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Socially Unacceptable? Ethical Issues in Lawyers' Use of Social Media

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Despite a slew of ethics opinions and high-profile sanctions on everything from contacting represented parties via Facebook to instructing clients to delete damaging online content, attorneys are still getting into trouble resulting from their misuse of social media. In the past six months alone, lawyers all over the country have experienced Facebook fumbles and Twitter misfires leading to public embarrassment, firing, and even disbarment.

On Oct. 28, Vincent "Trace" Schmeltz, a partner at Barnes and Thornburg's Chicago office, was observing the "spoofing" trial of accused futures trader Michael Coscia in U.S. District Judge Harry Leinenweber's Chicago courtroom. While there, Schmeltz took photos of some of the evidence, and sent at least nine tweets about them from his Twitter account, including such tweets as "Prosecutor trying to impeach algo with this email. #HFT #cosciatrial," and "Screenshot of 'QuoteTrader,' the allegedly spoofing algo used by Michael Coscia. #cosciatrial #HFT." Schmeltz's actions were spotted by an FBI special agent in the courtroom. Schmeltz didn't notice the agent, or for that matter the large 4-foot-tall sign posted near the courtroom's door that said "PHOTOGRAPHING, RECORDING OR BROADCASTING IS PROHIBITED." Schmeltz was ordered to appear before U.S. District Court Chief Judge Ruben Castillo for a show cause hearing to explain why he shouldn't be sanctioned for violating Federal Rule of Criminal Procedure 53, as well as the court's local rules banning photography and use of handheld devices in the courtroom. The court ordered Schmeltz to pay \$5,000 to the Chicago Bar Foundation, do 50 hours of pro bono work, and attend a seminar on social media and legal ethics.

Of course, he still has his job, which is more than former Goldberg Segalla partner Clive O'Connell can say. The London attorney—named the UK's best insurance lawyer in 2014—and avid Chelsea soccer fan was filmed following his team's loss to Liverpool unleashing a furious tirade about the Liverpool fans, calling them "scum" and making other offensive comments. As if the 120,000 views the rant received on YouTube weren't enough, O'Connell also took to a blog to vent some more. Goldberg Segalla managing partner Rick Cohen terminated O'Connell, and also posted a video to YouTube condemning the partner's comments, calling them "offensive, plain and simple" and "inconsistent with our ethos." Live by social media, die by social media?

If venting on social media about your sports affiliations can land you in hot water, imagine what

an online rant about a judge or a trial can lead to. In the case of former Louisiana attorney Joyce McKool, it resulted in disbarment. Frustrated with the handling of related child custody and adoption proceedings by judges in Louisiana and Mississippi, McKool embarked upon what the Louisiana Supreme Court called "a social media blitz to influence the judges' and this court's rulings in pending matters." This blitz included numerous online postings and Twitter feeds that the court described as "littered with misrepresentations and outright false statements," as well as orchestrating online petitions urging the judges to make specific rulings. Concluding that McKool had violated Rules of Professional Conduct against improper ex parte communication, disseminating false and misleading information, and engaging in conduct prejudicial to the administration of justice, the Louisiana Supreme Court disbarred her on June 30.

Posting on Facebook about a trial carries consequences, regardless of whether trial has yet to start or has just concluded. Des Moines, Iowa trial 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 alleged false imprisonment. 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." In response to an emergency motion by Conlin's opposing counsel, and out of concern that the jury pool had been tainted by the Facebook comments, the trial judge delayed the trial until November. And following what she characterized as "an unjust acquittal" in the New Braunfels punching death case of Logan Davidson, Comal County Criminal District Attorney Jennifer Tharp took to Facebook in May 2015 to criticize both the judge and the jury's verdict. That decision to air such unhappiness on social media has been widely criticized.

When it comes to social media, lapses in professional judgment have become all too commonplace. Following the Sept. 18 acquittal of his client Brandon Burnside on homicide charges, Wisconsin criminal defense attorney Anthony Cotton decided to take a "victory selfie" in the courtroom with his client and post it to Facebook. The judge didn't "like" it, and ordered Cotton back to court. Cotton apologized, and took down the Facebook post. In July, Allegheny County (Pa.) assistant district attorney Julie Jones thought it would be cute to take a picture with a uniformed police officer in which they were toting guns seized as evidence in a case, and post it to Facebook with the caption, "You should take the plea." The district attorney's office was not pleased, issuing a statement calling Jones' conduct "contrary to office protocol with respect to the handling of evidence."

Lawyers need to remember not only the speed with which the online 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 also 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. Follow the same counsel you should be giving your clients. As an apologetic Roxanne Conlin admitted, "I tell my clients to stay off of social media, you know. But sometimes we lawyers forget to follow our own advice."

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