
#NOTWEETING AFTER MIDNIGHT: ETHICAL USE OF SOCIAL MEDIA FOR YOU AND YOUR CLIENTS

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With Technology and Justice for All

State Bar of Texas Computer & Technology Law Section

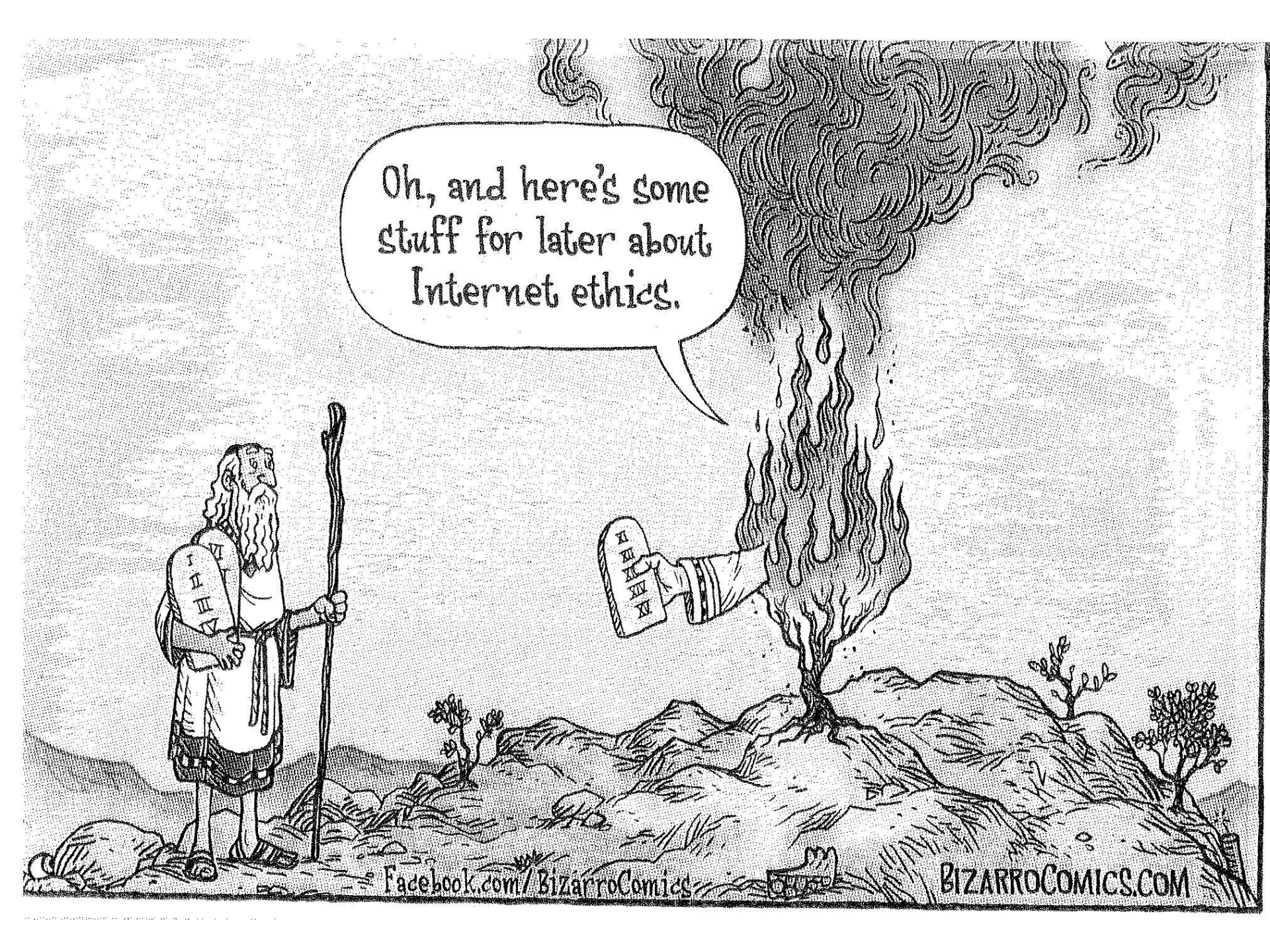
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- John Browning is a shareholder in the Dallas, Texas firm of Passman & Jones, P.C., where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Mr. Browning has extensive trial, arbitration, and summary judgment experience and has represented companies in a wide variety of industries throughout Texas. Mr. Browning received his Bachelor of Arts with general and departmental honors from Rutgers University in 1986, where he was a National Merit Scholar and member of Phi Beta Kappa. He received his Juris Doctor from the University of Texas School of Law in 1989. He is the author of the books *The Lawyer's Guide to Social Networking*, *Understanding Social Media's Impact on the Law*, (West 2010); the *Social Media and Litigation Practice Guide* (West 2014); and two forthcoming books, including a book on legal ethics and social media for the ABA. Mr. Browning is also a contributing author to seven other books, the author of over 30 published law review articles; and the award-winning writer of numerous articles for regional and national legal publications. His work has been cited in over 300 law review articles, practice guides in 11 states, and by courts in Texas, California, Maryland, Tennessee, and Florida. He has been quoted as a leading authority on social media and the law by such publications as *The New York Times*, *The Wall Street Journal*, *USA Today*, the *ABA Journal*, *Law 360*, *Time Magazine*, *The National Law Journal*, *WIRED Magazine* and *Inside Counsel Magazine*, and he is a recurring legal commentator for the NBC, CBS, and FOX news stations in Dallas. He serves as Chair of the Texas Bar Journal Board of Editors, as a member of Professional Ethics Committee of the State Bar of Texas, and is a frequent speaker at CLE seminars and legal symposia all over the country.



Oh, and here's some
stuff for later about
Internet ethics.

WHY IS IT CRITICAL FOR LAWYERS TO BE MINDFUL OF ETHICAL GUIDELINES WHEN USING SOCIAL MEDIA?

- Reason #1: Social media too pervasive to ignore



- **Over 1 billion unique users each month; 400 hours of video are uploaded to YouTube each minute**



- **Over 2.0 billion users worldwide**



- **Approximately 1 billion registered users (300 million monthly active users)**



- **Over 433 million users**



- **Over 400 million active users (over 60% log in daily)**

Fun Facts



- 80% of all adult Americans have at least one social networking presence
- Sixteen minutes of every hour spent online is spent on Facebook
- More Facebook profiles (5) are created every second than there are people born (4.5)
- More than a billion tweets are processed every 48 hours (about 6,000 every second)
- Every 60 seconds, there are over 293,000 status updates posted on Facebook, as well as 510,000 comments and 136,000 photos
- 146 million “likes” generated every hour

REASON # 2: A NEW STANDARD OF COMPETENCE

- ABA Ethics 20/20 Commission and new Rule 1.1
 - “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.**”
- Trend in courts nationwide to hold lawyers to a higher standard regarding technology: a “duty to Google”

**I'M JUST A CAVEMAN. YOUR WORLD
FRIGHTENS & CONFUSES ME!**

**I- I'M CONFOUNDED BY THE MAGIC VOICES
COMING FROM THIS ENCHANTED TALKING BOX!**

- Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) – affirmative duty to research jurors online.
- Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013) – failure to investigate social media recantation of sexual abuse victim held to be inadequate assistance of counsel.

YES, EVEN APPELLATE LAWYERS HAVE RUN AFOUL OF SOCIAL MEDIA...

- “Naughty, naughty boy”
- “Why is Phil Klein (sic) smiling?
There is nothing to smile about,
douchebag.”
 - Tweets by Sarah Peterson Herr, a research attorney with the Kansas Court of Appeals

Public Statement by Herr

“I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also *communicating with the public* at large, which was not appropriate for someone who works for the court system.”

Statement by Herr (Cont.)

“I apologize that because the comments were made on *Twitter – and thus public* – that they were perceived as a reflection on the Kansas courts.”

Result:

- Fired from Job
- Informal Admonishment (Jan 2014)

DANGER AREAS FOR LAWYERS:

1) DISREGARDING CONFIDENTIALITY

Confidentiality

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the presentation or the disclosure is permitted by paragraph (b)”

- Rule 1.6(a)

“... proper attire for trial.”



- Facebook post by Public Defender Anya Citron Stern (Fl. 2012)

Result:

- Motion for mistrial – granted
- Lawyer fired

2) UNETHICAL INFORMATION - GATHERING

Ethical Information Gathering

- Don't misrepresent who you are, or act with deception.
 - Ethics opinions about contacting witnesses via Facebook: Philadelphia Bar Association Ethics Committee (March 2009), New York City Bar Association Committee on Professional Ethics (September 2010), New York State Bar Association Committee on Professional Ethics (September 2010), and New Hampshire Bar Association (2012)
 - You can't "friend" a witness under false pretenses

Rule 4.1 "A lawyer shall not knowingly make a false statement of material fact or law to a third person."

Rule 8.4 "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Cases of “False Friending”

- June 2013 – Cleveland assistant prosecutor Aaron Brockler fired for posing on Facebook as fictional “baby mama” of murder defendant in order to persuade two female alibi witnesses not to testify; is later disciplined as well.

- 2017 – Centre County (PA) District Attorney Stacy Parks Miller faces November disciplinary hearing over allegedly creating a Facebook profile for fake person “Britney Bella” in order to obtain information from at least 2 pro se defendants. She is also accused of texting with 2 judges about pending cases without informing defense lawyers.

Don't Communicate With A Represented Party

- Rule 4.2 of the Model Rules of Professional Conduct: “A lawyer shall not communicate with or cause another person to communicate with an individual represented by counsel without the prior consent of that individual’s attorney.”
- May 2011: San Diego County Bar Association Legal Ethics Committee Opinion
- John Robertelli/Gabriel Adamo pending ethics case in New Jersey; allegedly directed their paralegal to “friend” young male plaintiff in personal injury case, even though he was represented by counsel, to gain access to privacy-restricted portion of his Facebook profile.

CAN YOU ADVISE YOUR CLIENT TO “CLEAN UP” HER FACEBOOK PAGE?

- New York County Lawyers Association Ethics Opinion 745 (2013)
- Philadelphia Bar Assoc. Profl. Guidance Committee Opinion 2014-5 (2014)
- Pennsylvania Bar Assoc. Opinion 2014-300 (2014)
- North Carolina Formal Ethics Opinion 2014-5 (2014)
- Florida Bar Profl. Ethics Committee Proposed Advisory Opinion 14-1 (2015)
- Washington, D.C. Profl. Ethics Opinion (November 2016)

- All ethics opinions looking at this issue have said that it is ethically permissible to provide advice to clients on what privacy settings to implement on social media profiles, as well to counsel them on the content they post and the potential ramifications of same.
- All say that it is ethically permissible to advise clients to remove or take down social media content, so long as no spoliation of evidence occurs and all evidence preservation obligations are adhered to.

The Dangers of Not Knowing What Your Client is Doing on Social Media

- Gulliver Schools, Inc. v. Snay, (Fla. Ct. of App., 2014)
 - \$80,000 settlement torpedoed by Plaintiff's daughter's "Suck it" Facebook post, which violated release's confidentiality provision.

- 50 Cent ordered by bankruptcy court judge to explain why he's posting photos like this on Instagram:





3) SPOLIATION OF EVIDENCE

- Rule 3.1 – A lawyer may not unlawfully alter or destroy evidence and cannot direct or assist others in doing so.
- Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Virginia 2013)
 - wrongful death case; surviving husband told to “clean up” his Facebook page, and then answer sworn interrogatories that he didn’t have a Facebook account;
 - \$722,000 in sanctions;
 - Plaintiff’s counsel resigns from the practice of law, and in June 2013 has his license suspended for five years by the Virginia Bar.

4) CAN YOU RESEARCH JURORS ONLINE?

Ethical Conduct Involving Jurors

- Ethics opinions say it's o.k. to research prospective jurors using social media (New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 743, May 2011, and Oregon Bar Association Ethics Opinion, 2013).
- However, all stress using caution, so as not to inadvertently communicate with juror.

ABA Formal Opinion 466

(April 2014)

- Okay to review a juror's internet presence as long as no contact is initiated;
- “The fact that a juror or a potential juror may become aware that a lawyer is reviewing his internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5 (b).”
- Followed by subsequent opinions in Pennsylvania, West Virginia, Colorado, and D.C.

Travis County, Texas (2013)

- Assistant D.A. Steve Brand “Facebooks the jury” during voir dire for robbery trial of Darius Lovings. He strikes an African-American woman from the panel because of NAACP references on her Facebook page. A Batson challenge is made, and Brand loses.
- *Brand is then fired by D.A. Lemberg for “racially insensitive remarks.”*

While a growing number of courts have adopted specific rules for researching jurors (see, for example, Judge Gilstrap's recent standing order in the E.D. of Texas), some judges oppose the practice.

- U.S. District Judge Alsup's orders in *Oracle v. Google* (2016).

BE CAREFUL ABOUT WHAT YOU POST

- Roxanne Conlin's pretrial Facebook posts questioning whether her client could get justice results in trial being postponed due to concerns over tainting the jury pool (Iowa 2015)
- Defense attorney Mark Griffith's Facebook prayers met with gag orders from Ellis County judges (2016)

MORE QUESTIONABLE BEHAVIOR

July 2015 – Pittsburgh –area assistant district attorney Julie Jones poses for photo toting a shotgun, along with police officer holding assault rifle, both of which were evidence in a case they worked on together. The photo is posted to Facebook with the caption “You should take the plea.”

- The D.A. is not amused, says Jones’ conduct is “contrary to office protocol with respect to the handling of evidence.”



And then, there are lapses in professionalism...

September 2015 – Courtroom “victory selfies?”

- Wisconsin lawyer Anthony Cotton snaps “victory selfie” with acquitted murder client in the courtroom, then posts it on Facebook.
 - Judge didn’t “like” it; orders Cotton to return to court to explain himself.



Zealous advocacy, or felony intimidation?

- Indiana attorney sends client's ex-husband a profanity laced Facebook post, in which he says "I'm going to gather all the relevant evidence and then I'm going to anal rape you so hard your teeth come loose...I've got you in my sights now."
- Lawyer is later charged with felony intimidation, and received suspension of his law license.

- Kansas, December 2014: Kansas Supreme Court imposes 6 month suspension on lawyer for “egregious,” “over the top” messages on Facebook to an unrepresented unwed mother while representing the baby’s biological father in an adoption proceeding. Court held that lawyer’s messages, trying to make the mother feel guilty about consenting to giving the child up, constituted violations of Rule 8.4(d) (conduct prejudicial to the justice system) and Rule 8.4(g) (conduct reflecting adversely on fitness to practice)

- In Re Gamble, 2014 BL 342439

- July 2015: Joyce McCool, a Louisiana lawyer who used Twitter and other social media to publish “misleading and inflammatory” statements about judges and to promote an online petition about child custody cases that contained sealed information about those cases, gets disbarred for her “social media blitz.”

- August 2017: Illinois lawyer Drew Quitschau faces disciplinary charges for setting up fake Facebook profile and fake Match.com profile of a female attorney; also did online registrations in her name for lap band surgery, the Obesity Action Coalition, and Pig International.

- August 2017 – Lawyers for New York City’s child welfare agency (Administration for Children’s Services) and the Legal Aid Society face disciplinary charges after it is learned that they were taking photos of people at the Family Court and posting them on Facebook with snarky captions about their appearance.
 - Commission: “I’m appalled...it’s completely inconsistent with our agency culture and out expectation that we treat every family humanely and decently.”

- July 2012 – Justin Marrus, a Brooklyn A.D.A., has his Facebook page posted on a national media outlet. On it, these are photos of him in blackface, holding a Confederate flag, and simulating prison rape. The Brooklyn D.A. is not amused by the “abhorrent, stupid, and childish” behavior.
- February 2011 – Indiana Deputy A.G. Jeffrey Cox tweets about using “live ammo” on pro-labor protesters in Madison, Wisconsin. *He is fired.*
- May 2015 – Wayne County, Michigan prosecutor Teana Walsh posts on Facebook about shooting rioters in Baltimore.

- August 2013 – AUSA John Craft (Beaumont office, E.D. of Texas) comes under fire for inflammatory posts on Facebook about the Trayvon Martin case and derogatory statements about Pres. Obama (including referring to him as “the Dalibama”). U.S. Attorney for the Eastern District John Bales calls the comments “reprehensible”

Defense attorneys use the comments to allege “improper motivation” behind Craft’s sentencing recommendations.

2016: Florida prosecutor Kenneth Lewis posts controversial comments after Orlando nightclub mass shooting.

- says nightclubs are “utter cesspools of debauchery”
- calls for Orlando to be “leveled” as a “melting pot of 3rd world miscreants and ghetto thugs.”
- RESULT: Lewis is fired

- 2016: Just before start of trial in plaintiff p.i. case against Carnival Corp., Florida lawyer posts on Facebook “wildly improper” photos and statements about clients injuries and case; also posts about confidential mediation proceedings
 - Result: Federal judge refers lawyer to disciplinary committee on first day of trial

- 2016: Nevada – General counsel of Nevada Public Utilities Commission “resigns” one day after media reveals that she tweeted negative comments about parties appearing PUC through a Twitter account under another name.
- 2016: United Kingdom – British lawyer Mark Small sends “gloating,” “insensitive” tweets after court victory for local government in case brought by parents of disabled child.
 - Result: “a publicity nightmare” and the loss of half of his client base

WASHINGTON, D.C. BAR LEGAL ETHICS COMMITTEE

Opinions 370 and 371 (November 2016)

In addition to other areas of practice in which social media use can present ethical concerns for lawyers, those opinions warn of another potential pitfall: the risk of creating “positional” conflicts when blogging, posting, or tweeting about legal developments or even news. When a lawyer advances one position online, but is called upon to argue the opposite on a client’ behalf, a “positional” conflict exists.

- This can, and does, happen in the real world. In 2011, Paul Mirengoff – then a partner at Akin Gump in Washington, D.C. – posted certain comments on the conservative blog Power Line criticizing a Native American prayer as “ugly.” The firm, which represents a number of Native American tribes, was not pleased. One partner, who is Native American and practiced in the firm’s American Indian Law & Policy practice group, said he was “shocked, appalled and embarrassed” by the “insensitive and wholly inappropriate” comments.

A FINAL CONCERN: YOUR COMMENTARY TO CLIENTS ON SOCIAL MEDIA PLATFORMS

- April 27, 2017 – Nebraska Supreme Court imposes 3 month suspension on lawyer Dustin Garrison, who failed to adequately answer client's questions about his case
- Garrison responded to client's Facebook inquiries with statements like the following:

- “Relax.”
- “I will take care of it.”
- “I’m busy right now.”
- “We are fine.”
- “This is complicated.”
- “I can’t explain the whole process.”

SOCIAL MEDIA POLICIES

- Increasingly important for government attorneys and court employees.
 - Example: OPERATIONS MANUAL SECTION 2.13 – The District Attorney's Office recognizes that employees may participate in social networking sites on the internet such as MySpace, Facebook, and Twitter and may publish their own blogs. However, since any information shared online can reflect this office, such postings should be personal and should not discuss any official business of the office or make reference to the office or an activity within the office. Any posting should not purport to describe office policy, as the administration will address office policies. You should not state your title or position in the office on any posting, as this may imply an official statement of the office. Your online conduct should mirror your conduct in the office. Remember – nothing online is truly anonymous. Information that you post online is often permanent or, at least may remain present for a long period of time.