Ethics and Hearing Officer Use of Social Media

Bobbie Marshall & Sarah Huber
National Association of Hearing Officials

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What is social media?

- Websites and applications that enable users to create and share content or to participate in social networking.- Oxford Dictionary
- Electronic communication through which users create online communities to share information, ideas, personal messages, and other content.
- Any tool or service that uses the internet to facilitate conversations.
  - Examples are: Blogs, collaborative project management tools, business networks, forums, microblogs, photo sharing, product/service review, social bookmarking, social gaming, social networks, video sharing and virtual worlds

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How Many Social Media site can you think of?

- Facebook Inc (Reels) (CrowdTangle) (2004)
- LinkedIn (2003)
- Twitter Inc (2006)
- YouTube LLC (2005)
- Snapchat (2011)
- Instagram (2010)
- TikTok (2016)
- WhatsApp
- WeChat
- MySpace (2003)
- Qzone
- Weibo
- Tumblr (2007)
- Friendster (2003)
- Baidu Tieba
- Quora
- Telegram
- Pintrest
- Viber
- Reddit
- Discord
- Microsoft Teams
- Viber
- Reddit
- Discord
- Microsoft Teams
- Classmates (1995)
- Dating apps?

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Stats of Social Media

https://www.statista.com/statistics/195140/new-user-genera...

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Problems Inherent In Social Media Use

- Once it's posted, viewers can't "unsee" it or "unknow" it. And there are many instances, where someone else captured the content and saved it outside of your control, so even if you later decide to delete the content, it can still exist.
- There's an illusion of privacy or restrictedness, but in many apps, posts are public and even when restrictions are set, friends of friends are often total strangers.
- What you post can be further disseminated by others and they can credit you with the post, or you can be "tagged" in the post.

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Ethics of Social Media for Hearing Officers

Usage of social media sites seems to be very jurisdictional, and varies from agency to agency. Know your agencies social media policies because in some states "friending" or having someone as a contact on social media platforms is enough to trigger a violation.

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Prohibited Postings

- Slurs regarding gender, race, sexual orientation, ethnicity, religion, political affiliation or disability.
- Political statements may be protected speech under some circumstances but are very unwise.
- Many other postings are unethical and impermissible for a hearing officer such as:

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Prohibited Postings

- Comments regarding a party, witness or attorney that has the potential to appear before you
  - Attorneys, as a group
  - Parties or petitioners, as a group
  - Witnesses, as a group
  - Expert witnesses, as a group

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Prohibited Postings

- Comments on any case pending before you; or cases that may be pending before you.
- Comments that would violate regulations, policies or office rules;
- Comments indicating bias or conflict of interest toward or with any attorney, party or witness;
- Postings that demean position of hearing officer;
- Postings that demean the agency or government.

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Other Social Media Concerns

- Stealing employer's time checking by spending time on social media while at work (unless your job is maintaining the agency's social media platforms)
- Social media postings can impact your performance evaluation if they damage your reputation as a neutral, unbiased, responsible, open-minded person or the reputation of the agency for which you work.

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Other Social Media Concerns

- Hacking and/or someone creating a separate Facebook, Instagram, Twitter, or TikTok account page using your name and identity (Facebook Messenger has notoriously bad security and is easily hacked).
- Employer has the right to limit employees' off-duty activities and off-duty speech if they have the potential to be injurious to the employer or infringe on the employer's interest. Courts have backed employer's right to terminate employees whose social media posts might damage the employer's image.

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Social Media Postings: the good, the bad

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Scenario 1

Judge asked defendants if they were ready for trial only a week after arraignment. Via a blog, attorney, claimed it was a ploy to get the defendants to ask for a continuance and accused the judge of depriving them of the right to a speedy trial. He called the judge "evil, unfair witch" and "unfit."

What do you think happened next and why?

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The judge was seriously ill and was trying to get all of her cases heard before she left for a lengthy medical absence. The attorney claimed his rants were protected free speech.

The attorney's statements were found to violate the rules of professional conduct for attorneys. He received a ***public*** reprimand and a $1,200 fine.

http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/

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Scenario 2

A judge had Facebook friend who was attorney and happened to be appearing in a case before him. The two exchanged a few brief online comments regarding the pending case.

What happened next?

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The attorney with whom judge exchanged comments was the prosecutor. Defendant saw Facebook post and understandably challenged judge's ability to be fair and impartial.

>The judge was required to recuse from the criminal case.

Domville v. State of Florida

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Scenario 3

Deputy public defender blogged about cases on which she was working. She was very careful not to mention any of the parties by name. Also, she referred to judge as "Judge Clueless."

What happened next?

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The information she posted about clients was only thinly veiled. She omitted names but provided other information that made it possible to identify them.

>She was fired for revealing confidential client information and violating legal ethics. Law license was suspended for 60 days.

http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous

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Scenario 4

Judge blogged about a trial over which she was presiding. Newspaper praised blog saying it "provided information that was in the public interest." When blog came under scrutiny, judge claimed daughter was blogger (but blog was logged on judge's office computer). Judge declined to recuse.

What happened next?

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The media had been reporting about the battle between the judge who refused to recuse and those that requested recusal.

>She was forced to recuse by presiding judge: "When the case becomes about the judge rather than the facts, it's time for the judge to step aside."

http://media.cleveland.com/pdextra/other/DOC042210.pdf

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Scenario 5

Former pro-life state attorney general was before state supreme court on ethics violation. During proceeding, pro-choice research attorney for state court of appeals tweeted from courtroom about AG and potential outcome calling him names and predicting disbarment.

What happened next?

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She apologized saying she didn't stop to think her tweets would be seen by anyone but her friends. Her comments were perceived as a reflection on the courts of the state (made the state look bad).

>Her law license was suspended.

http://www.abajournal.com/news/article/research_lawyer_is_suspended_after_tweeting_during_ethics_hearing_of_naught/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

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Scenario 6

Prosecutor blogged about a pending case, complaining about defense attorney and mentioning evidence that had been ruled inadmissible. Called defense attorney "chicken" when she asked for continuance & alluded to her in blog titles containing obscenities.

What happened next?

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>He was disqualified from prosecuting the case.

- In a similar case, a lawyer from California was blogging about a case as he sat on a jury. The lawyer claimed he had not been told he could not blog or tweet about the case. The lawyer had his law license suspended for 45 days and was placed on two years of probation.

http://www.texasbar.com/flashdrive/materials/open_government_forum/SocialNetworkingDosandDontsforLawyersandJudges.pdf

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Scenario 7

Employee of county circuit clerk working under newly-elected clerk posted on Facebook page about 4 others who hadn't been retained who'd been hired by previous clerk. Her comments made new clerk look mean. He received calls.

What happened next?

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Scenario 7

The employee was fired. She filed a wrongful termination suit and the ground that: "Can't be fired for exercising right to free speech."

>Court held termination wasn't wrongful. She was an "at will" employee who could be fired without cause at discretion of employer. There was no "free speech" claim.

Mattingly v. Milligan, 2011 WL 5184283 (E.D.Ark. 2011):

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Scenario 8

A patrol officer applied for a promotion to investigator. She found members of her department, including some who also applied for the investigator position, were acting against department policy and/or acting illegally. She named the officers and described their activities on her Facebook page.

What happened next?

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She lost the promotion because of her Facebook postings. She filed suit on the ground that "Denying her promotion based on Facebook posts violated free speech."

The court held: She should have complained to her superiors regarding the illegal/improper behavior of other officers. Her postings impacted the policed department negatively because: 1. It deterred the collegiality and harmony of the police force;

2. Hindered the secret internal affairs investigation of the other officers that began before she posted their activities. (Gresham v. City of Atlanta, 2011WL4601020)

> Most of the recent cases regarding posts are looking at whether there is a different protection for public-employee speech that is done while the person is off duty and "non-work related". The balancing test most used seems to indicate that the speech must touch on a matter of public concern before there is a violation of free speech. (Arizona)

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Scenario 9

Department of Public Safety denied a professional investigator license based on posts and comments made on social media accounts, including accounts bearing the name of an out-of-state private investigation business. The posts concerned a Maine State Police member.

Investigator contended that the Department had violated his free speech rights.

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The appellate court thought that actual malice must be shown in the comments. The Maine Supreme Court stated that actual malice need not be shown, and that the Department could consider the comments made on social media to determine if the applicant met the requirements under law to hold the license.

Gray v. Dep't of Pub. Safety, 248 A.3d 212 (Me. 2021)

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Scenario 10

Attorney had created a Facebook page that described himself as an attorney. A "friend" posted a public inquiry about carrying a gun in her car. The attorney responded to the post in the public forum with comments endorcing the escalating use of force. He posted that if he wanted to "kill" her ex-boyfriend she should "lure" him into her home and then "claim" be broke in with the intent to do her harm and say that she feared for her life. The attorney emphasized that his advice was given as a lawyer and that if she was remotely serious she should keep mum and delete the entire thread so it could not be used against her at a later proceeding.

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- Attorney received a 4-year suspension because the advice given was clearly prejudicial to the administration of justice and violated the Rules of Professional conduct.
- It was also found that his choice to post the remarks on a public platform amplified their deleterious effect. As the social media posts fostered a public percention that the lawyer's role is to manufacture false defenses and they projected a public image of corruption of the judicial process.

In re Sitton, 618 S.W.3d 288 (Tenn. 2021)

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Scenario 11

Local Politician maintained a personal Twitter and Facebook account. A constituent tagged the politician in a tweet asking him to explain his vote on a particular bill. Politician thought that the post was unnecessarily aggressive, and after looking at the constituent's social media accounts blocked the constituent from his social media accounts.

What happened next?

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>Elected official stated reason for blocking the constituent was because of the profanity. Elected official also stated that the constituent was currently blocked and there were not plans to unblock the access to the accounts.

> Court fount that there was no specific constitutional provision that allows constituent to speak freely on elected official's personal social media accounts

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>However there are other very similar cases in other jurisdictions that say if the elected official is using social media that has been used for the public/official purposes of the elected official, they are not allowed to erase or block constituents' comments as a matter of free speech

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Scenario 12

Petitioner was issued a pistol license in 2018. In 2019 the petitioner's child, then 11, opened the gun safe, removed the pistol and made and shared to social media, a video of himself with the gun.

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An administrative county licensing officer revoked the pistol license on the grounds that the petitioner was careless in securing the gun and demonstrated a lack of judgment and maturity necessary to be a responsible gun owner. The determination was upheld by reviewing courts.

Derry v. Fufidio, 192 A.D.3d 1099, 141 N.Y.S.3d 352(Mem) (N.Y. App. Div. 2021)

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Can Social Media Postings Be Used As Evidence in a Court or Hearing?

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Patterson v. Turner Const.

Patterson filed a personal injury suit against Turner Construction. The court granted Turner Construction's motion to obtain Patterson's social media postings. Patterson lost the case and appealed on the ground that his posts were undiscoverable because he used privacy settings to keep the public from viewing his posts. Appeals court held: posting on the internet is a waiver of privacy rights even when privacy settings to restrict access.

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French v. Social Security

Plaintiff was denied SSI/TANF for her alleged blindness in the right eye and poor vision in the left. The ALJ found she didn't qualify for SSI because her "blindness" didn't prevent her from regularly posting on her Facebook page.

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Jivatma v. Astrue

Plaintiff applied for 100% disability due to intense pain requiring her to stay in bed. Her request was denied and she requested an administrative hearing. The only evidence of her pain was her testimony. The ALJ who presided over her case said she wasn't credible because she testified "it was really painful to type" but spent a lot of time communicating by email and Facebook.

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McMillen v. Hummingbird Speedway

Plaintiff claimed his injury at a stock car race caused his "inability to enjoy the pleasures of life." His Facebook page contained info on his fishing trips and his attendance at the Dayton 500. He lost. The court said his Facebook posts indicated that his injuries were exaggerated.

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Romano v. Steelcase Inc.

Sought damages for injuries & emotional harm. Claimed confined to bed. Public Facebook profile showed her smiling happily outside her home. Judge granted access to private portions of Facebook and MySpace.

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EEOC v. Simply Storage

Judge allowed access to all areas of every social media site of females alleging severe emotional distress from sexual harassment in workplace as they were relevant to mental and emotional state.

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Beye v. Blue Cross Blue Shield

A mother felt her children's "eating disorders" should be covered by insurance and sued her insurance company. Her insurance company believed the disorders were non-biologically based mental illnesses not covered under the policy. The court ordered all emails, social network postings, etc. be turned over as evidence.

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Murphy v. Perger

A plaintiff in a personal injury suit submitted as evidence Facebook posts of her involved in pre-collision activities. The defendant in the suit argued that her recent Facebook posts likely contained photos relevant to her claim of serious injury. Court ordered access to the posts and she lost the suit. She appealed on the ground the court violated her right to privacy in giving Facebook access to the defendant. Held: Plaintiff could have no serious expectation of privacy when she'd given 366 people access to her "private" Facebook page.

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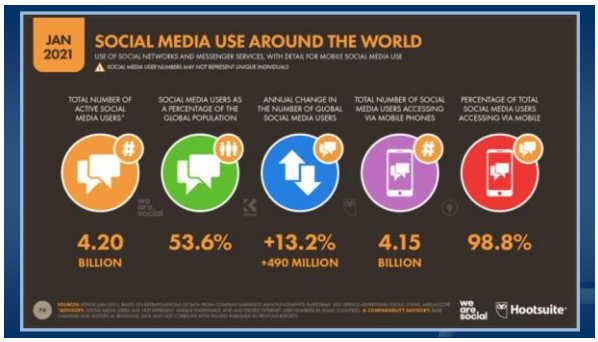

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Usge That Impact How People Perceive You as a Hearing Official

- Photos of you partying or taking unusual risks
- Sharing a post with words or ideas that might be offensive to others
- Sharing a joke or story with offensive words
- Making comments on posts that could be construed as sexist, or regarding race, ethnicity, sexual orientation, religion, political affiliation, or disability

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