

The Ethics of Social Media: (a) New Rules, (b) Old Rules, (c) Other

June 21, 2018

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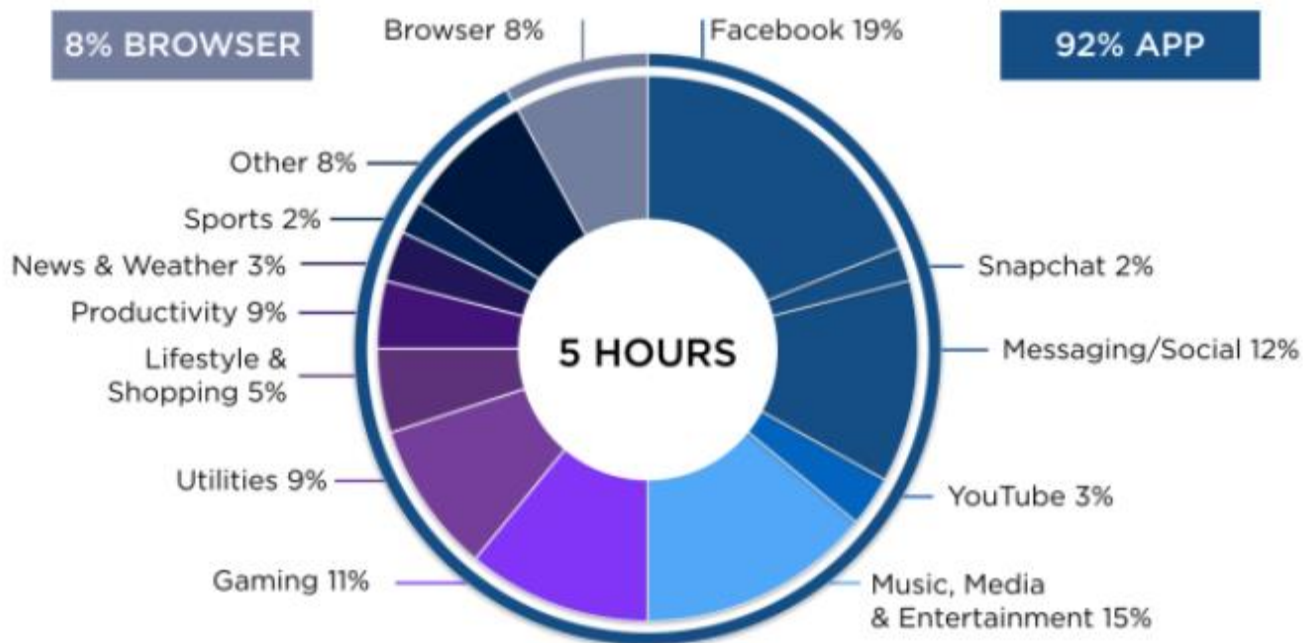
AZA

People Spend Hours on Social Media Every Day



What Are People Doing on Social Media?

US Time Spent By App Category



Phones and Apps Record Important Events in Real Time



Murder caught on Facebook Live

MON, FEB 26

55-year-old Prentis Robinson was live-streaming on Facebook his walk home after having his phone stolen when he was suddenly approached by a man who killed him in cold blood.

SHARE VIDEO [f](#) [t](#) [e](#) [</>](#)

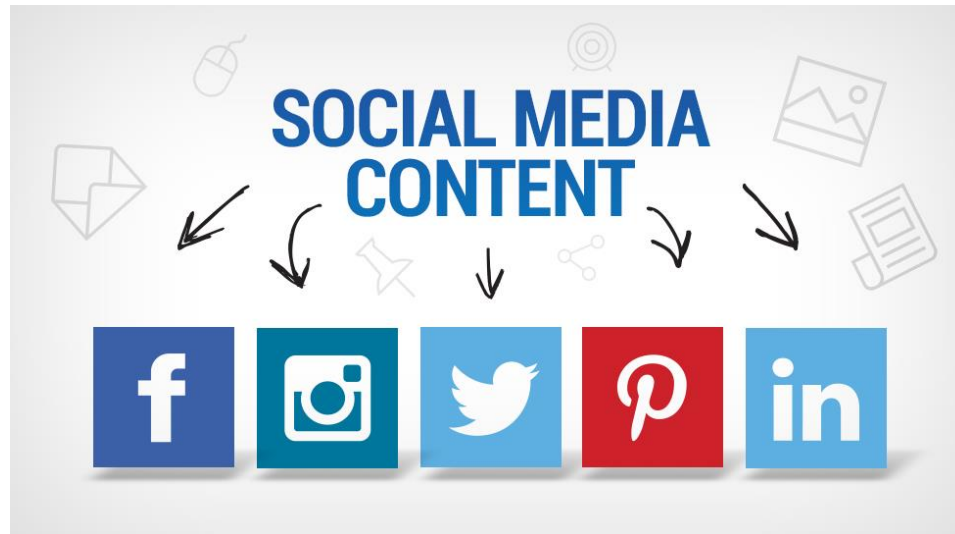
VICTIM SHOT AND KILLED WHILE STREAMING ON FACEBOOK LIVE

NIGHTLY NEWS



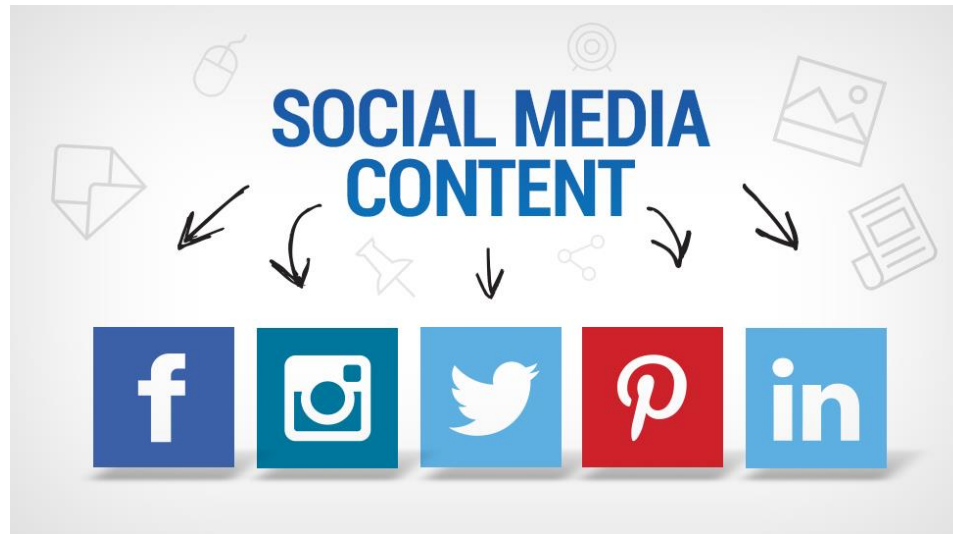
ABA Ethics Rule 1.1 (Comment 8)

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology...**”



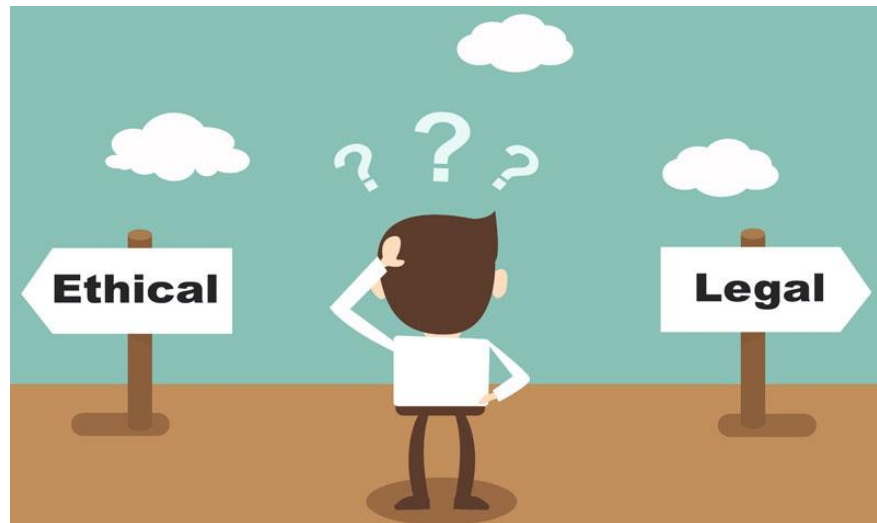
Each Person Generates Evidence Through Social Media

- Facebook Posts
- Instagram Photos
- Check-in on Foursquare
- Yelp Reviews
- Tweets
- LinkedIn Resumes



Some Ethical Issues Arising from Social Media

- Discovery Requests and Spoliation
- Research on Potential Jurors
- Confidentiality
- Threats
- Defamation
- Anti-SLAPP Motions
- Impeachment
- Legal Advertising



Example Discovery Requests for Social Media Posts

- Requests for production for Facebook posts, Instagram pictures, and Tweets around time of key event or accident
- Interrogatories asking a party to identify all account names and handles on social media such as Facebook, Twitter, Instagram, LinkedIn, and YouTube
- You may also want to add these items to preservation letters



Spoliation for Social Media Posts

- Texas Disciplinary Rules of Professional Conduct, Rule 3.04
 - A lawyer shall not...unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.



Spoliation for Social Media Posts

- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)
 - Isaiah Lester sued company for wrongful death of his wife in accident with concrete truck.
 - Company sends discovery requests for Lester's Facebook posts, attaching a picture of Lester drinking beer and wearing a T-shirt saying "I [heart] Hot Moms."



Spoliation for Social Media Posts

- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)
 - Lester’s lawyer, through paralegal, tells Lester to “clean up” his Facebook page because “[w]e do NOT want blow ups of other pics at trial...”
 - Lester notifies lawyer he deleted Facebook page.
 - Lawyer signs and serves interrogatories saying Lester does not have a Facebook account.
 - Lawyer does not put message from paralegal on his privilege log.



Spoliation for Social Media Posts

- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)
 - Lawyer sanctioned for \$542,000.
 - Lester sanctioned for \$180,000.
 - Spoliation instruction given:
 - “[Lester] intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the...photographs he deleted from his Facebook account were harmful to his case.”

Spoliation for Social Media Posts

- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013)
 - Lester won a jury verdict of \$6,227,000.
 - Court granted remittitur, reducing award to \$2,100,000.
 - Company moved for a new trial, but Virginia Supreme Court said that sanctions and instructions cured prejudice.
 - Virginia Supreme Court said lawyer's conduct was "patently unethical."

Spoliation for Social Media Posts

- Key Lessons
 - Adjust Facebook privacy settings.
 - Preserve the posts and object to the requests.
 - Offer to provide posts *in camera* to the Court.



- American Bar Association Formal Opinion 466 – Lawyer Reviewing Jurors’ Internet Presence
 - “Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings...but a lawyer may not communicate directly or through another with a juror or potential juror.”

Orders Banning Social Media Research on Potential Jurors

- Oracle v. Google (N.D. Cal., Mar. 25, 2016)
 - Do not want jurors researching lawyers and case.
 - Prevent improper personal appeals to jurors.
 - Protect the privacy of the jurors.
 - “They are not celebrities or public figures. The jury is not a fantasy team composed by consultants...”



Confidentiality and Social Media – Things to Avoid

- Do not post about confidential settlement agreements.
- Do not post pictures of confidential drafts of briefs or expert reports.
- Do not post about document productions.
- Do not post about mediation.



Don't Threaten Judges on Facebook

- Jeffries v. United States, 692 F.3d 473 (6th Cir. 2012)
 - Father wrote, performed, recorded, posted, and shared a music video on Facebook threatening to kill the judge overseeing his daughter's upcoming custody battle on July 14th.
 - He was convicted under 18 U.S.C. § 875(c), which prohibits “transmit[ting] in interstate or foreign commerce *any communication* containing *any threat*...to injure the person of another.”

Don't Threaten Judges on Facebook

- Jeffries v. United States, 692 F.3d 473 (6th Cir. 2012)



Army Sgt. Dale Jeffries' video that threatened a Knox County judge

<https://www.youtube.com/watch?v=fS3qh9VuuaY>

Don't Threaten Judges on Facebook

- Jeffries v. United States, 692 F.3d 473 (6th Cir. 2012)
 - Lyrics to the song “Daughter’s Love” included:
 - So I promise you, judge, I will kill a man.
 - So July the 14th is the last time I’m goin’ to court. Believe that. Believe that, or I’ll come after you after court. Believe that.
 - I can shoot you. I can kill you...Do the right thing July 14th.



Don't Threaten Judges on Facebook

- Jeffries v. United States, 692 F.3d 473 (6th Cir. 2012)
 - He posted link to his Facebook wall and sent links to 29 Facebook users, including a Tennessee state representative and local TV news station.
 - He removed the link within 25 hours.
 - The sister of Jeffries' ex-wife saw the link and told the judge.



Don't Threaten Judges on Facebook

- Jeffries v. United States, 2018 WL 910669 (E.D. Tenn. Feb. 15, 2018)
 - Trial court has ordered a new trial in light of a change in the law, and the conviction is vacated (for now).
 - Jeffries has already served full sentence, and now it is only a question of whether he remains a convicted felon.



- Dial v. Hammond, North Carolina State Court (2015)
 - Plaintiff leads successful charge to have Defendant removed from position at local radio station.
 - Defendant posted “I didn’t get drunk and kill my kid.”
 - Plaintiff alleged post referred to her because she had lost her son decades ago in a gun accident involving a little boy, but the Plaintiff had nothing to do with her son’s death.

Be Careful What You Write – Defamation on Facebook

- Dial v. Hammond, North Carolina State Court (2015)
 - Defendant's post was not true, so the parties entered a consent judgment for \$500,000.

The undersigned Defendant, Jacquelyn Hammond ("Hammond" or "Defendant") does hereby consent to entry of judgment in favor of Plaintiff Davyne Dial and against Defendant for defamation, intentional infliction of emotional distress and negligent infliction of emotional distress, for actual damages in the amount of \$250,000, plus punitive damages in the amount of \$250,000 for Hammond's intentional acts, for a total judgment in favor of Plaintiff and against Defendant of \$500,000.

Anti-SLAPP and Defamation on Facebook

- Landry's, Inc. v. Animal Legal Defense Fund, Harris County (2016-79698)

**Animal Legal Defense Fund**
September 20, 2016 · 🌐

Tigers are complex apex predators with specific biological, environmental, and enrichment needs. [Landry's, Inc.](#) should stick to the restaurant business and leave the housing of tigers to those who are able to provide big cats with proper care and naturalistic habitats rather than sacrificing the wellbeing of an endangered species for the sake of tourist dollars.



[Landry's Inc.](#) is Served Notice of Intent to Sue for Endangered Species Act Violations - Animal Legal Defense Fund

ALDF.ORG

- Texas Citizens Participation Act
 - The Texas Citizens Participation Act creates a way to quickly dismiss certain strategic lawsuits against public participation.
 - The statute is meant to “encourage and safeguard the constitutional rights of persons to petition, speak freely, and associate freely...”

Anti-SLAPP Basics – Step 1

- Demonstrate statute applies by showing lawsuit is “based on, related to, or filed in response to” one of the following rights:
 - Right of Free Speech
 - Right to Petition the Courts
 - Right to Associate



Anti-SLAPP Basics – Step 1

- Make sure no exception applies, such as:
 - Exceptions for bodily injury, wrongful death, and insurance-related claims
 - “Commercial speech” exception

Anti-SLAPP Basics – Step 2

- If the TCPA applies, are the claims supported by “clear and specific” evidence?
- Even if non-movant meets this burden, can movant bring “clear and specific” evidence of an affirmative defense?



Anti-SLAPP and Defamation on Facebook

- Landry's, Inc. v. Animal Legal Defense Fund
 - Trial court awarded the following:
 - Sanctions totaling \$450,000
 - More than \$150,000 in attorneys' fees incurred at the trial court level
 - Contingent award of appellate attorneys' fees
 - Appeal of this order is currently pending before the Fourteenth Court of Appeals (14-17-00207-CV)



Impeachment – Investigate Your Own Clients' Social Media

- Before claiming permanent disabilities, investigate your clients' social media accounts to ensure there are no photos or videos that contradict that claim.
- When constructing timeline of case, make sure to check dates and timestamps of your clients' social media posts.
- Always check for other harmful admissions.



Legal Advertisements on Social Media

- Rule 7.07 generally requires the following materials be submitted to the State Bar's Advertising Review Committee
 - “Solicitation communications”
 - Advertisement in the public media
 - Copy of the lawyer's website



Legal Advertisements on Social Media

- Texas Young Lawyers' Association's Helpful Hint:
 - “When approaching any type of online expression...it is important to be professional and remember that all of the disciplinary rules, not just those related to advertising online, apply. In any medium, attorneys must maintain the confidentiality of his or her client, be truthful in statements to others, and avoid dishonesty, fraud, deceit, or misrepresentation.”

<http://www.tyla.org/tyla/assets/File/Social%20Media101%20booklet.pdf>

