as to whether the "judge's impartiality might reasonably be questioned."[15] Objectively, the public exercise of discretion by a judge to friend (or not friend) a lawyer sends a message to the litigants in that judge's court about how that judge perceives the lawyer. Although a judge's disclaimer on his or her Facebook account may help clarify the true meaning of a decision to "friend" a lawyer, the label remains objectively meaningful.

A minority of states that have considered this issue have found that a Facebook "friendship" between a judge and an attorney appearing before the judge creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct.[16]

The majority of states, however, that have considered the ethics of judicial friending have declined to find it disqualifying. Arizona, Kentucky, Maryland, Missouri, New Mexico, New York, Ohio, South Carolina, and Utah have all issued advisory opinions permitting the use of social networking sites, finding that friending trial participants, standing alone, is not disqualifying.[17]

The common admonishment, however, in all of these opinions is that judges who use social media should be sensitive to how their online activities are perceived, and adhere to the applicable canons of judicial conduct.

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11 *See* John Browning, *Taking Heat for a Tweet*, 81 TEX. BAR. J. 336, 337 (May 2018).

12 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

13 Miriam Rozen, *Social Networks Help Judges Do Their Duty*, TEX. LAWYER (Aug. 25, 2009). Judge Criss also related the story of how, when a lawyer posted, "Bond reduction. Joy," on Facebook, anticipating a favorable bond ruling in a pending criminal case before Judge Criss, she posted, "Joy postponed."

14 TEX. CODE OF JUDICIAL CONDUCT Canon 2(B).

15 *See* TEX. CODE OF JUDICIAL CONDUCT Canon 2(A); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2267 (2009) ("Almost every State … has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.'")

16 *See, e.g.*, Cal. Judges Ass'n Jud. Ethics Comm. Op. 66 (2010); Conn. Jud. Ethics Comm. Op. 2013-06 (2013); Mass. Jud. Ethics Comm. Op. 2011-6 (2011); Okla. Jud. Ethics Adv. Pan. 2011-3 (July 6, 2011).

17 Ariz. JEAC Op. 14-01 (2014); Ky. Jud. Ethics Comm. Op. JE-119 (2010); Md. Jud. Ethics Comm. Op. 2012-07 (2012); Mo. Ret., Removal, & Discipline Comm'n Op. 186 (2015); N.M. Jud. Conduct Adv. Comm. Op. Concerning Soc. Media (2016); N.Y. JEAC Op. 13-39 (2013); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010); S.C. Advisory Comm. on Stds. of Jud. Conduct, Op. 17-2009 (2009); Utah JEAC Op. 12-01 (2012); *see also* Washington Ethics Advisory Comm. Op. 09-05 (2009) (permitting blogging).

Interestingly, although Florida's Judicial Ethics Advisory Committee had held in 2009 that a judge's friending an attorney appearing before the judge would violate the Florida Code of Judicial Conduct, *see* Florida Sup. Ct., Jud. Ethics Advisory Comm., Op. 2009-20 (2009), the Florida Supreme Court recently held that "mere Facebook 'friendship' between a judge and an attorney appearing before the judge, without more, does not create the appearance of impropriety under the applicable code of judicial conduct." *See Law Offices of Herssein And Herssein v. United Services Automobile Association*, No. SC17-1848, 2018 WL 5994243 (Fla., Nov. 15, 2018).

Here in Texas, the Supreme Court has not provided guidance on the parameters of social media use by judges. It is high time that they do so.

The Supreme Court and the Bar should also provide some guidance to lawyers about the manner in which "friending" can be used deceptively as a tool for investigation. In 2009, the Philadelphia Bar Association Professional Guidance Committee was asked whether a lawyer could instruct a non-lawyer to friend a witness in litigation for the purpose of accessing the witness's friend-only Facebook account page.[18] In short, the lawyer wanted to use a Trojan Horse to access the target's secure account.

The Philadelphia Bar disapproved:

> [T]he committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) [the equivalent to Texas Rule 8.04(a)(3)] because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness.[19]

The committee gave no weight to the witness's lack of discrimination in accepting friend requests. It was the deceptiveness of the proposed conduct that was dispositive in their opinion:

> Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the Internet and susceptibility to be deceived.[20]

The committee also concluded that this conduct would violate the ethical rule against making false statements of material fact to others.[21]

Again, this raises the fascinating disconnect between the virtual world online and the real world. If the attorney sent a real person to befriend the witness and pump her for information, it would be costly and difficult. The witness's natural defenses would be up and she would be naturally suspicious of the "friend's" motives. Running a virtual friend at the witness, however, costs next to nothing and, in the wide-open Facebook culture, has some likelihood of succeeding.

The Texas Professional Ethics Committee has not yet addressed the issue of whether this kind of deception is permitted. Ethics Opinion 575, however, suggests that the kind of deceptiveness described in the Philadelphia Bar Association opinion would be similarly disapproved in Texas. In that case, the Committee approved surreptitious taping of telephone calls, but specifically did not approve of a lawyer making a false representation about whether the taping was taking place.[22] The same reasoning could apply to false friending in Texas: an attorney could make a friend request to a witness who could choose to friend or not friend the attorney, but the attorney could not ethically use a false identity or an intermediary to deceive the witness. This issue should be taken up and resolved sooner than later.

In conclusion, although social networking is a relatively new technological development, the challenges it really presents are less about content and more about learning how to make the same wise decisions people have always made, but in a much faster, much more efficient environment.

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18 Philadelphia Bar Assn. Prof'l Guidance Comm., Op. 2009-02 at 1 (2009).

19 *Id.* at 3.

20 *Id.*

21 *Id.*

22 Tex. Prof'l Ethics Comm. Op. No. 575 at 3 (2006).