

## Cyber Ethics: Part 2

### Early Lessons from Lawyers' Social Media Use\*

By John G. Browning<sup>†</sup>

In our previous installment of this three-part series, we discussed the implications of geo-fencing and examined ethical issues around both attorneys' and clients' ability to use these new technologies to communicate about a case. Naturally, this leads us to ask: what exactly is ethically permissible for lawyers to say about a case on social media?

This question is especially important in our increasingly wired world. For example, over 72% of adult Americans maintain at least one social networking profile,<sup>1</sup> and Facebook boasts more than 2.4 billion monthly active users worldwide.<sup>2</sup> In a single minute over 350,000 tweets are posted on Twitter,<sup>3</sup> 317,000 statuses are updated on Facebook,<sup>4</sup> and over 500 hours of footage are uploaded to YouTube.<sup>5</sup> With social media becoming so ubiquitous, it is not surprising that being active on social media has taken on an increased significance for both lawyers and law firms. According to the American Bar Association's 2017 Legal Technology Survey, 81% of lawyers

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<sup>1</sup> *Social Media Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewinternet.org/fact-sheet/social-media/>.

<sup>2</sup> *Company Info*, FACEBOOK.COM, <https://newsroom.fb.com/company-info/> (last visited Oct. 12, 2019) (stating statistics that "1.59 billion daily active users on Facebook on average for June 2019" and "2.41 billion monthly active users on Facebook as of June 30, 2019").

<sup>3</sup> *Twitter Usage Statistics*, INTERNET LIVE STATISTICS, <https://www.internetlivestats.com/twitter-statistics/> (last visited Oct. 13, 2019).

<sup>4</sup> *Facebook by the Numbers Stats, Demographics & Fun Facts*, OMNICORE (Sept. 4, 2019), <https://www.omnicoreagency.com/facebook-statistics/>.

<sup>5</sup> James Loke Hale, *More than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute*, TUBE FILTER (May 7, 2019), <https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/>.

responded that they use social media for professional purposes, while 77% reported that their firms also maintained a social media presence.<sup>6</sup> Seventy-one percent of firms with 500 or more attorneys maintain at least one law firm blog, while 38% of mid-sized firms with 10-49 lawyers maintain a blog.<sup>7</sup> Client development was the leading reason provided for lawyer blogging (76%) with public outreach/writing enjoyment coming in second (47%).<sup>8</sup> From Facebook and Twitter to blogging and LinkedIn, the legal profession's embrace of technology continues to steadily increase.

Although there is obvious benefit to this embrace of technology, there have been numerous warnings to lawyers on the limits of blogging about one's case or tweeting about a ruling that impacts an upcoming trial. Recent ethics opinions, along with other forms of backlash, provide examples of lawyers getting into trouble for their social media posts. This flurry of activity from courts and disciplinary committees is an important reminder for lawyers to consider ethical boundary lines before commenting about a case in any medium.

Consider the following cautionary tales of lawyers posting about their cases and the various consequences of doing so:

### **Referral to Disciplinary Committee.**

- In 2016, Florida personal injury lawyer David Singer began a jury trial in a case over whether his client had been permanently injured by walking on the hot deck of a Carnival cruise ship. However, the federal judge presiding over the case chose to hear a motion to disqualify Singer over his Facebook posts.<sup>9</sup> Carnival's counsel argued that Singer should be disqualified for "inexcusable" conduct in posting photos and "wildly improper" statements on Facebook that warned passengers of "outrageously high temperatures" on the cruise ship deck.<sup>10</sup> Among other statements on his Facebook, right before the trial began, Singer had alleged that Carnival "knew that their fake Teakwood deck heated up" so as "to burn the feet of a passenger who ended up having all ten toes and parts of both feet amputated."<sup>11</sup> He also admonished Carnival's defense medical expert posting, "Doc, your buddies at Carnival knew of the problem because there were nine previous cases of burns on their deck—many of them kids."<sup>12</sup> In their arguments to disqualify Singer, Carnival's lawyers also claimed that Singer had violated court orders by publishing private information about a mediation in the case.<sup>13</sup> Although Singer apologized to the court,

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<sup>6</sup> Allison Shields, *2017 Social Media and Blogging*, ABA TECHREPORT (Dec. 1, 2017), [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2017/social\\_media\\_blogging/](https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging/).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Joyce Hanson, *Facebook Post Earns Atty A DQ Bid in Cruise Injury Suit*, LAW360 (May 31, 2016, 12:21 PM), <https://www.law360.com/articles/801761/facebook-post-earns-atty-a-dq-bid-in-cruise-injury-suit>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Joyce Hanson, *Carnival Injury Atty's Facebook Posts Go to Conduct Panel*, LAW360 (June 3, 2016, 5:10 PM), <https://www.law360.com/articles/803590/carnival-injury-atty-s-facebook-posts-go-to-conduct-panel>.

<sup>13</sup> *Id.*

federal judge Joan Lenard referred Singer's conduct on Facebook to a disciplinary committee.<sup>14</sup>

### **Sanctions and Monetary Fines.<sup>15</sup>**

- In early 2018, a Philadelphia judge punished two lawyers, Ned McWilliams and Emily Jeffcott, for their Instagram posts during their representation of a client in a trial over the medication Xarelto.<sup>16</sup> The two had posted a number of photographs of the courtroom to Instagram, using the hashtag "#killinnazis".<sup>17</sup> In post-trial motions, the defense argued that these social media posts were intended to create a link in the minds of the jurors between the German pharmaceutical company who owned Xarelto and Nazi Germany, calling it a "xenophobic" strategy.<sup>18</sup> Although the court set aside the \$27.8 million verdict on grounds unrelated to the social media posts,<sup>19</sup> the court still revoked McWilliams's pro hac vice admission and sanctioned Westcott \$2,500 and ordered twenty-five hours of community service.<sup>20</sup> The judge noted that the Instagram posts in question and the #killinnazis hashtag were "well beneath the dignity of the legal profession."<sup>21</sup>

### **Job Loss.**

- In 2012, assistant public defender Anya Citron-Stern in Florida was fired after she posted a photo of her client's underwear on Facebook along with a demeaning caption.<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> See Browning et al., *supra* note \*, at 7 (referencing this example).

<sup>16</sup> Debra Cassens Weiss, *Judge Punishes Lawyer for Using Hashtag #killinnazis, Tosses \$27.8M Xarelto Verdict on Other Grounds*, ABA J. (Jan. 11, 2018, 7:00 AM), [http://www.abajournal.com/news/article/judge\\_punishes\\_lawyer\\_for\\_killinnazis\\_hashtag\\_tosses\\_27.8m\\_xarelto\\_verdict/](http://www.abajournal.com/news/article/judge_punishes_lawyer_for_killinnazis_hashtag_tosses_27.8m_xarelto_verdict/); Max Mitchell, *Judge Metes Out Punishment to Xarelto Attorneys Over Courtroom Photos, Use of '#killinnazis' Hashtag*, LAW.COM (Jan. 9, 2018, 2:10 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/01/09/judge-metes-out-punishment-to-xarelto-attorneys-over-courtroom-photos-use-of-killinnazis-hashtag/>.

<sup>17</sup> Weiss, *Judge Punishes Lawyer*, *supra* note 15.

<sup>18</sup> Debra Cassens Weiss, *Drugmaker Claims #killinnazis Instagram Posts are Part of Lawyers' 'Xenophobic' Strategy*, ABA J. (Dec. 20, 2017, 11:50 AM), [http://www.abajournal.com/news/article/xarelto\\_maker\\_claims\\_killinnazis\\_instagram\\_posts\\_are\\_part\\_of\\_plaintiffs\\_xen](http://www.abajournal.com/news/article/xarelto_maker_claims_killinnazis_instagram_posts_are_part_of_plaintiffs_xen).

<sup>19</sup> Matt Fair, *'#Killinnazis' Uproar Attys Must Treat Lightly Online*, LAW360 (Jan. 19, 2018, 9:48 PM), <https://www.law360.com/articles/1003565>.

<sup>20</sup> *Id.*

<sup>21</sup> Weiss, *Drugmaker Claims #killinnazis Instagram Posts are Part of Lawyers' 'Xenophobic' Strategy*, *supra* note 18.

<sup>22</sup> See John G. Browning, *Facing Up to Facebook—Ethical Issues With Lawyers' Use of Social Media*, BLOOMBERG L. (Aug. 4, 2014, 11:00 PM), <https://news.bloomberglaw.com/us-law-week/facing-up-to-facebookethical-issues-with-lawyers-use-of-social-media> (citing David Ovalle, *Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case*, MIAMI HERALD (Sept. 13, 2012)); see also *Facebook Photo Leads to Mistrial in Miami Murder Case*, NBC MIAMI (Sept. 13, 2012, 9:39 AM),

## **Publicity Nightmare.<sup>23</sup>**

- In 2016, defense lawyer Mark Small went on Twitter to celebrate his win for a local government client in a case brought by the parents of a disabled child. 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.<sup>24</sup>

## **Suspension.**

- In 2012, an Illinois criminal defense attorney received a suspension after, in an attempt to sway public opinion, he posted a discovery video of an undercover drug buy on YouTube. The lawyer later acknowledge the video actually appeared to incriminate his client.<sup>25</sup>

## **Loss of Credibility.**

- In California, a prominent commercial litigator had to go before the court to explain how, when he had later tweeted about a case, he accidentally linked to documents that the court had placed under seal.<sup>26</sup>

## **Delayed Trial.**

- In 2015, lawyer Roxanne Conlin posted on Facebook just before the start of a July trial in which she represented a woman suing her former attorney for false imprisonment.<sup>27</sup> Besides publicly calling out that former attorney, Conlin’s post also criticized Iowa’s “all-white, all-male” Supreme Court for reducing that former attorney’s disciplinary penalty, saying the court “really needs a woman” and expressing hope that “a jury will be a little harder on him.”<sup>28</sup> In response to an emergency motion by Conlin’s opposing counsel, and

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<https://www.nbciami.com/news/Facebook-Photo-Leads-to-Mistrial-in-Miami-Murder-Case-169614756.html>.

<sup>23</sup> Browning et al., *supra* note \*, at 10 (referencing this example).

<sup>24</sup> 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/>.

<sup>25</sup> See Browning, *Facing Up to Facebook*, *supra* note 21 (citing *In re Gilsdorf*, No. 12PR0006 (Ill. Att’y Registration & Disciplinary Comm’n, Feb. 6, 2012)).

<sup>26</sup> See *id* (citing JOHN G. BROWNING, THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW (West 2010)).

<sup>27</sup> The Register’s Editorial, *Editorial: Beware What Your Lawyer Says on Facebook*, DES MOINES REGISTER (July 14, 2015, 6:44 AM),

<https://www.desmoinesregister.com/story/opinion/editorials/2015/07/14/roxanne-conlin-biased-social-media-post/30120613/>.

<sup>28</sup> *Id.*

out of concern that the jury pool had been tainted by the Facebook comments, the judge delayed the trial until November.<sup>29</sup>

### **Creating Future Conflicts of Interest.<sup>30</sup>**

- In late 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 legal news.<sup>31</sup> When a lawyer advances one position online, but is called upon to argue the opposite on a client’s behalf, a “positional” conflict exists.<sup>32</sup> 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 deplored the proliferation of guns.<sup>33</sup>

### **Disbarment.**

- In mid-2015, the Louisiana Supreme Court disbarred Joyce McCool for using Twitter and an online petition to engage in what it called a “social media blitz” against two judges presiding over child custody cases.<sup>34</sup> Upset with these judges’ rulings, McCool had posted on social media what the court described as “false, misleading, and inflammatory statements,” including accusing the judges in question of refusing to admit audio recordings of children talking about alleged abuse. McCool circulated an online petition calling for the judges’ removal, and solicited others to make ex parte contact with the judges to express their feelings about these sealed domestic proceedings. On a single day, McCool sent thirty tweets about the case and online petition, including ones that indicated an awareness of the potential consequences of her actions: “I am SO going 2 have 2 change jobs after this...! I’m risking sanctions by the LA supreme court; u could be a HUGE help.”<sup>35</sup> In ordering McCool’s disbarment, the Court found that the social media campaign she launched was “part of a pattern of conduct intended to influence the judges’ future

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<sup>29</sup> *Id.*

<sup>30</sup> Browning et al., *supra* note \*, at 10 (referencing this example).

<sup>31</sup> D.C. Bar Ass’n Legal Ethics Comm., Ethics Op. 370 (Nov. 2016), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm> (discussing social media for business and personal reasons).

<sup>32</sup> See D.C. Bar Ass’n Legal Ethics Comm., Ethics Op. 265, <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion265.cfm> (noting the paradigm case of a positional conflict is “that of the lawyer who argues a case to a court of appeals, arguing that the court ought to reach a certain conclusion of law . . . the oral argument in the first case is concluded, the clerk calls the next case, and the same lawyer returns to the podium . . . to urge a position that is flatly inconsistent with the one that the lawyer took five minutes ago . . . [here] one or both of the clients is thought to have been deprived of effective representation.”).

<sup>33</sup> Browning et al., *supra* note \*, at 10.

<sup>34</sup> *In re McCool*, 2015-B-0284 (La. 6/30/15); 172 So.3d 1058, 1084.

<sup>35</sup> *Id.*

rulings in pending litigation,” and that her actions “threaten[ed] the independence and integrity of the judicial system, and caus[ed] the judges concern for their personal safety and well-being.”<sup>36</sup>

- Even more recently, the Louisiana Supreme Court disbarred another attorney for online misconduct. In late 2018, the Court ordered the disbarment of former federal prosecutor Salvador “Sal” Perricone for posting anonymous online comments about pending investigations and cases being handed by himself or the U.S. Attorney’s office.<sup>37</sup> The court found that Perricone’s “caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system,” and said its decision “must send a strong message . . . to all members of the bar that a lawyer’s ethical obligations are not diminished by the mask of anonymity provided by the internet.”<sup>38</sup> Between November 2007 and March 2012, using online pseudonyms like “Henry L. Mencken 1951,” Perricone had posted more than 2,600 comments on the New Orleans Time-Picayune’s website, 100 to 200 of which related to matters being prosecuted in the U.S. Attorney’s Office.<sup>39</sup> These comments included references to a defense lawyer who had “screwed his client” in a case Perricone was prosecuting,<sup>40</sup> as well as commentary about the prosecution of New Orleans police officers in the Danziger Bridge shootings of six civilians (saying of the officers involved that “NONE of these guys should have ever been given a badge”).<sup>41</sup>

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Tune in next week for a discussion of current guidance on ethical restrictions around social media.

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<sup>36</sup> *Id.*

<sup>37</sup> *In re Salvador R. Perricone*, 2018-B-1233 (La. 12/5/18); 263 So.3d 309, 319.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id* at 311.

<sup>41</sup> *Id* at 312.