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## Negative Commentary—Negative Consequences: Legal Ethics, Social Media, and the Impact of Explosive Commentary

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# ARTICLE

*Jan L. Jacobowitz*

## Negative Commentary—Negative Consequences: Legal Ethics, Social Media, and the Impact of Explosive Commentary

**Abstract.** Connecting and sharing on social media has opened communication channels and provided instantaneous information to billions of people worldwide. Commentary on current events, cases, and negative online reviews may be posted in an instant, often without pause or thought about the potential repercussions. This global phenomenon may not only provide news of the day updates, humor, and support for those in need but also is replete with ethical landmines for the unwary lawyer. Lawyers commenting on current events, their cases, or responding to a client’s negative online review, have suffered damage to their careers. In some instances, they have even faced disciplinary consequences for their online conduct. This Article not only recounts some of these unfortunate events but also attempts to provide insight into how both communication strategies and self-awareness techniques may be used to build a preventative toolbox for a lawyer’s social media engagement.

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In the end, the whole Internet thing kills me, because you can use it as a positive thing or you can read into all the negativity. And I think you've gotta put out positive energy, put out cool viral stuff, and then just stay out of people's opinions.<sup>1</sup>

## I. INTRODUCTION

Social media allows individuals to connect and share their thoughts and opinions—regardless of whether those thoughts and opinions are carefully construed or just downright nasty. Consumers review hotels, restaurants, retailers, and yes, lawyers, too. Individuals often motivate to post an online review because they have had either an excellent experience or a terrible one. Online posters also frequently share their opinions about current events and politics. Again, the individual may be posting from a place of passion, anger, or joy about an event or political issue. Only in extreme situations do social media platforms block the content; however, the legal profession has experienced the consequences of negative commentary as career-ending, reputation-damaging, or incredibly embarrassing events. Social media landmines impacting the legal profession generally fall into three categories: discussing current events, commenting on cases, or responding to a client's negative review. This Article explores these events and the underpinnings of why individuals, including lawyers, throw caution to the wind only to suffer the impact of the storm that ensues.

This Article will first explore the nature of communication and the components of competent communication. It will then discuss the evolution of communication as a vehicle for social connection and social media history—both in its analog and digital state. Next, the Article will report on lawyers' social media use and explore three negative commentary categories: current events, cases, and negative online reviews. The Article will then explore why lawyers trip on social media landmines from a cultural perspective and view of self-awareness. Finally, the Article will explain why self-awareness is a crucial element in communication and decision making and discuss some of the pathways to self-awareness through the lens of brain science, mindfulness, and psychology.

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1. *Nikki Sixx Quotes*, BRAINY QUOTE, [https://www.brainyquote.com/quotes/nikki\\_sixx\\_640790](https://www.brainyquote.com/quotes/nikki_sixx_640790) [<https://perma.cc/EU56-4KPF>].

## II. COMMUNICATION

The ancient orators who set the stage for the modern legal profession studied rhetoric and the art of communication. Today communication is studied both as an art form and a science.<sup>2</sup> Although the duty of communication is one of the fundamental legal ethics rules, the study of communication is generally not taught in law school nor necessarily studied by the legal profession.<sup>3</sup> Moreover, the digital age expanded the vehicles through which we may communicate and the language we employ to formulate our messages.<sup>4</sup> While the increased opportunity for communication enhanced our ability to share our thoughts with a multitude of individuals simultaneously, the digital age also laid ethical landmines for the unwary lawyer.<sup>5</sup> There are generally no takebacks or mulligans when playing on the digital landscape. Negative commentary often leads to negative career consequences. Perhaps the time has arrived for the legal profession to sharpen its understanding of communication and how communication theory applied to online communication intersects with legal ethics and the legal profession's professional responsibilities.

### A. *Communication Defined*

Among the theories about the development of language, Robin Dunbar espouses the belief that “the most plausible starting point for the evolution of language is as a bonding device based on the exchange of social information concerning relationships within the social network.”<sup>6</sup> Regardless of its starting point, language is an essential component of communication and central to the human experience.<sup>7</sup>

In contemporary society, the study of communication reveals it establishes a connection that enhances physical well-being and an

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2. See generally RONALD B. ADLER ET AL., INTERPLAY: THE PROCESS OF INTERPERSONAL COMMUNICATION 15–19 (14th ed. 2018) (detailing the many different forms of interpersonal communication through the use of both subjective and objective criteria).

3. See Nicholas W. Allard & Heidi K. Brown, *Training Powerful Legal Communicators What Does the Future Hold?*, N.Y. ST. BAR ASS'N J., Sept. 2018, at 10, 10 (analyzing the low priority law schools generally placed on teaching fundamental communication skills, such as legal writing).

4. *Id.*

5. See John G. Browning, *Watch Your Tweets and Wash Your Hands: Digital Hygiene for the COVID-19 Pandemic*, 83 TEX. BAR J. 466, 467 (2020) (describing the ethical implications some attorneys experienced after posting comments online).

6. TOM STANDAGE, WRITING ON THE WALL: SOCIAL MEDIA THE FIRST 2000 YEARS, at 14 (2013).

7. *Id.*

individual's sense of identity.<sup>8</sup> Studies show that socially connected people live longer, have lower coronary artery disease risks, and are less susceptible to the common cold.<sup>9</sup> Communication also fulfills social and practical needs.<sup>10</sup> Social scientists assert that without communication, essential relationships could not be formed, and some theorize that “the primary goal of human existence” is communication.<sup>11</sup> Beyond our social needs, communication provides a fundamental vehicle for exchanging information in our daily lives and serves as an essential variable for achieving career success.<sup>12</sup>

B. *The Dance: Interpersonal Communication*

Interpersonal communication is a dynamic, complex transaction. Interestingly, communication scholars explain that communication is not defined by the message.<sup>13</sup> Rather, the message's meaning arises from both the person who expresses the message and those who interpret it.<sup>14</sup> Communication may be analogized to dancing:

Communication is like dancing with a partner: No matter how skilled you are, success depends on the other person's behavior as well as your own. In communication and in dancing, the partners must adapt to and coordinate with each other. Further, relational communication—like dancing—is a unique creation that arises from how the partners interact. The way you dance probably varies from one partner to another because of its cooperative, transactional nature. Likewise, the way you communicate almost certainly varies with different partners. That's why competent communicators score high in adaptability . . .<sup>15</sup>

Interestingly, communication consists of both a relational and content dimension. Content is the message, but perhaps more significant is the relational dimension, which refers to the receiver's reaction to the

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8. ADLER ET AL., *supra* note 2, at 6 (citation omitted) (“[Communication] is the primary way we learn who we are.”).

9. *See id.* at 4–6 (describing the importance of communication for people's physical health).

10. *See id.* at 7–9 (discussing the link between communication and social satisfaction, as well as the importance of communication in dealing with practical matters).

11. *Id.* at 7.

12. *Id.* at 8 (“[A] wealth of research demonstrates that communication is an essential ingredient for success in virtually every career.”).

13. *Id.* at 11.

14. *Id.*

15. *Id.* at 13.

message.<sup>16</sup> For example, sometimes what appears to be a dispute over a trivial matter like whose turn it is to walk the dog or cook dinner may be more about an imbalance (or perceived imbalance) in the relationship rather than the chore that appears to be the primary source of disagreement.<sup>17</sup>

Beyond a fundamental understanding of communication as a dynamic multi-dimensional transaction, communication studies remind us that communication is irreversible, unrepeatable, and not necessarily a panacea for solving life's problems.<sup>18</sup> Communication is an event. Once passed, it cannot be recreated or repeated in the same manner because the behavior is no longer original, and the communicators, even if identical, have moved forward in their lives and experiences.<sup>19</sup>

Moreover, common misconceptions exist concerning the purpose and value of communication. One of the misconceptions is that all communication seeks understanding between communicators.<sup>20</sup> Instead of understanding, communication sometimes seeks only to acknowledge another (“How’s it going?”), to influence another (a commercial designed to persuade a consumer), or to create ambiguity and deception (stating “I can’t make it” in response to a party invitation when you are available, but would rather not attend).<sup>21</sup> Another couple of misconceptions are the adages that “more communication is always better” and “communication can solve all problems.” In fact, “[m]ore and more negative communication merely leads to more and more negative results.”<sup>22</sup> Furthermore, sometimes a clear and sincere answer to the question, “does this outfit make me look fat?” causes more problems than it solves.<sup>23</sup>

Finally, perhaps one of the most significant misconceptions in the context of our digital world is the presumption that effective communication is a natural ability shared by all.<sup>24</sup> Communication scholars have concluded

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16. *Id.* at 14 (describing the relational dimension as an expression of “how you feel about the other person: whether you like or dislike the other person, feel in control or subordinate, feel comfortable or anxious, and so on”).

17. *Id.* at 15 (explaining how “the relational dimension of a message is often more important than the content” dimension of a message, which is why arguments over a trivial matter appear to be important).

18. *Id.* at 14.

19. *Id.* (“Because communication is an ongoing process, an event cannot be repeated.”).

20. *Id.* at 17–18.

21. *Id.* (listing examples in which understanding is not the primary goal of the communication).

22. *Id.* at 18–19 (quoting JAMES C. MCCROSKEY & LAWRENCE WHEELLESS, INTRODUCTION TO HUMAN COMMUNICATION 5 (1976)).

23. *Id.* at 19.

24. *Id.* (comparing communication skills to an athletic ability).

that, although people without any “communication training” generally function satisfactorily, “most people operate at a level of effectiveness far below their potential.”<sup>25</sup> Moreover, not only may those deemed to be inept improve with training and practice, but also highly effective communicators, like elite athletes, need to “keep in shape.”<sup>26</sup>

### C. *Communication Competence*

What is the meaning of keeping in shape in the context of effective communication? Once again, the literature identifies two dimensions when defining competent communication: effectiveness and appropriateness.<sup>27</sup> Appropriate communication generally “enhances the relationship in which it occurs.”<sup>28</sup> In other words, using language that does not offend the listener based both upon the circumstances and attention to cultural differences.<sup>29</sup> For example, sarcastic joking that might work with a friend or romantic language over a candlelight dinner would not be appropriate in workplace conversation.<sup>30</sup> Effectiveness concerns delivering the content of a message and does not derive from a singular approach or an ideal method of communication.<sup>31</sup> Flexibility is essential for effective and appropriate communication, as both the circumstances and the individuals involved must be considered before delivering a message.<sup>32</sup> Moreover, some people may be competent in some situations and less so in other exchanges.<sup>33</sup> For example, in the legal profession, some litigators may be stellar in the courtroom but less adept at communicating with their clients, especially if there is a tremendous cultural divide between them. The communication studies literature suggests that some people are naturally better communicators.<sup>34</sup> Nonetheless, effective communication skills may

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 19–20.

30. *See id.* at 20 (using similar examples).

31. *See id.* at 19–20 (“Your own experience shows that a variety of communication styles can be effective.”).

32. *See id.* at 20 (citation omitted) (“For example, qualities such as self-disclosure and straight talk may be valued in the United States but considered overly aggressive and insensitive in many Asian cultures.”).

33. *Id.*

34. *Id.*



be learned and involve understanding the many components contributing to effective communication.<sup>35</sup>

#### D. *Competent Communication Characteristics*

Studies have identified several characteristics that evidence communication competence.<sup>36</sup> One fundamental attribute is described as possessing a “[l]arge [r]epertoire of [s]kills,” meaning having several different options as to how you may choose to communicate or begin a conversation depending upon the circumstances.<sup>37</sup> “Just as a chef draws from a wide range of herbs and spices, a competent communicator can draw from a large array of potential behaviors.”<sup>38</sup> Of course, having an extensive repertoire of skills must go hand in hand with adaptability and empathy.<sup>39</sup> Interpreting the situation to select the correct approach and imagining the other party’s perspective are essential aspects of communication competence.<sup>40</sup> To carry the chef analogy a step further, you may own an incredible set of herbs and spices or communication tools; however, if you fail to analyze which one is needed or appropriate, you diminish your chance of success.<sup>41</sup>

Cognitive complexity and self-monitoring also build communication competence.<sup>42</sup> “Cognitive complexity is the ability to construct [various] frameworks” for interpreting the behavior of others.<sup>43</sup> Research has found that these constructs share a connection with empathy and lead to better “conversational sensitivity,” resulting in more effective communication.<sup>44</sup> In other words, understanding the person with whom you are speaking and being able to imagine standing in his or her shoes improves communication. Moreover, if you can construct different possibilities for the nature of the other person’s message, then you are more likely to communicate

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35. *Id.*

36. *Id.* at 20–21.

37. *Id.* at 21.

38. *Id.*

39. *See id.* at 21–22 (finding adaptability and empathy to be important communication tools because “good communicators don’t use the same approach in every situation”).

40. *Id.*

41. *See id.* at 21 (using a similar metaphor).

42. *See id.* at 22–23 (discussing how cognitive complexity and self-monitoring make for a better communicator).

43. *Id.* at 22.

44. *Id.*

effectively.<sup>45</sup> For example, your friend appears to be angry with you. Have you said something offensive, is your friend having a bad day, or is some other event impacting your friend's life and communication style?

Self-monitoring is another essential trait for competent communication.<sup>46</sup> Psychologists define self-monitoring as the "process of paying close attention to one's own behavior and using these observations to shape [one's own behavior]."<sup>47</sup> In common parlance, self-monitoring may be referred to as self-awareness and self-control in interactions with others.<sup>48</sup> Self-awareness becomes especially important, as discussed later, when an individual is communicating while in a highly emotional state.<sup>49</sup>

Interestingly, psychologists caution that it is not only a deficiency in traits such as self-monitoring, cognitive complexity, and empathy that hampers communication; an excess in these traits may also lead to incompetent communication.<sup>50</sup> An excess in self-monitoring may cause an individual to become overly concerned with impressions and, therefore, less authentic.<sup>51</sup> The overly empathic person who employs cognitive constructs may create an excess of vantage points such that analysis paralysis occurs, thereby rendering the individual incapable of acting.<sup>52</sup>

#### E. *Communication & Social Media Networking: A 2000 Year Phenomena*

The contemporary definition and description of communication competence developed over time; much of the research predates the internet, although the study of communication has continued through the beginning of the digital age into today. Tom Standage posits that human

45. *Id.*

46. *See id.* at 23 ("It's no surprise that self-monitoring generally increases one's effectiveness as a communicator.").

47. *Id.*

48. *See id.* (describing self-monitoring, self-awareness, and self-control as providing the same benefit to effective communication).

49. *See id.* at 26 (noting how "online communicators . . . share more emotions than they would in person, often leading to a hastened (and perhaps premature) sense of relational intimacy").

50. *See id.* at 23 (discussing how self-monitors observe their actions in various situations); *see also* Kendra Cherry, *What Is Self-Monitoring*, VERYWELLMIND (May 20, 2021), <https://www.verywellmind.com/what-is-self-monitoring-5179838> [<https://perma.cc/Q6ZU-UG2G>] (noting the connection between excessive self-monitoring and social anxiety).

51. *See* ADLER ET AL., *supra* note 2, at 22–23 (indicating self-monitors analyze their behavior and may adjust to better fit in with those around them); Cherry, *supra* note 50 ("High-self monitors are good at adapting to the situation and getting along with others. In some contexts, they might be seen as being 'fake,' but it is also a social skill that can promote interpersonal harmony.").

52. *See supra* note 50.

beings have been “writing on the wall” for two thousand years, and the internet has merely provided a digital format for social communication, which is part of our basic human nature.<sup>53</sup> Standage traces “[t]he compelling nature of social media” today back to three ancient foundations: “the evolution of the social brain,” “the emergence of human language,” and the origin of writing.<sup>54</sup>

The social brain theory posits that primates developed larger brains with enhanced mental processing capacity to analyze social networks like the web of social relationships expanded in their environments.<sup>55</sup> The theory’s focus is the neocortex, which is the area of the brain that is involved in higher functioning activities such as conscious thought, sensory perception, and spatial reasoning.<sup>56</sup> In 1992, British anthropologist Robin Dunbar identified a correlation between the neocortex size, as a percentage of overall brain volume, and the group size of various primates.<sup>57</sup> The larger the group, the greater the need for processing social relationships; thus, the larger the neocortex percentage.<sup>58</sup> Other researchers who conducted studies on deception rates have supported the social brain theory.<sup>59</sup> Deception rates or the frequency of deceptive behavior in primates also correlate to the neocortex volume suggesting that a larger neocortex allows for more extensive social analysis and manipulation.<sup>60</sup>

Tom Standage offers this exploration of the primate brain as evidence that the human brain was “literally made for social networking.”<sup>61</sup> He notes Dunbar’s theory that the most compelling reason for language development was to analyze relationships and share social information.<sup>62</sup> The “Dunbar

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53. See STANDAGE, *supra* note 6, at 8 (“[T]he social sharing of media, whether using papyrus scrolls in Roman times or the Internet today, has rested over the past two millennia.”).

54. *Id.*

55. See *id.* at 10 (finding a relation between primates’ unusually large brain and their unusually complex social systems).

56. *Id.* at 8.

57. *Id.* at 10–11.

58. See *id.* at 11 (detailing Dunbar’s study of howler monkeys, proboscis monkeys, capuchin monkeys, macaques, baboons, and chimpanzees).

59. *Id.* at 11.

60. See *id.* (“Monkeys who discover a tasty food source, for example, may keep other members of their group away by feigning a lack of interest.”).

61. *Id.*

62. *Id.* at 14 (“Dunbar has gone so far as to suggest that the exchange of social information . . . was the driving force behind the development of language, because using language makes maintaining social bonds much more efficient—which in turn allows for larger (and safer) groups.”).

number” suggests humans’ average group size, based upon our neocortex size and processing capacity, should be 150 people.<sup>63</sup> Dunbar asserts that a group of 150 people is the maximum size in which people will all know one another.<sup>64</sup>

Standage applies the Dunbar number to Facebook, where the vast majority of people have between 120 and 130 friends.<sup>65</sup> While acknowledging that some Facebook users have a far greater number of “friends,” Standage suggests that many of those online friends are likely to be casual contacts rather than “genuine friends.”<sup>66</sup> In fact, Dunbar’s research indicates that most people have approximately five intimate real-world friends and an additional ten close friends within a more extensive network of 150 relationships.<sup>67</sup> Standage connects this research to Facebook by observing that Facebook interaction is generally concentrated among seven to ten members of an individual’s core group, although shared with a larger group with whom users exchange gossip.<sup>68</sup> He explains: “Gossip is an extraordinarily rich source of social intelligence, both about the person speaking and about whoever is being discussed. And because our brains are wired to process just this kind of information, we find exchanging it extraordinarily compelling.”<sup>69</sup>

Gossip, or social information exchange, began as oral speech, initially because of a lack of writing acumen and literacy in early civilizations such as Mesopotamia and Egypt.<sup>70</sup> The ancient Greeks possessed a much higher rate of literacy but valued oration over the written word.<sup>71</sup> Plato preferred the possibility of a “flash” of enlightenment that may occur amid dialogue.<sup>72</sup> Aristotle noted that “spoken words are the symbols of mental experience,

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63. *Id.* at 12.

64. *Id.* The Dunbar number has been associated with the average size of a military company and the Hutterites, a community of Christians, who have divided their rural communities into groups that do not exceed 150, claiming that any more than 150 people require a police force to maintain order. Their groups of less than 150 maintain order by employing peer pressure. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* at 12–13 (discussing the shift from physical forms of grooming to the exchange of gossip).

69. *Id.* at 13.

70. *Id.* at 14–15.

71. *See id.* at 17–18 (“With their discursive political and intellectual culture and an unusually high rate of literacy, the Greeks had the opportunity to create the first social-media culture, . . . [but] Greek culture, it seems, never quite shook off its skepticism toward writing.”).

72. *Id.* at 19.

and written words are the symbols of spoken words,” thus preferring the verbal experiential exchange of language.<sup>73</sup> The ancient Greeks might agree with some critics of the digital world concerned that people are losing the art of interpersonal, verbal communication as they resort to abbreviated texting and social media posts rather than real-time verbal exchanges.<sup>74</sup> No doubt, the ancient Greeks left some extraordinary written words that the world continues to study, but it is the ancient Romans to whom we attribute the initial social media ecosystem.

### III. THE EMERGENCE OF A SOCIAL MEDIA COMMUNITY

Whether you have any news or not, write something . . . I shall write to you nearly every day, for I prefer to send letters to no purpose rather than for you to have no messenger to give one to, if there should be anything you think I ought to know.<sup>75</sup>

In ancient Rome, letter writing established a social system of exchange.<sup>76</sup> Often letter writers would send copies of their letters to friends who were not directly involved in the communication exchange.<sup>77</sup> Individuals would also often attach copies of other letters to their correspondence.<sup>78</sup> For example, one of Cicero’s letters to his friend Atticus stated: “I sent you on the 24th of March a copy of Balbus’ letter to me and of Caesar’s letter to him. Then on the very day from Capua I got a letter from Quintus Pedius saying that Caesar had written to him on the 14th in the following terms.”<sup>79</sup>

In addition to widely publishing letters, in 59 B.C. Julius Caesar founded a daily gazette named *acta diurna populi Romani (acta)*.<sup>80</sup> The English translation is “daily acts of the people of Rome.”<sup>81</sup> Interestingly, only one copy of the gazette was officially published and made available each day in the Roman Forum.<sup>82</sup> The *acta* readers informally shared the daily news via

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73. *Id.*

74. *See id.* at 20 (drawing a parallel between ancient Greek thought and concerns many have regarding the drawbacks to the proliferation of digital media).

75. *Id.* at 26 (internal quotation marks omitted).

76. *See id.* (discussing the Romans’ reliance on letters).

77. *Id.* at 27.

78. *Id.*

79. *Id.*

80. *Id.* at 28.

81. *Id.*

82. *Id.* at 31.

various social networks designed to reach a wide audience.<sup>83</sup> Although the *acta* began as a journal of government actions, it quickly became a vehicle for reporting nonpolitical items including gifts, funerals, and other noteworthy events.<sup>84</sup> Reports from the *acta* were often written by scribes who were sent to the Forum by wealthy citizens.<sup>85</sup>

Interestingly, much like posts on a Facebook wall, reports differed in content and emphasis based upon the original reporter's interests and those who included excerpts from *acta* copies in their letters to friends.<sup>86</sup> Individuals shared the ideas and events that held the most significance to the sender. Standage credits the Christians as the most successful users of the Romans' early social networking system, as he asserts that the network allowed them to share their beliefs to give birth to Christianity.<sup>87</sup>

#### A. *Early Writing on the Wall*

The archeological discoveries at Pompeii provide examples of writing on an analog wall—otherwise known as graffiti.<sup>88</sup> Roman homes were often comprised of rooms facing inward to a courtyard with a blank wall facing the street that could be used as a public message board. Graffiti did not carry a negative connotation but rather was another accepted social networking device.<sup>89</sup> Messages ranged from a notation of a routine activity (“On April 19, I made bread.”), to a categorization of character (“The man I am having dinner with is a barbarian.”), to recommendations (“Traveler, eat bread in Pompeii but go to Nuceria to drink. At Nuceria, the drinking is better.”).<sup>90</sup>

Dialogues were also discovered that could be compared to a social media post and various comments that follow it.<sup>91</sup> For example, on the wall of a tavern, the following comments were uncovered: “Successus, a weaver, loves the innkeeper's slave girl named Iris. She, however, does not love him.

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83. *Id.* at 31–32.

84. *Id.* at 30.

85. *Id.* at 31.

86. *See id.* at 32–33 (describing how those who copied and distributed the *acta* for friends would highlight items of interest and include commentary or other information of interest).

87. *Id.* at 42.

88. *See id.* at 38 (“More than eleven thousand items of graffiti have been recorded on the walls of Pompeii, a town with a population of ten to twenty thousand.”).

89. *Id.* at 38–39.

90. *Id.* at 40.

91. *Id.* at 41.

Still, he begs her to have pity on him. His rival wrote this. Bye, loser!”<sup>92</sup> On the wall below it, another individual posts: “Envious one, why do you get in the way? Submit to a handsomer man who is being treated very wrongly and is darn good-looking.”<sup>93</sup> The next post on the wall stated: “I have spoken. I have written all there is to say. You love Iris, but she does not love you. To Successus, see above. Severus.”<sup>94</sup>

#### B. *Going Viral 16th Century Style*

Although the Roman social network ecosystem laid the groundwork for the rapid exchange of social information, the system and information sharing partially shut down throughout the middle ages until universities began to emerge in the late eleventh century.<sup>95</sup> Once again, there was a compelling desire to share information, and eventually, in the thirteenth century, there was an effort to copy and make books available more efficiently.<sup>96</sup>

In 1444, Johannes Guttenberg’s invention of the printing press emerged as one of the earliest examples of machine technology impacting communication and making it possible to share information throughout a community simultaneously.<sup>97</sup> Martin Luther’s pamphlets and the printing press’s use illustrated an early example of a viral message that became a revolution.<sup>98</sup> In fact, “Luther . . . unwittingly revealed the power of a decentralized, person-to-person media system whose participants took care of distribution, deciding collectively which messages to amplify through sharing, recommendation, and copying.”<sup>99</sup>

Martin Luther’s *Ninety-Five Theses*, published in 1517, opposed the church’s selling of indulgences that ensured the purchaser would avoid “temporal punishment” and go directly to heaven.<sup>100</sup> It is unclear whether

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 48–49.

96. *Id.* at 49. The *pecia* system involved dividing a book into sections and renting it out to be recopied by scribes or students, who would gradually complete an entire copy of the book. *Id.*

97. *See id.* at 50 (providing a history of Gutenberg’s inventing the printing press and the impact of the invention). Of course, one might argue that the technology discovered to create both paper and writing instruments are the earliest and most essential inventions. *Id.* at 49 (describing the impact of the introduction of paper on the production of books in Europe).

98. *Id.* at 52–53.

99. *Id.* at 53–54.

100. *Id.* at 51–52.

Martin Luther facilitated the original widespread distribution of *Ninety-Five Theses*, but the popular demand and unprecedented ability to rapidly meet the demand provided Luther with a methodology to share additional thoughts.<sup>101</sup> “Luther would pass the text of a new pamphlet to a friendly printer—no money changed hands—and then wait for it to ripple through the network of printing centers across Germany.”<sup>102</sup>

The number of separate editions of a pamphlet determined popularity.<sup>103</sup> That metric has been analogized to contemporary social media metrics that may consider the popularity of a message based upon the number of likes, tweets, reblogs, and page views.<sup>104</sup> A 1994 analysis and chart of Martin Luther’s “traffic statistics” demonstrates that from 1517–1527, known as the first decade of the Reformation, six million pamphlets were printed; Luther authored approximately one-third of the pamphlets.<sup>105</sup> Some of the pamphlets criticized Luther and his ideas; he promptly responded with another pamphlet.<sup>106</sup> The pamphlets’ ideas become the focus of discussions among family, friends, co-workers, and at the inns and taverns.<sup>107</sup> The analogy to viral messaging on social media today that fuel political or social revolution is an apt one. “Luther did not set out to split the Christian church, but that was the ultimate effect of the campaign he had started, in which the social sharing of his works played a vital role.”<sup>108</sup>

### C. *Social Networking: The Transition from Analogue Communication to the Digital Age*

Between Martin Luther’s viral messaging and the advent of the internet and social media, the world is replete with examples of social networks designed to connect people, share thoughts or feelings, and advance various social and political movements.<sup>109</sup> For example, scholars write about the

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101. *Id.* at 52–53.

102. *Id.* at 54.

103. *Id.*

104. *Id.*

105. *See id.* at 55 (citing MARK U. EDWARDS, JR., PRINTING, PROPAGANDA, AND MARTIN LUTHER (1994)), (analyzing “the number of editions of [Luther’s] pamphlets printed each year in German and Latin”).

106. *Id.* at 55–56.

107. *Id.* at 57.

108. *Id.* at 53.

109. *Id.* at 64–69. For example, there is a charming tale of a book whose “walls” or pages were shared by at least nineteen different users to write poetry, inscribe feelings for one another, and to send coded messages. It has been referred to as “the Facebook of the Tudor Court.” *Id.* Entitled the



viral nature of Thomas Paine's pamphlet, *Common Sense*, and its contribution to the American Revolution.<sup>110</sup> The French Revolution also appears to have been fueled, in part, by an underground network of witty rhymes that traveled freely and were shared in both oral and written form, thereby reaching people of all classes.<sup>111</sup>

The arrival of the internet and social media transformed social networking into a rapid-fire, digital exchange that impacts and influences society.<sup>112</sup> From the Arab Spring uprisings in the Middle East commencing in 2010<sup>113</sup> to the murder of George Floyd and the Black Lives Matter protests throughout the world in the summer of 2020,<sup>114</sup> there is no doubt that social media played a role. However, it is important to note that when analyzing analog or digital social networks' impact on society, both the network and the nature of its communication must be considered in context.<sup>115</sup> Clearly, social networking influences people, but the degree to which its influence exists as a change agent remains a subject of debate.<sup>116</sup> Tom Standage explains:

A helpful perspective, common to the Arab Spring and the Reformation, is that getting a revolution going is like starting a fire. Jared Cohen, a former official in [the United States'] State Department who now works for Google, has likened social media's role in the Arab Spring to that of an "accelerant" that causes fire to spread more quickly. A similar view was expressed in an illuminated manuscript from 1572, showing how the tinderbox of European religious discontent was finally ignited. John Wycliffe is depicted holding a match, Jan Hus a candle, and Martin Luther a flaming torch. New forms of social media did not start the fire in either the sixteenth or twenty-first

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Devonshire Manuscript, the book was circulated for several years and contained 194 messages primarily written between 1534 and 1539. *Id.*

110. *Id.* at 139–41.

111. *Id.* at 152–53.

112. *Id.* at 4.

113. *Arab Spring*, HISTORY (Jan. 17, 2020), <https://www.history.com/topics/middle-east/arab-spring> [<https://perma.cc/7PU3-UZ3M>].

114. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/V49N-JKG6>].

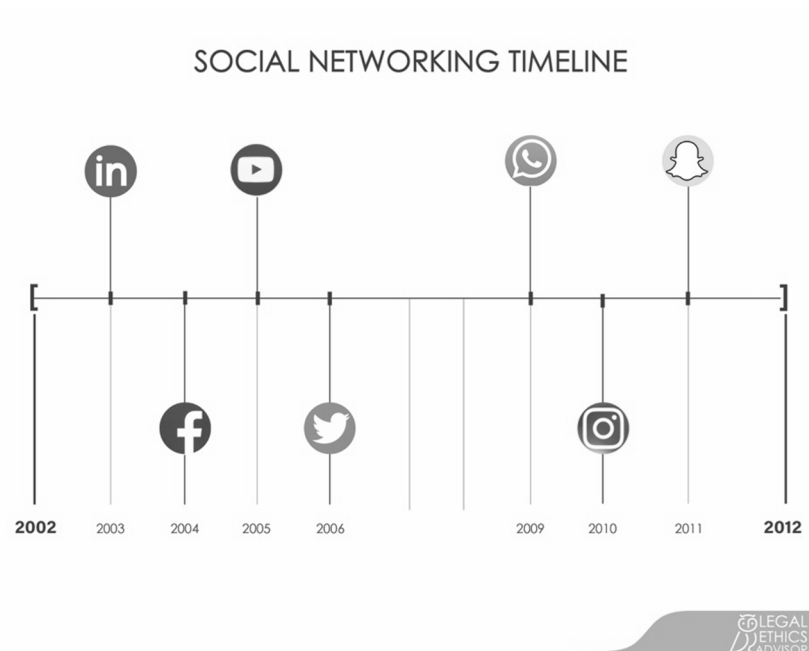
115. ADLER ET AL., *supra* note 2, at 15.

116. STANDAGE, *supra* note 6, at 241–42.

centuries. But in both cases it helped turn an initial spark into a conflagration.<sup>117</sup>

#### D. *Online Networking: The Contemporary Method of “Writing on the Wall”*

Social media has permeated daily life, so it may be surprising to learn that Facebook, the site from which contemporary, large-scale social networking began, celebrated its seventeenth anniversary in 2021.<sup>118</sup> The chart below provides a timeline of the most popular sites and their dates of origin.<sup>119</sup>



The chart reveals that, from 2003–2006, a cluster of new social networking vehicles arrived and would continue to gain popularity until they reached

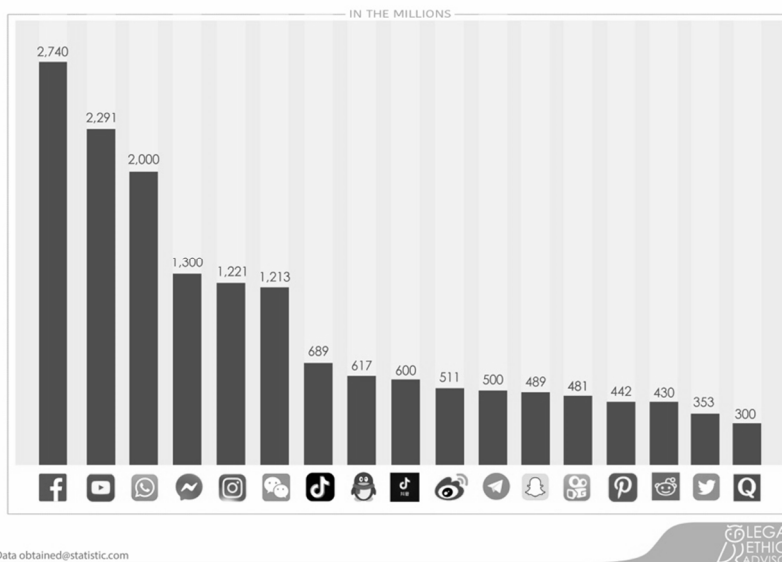
117. *Id.*

118. See *When Did Social Media Start?*, SHILINIUM (Oct. 17, 2019), <https://shilinium.com/social-media/when-did-social-media-start/> [https://perma.cc/A9PJ-J99Z] (indicating Mark Zuckerberg launched Facebook at the beginning of 2004).

119. *Id.*

millions or billions of individuals.<sup>120</sup> In fact, the January 2021 statistics below provide a glimpse of social media's global impact.<sup>121</sup> The data pertains to monthly active users and evidences over 2.7 billion users on Facebook.<sup>122</sup> YouTube, the second most popular site, has approximately 2.2 billion users.<sup>123</sup>

WORLDWIDE SOCIAL MEDIA NETWORKING  
as of January 2021



Facebook, YouTube, and Instagram provide platforms for multiple types of sharing: family and friends sharing photographs of vacations and dining experiences, political thoughts, current events and news, educational material, advertising of goods and services, and general entertainment.<sup>124</sup> Billions of photographs and videos are shared each year.<sup>125</sup> Twitter's primary focus involves rapidly sharing the news of the day and commentary

120. *Id.*

121. *Most Popular Social Networks Worldwide as of January 2021, Ranked by Number of Active Users*, STATISTA (Jan. 2021), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [https://perma.cc/7KYC-URRP].

122. *Id.*

123. *Id.*

124. See ADLER ET AL., *supra* note 2, at 23 (describing various ways people use social media).

125. See Jimit Bagadiya, *367 Social Media Statistics You Must Know in 2020*, SOCIALPILOT, <https://www.socialpilot.co/blog/social-media-statistics> [https://perma.cc/6YW6-E4TH] (providing statistics about photos and videos posted on various social media platforms).

about current events.<sup>126</sup> As of May 2020, Twitter users sent approximately 6,000 tweets per second or 500 million tweets per day, which amounts to 200 billion tweets per year.<sup>127</sup> The Pew Research Center reports that approximately seven out of every ten adults in the United States use social media, and roughly 75% are daily users.<sup>128</sup>

Thus, while contemporary social networking may hearken back to a primordial human instinct to connect, the scale and speed with which it occurs today is unprecedented and would likely garner the envy of Cicero and his Roman colleagues. Of course, it is the rapid-fire nature of social media that not only brings the world closer together but also may cause its users to suffer unfortunate repercussions, ranging from an occasional simple regret to severe consequences that impact relationships, reputations, and careers.<sup>129</sup> The explosion of negative commentary and the widespread societal impact of the tenor of charged political posting and fake news is beyond this Article's scope; however, its trickle-down effect on the legal profession is worthy of discussion.

#### IV. LAWYERS (AND JUDGES) ARE HUMAN, TOO

Before drilling down on the existence and impact of negative commentary on lawyers, it should be noted that lawyers, as humans, are included in the general statistics discussed above. Additionally, data focuses on the use of social media by both law firms and individual lawyers.<sup>130</sup> Independent research studies conducted in 2018 by the American Bar

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126. See David Sayce, *The Number of Tweets Per Day in 2020*, DAVID SAYCE (May 6, 2020), <https://www.dsayce.com/social-media/tweets-day/> [https://perma.cc/X5F5-GFMD] (recounting occasions generating the most tweets in history).

127. *Id.*; Bagadiya, *supra* note 125.

128. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [https://perma.cc/7M65-QFNA]. It is important to note that the percentage differs among age groups. Using the example of the popular online platform, YouTube, data indicates 18–29-year-old group reports usage at 91% while the over 65-year-old group usage is at 38%. The 30–49-year-old group reports 87% use and the 50–64-year-old group reports 70% usage. *Id.*

129. See ADLER ET AL., *supra* note 2, at 28 (describing the downside of social media, including the permanence of regrettable and hurtful messages).

130. *Social Media for Lawyers*, RANKINGS.IO (Oct. 3, 2019), <https://medium.com/@Rankingsio/social-media-for-lawyers-814cf5518c1a> [https://perma.cc/YVT9-8EK7]; Chris Dreyer, *Social Media for Lawyers*, RANKINGS.IO (Sept. 28, 2019), <https://rankings.io/social-media-for-lawyers/> [https://perma.cc/ZW54-GHC6].

Association and Attorney at Work found that over 75% of respondent law firms use social media and that lawyers primarily use LinkedIn, Facebook, and Twitter.<sup>131</sup> These statistics primarily address social media use for branding and marketing and do not distinguish personal posts from professional ones.<sup>132</sup> However, plentiful anecdotal evidence indicates that lawyers often present a blend of their personal and professional lives on social media with varying results.<sup>133</sup>

Interestingly, lawyers also use social media to connect and assist one another, as exemplified by a Texas Lawyers Facebook page that in 2018 reported over one million interactions since its 2014 inception.<sup>134</sup> As of 2018, 11% of Texas lawyers belong to the Facebook group, characterized as the “[s]tate’s [l]argest [v]oluntary [b]ar [a]ssociation.”<sup>135</sup> Some judges also use social media for personal purposes, to campaign in states where they must be elected, and to comment on legal cases and political events.<sup>136</sup>

#### A. *But Lawyers Are Different, Too*

The distinction among lawyers, judges, and other humans in the context of social media use resides in the legal ethics rules and judicial canons. Lawyers and judges study the law and become licensed to practice in their respective states. In exchange for their licenses, lawyers relinquish certain rights to support the trust required for the attorney-client relationship, the fair administration of justice, and the rule of law. For example, lawyers must maintain their clients’ confidentiality, not misrepresent or mislead the

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131. Dreyer, *supra* note 130.

132. *Id.*

133. See generally JACOBOWITZ & BROWNING, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER’S HANDBOOK 217 (2017); Jan L. Jacobowitz, *Lawyers Beware: You Are What You Post—The Case for Integrating Cultural Competence, Legal Ethics, and Social Media*, 17 SMU SCI. & TECH. L. REV. 541 (2014) [hereinafter Jacobowitz, *Lawyers Beware*] (“Many lawyers actively participate in social media networks in their personal and professional lives.”).

134. John Council, *Texas Lawyers Facebook Group, with 1 Million Interactions, Has Become State’s Largest Volunteer Bar Association*, LAW.COM (Nov. 26, 2018, 2:00 PM), <https://www.law.com/texaslawyer/2018/11/26/social-media-mentoring-texas-lawyers-facebook-group-with-1-million-questions-answered-has-become-states-largest-volunteer-bar-association/> [https://perma.cc/WQ8Q-DBBE].

135. *Id.*; Debra Cassens Weiss, *Facebook Group Becomes Texas’ Largest Voluntary Bar Association; Can Lawyers Use Advice Ethically?*, A.B.A. J. (Nov. 27, 2018, 1:15 PM), [https://www.abajournal.com/news/article/facebook\\_group\\_becomes\\_texas\\_largest\\_volunteer\\_bar\\_association\\_can\\_lawyers\\_](https://www.abajournal.com/news/article/facebook_group_becomes_texas_largest_volunteer_bar_association_can_lawyers_) [https://perma.cc/SZQ8-H9QT].

136. Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 SMU L. REV. 249, 256–261 (2018).

public, and act with candor to the tribunal and fairness to opposing counsel.<sup>137</sup>

When a lawyer becomes a judge, additional sacrifices must be made to uphold the judicial system's integrity. Judges are held to the highest standard of any public official; that is, they must avoid bias and impropriety and refrain from any *appearance* of impropriety.<sup>138</sup> It is important to note that the legal profession remains a self-regulating one.<sup>139</sup> The legal profession establishes its own codes of conduct and governs lawyers' and judges' conduct through regulations, some of which apply 24-7.<sup>140</sup> In other words, an individual who accepts the privileges of a law license must adhere to applicable professional conduct rules, whether acting in real-time or posting on the internet.

Moreover, members of the legal profession have an ongoing duty to remain competent, including the obligation to understand technology's benefits and disadvantages.<sup>141</sup> As of this Article's writing, nearly forty states have adopted some version of the ABA 2012 amendment to the notes that interpret the duty of competence to include understanding the benefits and disadvantages of technology.<sup>142</sup> For example, in Florida, the note to the Florida Rule of Professional Conduct regarding competence adds the ABA language and emphasizes that if a lawyer does not understand technology, they may need to employ a non-lawyer, whilst complying with the rule on confidentiality.<sup>143</sup> Florida has also added mandatory three

137. *See generally* MODEL RULES OF PROF'L CONDUCT RR. 1.6, 3.3, 3.4, 7.1 (AM. BAR ASS'N 2020) (proscribing lawyer misconduct).

138. *See* MODEL CODE OF JUD. CONDUCT Canons 1–3 (AM. BAR ASS'N 2010) (imposing restrictions on judicial officers to prevent public misconception of impropriety).

139. *See* AM. BAR ASS'N, CONSTITUTION AND BYLAWS: RULES OF PROCEDURE OF THE HOUSE OF DELEGATES § 1.2 (2020–2021) (promulgating guidelines for the American Bar Association's regulation of the profession).

140. *See, e.g.*, MODEL CODE OF JUD. CONDUCT Canon 3 (indicating judges must conduct their "personal and extrajudicial activities" in a way that will not conflict with their judicial obligations).

141. MODEL RULES OF PROF'L CONDUCT R. 1.1 & cmt. 8 (AM. BAR ASS'N 2012).

142. *Cf.* Robert J. Ambrogio, *Tech Competence*, LAW SITES, <https://www.lawsitesblog.com/tech-competence> [<https://perma.cc/FWW5-4LNT>] (reflecting a total of thirty-nine jurisdictions "have ma[d]e clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology"); *Jurisdictional Adoption of Model Rule 1.1, cmt. [8] on Tech Competence*, ABA (Dec. 1, 2019), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc1-1-comment-8.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc1-1-comment-8.pdf) [<https://perma.cc/K3CQ-DCL8>] (showing thirty-eight states "have adopted a statement on tech competence").

143. R. Regulating Fla. Bar 4-1.1, 4-1.6 (2021).

credits of technology continuing education to Florida lawyers' three-year mandatory continuing education cycle.<sup>144</sup>

Defining the benefits and disadvantages of technology within the context of the practice of law encompasses a large number of topics that range from the complex issues that arise in cybersecurity, coding methods for e-discovery, and the use of artificial intelligence to the more fundamental use of email and e-filing protocols. As a subset of technology, the understanding of social media falls on the mid-range of the spectrum depending upon a lawyer's practice area, marketing plan, and personal use of social media.

Lawyers who actively engage in social media should understand it. Lawyers who practice in areas such as family law and personal injury law will find a treasure trove of evidence on social media, so they must understand how to use it to represent their clients effectively.<sup>145</sup> In fact, social media may impact a case from the investigatory stages, to issues of jurisdiction and service of process, throughout discovery, jury selection, and throughout the trial.<sup>146</sup> Of course, at each stage of the case, some ethics rules govern social media use, but a detailed discussion of each of those rules is beyond this Article's scope.<sup>147</sup> Instead, this Article seeks to explore lawyers' negative commentary on social media, identify the consequences for the posting lawyer, delve into the potential causes of the conduct, and thereby suggest methods to avoid negative consequences.

#### V. LAWYERS ON SOCIAL MEDIA: NEGATIVE COMMENTARY & NEGATIVE CONSEQUENCES

Social media landmines generally fall into three categories: lawyers discussing current events, commenting on cases, or responding to a client's

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144. *Id.* at 6-10.3(b).

145. See *How Social Media Can Undercut Your Personal Injury Claim*, PARRISH L. FIRM, PLLC, <https://www.theparrishlawfirm.com/faqs/how-social-media-can-undercut-your-personal-injury-claim/> [https://perma.cc/27UL-XS9P] (“Sharing profile information, pictures, posts, videos, and comments on social media can undercut your personal injury claim by giving opposing counsel’s research team fodder that they can use against you.”).

146. See *id.* (explaining the various ways an opposing attorney can use adverse clients’ social media against them).

147. See Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIA. L. REV. 445, 446 (2014) [hereinafter Jacobowitz & Singer, *The Social Media Frontier*] (indicating there have been many articles on how to avoid the ethical dilemmas accompanying use of social media).

negative review.<sup>148</sup> Each category possesses nuances and legal ethics concerns that may overlap from one category to another. The following sections offer a glimpse into these categories and the possible repercussions of tripping on a legal ethics landmine.

A. *Commenting on Current Events*

The summer of 2020 gave rise to protests ranging from those related to the death of George Floyd, the Black Lives Matter movement, the Covid-19 shut down, and mask mandate protests. The presidential election also provided an opportunity for gatherings of people adamantly supporting or opposing a particular candidate. Not surprisingly, many social media posters passionately commented on these events. Unfortunately for some of the lawyers who felt compelled to comment, they have damaged their reputations and careers. For example, during the protests over the death of George Floyd, a Broward County assistant state attorney posted on her Facebook page: “When will people learn that their criminal acts and obnoxious protesting actually gets you nowhere? . . . Act civilized and maybe things will change. I’ve never seen such animals except at the zoo.”<sup>149</sup> Although her post noted that it was not directed at any particular race, the Broward County State Attorney’s Office swiftly responded:

Following our review of the Facebook posting by [the assistant state attorney], we have made the decision to terminate her effective immediately, . . . . The views expressed in that posting are entirely inconsistent with the ideals and principles of the Broward State Attorney’s Office and the duties and responsibilities of an assistant state attorney.<sup>150</sup>

She attempted to clarify her conduct by posting:

I made a post and realized that it could be misinterpreted, so I *deleted it within seconds* . . . . I believe in justice for all and that ALL lives matter. I don’t look at anybody by their color shape or size . . . My post specifically referenced the people who took advantage of the opportunity to protest. I respect the people

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148. See generally JACOBOWITZ & BROWNING, *supra* note 133, at 207–08, 217–22.

149. Bob D’Angelo, *South Florida Prosecutor Fired over Facebook Post Comparing Protesters to ‘Animals’*, WSOC-TV 9 (June 2, 2020, 11:19 AM), <https://www.wsocv.com/news/trending/south-florida-prosecutor-fired-over-facebook-post-comparing-protesters-animals/AELGXJWOXZBMHAH5TCBUA2YVGA/> [<https://perma.cc/DR25-55WZ>].

150. *Id.*



who have a mission and wanted to accomplish it. It is hard to respect those who are taking it away with violence and destruction.<sup>151</sup>

In a matter of seconds, an eight-year career at the State Attorney’s Office ended because of an inflammatory post in the emotional space known as social media.<sup>152</sup> More on dealing with those “seconds” later in the Article.<sup>153</sup>

Summer 2020 also witnessed the end of another prosecutor’s career at the District Attorney Office in Harris County, Texas. The prosecutor did not write the offending post but rather reposted someone else’s post.<sup>154</sup> The post contained a black-and-white photograph of many wedding rings. A caption stated the rings had been “removed from Holocaust victims prior to being executed. . . . Never forget, Nazis tore down statues, . . . . Banned free speech. Blamed economic hardships on one group of people. Instituted gun control. Sound familiar?”<sup>155</sup> When she realized the next day that the post was being interpreted as racist, she removed the post. The New York Times quoted her as saying that it was never her intention and that she had spent her life defending the rights of both victims and those who had been wrongfully accused.<sup>156</sup>

Nonetheless, a petition calling for her resignation was circulated, and the Harris County District Attorney explained: “[I]his organization and my administration [have] zero tolerance for racism in any shape or form.”<sup>157</sup> She went on to say that it is “not our intent to involve ourselves in employees’ personal lives,” but that the law allowed her to “implement graduated sanctions ranging from education and counseling up to

151. *Id.* (emphasis added).

152. *Id.*

153. *Id.*

154. Jacey Fortin, *Texas Prosecutor Resigns over Facebook Post About Nazi Germany*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/us/kaylynn-williford-harris-county-prosecutor-or-resign.html> [<https://perma.cc/Q49A-ZSRH>]; *Top Harris Co. Prosecutor Resigns After Post Appearing to Compare Protesters to Nazis, District Attorney Says*, ABC 13 (June 30, 2020), [https://abc13.com/kaylynn-williford-harris-county-prosecutor-racist-post-district-attorneys-office/6281214/?fbclid=IwAR0d6CqTsfPg0f5KkssRvOZzgM-tcOCEZAxFr-4t1y-t6Ax3k\\_rTX7Ki1To](https://abc13.com/kaylynn-williford-harris-county-prosecutor-racist-post-district-attorneys-office/6281214/?fbclid=IwAR0d6CqTsfPg0f5KkssRvOZzgM-tcOCEZAxFr-4t1y-t6Ax3k_rTX7Ki1To) [<https://perma.cc/RHR9-MJUU>]. For the original post see America’s Mom @Sherronna, *Photos*, FACEBOOK (June 22, 2020), <https://www.facebook.com/Sherronna/photos/a.418725218917499/714562756000409> [<https://perma.cc/LAYP-2QC7>] [hereinafter Holocaust Wedding Band Post].

155. Holocaust Wedding Band Post, *supra* note 154; *see also* Fortin, *supra* note 154 (providing excerpts of the post and additional background information).

156. Fortin, *supra* note 154.

157. *Id.*

termination” when an employee’s social media posts “publicly contradict and violate this office’s policies.”<sup>158</sup> She added: “When speech made in the privacy of one’s home or on social media contradicts our core values, . . . we take action.”<sup>159</sup> Again, a career ended in moments—the prosecutor, who was the trial bureau chief, resigned from her position.<sup>160</sup>

Lest one conclude that the social media career-ending scenario is unique to prosecutors, there are public defenders, judges, and other lawyers who step on social media landmines. Another post, which also appeared in summer 2020, depicted individuals who were being assaulted by water cannons with a caption that said: “The next riot at the Market House”—an apparent reference to an incident that occurred after a peaceful protest held in the aftermath of George Floyd’s death when there was an attempt to burn down the property.<sup>161</sup> The author of the post was Cumberland County’s chief public defender, who ultimately removed the post and resigned with remorse.<sup>162</sup>

In 2017, after the Charlottesville protests regarding Confederate statues, a judge in Gwinnett County, Georgia, was suspended for his Facebook posts that included comments that called the protestors “snowflakes [who] have no concept of history” and added that “[t]he nut cases tearing down Confederate monuments are equivalent to ISIS destroying history.”<sup>163</sup> The county chief magistrate, who issued the suspension, explained:

As the Chief Magistrate Judge, I have made it clear to all of our Judges that the Judicial Canons, as well as our internal policies, require Judges to conduct themselves in a manner that promotes public confidence in the integrity, impartiality, and fairness of the judiciary . . . .

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158. *Id.*

159. *Id.*

160. *Id.*

161. Michael Futch, *Public Defender Resigns After Social Media Post*, FAYETTEVILLE OBSERVER (June 10, 2020, 3:30 PM), <https://www.fayobserver.com/story/news/courts/2020/06/10/public-defender-resigns-after-social-media-post/41730835/> [<https://perma.cc/P943-CTVQ>].

162. *Id.*

163. Mollie Cahillane, *Georgia Judge Is Suspended After Calling Anti-Racist Protesters in Charlottesville ‘Nutcases’ and ‘Snowflakes’ and Comparing Them to ISIS for Tearing Down Confederate Monuments*, DAILY MAIL (Aug. 15, 2017, 5:36 PM), <https://www.dailymail.co.uk/news/article-4793686/Georgia-judge-suspended-posts-Charlottesville.html> [<https://perma.cc/AH39-D3XA>].

I consider any violation of those principles and policies to be a matter of utmost concern, and will certainly take any action necessary to enforce compliance and to maintain the integrity of this Court[.]<sup>164</sup>

Interestingly, the judge did not believe that his posts were offensive.<sup>165</sup> Another judge in Tennessee, reprimanded in 2019 for Facebook posts, also expressed surprise that his posts were considered problematic.<sup>166</sup> In fact, the Tennessee Board of Judicial Conduct that reprimanded the judge found no evidence “he displayed ‘any actual bias, prejudice, or impartiality’” in the courtroom but stated that the judge’s Facebook posts were “partisan in nature, . . . [and a] clear violation of the code of judicial conduct . . . .”<sup>167</sup> The letter of reprimand required the judge to ensure that his Facebook page is private and to enroll in a course in judicial ethics and social media use.<sup>168</sup> The letter explained:

Specifically, those images you ‘shared’ on your Facebook account reflects among other things a concern for credibility of certain federal agencies, a strong position on professional athletes kneeling during the national anthem, the effect of illegal aliens on the economy, opposition to certain democrat platform principles, opposing support for then presidential candidate Hillary Clinton, a position on black lives matter and the double standard of the news media . . . .<sup>169</sup>

Negative commentary leads to negative consequences for lawyers throughout the world, as seen in summer 2020 in Alberta, Canada, where a lawyer resigned from his appointment to a judicial nominating committee after his online posts came to light.<sup>170</sup> The media reported on his “comparison of a future COVID-19 vaccine to Auschwitz tattoos and posting of a video that called Black Lives Matter a ‘leftist lie’ controlled by

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164. *Id.*

165. *Id.*

166. Yolanda Jones, *Judge Jim Lammey Reprimanded for Social Media Posts*, DAILY MEMPHIAN (Nov. 18, 2019, 5:11 PM), <https://dailymemphian.com/article/8953/judge-jim-lammey-reprimanded-for-social-media> [https://perma.cc/FZF7-BBBL].

167. *Id.*

168. *Id.*

169. *Id.*

170. Rachel Ward, *Lawyer Who Posted Black Lives Matter ‘Leftist Lie’ Video Resigns from Alberta Judicial Vetting Committee*, CBC (June 19, 2020), <https://www.cbc.ca/news/canada/edmonton/pcnc-member-alberta-1.5618816> [https://perma.cc/5KCK-QVLF].

a Jewish philanthropist.”<sup>171</sup> Furthermore, in Hong Kong, an in-house attorney resigned from his position at a French investment bank.<sup>172</sup> The lawyer’s posts controversially commented on protestors in China.<sup>173</sup> There was a call for his termination, and the bank published a statement encouraging people to conduct themselves to avoid social division and stated: “We deeply apologise for the offence caused by a social media post that was expressed on one of our employees’ personal accounts.”<sup>174</sup>

Negative commentary also impacts law firms when staff posts controversial social media posts. In May 2020, a document services manager at a large law firm posted irate comments concerning Covid-19 mask requirements.<sup>175</sup> The employee posted the following about any business requiring him to wear a mask: “Do I have to show the lame security guard outside of a ghetto store my CV19 test results? I will show him my Glock 21 shooting range results.”<sup>176</sup> The firm responded by terminating the employee and posting this message:

This afternoon we learned that an administrative employee of the Firm issued a threatening and offensive post on a personal social media account related to COVID-19 mask protections. This post is a complete violation of the values of our Firm, including our commitment to the health and safety of the communities we serve. We have terminated this individual’s employment and notified the proper authorities about the post as a precaution. We are deeply sorry for this situation. This type of post is not and never will be tolerated by our Firm.<sup>177</sup>

It is worth noting that, despite the last few years of particularly divisive rhetoric in our society, the phenomena of lawyers posting negative commentary on current events and the negative consequences that ensue

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171. *Id.*

172. Alvin Lum & Chris Lau, *Hong Kong Lawyer Quits BNP Paribas After Facebook Post Supporting Anti-Government Protests and Ridiculing Pro-Beijing Activists*, S. CHINA MORNING POST (Sept. 27, 2019, 9:42 AM), <https://www.scmp.com/news/hong-kong/article/3030581/hong-kong-lawyer-quits-bnp-paribas-after-facebook-post-supporting> [<https://perma.cc/YF49-EFEF>].

173. *Id.*

174. *Id.*

175. Dana Branham, *Dallas Law Firm Fires Employee After ‘Threatening’ Post About His Gun, COVID-19 Mask Requirements*, DALL. MORNING NEWS (May 11, 2020, 8:49 PM), <https://www.dallasnews.com/news/public-health/2020/05/11/dallas-law-firm-fires-employee-after-threatening-post-about-his-gun-covid-19-mask-requirements/> [<https://perma.cc/3YMD-GX3S>].

176. *Id.*

177. *Id.*

are not a product of current controversial issues. In fact, these types of posts and repercussions certainly predate Covid-19 and the summer 2020 protests; they have been in the news for at least a decade.<sup>178</sup> Moreover, while the majority of these posts appear to be about high profile current events, others are more personal. For example, a lawyer in Tampa, Florida, found himself in trouble with the Florida Bar because of his viral video post in which he utters profanities as he knocks a stowaway raccoon off of his boat and leaves it to drown.<sup>179</sup> After a seven-month investigation, the Florida Bar recommended a diversion program in which the lawyer had to complete a \$750.00 professionalism workshop to remain in good standing.<sup>180</sup>

### B. *Commenting on Cases*

Lawyers who comment about their cases, clients, or the judges before whom the lawyers appear have also found themselves suffering negative consequences. Comments of this nature more directly implicate the legal ethics rules including, but not limited to, the rules governing competence, confidentiality, impugning the integrity of the judiciary, and general misconduct.<sup>181</sup> A lack of understanding of the technology of social media lies at the heart of the competence issue.<sup>182</sup> Revealing client information without consent generally violates the confidentiality rule.<sup>183</sup> Recklessly characterizing a judge's personality or conduct may violate the rule prohibiting impugning the integrity of the judiciary.<sup>184</sup> The general misconduct rule exists as an umbrella over any conduct that violates rules or inhibits the fair administration of justice.<sup>185</sup>

Some of the first cases occurred in 2008–2009 and laid the groundwork for those to follow. Sean Conway, a Florida criminal defense lawyer,

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178. See Jacobowitz, *Lawyers Beware*, *supra* note 133, at 562 (noting changes brought on by social media regarding peoples' behavior may have contributed to lawyers' violation of legal ethics in ways that "align[] with social media norms").

179. Colin Wolf, *Florida Lawyer Who Filmed Himself Leaving a Raccoon to Die 20 Miles Offshore Told to Take a Workshop*, ORLANDO WEEKLY (Dec. 17, 2019, 3:21 PM), <https://www.orlandoweekly.com/Blogs/archives/2019/12/17/florida-bar-fines-lawyer-who-filmed-himself-leaving-a-raccoon-to-die-20-miles-offshore> [<https://perma.cc/T6Y7-L4CV>].

180. *Id.*

181. MODEL RULES OF PROF'L CONDUCT RR. 1.1, 1.6, 8.2, 8.4 (AM. BAR ASS'N 2020).

182. *Id.* at R. 1.1 & cmt. 8.

183. *Id.* at R. 1.6.

184. *Id.* at R. 8.2.

185. *Id.* at R. 8.4.

blogged about a judge whose courtroom procedures, in his belief, denied criminal defendants their right to a speedy trial.<sup>186</sup> In addition to cautioning fellow practitioners, Conway characterized the judge as an “[e]vil, [u]nfair [w]itch,” a “malcontent,” and “seemingly mentally ill.”<sup>187</sup> The Florida Supreme Court asked for briefs on the First Amendment issue raised by the case but ultimately approved Conway’s settlement with the Florida Bar, in which he agreed to a public reprimand and paid a fine.<sup>188</sup> Kristine Peshek was another attorney who negatively blogged about the judges before whom she appeared.<sup>189</sup> As she was an Illinois public defender, her case is probably more well-known because she also negatively blogged about her clients using their prison numbers, first names, or nicknames.<sup>190</sup> She was suspended for sixty days in both Illinois and Wisconsin.<sup>191</sup>

Perhaps these early cases served as a warning to some attorneys, but all have not taken heed. In November 2019, an attorney in Massachusetts was reprimanded after he posted on his public Facebook page about a juvenile case.<sup>192</sup> He was representing a woman who was seeking guardianship of her grandson.<sup>193</sup> His post and follow up comments are contained in the public reprimand that he received:

On September 22, 2015, the respondent appeared at a hearing in Juvenile Court. The judge gave the respondent until October 2015 to present his client’s guardianship petition. The day after the hearing, September 23, 2015,

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186. Fla. Bar v. Conway, 996 So. 2d 213, 213 (Fla. 2008); John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES (Sept. 12, 2009), <https://www.nytimes.com/2009/09/13/us/13lawyers.html> [<https://perma.cc/7885-VMUE>]; Bradley C. Nahrstadt & W. Brandon Rogers, *Think Before You “Speak”: What Lawyers Can and Cannot Say in the Digital Age*, 80 DEF. COUNS. J. 252, 266–67 (2013).

187. Nahrstadt & Rogers, *supra* note 186, at 267; Schwartz, *supra* note 186. For additional context and background, see *Conway*, 996 So. 2d at 213; JACOBOWITZ & BROWNING, *supra* note 133, at 220.

188. *Conway*, 996 So. 2d at 213.

189. Debra Cassens Weiss, *Bloggng Assistant PD Gets 60-Day Suspension for Posts on Little-Disguised Clients*, A.B.A. J. (May 26, 2010, 1:57 PM), [https://www.abajournal.com/news/article/bloggng\\_assistant\\_pd\\_gets\\_60-day\\_suspension\\_for\\_posts\\_on\\_little-disguised/](https://www.abajournal.com/news/article/bloggng_assistant_pd_gets_60-day_suspension_for_posts_on_little-disguised/) [<https://perma.cc/B4VR-6AAG>]; see also *In re Peshek*, 798 N.W.2d 879, 879–80 (Wis. 2011) (“The public blog contained confidential information about her clients and derogatory comments about judges.”).

190. Cassens Weiss, *supra* note 189.

191. *Id.*; *In re Peshek*, 798 N.W.2d at 881.

192. See generally Bar Couns. v. Smith, Pub. Reprimand No. 2019-16 (Mass. Nov. 16, 2016), <https://bbopublic.blob.core.windows.net/web/f/pr19-16.pdf> [<https://perma.cc/JY78-GDDB>].

193. *Id.* at 2.

the respondent posted the following on his personal Facebook page, which was public and had no privacy setting:

I am back in the Boston office after appearing in Berkshire Juvenile Court in Pittsfield on behalf of a grandmother who was seeking guardianship of her six year old grandson and was opposed by DCF yesterday. Next date—10/23.

Two people responded to the respondent's public Facebook post. The first (a lawyer in Massachusetts who is a Facebook friend of the respondent) asked, "What were the grounds for opposing"? To which the respondent replied: "GM [grandmother] will not be able to 'control' her daughter, the biological mother, and DCF has 'concerns.' Unspecific." The friend responded (with apparent sarcasm), "DCF does have a sterling record of controlling children and questionable mothers, after all." The respondent similarly replied, "Indeed."

A second Facebook friend of the respondent (who is not an attorney) wrote, "So, what's the preference . . . Foster care? What am I missing here"? The respondent answered, "The grandson is in his fourth placement in foster care since his removal from GM [grandmother]'s residence in late July. I will discover what DCF is doing or not doing as to why DCF opposes the GM [grandmother] as guardian. More to come."<sup>194</sup>

The grandmother was informed about the post by her daughter and eventually filed a disciplinary complaint.<sup>195</sup> The attorney asserted that he had not violated rules as he had not disclosed information that identified his client.<sup>196</sup> The Massachusetts Board of Bar Overseers of the Judicial Supreme Court disagreed and found that the attorney had violated the confidentiality rule and significantly noted: "There is no requirement that a third party actually connect the dots. If it would be reasonably likely that a third party could do so, the disclosure runs afoul of the rule."<sup>197</sup>

The case of Ashley Krapacs represents a variation on the commenting-on-cases theme. Ms. Krapacs acted as both attorney and client when she represented herself in a domestic violence petition for an injunction, which

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194. *Id.* at 2–3 (alteration and omission in original).

195. *Cf. id.* at 4 (stating the grandmother threatened to file a complaint, which ultimately she did, resulting in this public reprimand).

196. *Id.*

197. *Id.* at 7.

she ultimately dismissed.<sup>198</sup> She employed social media to discuss her opposing counsel, and the judge presiding over her case.<sup>199</sup> Her vicious attack on her opposing counsel, Russell Williams, prompted him to hire his own attorney, Nisha Bacchus, to file a defamation suit against Krapacs.<sup>200</sup> Krapacs then waged a social media blitz against both William and Bacchus that caused Bacchus to file for an anti-stalking injunction.<sup>201</sup> The Florida Bar filed a Petition for Emergency Suspension.<sup>202</sup> The petition is thirty-two pages and includes twenty-three exhibits, many of which are screenshots of Ms. Krapacs' posts.<sup>203</sup> The following are excerpts from Krapacs' YouTube video included in the body of the petition.<sup>204</sup>

- I have been laughing a lot. I can't stop laughing since I read this complaint that has been filed against me on . . . behalf of Russell J. Williams. . . .
- Twenty-five pages of garbage, lies, fake news . . . riddled with lies and other nontruths . . . obscene. . . .
- . . . lying on the record is just what Mr. Williams does best . . . I have the court recording and the official court transcript of that hearing that confirms his lies. . . .
- More lies. This guy just—he cannot get enough of lying in formal proceedings. I mean, man, like, it's just, it's a lie. . . .
- . . . he also whines that I call him a moron and a sexist and a bully. Well, sorry—I'm not sorry, but you are all of those things. . . .
- Um, you know, and there is—there is another option here. There is a really easy option. You could, you know, just stop being a dick. Like, that's a really simple solution, just don't be a dick. Um, but men like Russell J. Williams want to have their cake and eat it too. Listen, when you have been having your cake and eating it too for three decades and it worked and it has made you a lot of money, I

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198. The Florida Bar's Petition for Emergency Suspension at \*1, Fla. Bar v. Krapacs, SC19-277 (Fla. Feb. 1, 2019) (No. 2018-50,829(171)FES).

199. *Id.* at \*7.

200. *Id.* at \*2.

201. *Id.*

202. *Id.* at \*1.

203. *See generally id.* (including the Florida Bar's petition and exhibits).

204. *Id.* at \*12–15.



guess it would piss you off when someone comes along and makes it clear that that just isn't going to work anymore. . . .

You know, it pisses him off that he can't just keep acting a fool and then pretending to be a good guy. He wants to act like a baby, bully people around, lie and cheat his way through cases and then pretend like he's a decent human being. Sorry, that's just not an option anymore. It's just not. . . .

- If you want to take cases where you're going after a domestic violence survivor in a completely frivolous bullshit lawsuit, you cannot also claim to support women's rights. You just can't. I mean, you can do whatever you want, but the math just doesn't add up. And I'm going to call you out. So, Nisha Bacchus, you're a backstabbing traitor. I almost feel bad for you, almost. Almost. Because he's playing her. He is playing her like a fucking fiddle. He knew he was going to have a hard time finding any attorney who was actually going to file this piece of garbage. He knew it. So, what did he do? He found someone desperate for work, someone so hard up for cases that she would do anything for a quick buck. And this much is obvious to me. It's really clear from her website. . . .
- So, I almost feel bad for her but not quite. At the end of the day no matter how convincing and manipulative he is, it is still her choice to represent him and it's a choice that she'll live with for the rest of her life. Um, the choice to file this utter bullshit complaint. The choice to go after a rape survivor when you claim to be pro women's rights. Are you fucking kidding me? The choice to sell out to make a quick buck. It's her choice. Her actions have spoken volumes about the kind of person she really is. And that is a woman who does not like women very much. So, sorry, honey, you're exposed. . . .
- Everyone has a price and Russell J. Williams figured out Nisha's. But, girl, it's going to cost you. It's going to cost you, girl. You made your bed, so lay in it. Hope you're comfortable. . . .
- So you get to choose your branding. And your choice of branding is representing misogynist pigs, misogynist bullies like Russell J. Williams, that's not good branding. . . .<sup>205</sup>

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205. *Id.* (third, fourth, sixth, seventh, and tenth omissions added).

Krapacs also posted an image of a boy holding a gun up to the face of a man looking in through a dog door (from the 20th Century Studios film, *Home Alone*), along with the following caption:

when opposing counsel tries to use  
the same exact trick you saw in  
your last case



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The Florida Bar asserted that Krapacs’s conduct “strike[s] at the heart of conduct prejudicial to the administration of justice” because her attacks were solely based upon the fact that “attorneys Williams and Bacchus represent or represented individuals adverse to” Krapacs.<sup>207</sup> The Florida Bar’s petition further stated:

By waging a personal and public war on social media against attorneys representing clients, Ms. Krapacs has resorted to terrorist legal tactics. The practice of law, for attorneys Williams and Bacchus, should not subject them to guerilla warfare, and such behavior is the essence of conduct prejudicial to the administration of justice and great public harm. Additionally,

206. *Id.* at \*21. To view a clear copy of the image used in the post, please see the opinion cited.

207. *Id.* at \*3.

Respondent's outrageous conduct only serves to perpetuate the public's perception that lawyers are uncivilized.<sup>208</sup>

The Florida Supreme Court granted the emergency suspension and ultimately disbarred Ms. Krapacs.<sup>209</sup> While the Krapacs case stands as an extreme example of a social media career demolition, it nonetheless provides a cautionary tale for the legal profession.

While the discussion thus far focuses on negative commentary about current events, clients, judges, and opposing counsel, there is one more category of negative posts that cause career disruption: responding online directly to clients who post negative reviews.

### C. *Responding to Clients' Negative Reviews*

One of the earliest disciplinary cases occurred in Massachusetts in 2009, where an attorney received an admonition after a client complained on an internet bulletin board that the attorney had charged excessive fees and failed to complete negotiating his tax matters.<sup>210</sup> The admonition report states:

The respondent learned of the client's posting from another attorney. After reading the posting, the respondent responded with a posting of his own denying the client's claims and disclosing the client's purported substance abuse and other highly confidential information that the respondent had gained during the course of the representation. This information was not necessary to defend the respondent against claims of wrongdoing.<sup>211</sup>

One of the first published opinions, *In re Skinner*,<sup>212</sup> occurred in 2013 in Georgia, where an attorney being prosecuted by the Georgia Bar for several ethics violations was found to have violated client confidentiality in responding to a negative online review.<sup>213</sup> At about the same time, an Illinois attorney, Betty Tsamis, stipulated a reprimand for her response to a

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208. *Id.* at \*6.

209. Fla. Bar v. Krapacs, No. SC19-277, 2020 WL 3869584, at \*1 (Fla. July 8, 2020).

210. 2009 Admonitions | Admonition No. 09-18, MASS.GOV (2009), <https://bbopublic.blob.core.windows.net/web/f/admon2009.pdf> [<https://perma.cc/SHR3-GCZX>].

211. *Id.*

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

213. *Id.* at 171–72.

negative online review by one of her clients and other ethics violations.<sup>214</sup> After seeing the negative online review, Tsamis contacted her client by email, and Avvo removed the negative online review.<sup>215</sup> However, the client posted a second negative review, after which Tsamis posted a reply.<sup>216</sup> Noting that the client's allegations were false, she added: "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."<sup>217</sup>

Since these early episodes, rather than receding into the background of the social media and legal ethics discussion, responding to client negative online reviews has become a "hot topic" for state bars and bar journals.<sup>218</sup> Approximately nine ethics advisory opinions and numerous journal articles have cautioned lawyers to pause and consider whether to respond and, if so, in what manner.<sup>219</sup> However, caution has not necessarily stopped lawyers from expressing their anger and frustration, thereby demonstrating that negative commentary may lead to negative consequences.<sup>220</sup>

As recently as May 2020, the Supreme Court of New Jersey's Disciplinary Review Board suspended a lawyer for one year for numerous violations of

214. Debra Cassens Weiss, *Lawyer Accused of Revealing TMI in Response to Bad Avvo Review Is Reprimanded; Overdraft Also Cited*, ABAJOURNAL (Jan. 21, 2014, 11:45 AM), [https://www.abajournal.com/news/article/lawyer\\_who\\_revealed\\_tmi\\_in\\_response\\_to\\_bad\\_avvo\\_review\\_is\\_reprimanded](https://www.abajournal.com/news/article/lawyer_who_revealed_tmi_in_response_to_bad_avvo_review_is_reprimanded) [<https://perma.cc/Q346-5UD8>]. See generally Complaint, *In re* Tsamis, No. 2013PR00095 (Ill. ARDC Hearing Bd., Aug. 26, 2013) [hereinafter Complaint], <https://www.iardc.org/13PR0095CM.html> [<https://perma.cc/878U-UAHW>].

215. Complaint, *supra* note 214.

216. *Id.*

217. *Id.*

218. See L.A. Cnty. Bar Ass'n Pro. Resp. & Ethics Comm., Op. 525 (2012) (addressing the propriety of attorneys responding to negative client reviews); Bar Ass'n of S.F., Legal Ethics Op. 2014-1 (2014) (addressing the same); Ken Matejka, *What to Do When Clients Post Negative Reviews?*, ABA (Oct. 1, 2020), [https://www.americanbar.org/groups/lawyer\\_referral/publications/lris2know/fall-2020/what-to-do-when-clients-post-negative-reviews/](https://www.americanbar.org/groups/lawyer_referral/publications/lris2know/fall-2020/what-to-do-when-clients-post-negative-reviews/) [<https://perma.cc/39SQ-6ZTT>] (providing alternatives to formulating inappropriate responses to negative reviews).

219. See sources cited *supra* note 218; Colo. Bar Ass'n Ethics Comm., Op. 136 (2019); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1032 (2014); Bar Ass'n of Nassau Cnty. Comm. on Pro. Ethics, Op. 2016-01 (2016); Pa. Bar Ass'n, Formal Op. 2014-200 (2014); The Pro. Ethics Comm. for the State Bar of Tex., Op. 662 (2016); Fla. Bar, Advisory Ethics Op. 20-01 (2020); Lucian T. Pera, *Responding Intelligently to Negative Online Reviews*, ABA (May–June 2020), [https://www.americanbar.org/groups/law\\_practice/publications/law\\_practice\\_magazine/2020/mj2020/mj20ethics/](https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2020/mj2020/mj20ethics/) [<https://perma.cc/U5SZ-9T2H>]; JACOBOWITZ & BROWNING, *supra* note 133, at 207–14.

220. See Pera, *supra* note 219 (counseling lawyers on how to respond on social media).

the legal ethics rules.<sup>221</sup> Among these violations was the attorney's response to a negative online review posted by one of his former clients approximately a year after the representation concluded.<sup>222</sup> Rather than responding directly to the review, the attorney located the Yelp page for the former client's massage business and posted this comment:

Well, [client] is a convicted felon for fleeing the state with children. A wonderful parent. Additionally, she has been convicted of shoplifting from a supermarket. Hide your wallets well during a massage. Oops, almost forgot about the DWI conviction. Well, maybe a couple of beers during the massage would be nice.<sup>223</sup>

In responding to the subsequent ethics complaint that was filed against the attorney, he explained:

As to the Yelp rating about [client's] massage therapy business, I admit to same. I was very upset by [her] Yelp rating of my practice. This rating was made more than a year and a half after the conclusion of my representation. My disclosures, i.e. her arrests, were public information and I did not violate attorney[-]client privilege. My position was that what was good for the goose was good for the gander. I do concede that I do not believe that the rating was my finest moment. However, it was not unethical. That posting has subsequently been taken down.<sup>224</sup>

The Review Board found that the attorney violated his former client's confidentiality and distinguished information publicly available from generally known information.<sup>225</sup> In other words, the fact that information may be publicly available (e.g., in court records) but not generally known by people in the relevant community does not waive the attorney's duty of confidentiality.<sup>226</sup> In assessing the aggravating factors to determine the

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221. Charles Toutant, *New Jersey Lawyer Suspended for 2 Years After String of Disciplinary Scrapes*, LAW.COM (Oct. 08, 2020, 6:26 PM), <https://www.law.com/njlawjournal/2020/10/08/new-jersey-lawyer-suspended-for-2-years-after-string-of-disciplinary-scrapes/> [<https://perma.cc/65Z8-ANW3>].

222. *In re Calpin*, IIB-2018-0011E, IIB-2018-0012E, IIB-2018-0014E, IIB-2018-0031E (No. DRB 19-172), at \*13–14 (N.J. Disciplinary Rev. Bd. Dec. 17, 2019), [http://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document\\_id=1124239](http://drblookupportal.judiciary.state.nj.us/DocumentHandler.ashx?document_id=1124239) [<https://perma.cc/XBJ6-5ST5>], *aff'd*, 229 A.3d 1270 (N.J. May 7, 2020).

223. *Id.* at \*13.

224. *Id.* at \*13–14 (second alteration in original).

225. *Id.* at \*25.

226. *See id.* (describing “the ‘generally known’ exception to” Model Rule 1.9(c)(1)).

penalty for all of the attorney's violations, the opinion states: "Moreover, we were particularly disturbed by respondent's use of social media in the *Carroll* matter to disparage a former client more than a year after the termination of the representation."<sup>227</sup>

#### VI. WHY DO LAWYERS CONTINUE TO TRIP ON LANDMINES?

I have previously explored the possibility that a culture clash between social media and the legal profession may cause some lawyers to trip on landmines and believe that maintains to be one of the overarching themes that cause trouble for some lawyers.<sup>228</sup> Fundamentally, the theory identifies social media culture as one of frequent sharing and connecting. Instantaneous sharing of thoughts, feelings, and general information about events is not only possible but encouraged. Social media culture supports the gathering of followers, friends, and connections to support your tweets, posts, and updates.<sup>229</sup>

In contrast to social media culture, the legal profession's culture may be distilled to reflect a careful analytical approach imbued with the concepts of confidentiality and respect. Lawyers research to construct legal arguments methodically. They owe their clients a duty of confidentiality and the courts a duty of candor. Lawyers are officers of the court charged with the responsibility of protecting the rule of law.<sup>230</sup> Thus, my culture clash theory asserts that lawyers on social media may be subject to clashing cultural values such as the legal profession's priority of thoughtful analysis in a confidential environment as opposed to the unfiltered, rapid sharing that takes place on a social media network.<sup>231</sup> While individuals generally belong to multiple sub-cultures such as gender, race, sexual preference, age, nationality, and religion, the melding of the various long-standing cultural values occurs over a lifetime of experience.<sup>232</sup> Relatively nascent in our society, social media culture continues to evolve and, thus, has not been fully culturally integrated into various sub-cultures within our society despite its ubiquitous nature.

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227. *Id.* at \*13, 31.

228. Jacobowitz, *Lawyers Beware*, *supra* note 133, at 541–42.

229. *Id.* at 541; JACOBOWITZ & BROWNING, *supra* note 133, at 223–24.

230. JACOBOWITZ & BROWNING, *supra* note 133, at 223–24.

231. Jacobowitz, *Lawyers Beware*, *supra* note 133, at 541, 572.

232. *Id.* at 543.

In terms of lifetimes, social media's seventeen years on the planet places it at the adolescent stage.<sup>233</sup> Moreover, most lawyers have not engaged in social media for any significant percentage of their lifetimes.<sup>234</sup> Only the youngest lawyers came of age in the digital world, and sometimes their young embrace of social media becomes the problem rather than the solution when they don their lawyer hats and fail to adjust their social media conduct accordingly. In other words, it is understandable from a cultural competence standpoint that some lawyers get caught up in the share and connect values of social media and temporarily abandon the careful, analytical, and confidential values of the legal profession's culture.<sup>235</sup>

A. *More Than Just a Cultural Divide*

Although culture clash theory may account for some lawyers' ethical social media errors, an individual lawyer's communication competence and emotional triggers may provide greater insight into why some lawyers trip on ethical landmines. As discussed above, some individuals are naturally competent communicators, while others may need to learn some of the main effective communication components.<sup>236</sup> One of the competent communicators' traits is self-monitoring, defined as self-awareness and self-control in interactions with others.<sup>237</sup> Enhancing both self-awareness and empathy may be a valuable strategy to avoid ethical lapses on social media.

Self-awareness relates to being in touch with thoughts, feelings, and bodily sensations.<sup>238</sup> Sometimes referred to as meta-awareness, it provides the possibility that an individual may pause and think before thoughtfully responding to a particular situation or exchange with another individual.<sup>239</sup> Simply stated, thinking about thinking may lead to realizations about initial reactions or responses and how they may be driven by the subconscious mind or emotional reactivity that can lead an individual astray.

Daniel Kahneman creates a fictional description of two systems to describe the inner workings of the mind and decision making. He describes

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233. See Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [<https://perma.cc/V4US-QKY2>] (discussing the rise of social media in the early 2000s).

234. See *id.* (describing the relative age of social media).

235. Jacobowitz, *Lawyers Beware*, *supra* note 133, at 572.

236. ADLER ET AL., *supra* note 2, at 20.

237. *Id.* at 23.

238. *Id.*; Jacobowitz, *Lawyers Beware*, *supra* note 133, at 578.

239. See Jacobowitz, *Lawyers Beware*, *supra* note 133, at 578–79 (discussing mindfulness and how the practice can lead one to be self-aware and reflective when responding to others).

System 1 as the driver of instantaneous reactions and System 2 as the slower, analytical driver of conscious decision making.<sup>240</sup> More specifically, he defines System 1 as:

[The aspect of the mind that] operates automatically and quickly, with little or no effort and no sense of voluntary control. . . .

[And] System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.<sup>241</sup>

Kahneman invites his readers to consider the two systems as characters in a psychodrama in which “System 2 believes itself to be where the action is, . . . [but] System 1 is the hero of the book. . . . System 1 [is] effortlessly originating impressions and feelings that are the main sources of the explicit beliefs and deliberate choices of System 2.”<sup>242</sup> Meta-awareness provides the opportunity for System 2 to question the suggested immediate response being generated by System 1 and perhaps garner self-control to avoid a landmine.<sup>243</sup> In fact, psychologists have concluded that self-control requires attention and mental effort—a System 2 task.<sup>244</sup> Moreover, when System 2 is overloaded or cognitively challenged, then System 1 is likely to have more influence.<sup>245</sup>

“People who are *cognitively busy* are also more likely to make selfish choices, use sexist language, and make superficial judgements in social situations.”<sup>246</sup> Additionally, System 2’s ability to muster effort for self-control may be depleted by a few drinks, a sleepless night, or performance anxiety. A couple of the cognitive situations that deplete System 2’s ability to manage self-control and are common to the legal profession are making a series of choices involving conflict and trying to impress others.<sup>247</sup> Because self-control requires System 2’s cognitive energy, with each event in which self-control is engaged, System 2’s energy to engage in additional

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240. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011).

241. *Id.* (alterations added) (emphasis omitted).

242. *Id.* at 21.

243. *Id.*

244. *Id.* at 41.

245. *Id.*

246. *Id.*

247. *See id.* at 42 (listing the “situations and tasks that are . . . known to deplete self-control”).



self-control is lessened.<sup>248</sup> Some of the indicators that System 2's ability to manage self-control has been depleted include aggressive reaction to provocation, poor performance in cognitive tasks, and poor performance in logical decision making.<sup>249</sup>

If it seems like gaining control or self-control over our tendencies to respond from a place of emotional reactivity in a challenging or emotionally provocative situation is fraught with cognitive difficulties, Daniel Kahneman would agree.<sup>250</sup> He explains:

The way to block errors that originate in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2. . . . Unfortunately, this sensible procedure is least likely to be applied when it is needed most. We would all like to have a warning bell that rings loudly whenever we are about to make a serious error, but no such bell is available, and cognitive illusions are generally more difficult to recognize than perceptual illusions. The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision. More doubt is the last thing you want when you are in trouble. The upshot is that it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so. Observers are less cognitively busy and more open to information than actors.<sup>251</sup>

## VII. WHAT'S A LAWYER TO DO?

Malcolm Gladwell analyzes the dilemma and notes, “snap judgments . . . can be educated and controlled.”<sup>252</sup> He explains, “[o]ur unconscious reactions come out of a locked room, and we can't look inside that room. But with experience we become expert at using our behavior and our training to interpret—and decode—what lies behind our snap judgments and first impressions.”<sup>253</sup> Again, simple in principle, but is there

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248. *Id.*

249. *Id.*

250. *See id.* (“The list of situations and tasks that are now known to deplete self-control is long and varied.”).

251. *Id.* at 417.

252. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 15 (2005), [https://www.academia.edu/14561211/BLINK\\_The\\_Power\\_of\\_Thinking\\_Without\\_Thinking](https://www.academia.edu/14561211/BLINK_The_Power_of_Thinking_Without_Thinking) [<https://perma.cc/8UUU-NKL8>].

253. *Id.* at 183.

a toolbox to enhance self-awareness? While the answer to that question has been attempted in many volumes by philosophers, psychologists, psychiatrists, and others, perhaps a narrower question will align and assist with the dilemmas confronted by lawyers on social media.

More specifically, how might a lawyer manage his or her emotions to avoid posting negative online commentary that results in the negative consequences previously discussed? The question of emotional self-control seems to be apt, given that most of the career-jeopardizing examples appear to be comments fueled by emotion.<sup>254</sup> Additionally, recent studies have demonstrated that “social media spaces are also emotional spaces.”<sup>255</sup> Often the emotion fueling a social media fire seems to be anger, a universal emotion.<sup>256</sup> As Aristotle observed, “anybody can become angry—that is easy. . . . but to be angry with . . . the right person, and to the right amount, and at the right time, and for the right purpose, and in the right way—this is not within everybody’s power . . . .”<sup>257</sup>

In fact, a 2013 study demonstrated that “venting negative feelings, including discontent and anger and fighting back against perceived unfairness, are all important gratifications sought through social media use.”<sup>258</sup> Consistent with this finding, a 2018 study found that the main motivation for posting on Twitter and Reddit was to “express[] anger [about] a particular event.”<sup>259</sup> Anger begets incivility and hostility—“angry people rely more on stereotypes, and they exercise less critical judgment,” consistent with findings that reveal that anger may impede cognitive effort.<sup>260</sup> Yet, another study revealed that emotionally charged messages have a greater likelihood of being shared.<sup>261</sup> And a Facebook experiment revealed that both positive and negative emotions appear to be contagious in social media communication.<sup>262</sup> It is logical that vitriolic negative commentary is not only more likely to be shared but also inspires additional

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254. See Dag Wollebæk et al., *Anger, Fear, and Echo Chambers: The Emotional Basis for Online Behavior*, 5 SOC. MEDIA + SOC'Y 1, 1 (2019) (“Based on survey data, we show that anger and fear are connected to distinct behaviors online.”).

255. *Id.* at 2.

256. *Id.* at 4.

257. ARISTOTLE, THE NICOMACHEAN ETHICS bk. II, at 111 (T.E. Page et al. eds., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

258. Wollebæk et al., *supra* note 254, at 4.

259. *Id.* at 2.

260. *Id.* at 9.

261. *Id.* at 2.

262. *Id.*

negative posting. Angry posts from clients or vitriol about the events of the day may cause an equal or greater negative emotional reaction.<sup>263</sup>

Thus, it appears that enhancing emotional self-control, particularly when the emotion is anger, would be a good strategy for anyone, but especially for lawyers whose anger has exploded on social media with the fallout damaging their careers. Self-control necessarily begins with self-awareness.<sup>264</sup> Daniel Goleman explains:

Self-awareness . . . represents an essential focus, one that attunes us to the subtle murmurs within that can help guide our way through life. . . . [T]his inner radar holds the key to managing what we do—and just as important, what we *don't* do. This internal control mechanism makes all the difference between a life well lived and one that falters.<sup>265</sup>

#### A. *Self-Awareness and Essential Focus*

Daniel Goleman writes about focus and attention as keys to quieting the mind and becoming more in tune with its workings to avoid being driven by emotional impulse.<sup>266</sup> Like Kahneman, Goleman refers to two systems: the top-down and bottom-up minds.<sup>267</sup> The bottom-up mind aligns with Kahneman's System 1: it is faster; involuntary and automatic; "intuitive, operating through networks of association"; and impulsive, driven by emotions.<sup>268</sup> The top-down mind resembles the description of System 2: "voluntary; effortful; the seat of self-control, which can (sometimes) overpower automatic routines and mute emotionally driven impulses; [and] able to learn new models, make new plans, and take charge of our automatic repertoire—to an extent."<sup>269</sup> He explains that these systems are designed for maximum efficiency—"minimal effort [to] get optimal results" without exhausting our brain energy.<sup>270</sup>

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263. *See id.* (drawing a connection between the exposure to negative stimuli and the tendency to post a negative post).

264. *See* ADLER ET AL., *supra* note 2, at 23 (explaining how beneficial it is for an individual to become aware of his own emotional triggers).

265. DANIEL GOLEMAN, FOCUS: THE HIDDEN DRIVER OF EXCELLENCE 63 (2013).

266. *See id.* at 14 (discussing tips to avoid being driven by emotional impulse).

267. *Id.* at 25–26.

268. *Id.* at 25.

269. *Id.* at 26.

270. *Id.* at 28.

Achieving focus and maintaining attention involves both recognizing and managing sensory and emotional distractions.<sup>271</sup> Emotionally loaded incoming signals present the biggest challenge.<sup>272</sup> The methods for becoming aware of the moments in which a bottom-up impulsive, emotional reaction is about to hijack our top-down cognitive approach to a challenging situation fills volumes on mindfulness, psychology, and cognitive therapy.<sup>273</sup> While a full exploration is beyond this Article's scope, useful strategies exist that one may begin to consider. Whatever approach an individual may select to explore, the overarching goal is to notice emotions as they arise before impulsively acting based on emotional reactivity. In fact, there is a space between action and reaction—the ability to recognize this space and pause to consider how to respond thoughtfully is to become aware of the “subtle murmurs within,” or the operation of System 1 that involuntarily attempts to guide our actions in the midst of a minefield, and to call upon System 2, or our conscious, cognitive mind, for assistance.<sup>274</sup>

B. “*The Mindful Brain*”

Psychiatrist Daniel Siegel published *The Mindful Brain—Reflection and Attunement in the Cultivation of Well-Being* in 2007 before social media became ubiquitous and early in the secular popularization of mindfulness.<sup>275</sup> His book was heralded as a breakthrough in what was then the newly growing field of contemplative neuroscience. He explains brain function and some of the early neuroscience research as it relates to mindfulness and notes that “[s]tudies have shown that specific applications of mindful awareness improve the capacity to regulate emotion, to combat emotional dysfunction, to improve patterns of thinking, and to reduce negative mindsets.”<sup>276</sup> In other words, it was the beginning of the emerging thought that mindfulness could actually impact the neural pathways of the brain or, in laymen's terms, “rewire the brain.”<sup>277</sup>

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271. *Id.* at 14.

272. *Id.*

273. *See id.* at 26 (“Voluntary attention, willpower, and intentional choice are top-down; reflexive attention, impulse, and rote habit are bottom-up . . .”).

274. *Id.* at 63; KAHNEMAN, *supra* note 240, at 417.

275. DANIEL J. SIEGEL, *THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* (2007) [hereinafter SIEGEL, *THE MINDFUL BRAIN*].

276. *Id.* at 6.

277. *Id.* at 25.

In 2010, Siegel published *Mindsight: The New Science of Personal Transformation*.<sup>278</sup> He defines mindsight as:

[A] kind of focused attention that allows us to see the internal workings of our own minds. It helps us to be aware of our mental processes without being swept away by [emotions] . . . and moves us beyond the reactive emotional loops we all have a tendency to get trapped in. It lets us “name and tame” the emotions we are experiencing, rather than being overwhelmed by them.<sup>279</sup>

Siegel identifies reflection as the necessary tool to regain control after our mind has been hijacked by emotion.<sup>280</sup> Reflection’s fundamental components are openness, observation, and objectivity.<sup>281</sup> Siegel analogizes the components to three legs of a tripod that stabilize our mindsight lens and allows us to gain a clearer picture. The stabilization and clear view enhance “keenness, insight, perception, and, ultimately, wisdom.”<sup>282</sup> Openness allows an individual to be receptive to what is happening in the moment without attaching preconceived notions or expectations; openness creates clarity.<sup>283</sup> Observation is the ability to see ourselves even in an experience.<sup>284</sup> “It places us in a larger frame of reference and broadens our perspective moment to moment. . . . [S]elf-observation allows us to see the fuller context in which we are living.”<sup>285</sup> Objectivity provides discernment, which prevents us from being swept away by a thought or emotion and allows us to see thoughts and emotions as mental activity rather than absolute reality.<sup>286</sup> Siegel developed mindsight and changed his approach to psychotherapy.<sup>287</sup> His book is replete with examples of patients with whom he successfully employed mindsight, along with other therapeutic measures, to assist them in achieving well-being.<sup>288</sup> During the same approximate time frame that Siegel was exploring the

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278. DANIEL J. SIEGEL, *MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION* (2010).

279. *Id.* at xi–xii.

280. *Id.* at 31.

281. *Id.*

282. *Id.*

283. *Id.* at 32.

284. *Id.*

285. *Id.*

286. *Id.*

287. *See id.* at xi–xv (explaining the concept of “mindsight”).

288. *See generally id.* (explaining how Siegel made changes to his strategy after his experience with Barbara’s family).

mindful brain and developing mindsight, the legal profession was beginning to take note of both the benefit of understanding some fundamental principles of psychology and of exploring mindfulness.

### C. *Mindfulness*

Mindfulness has roots in ancient Buddhist and Hindu practices but has been secularized in our country since the 1970s and has become widespread through many aspects of our society today.<sup>289</sup> Jon Kabat Zin, often referred to as the father of mindfulness in the U.S., brought the practice to the University of Massachusetts Medical School, where he founded the Center for Mindfulness and the Oasis Institute for Mindfulness-Based Professional Education and Training.<sup>290</sup> He defines mindfulness as “paying attention in a particular way: on purpose, in the present moment, and nonjudgmentally.”<sup>291</sup> He developed the Mindfulness-Based Stress Reduction (MBSR) program to assist patients in managing stress.<sup>292</sup> On the other side of the country, Jack Kornfield, Sharon Salzberg, and Joseph Goldstein founded the Insight Meditation Society (IMS) in 1975 and are credited with introducing mindful meditation in a non-clinical manner.<sup>293</sup>

Although mindfulness in the U.S. began to take root in the 1970s, it was not until the late 1990s into the early 2000s that the legal profession first began to officially take notice. In 1998, Yale Law School convened one of the first law and meditation retreats in the country.<sup>294</sup> Around the same time, Jon Kabat Zin, at the invitation of Hale & Dorr’s managing partner, brought his mindfulness teaching to lawyers and staff at the law firm.<sup>295</sup> In 1999, the American Bar Association published Steven Keeva’s book,

289. Joaquín Selva, *History of Mindfulness: From East to West and Religion to Science*, POSITIVEPSYCHOLOGY.COM (Sept. 1, 2020), <https://positivepsychology.com/history-of-mindfulness/> [https://perma.cc/JGD5-8DKD].

290. SCOTT L. ROGERS & JAN L. JACOBOWITZ, MINDFULNESS & PROFESSIONAL RESPONSIBILITY: A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 4 (2012); *About the Author*, GUIDED MINDFULNESS MEDITATION PRACS. WITH JON KABAT-ZINN, <https://www.mindfulnesscds.com/pages/about-the-author> [https://perma.cc/6ZYF-6WBG].

291. See, e.g., Catherine Moore, *What Is Mindfulness? Definition + Benefits (Incl. Psychology)*, POSITIVEPSYCHOLOGY.COM (Mar. 17, 2021), <https://positivepsychology.com/what-is-mindfulness/> [https://perma.cc/J8X7-NASA] (providing one of many iterations of the definition in common parlance).

292. Selva, *supra* note 289.

293. *Id.*

294. ROGERS & JACOBOWITZ, *supra* note 290, at 4.

295. *Id.* at 5.

*Transforming Practices: Finding Joy and Satisfaction in the Legal Life.*<sup>296</sup> The book dedicates several pages to a discussion of contemplative practices and mindfulness.<sup>297</sup> In 2002, Leonard Riskin put mindfulness squarely on the legal profession map when Harvard not only published his article, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*,<sup>298</sup> but also made it the centerpiece for a symposium entitled *Mindfulness in Law and Dispute Resolution*.<sup>299</sup>

Today, mindfulness seems to be everywhere. There have been many contributors to the growth of its popularity, both within the legal profession and throughout society.<sup>300</sup> There are books, magazines, seminars, podcasts, ongoing neuroscience studies, and programs designed to teach mindfulness to audiences ranging from small children to active military and first responders. The benefits stemming from mindfulness also cover a range of possible outcomes ranging from stress management to improved attention and decision making.<sup>301</sup>

In the context of considering legal ethics and whether to post negative commentary, and learning to identify and manage the underlying emotion that may be the catalyst for the post, Leonard Riskin's observations prove beneficial. He notes that mindfulness increases a greater awareness of thoughts, the intentions underlying conduct, and the "emotions, bodily sensations, and behaviors they precipitate."<sup>302</sup> He suggests that as "we observe these phenomena at a psychological distance, their strength or power or influence tends to diminish and we have a chance to consider their merit."<sup>303</sup> In other words, "[m]indfulness allows us to insert a 'wedge of awareness' before we act."<sup>304</sup> This wedge of awareness or pause may allow the insight that the writing of negative commentary is likely emotionally fueled, and perhaps the potential repercussions are not worth the short-term

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296. *Id.*

297. *Id.*

298. See generally Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002), <http://scholarship.law.ufl.edu/facultypub/420> [<https://perma.cc/5N5Z-L7SF>].

299. ROGERS & JACOBOWITZ, *supra* note 290, at 7.

300. See *supra* notes 289–99 and accompanying text (discussing different actors who have contributed to the increasing popularity of mindfulness).

301. See, e.g., Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 495–96 (2009) (describing different benefits of mindfulness).

302. *Id.* at 499.

303. *Id.*

304. *Id.*

relief that one expects to experience.<sup>305</sup> Rifkin, Siegel, and Goleman reference neuroscience and psychology throughout their writing because, after all, psychiatry, brain science, emotional intelligence, and mindfulness are all methods for better observing and understanding the mind.<sup>306</sup>

#### D. *Psychology*

In 2012, Jennifer K. Robbennolt and Jean R. Sternlight published *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*.<sup>307</sup> They spent seven years writing the book, committed to the idea that “[m]ost lawyers would benefit greatly from knowing more about psychology, that is, the science of how people think, feel, and behave.”<sup>308</sup> In fact, they believe lawyers could be more effective in most aspects of their work and avoid ethical problems if they “harness the insights of psychology.”<sup>309</sup> Thus, while mindfulness was beginning to permeate the legal profession, Robbennolt and Sternlight were driving in a parallel lane to bring the legal profession a broad look at how understanding some of the nuances of the mind’s inner workings would benefit lawyers.<sup>310</sup> On the topic of emotion, they note a lawyer’s failure to regulate emotion may be detrimental to their career.<sup>311</sup> Interestingly, in discussing anger, they explain that venting “is not an optimal emotion-management strategy.”<sup>312</sup> Studies have revealed that venting may intensify anger.<sup>313</sup> Studies have shown that “by focusing attention on and rehearsing the angry feelings, venting tends to keep those feelings alive, perpetuating and sometimes even intensifying them.”<sup>314</sup>

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305. *Id.*

306. See GOLEMAN, *supra* note 265, at 14 (explaining mindfulness with terms and definitions used by psychologists); SIEGEL, *THE MINDFUL BRAIN*, *supra* note 275, at 25 (referencing and describing the neuroscience connected to mindfulness); Riskin, *supra* note 298, at 32 (“The teachings on which mindfulness is based are as much a philosophy or a psychology as a religion.”).

307. JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012).

308. *Id.* at xiii, 1.

309. *Id.* at 1.

310. *Id.*

311. *Id.* at 58.

312. *Id.* at 59.

313. *Id.* at 58.

314. *Id.*



The authors suggest four methods for managing emotions. First, control the aspects of your environment to minimize unwanted emotions.<sup>315</sup> For example, take a break from a stressful exchange by leaving the room or walking away from your computer to regroup and maintain control. Second, influence emotional states by employing temporary distraction or changing the channel and then return to gain greater perspective on a situation.<sup>316</sup> Third, reassess your appraisal of the situation.<sup>317</sup> Perhaps gathering additional information and perspective will change your appraisal and the emotion that accompanies it. Finally, they suggest a lawyer “can attempt to alter their experience of, response to, or expression of the emotion itself.”<sup>318</sup> They suggest a lawyer may:

[C]onsciously attempt to act in ways that correct for the effects of emotions. For example, a lawyer who recognizes that he is angry and feeling impelled to make a quick decision might decide to postpone the decision or to “sleep on it” in order to allow reconsideration of the decision once the intense feelings of anger have faded.<sup>319</sup>

Robbennault and Sternlight also suggest using implementation intentions, meaning that when you discover various situations that trigger an intense emotion, you development a built-in response that assists you with managing the emotion.<sup>320</sup> The idea involves knowing that when you feel anger arising you recognize it and institute a stop-gap measure to allow yourself to regain clarity and thoughtfully respond.<sup>321</sup>

The authors include chapters on decision making and ethics. The psychological variables that may impact our thinking when making decisions and crossing ethical lines are numerous and beyond the scope of this Article. However, it is worth noting the authors explain numerous variables that potentially impact our thought process, which compels the conclusion that there is tremendous value in learning about these variables and how they may impact us.<sup>322</sup> Certainly, knowledge and awareness lie at the heart of

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315. *Id.* at 60.

316. *Id.*

317. *Id.*

318. *Id.* at 61.

319. *Id.*

320. *Id.*

321. *Id.*

322. *See generally id.* (explaining how beneficial it is for an attorney to understand how to use emotions positively).

the authors' extremely effective message.<sup>323</sup> They remind lawyers to keep their core values and legal ethics responsibilities "front and center" because "psychological studies have found that increasing [an] awareness of ourselves and our values . . . reduces the incidence of unprincipled behavior."<sup>324</sup> However, they also explain that we cannot necessarily count on an automatic ethical response to every charged situation in which we may find ourselves.<sup>325</sup> Therefore, they recommend lawyers cultivate a set of ethical habits and attempt to anticipate ethical dilemmas, and draft a script to handle them.<sup>326</sup> Thus, a lawyer who is actively engaged on social media may consider establishing his or her script or guidelines for both posting content and when to refrain from posting.

Of course, Robbennault and Sternlight's recommendations bring us back to the idea of self-awareness as a critical element in competent communication.<sup>327</sup> Mindfulness may be a valuable tool to garner self-awareness to recognize our thoughts, feelings, and bodily sensations to enhance our self-control and the ability to respond thoughtfully (or not respond at all) rather than to post and communicate from a place of emotional reactivity.<sup>328</sup>

### VIII. CONCLUSION

The corollary to Aristotle's observation on the difficulty of properly managing anger may be Cicero's observation that "men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute."<sup>329</sup> In other words, the fact that emotions significantly impact our conduct and our communication is ancient knowledge. Also stemming from ancient times is the knowledge that self-awareness may be gained through mindfulness

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323. *See id.* at 1 ("Lawyers who can harness the insights of psychology will be more effective . . .").

324. *Id.* at 412, 413.

325. *Id.* at 413.

326. *Id.*

327. *Id.* at 47.

328. *See id.* (describing how attorneys who are aware of their emotions may come to understand their emotions, regulate their emotions during interactions with others, and thereby benefit their practice).

329. *Id.* (citations omitted).

practice.<sup>330</sup> What is relatively new is our fast-paced digital world and social media that invites rapid-fire responses in a defined emotional space.<sup>331</sup>

Recognizing the impact of emotions on our decision making takes on special significance not only because studies have shown that social media is an emotional place<sup>332</sup> but also because lawyers generally have more at stake than others who vent their anger on social media and inadvertently encourage others to do so.<sup>333</sup> Lawyers have to be especially careful to avoid being drawn into the social media emotional storms and maintain self-awareness to engage in the pause that comes with Riskin’s “wedge of awareness” and then monitor and control their responses.<sup>334</sup>

Law school does not traditionally focus on communication competence, emotional intelligence, psychology, or mindfulness. However, lawyers become proficient at research and analytical thinking, so they are aptly equipped to study all of these areas to enhance their effectiveness and, perhaps, their well-being. The strategic communication plan and accompanying toolbox for one lawyer may appear different from those of another. Each of us needs to find the methods that work best to enhance self-awareness, pause, and thoughtfully consider how to respond to any given situation, especially when posting on social media. While there is no universal approach that works for everyone, there is a universal social media truth for all lawyers: negative commentary often begets negative consequences.

Social media is something of a double-edged sword. At its best, social media offers unprecedented opportunities for marginalized people to speak and bring much needed attention to the issues they face. At its worst, social media also offers ‘everyone’ an unprecedented opportunity to share in collective outrage without reflection.<sup>335</sup>

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330. *Id.*

331. See Ortiz-Ospina, *supra* note 233 (highlighting the relatively short life of social media).

332. Wollebæk et al., *supra* note 254, at 2.

333. See *supra* text accompanying note 137.

334. Riskin, *supra* note 301, at 499.

335. Roxane Gay Quotes, BRAINY QUOTES, <https://www.brainyquote.com/authors/roxane-gay-quotes> [<https://perma.cc/46KZ-GYWH>].